



CANADIAN INSTITUTE FOR
ENVIRONMENTAL LAW AND POLICY

L'INSTITUT CANADIEN DU
DROIT ET DE LA POLITIQUE
DE L'ENVIRONNEMENT



CANADIAN ENVIRONMENTAL
LAW ASSOCIATION

ecojustice.ca
formerly Sierra Legal Defence Fund

Modernizing Environmental Approvals

EBR Registry No. 010-9143

*Submitted to the
Ontario Ministry of Environment*

Prepared by

Ramani Nadarajah, Counsel
Canadian Environmental Law Association

Maureen Carter-Whitney, Research Director
Canadian Institute for Environmental Law and Policy

Dr. Elaine MacDonald, Senior Scientist
Ecojustice

April 16, 2010

TABLE OF CONTENTS

PART I: INTRODUCTION	3
PART II: GENERAL COMMENTS ON MOE’S PROPOSAL.....	4
(A) BACKGROUND ON MOE’S DISCUSSION PAPER	4
PART III: GENERAL COMMENTS ON THE PROPOSED FRAMEWORK.....	8
(A) THE PROPOSED FRAMEWORK FAILS TO PROVIDE A DETAILED EXPLANATION ABOUT THE EXTENT OF DELAYS AND THEIR UNDERLYING CAUSES AND CURRENT STAFFING CAPACITY AT MOE	8
(i) <i>Need to Assess the Extent of Delays and their Underlying Causes</i>	8
(ii) <i>Need to Assess MoE’s Staff Capacity</i>	9
(B) THE ENVIRONMENTAL BILL OF RIGHTS (EBR) SHOULD APPLY TO THE REGISTRATION PROCESS.	10
(i) <i>EBR Notice and Comment</i>	10
(ii) <i>Leave to Appeal by Third Parties</i>	12
(C) THE PROPOSED FRAMEWORK FAILS TO CONSIDER “CUMULATIVE EFFECTS” AND THE MOE’S STATEMENT OF ENVIRONMENTAL VALUES	14
(i) <i>Failure to Consider Cumulative Effects</i>	14
(ii) <i>Failure to Consider the MoE’s Statement Environmental Values</i>	17
(D) THE PROPOSED FRAMEWORK LACKS DETAILS ABOUT A MONITORING AND COMPLIANCE STRATEGY	18
(i) <i>Monitoring</i>	18
(ii) <i>Compliance and Enforcement strategy</i>	19
(E) LEGAL IMPLICATIONS OF REGISTRATION AND REGULATORY NEGLIGENCE.....	20
(i) <i>The Legal Implications of Registration</i>	20
(ii) <i>Regulatory Negligence</i>	22
IV. SPECIFIC COMMENTS ABOUT THE PROPOSED FRAMEWORK	22
(A) THE MOE NEEDS TO PROVIDE INFORMATION ABOUT THE PERMIT-BY-RULE SYSTEMS IN OTHER JURISDICTIONS	22
(B) REGISTRATION PROCESS SHOULD ONLY APPLY TO ROUTINE, SIMPLE ACTIVITIES WITH VERY LITTLE CHANCE OF CAUSING ADVERSE EFFECTS TO THE ENVIRONMENT OR PUBLIC HEALTH AND SAFETY.	24
(C) THE MOE SHOULD CONSIDER THE PRIOR CONDUCT OF AN APPLICANT IN ITS RISK EVALUATION PROCESS	25
(D) THE MOE’S REGISTRY	26
(E) SINGLE SITE-WIDE, MULTI-SITE AND SYSTEM-WIDE APPROVALS.....	26
(F) OPERATIONAL FLEXIBILITY.....	27
(G) TRANSITION AND CONTINUOUS IMPROVEMENT	28
(H) QUALITY AND COMPLETE SUBMISSION REQUIREMENTS	28
(I) FINANCIAL ASSURANCE AND ENVIRONMENTAL CLEAN-UP.....	29
(J) HARMONIZATION OF EXISTING HEARING REQUIREMENTS.....	30
(K) SERVICE GUARANTEES	31
V. CONCLUSION.....	32
VI. SUMMARY OF RECOMMENDATIONS.....	33

PART I: INTRODUCTION

The Canadian Environmental Law Association (CELA) is a legal aid clinic, specializing in environmental law and represents individuals and citizens groups before trial and appellate courts on a broad range of environmental issues. CELA was founded in 1970 for the purpose of using and improving laws to protect the environment and natural resources and has a lengthy history of involvement with issues related to the Ontario Ministry of Environment's (MoE) approvals system. CELA provided comments on the MoE's proposal for *Standardized Approvals Regulations* and *Approvals Exemption Regulations*. CELA counsel have represented clients in cases involving issues regarding the approvals process. Recently CELA counsel represented local community groups in *Dawber v. Director, Ministry of Environment*, (hereinafter referred to as the Lafarge case) in which the Environmental Review Tribunal (ERT) considered the MoE's failure to consider cumulative effects of air containments when issuing approvals. A CELA counsel is also a member of the stakeholder roundtable to modernize the approvals process.

Ecojustice is Canada's premier non-profit organization providing free legal and scientific services to protect and restore the environment and human health. From offices at four locations in Canada in three provinces, Ecojustice legal counsel work on the leading environmental issues across the country, at every level of court. Since forming in 1990, legal reforms and litigation around approvals of pollution sources for greater protection of local communities and their environment has formed a core of our work. Ecojustice counsel also represented a local community group in the Lafarge case.

In recent years Ecojustice has worked on behalf of several communities confronted with pollution concerns from provincially regulated facilities. More recently, Ecojustice assisted members of the Aamjiwnaang First Nations near Sarnia, a community surrounded by numerous large emitters of air pollution operating under provincial approvals. Sarnia is one of many communities in Ontario that highlights the need for approvals reform to incorporate the consideration of cumulative effects. Through Ecojustice's work with communities like Aamjiwnaang, the organization has developed an in-depth understanding of the limitations and weakness of the approvals process. Ecojustice's senior scientist is also a member of the stakeholder roundtable to modernize the approvals process.

The Canadian Institute for Environmental Law and Policy (CIELAP) was founded in 1970, with the mission to provide leadership in the research and development of environmental law and policy that promotes the public interest and sustainability. CIELAP has a long history of involvement in the environmental approvals process in Ontario, and was deeply engaged in past consultations such as the proposed standardized approvals regime in 1998. CIELAP's Research Director also serves as the author of the Butterworths LexisNexis publication, *Environmental Regulation in Canada*, which is updated regularly to document the approvals regime in Ontario as well as other jurisdictions.

The purpose of this brief is to provide comments on the MoE's discussion paper titled "Modernization of Approvals: Proposed Legislative Framework for Modernizing Environmental Approvals" (Discussion Paper).¹ The MoE's Discussion Paper was posted on the Environmental Bill of Rights Registry (EBR Registry) on March 2, 2010, EBR Registry Number 010-9143 with a thirty-day comment period. CELA wrote to the Honourable John Gerretsen, Minister of the Environment, on March 12, 2010 requesting an extension of the comment period due to the complexity and high level of public interest in the MoE's proposal. CIELAP and Ecojustice also requested that the MoE extend the comment period. We are pleased that the MoE extended the time period for comment from 30 to 45 days.

PART II: GENERAL COMMENTS ON MOE'S PROPOSAL

(a) Background on MOE's Discussion Paper

The Ontario Ministry of Environment (MoE), as part of the province's Open for Business initiative, is undertaking to modernize its approvals system. The MoE has indicated that the ambitious three-year initiative will streamline government to business services, making them faster and smarter and making Ontario more attractive for business development, while protecting the public and the environment.² Through the modernization exercise the MoE is proposing a new two-tiered system for approvals. This includes a new Certificate of Approval

¹ Ontario Ministry of Environment, *Modernization of Approval: Proposed Legislative Framework for Modernizing Environmental Approvals*, (hereinafter "Discussion Paper") (Toronto: Ontario Ministry of Environment, February 2010) online: <http://www.ene.gov.on.ca/environ/env_reg/er/documents/2010/010-9143.pdf>.

² Ontario Ministry of Environment, News Release, "Modernization of Approvals, McGuinty Government Seeks Public Input on Proposed Direction" (March 2, 2010) online: <<http://www.news.ontario.ca/ene/en/2010/03/moving-forward-to-modernize-environmental-approvals.html>>.

process for higher risk environmental activities and a new rules-based environmental registry process for lower-risk environmental activities.³

The MoE's Discussion Paper states that the Ministry has been taking a number of initiatives to improve service delivery for environmental approvals in Ontario.⁴ These include:

- Guaranteed turn around times for selected approvals
- Streamlining the approvals process
- Model applications
- Expanding the use of comprehensive approvals to provide operational flexibility
- Eliminating the backlog
- Introducing Renewable Energy Approvals with service guarantees.

Ontario receives more than 6,000 requests for Certificates of Approval each year and, as of September 2009, the government had eliminated a backlog of approximately 1,700 applications for Certificates of Approval.⁵

The MoE's Discussion Paper contemplates a two-tiered approvals system that will involve two separate and distinct processes for approvals:

(i) Registry Process: Under this process, certain activities would be registered with the MoE provided they meet specified eligibility requirements. A facility which was subject to this process would be required to operate in accordance with rules established by regulation. This system has also been described as "permit-by-rule." Individual registrations would not be required to be posted on the EBR Registry and would not be subject to appeals by third parties.

³ Ibid.

⁴ Kevin Perry, "Modernization of Approvals: Project Overview: Round Table Session 1", Presented to the Round Table, February 17, 2010, (power point presentation), p. 5.

⁵ Ontario Ministry of Environment, News Release, *supra* note 2.

(ii) Certificate of Approval Process: Under this process, applications for Certificates of Approval would need to be made to the MoE and would cover activities not eligible for the registration process. A number of changes are proposed for the Certificate of Approval process, including the issuance of a single site-wide approval or single multi-site/system approval. An approval may also allow for “operational flexibility” (i.e. allow the applicant to make future changes to their operation without amending the Certificate of Approval, within given operational parameters).

CELA and CIELAP have commented on previous proposals by the MoE to introduce a permit-by-rule system in Ontario.⁶ In our earlier comments we stated that the approvals programme is a core governmental function and constitutes an integral component of the MoE’s regulatory regime.⁷ Before issuing a Certificate of Approval, the Environmental Assessment and Approvals Branch (EAAB) or the MoE’s regional office as the case may be, is supposed to carefully review the plans and specifications and determine whether the activity will result in unacceptable discharges of contaminants to the environment.⁸ It is important to note, however, that in determining whether to grant an approval, the MoE’s role extends beyond simply approving the sizing, design and building of structures. Rather, in issuing a Certificate of Approval, the MoE Director is also engaged in exercising an important public policy role in determining which type of activities will receive approval given the competing demands placed on finite environmental resources. In the event that the Director is not satisfied that an activity is environmentally acceptable, he or she can refuse to issue a Certificate of Approval. The MoE’s approvals function is, thus, a key mechanism through which Ministry undertakes a proactive up-front assessment to ensure that business operations do not cause harm to Ontario’s environment.

⁶ R. Nadarajah and M. Winfield, *Comments on MoE’s Proposal for Standardized Approvals Regulations and Approvals Exempting Regulations*, EBR Registry No. RA8E0008.P, Brief No. 343, (Toronto: CELA, March 25, 1998) See also letter from Ramani Nadarajah & Paul Muldoon to Daniel Cayen, Director, Transformation Office, Ministry of Environment, dated March 31, 2005.

⁷ Letter from Ramani Nadarajah & Paul Muldoon to Daniel Cayen, Director, Transformation Office, and Ministry of Environment, dated March 31, 2005.

⁸ D. Estrin & J. Swain, *Environment on Trial: A Guide to Ontario Environment Law and Policy*, (Toronto: Emond Montgomery Publications Limited, 1993) p. 443.

The registration process will remove the technical site specific review presently carried out by the MoE to identify unacceptable or problematic applications for Certificates of Approval. The registration process will also prevent the MoE from taking proactive steps to require changes to project design or construction to avoid or minimize adverse effects. It is far more expensive to retrofit or reconstruct facilities than it is to design and install them correctly. If problems are discovered after a facility commences operation, many companies may be unwilling to take steps to address the source of pollution.⁹ Consequently, legal commentators have been critical of previous efforts by the MoE to introduce a permit-by-rule system in Ontario and have cautioned that it is important to ensure that the MoE does not “trade environmental protection for faster approvals.”¹⁰

According to the MoE’s Discussion Paper, the approvals system which was first established in the 1970’s has “largely been viewed as effective in protecting the environment.”¹¹ The MoE thus, needs to provide a sound and compelling rationale to justify any major changes to the approval system. The MoE’s Discussion Paper fails to do this. In fact, many of the proposed changes have the potential to undermine environmental protection in the province. The proposed changes will also significantly erode the public’s right to participate in the environmental decision-making process which currently exists under Ontario’s environmental laws. Consequently, for the reasons which are provided in more detail below we have serious concerns with many of the proposed changes to Ontario’s approval system as outlined in MoE’s Discussion Paper.

⁹ Ibid., p. 442.

¹⁰ Ibid.

¹¹ Discussion Paper, p. 3.

PART III: GENERAL COMMENTS ON THE PROPOSED FRAMEWORK

(a) The Proposed Framework Fails to Provide a Detailed Explanation about the Extent of Delays and their Underlying Causes and Current Staffing Capacity at MoE

(i) Need to Assess the Extent of Delays and their Underlying Causes

We are supportive of many of the efforts that the MoE has undertaken to date to reduce delays in the approvals process. However, it remains unclear the extent to which the MoE is still continuing to face delays in the approvals process, after implementing these measures. If the delays are primarily due to external factors such as applicants submitting incomplete or deficient applications, this, in turn, will have a significant impact on the type of solutions which are required. The establishment of a registration process would not address the problem of incomplete or deficient applications nor would it speed up the approvals process. Business operations which are unable to correctly fill out application forms are unlikely to be able to comply with complex regulatory requirements set out in regulations. Instead, the MoE may need to devote more resources to outreach and public education to ensure that businesses are able to correctly fill out the required forms.

It is difficult for stakeholders or the public to provide meaningful comments on the MoE's efforts to modernize the approvals system without accurate and comprehensive information about the extent of, and underlying causes for delays. The MoE needs to provide stakeholders and the public with a detailed explanation about:

- the extent of the delays;
- the reasons for the delays;
- whether the delays have been caused primarily by factors external to the Ministry such as the submission of incomplete or deficient applications;
- the extent to which lack of adequate staff and resources is hampering the MoE's ability to review applications;
- whether there are delays throughout the entire approvals system or whether delays exist only in relation to certain type of approvals; and

- whether the time period for reviewing an approval is unduly lengthy or commensurate with the complexity of the application and the potential risk the activity may pose to the environment and human health.

If the MoE has undertaken an internal analysis regarding the issue of delay within the approvals system, this information should be made available to the public to ensure there is transparency about the underlying reasons warranting a move to a two-tiered approval system in Ontario.

Recommendation # 1: The MoE needs to provide details about delays in the approvals system. This should include a detailed explanation about the extent of the delays, the reasons for the delays, whether the delays have been caused primarily by factors external to the Ministry such as the submission of incomplete or deficient applications, the extent to which lack of adequate staff and resources is hampering MoE’s ability to review applications, whether there are delays throughout the entire approvals system or whether delays exists only in relation to certain types of approvals and whether the time period for reviewing an approval is unduly lengthy or commensurate with the complexity of the application and the potential risk the activity may pose to the environment and human health.

(ii) Need to Assess MoE’s Staff Capacity

Any solution to the issue of speeding up the approvals process also involves a consideration of how the EAAB performs its functions. The lack of capacity at the MoE has been highlighted by the Environmental Commissioner of Ontario (ECO) in a special report to the Legislative Assembly of Ontario.¹² The special report titled “Doing Less with Less: How shortfalls in budget, staffing and in-house expertise are hampering the effectiveness of MoE and MNR,” states that the expanding responsibilities of the MoE “have resulted in a need for additional staff to carry out the necessary monitoring, inspection, enforcement, research and reporting duties.”¹³ The report notes, however, that the MoE’s budget has not kept pace with its increased responsibilities.¹⁴ With regard to the approvals process, the ECO notes that “it appears that the MoE lacks adequate staff capacity to process these [Certificate of Approval] applications at a

¹² Environmental Commissioner of Ontario, “*Doing Less with Less: How Shortfalls in budget, staffing and in-house expertise are hampering the effectiveness of MoE and MNR*” (Toronto: ECO, April 24, 2007) online: <http://www.eco.on.ca/eng/uploads/eng_pdfs/LessWithLess.pdf>.

¹³ Ibid., p. 1.

¹⁴ Ibid.

reasonable rate.”¹⁵ Consequently, it appears that a key factor contributing to delays within the approvals system has been the shortage of Ministry staff to review applications in a timely manner. This suggests that the solution to delays in the approval process should also involve ensuring that the MoE has more funds to hire staff to carry out reviews to speed up the approvals process.

Recommendation # 2: The MoE needs to provide information about the staffing numbers in its approvals programme and the extent to which delays in processing applications for Certificates of Approval in a timely manner is due to lack of staff capacity.

(b) The *Environmental Bill of Rights (EBR)* should apply to the Registration Process.

(i) EBR Notice and Comment

The MoE is proposing to exempt individual registrations from the requirement to be posted on the EBR Registry and from appeals by third parties.¹⁶ The MoE has failed to provide any explanation in its Discussion Paper as to why this exemption from the *Environmental Bill of Rights, 1993 (EBR)* is warranted. We note that the MoE’s Discussion Paper states that one of the goals for the modernization exercise is to improve public transparency.¹⁷ If this is indeed the case, the proposal to exempt activities subject to the registration process from the *EBR* is fundamentally at odds with the MoE’s purported goals for conducting the modernization exercise. We are, therefore, strongly opposed to the proposal to exempt the registration process from the notice and comment provisions under the *EBR*.

The enactment of the *EBR* in 1994 greatly enhanced public participation in the environmental decision-making process. This included requirements for public notice and a minimum 30-day comment period for all proposals for new regulations, policies and instruments and an opportunity for third parties to seek leave to appeal MoE instruments such as Certificates of Approval to the ERT under certain circumstances. The MoE’s proposal would negatively impact all these rights.

¹⁵ Ibid., p. 40.

¹⁶ Discussion Paper, p. 12,

¹⁷ Ibid., p. 4.

An evaluation of the *EBR* almost a decade after its enactment concluded that it has improved access to information and decision-making in Ontario and has not had any measurable impact on delaying approvals.¹⁸ It is our understanding that posting on the EBR Registry and the Ministry's screening of applications takes place concurrently, not in a serial fashion.¹⁹ Consequently, there is no evidence to suggest that posting on the EBR Registry has resulted in undue delay in the approval process. Furthermore, even if posting on the EBR Registry were to cause a lengthier registration process for applicants, this factor needs to be weighed against the significant benefits of having the public participate in the approval process.

Even after regulations have been passed identifying the eligibility of a particular activity for the registration process, there may be a number of factors which may subsequently indicate that a particular activity should not be allowed to be registered due to special circumstances. There needs to be an opportunity for public input on the suitability of an activity for registration as this can provide decision-makers with access to important information about local conditions and circumstances about which they may not be aware. An activity which satisfies the eligibility criteria under regulation may, in fact, not be suitable for registration given unique local environmental conditions, such as its proximity to endangered species habitat and natural heritage features and systems. Furthermore, while an individual activity may not, by itself, pose a risk to the environment, numerous activities operating in relatively close proximity to each other may produce cumulative impacts which cause or are likely to cause adverse impacts to the environment and human health. The public may also be able to provide information to the MoE regarding environmental violations due to the past behaviour of an applicant which may warrant disallowing an activity to be registered. Consequently, even if a certain type of activity is deemed appropriate for registration, there may be unique features of a site or factors relating to the conduct of a particular applicant which may warrant not permitting the activity to be registered. A lack of meaningful participation will also tend to create instability and uncertainty in the approval process because citizens who have concerns about a particular

¹⁸ David McRobert & Catherine McAteer, "The Nuts, The Bolts And the Rest of the Machinery: A Guide to and Update on Ontario's Environmental Bill of Rights," Background Paper presented at the Environmental Law 200: New Developments and Current Issues to Comply in Today's Environment, Insight Conference, (August 2001) [unpublished] p. 29-30.

¹⁹ *Ibid.*, p. 30.

registration will seek other means through which to have their concerns heard. This, in turn, will make it more difficult and expensive for facilities to plan and undertake their operations.

The exemption of individual registrations from the *EBR* also raises concerns about how the MoE intends to fulfill its common law obligation to give notice to the public where their property may be affected by the activity.²⁰

We note that when the MoE recently undertook to streamline and expedite the approval process under the *Green Energy Act*, for renewable energy approvals, it maintained the requirement for notice and comment period under the *EBR* to ensure transparency and accountability.²¹ The MoE needs to do likewise in relation to its proposal to introduce a two-tiered approval system in Ontario.

Recommendation # 3: Individual registrations should be posted on the EBR Registry for a minimum 30-day comment period prior to registration.

(ii) Leave to Appeal by Third Parties

Legal commentators have remarked that the “mere existence of formal public comment opportunities should result in better or more environmentally sound proposals because proponents are aware that their proposals are likely to be reviewed and commented on under Part II of the *EBR*. This is particularly true for proposed instruments, which may be appealed under the *EBR* to an appellate body in certain circumstances.” Thus, the *EBR* has increased the incentive to ensure that public input is solicited and accommodated or acted upon where possible or appropriate in the approval process.²²

In order for members of the public to appeal instruments under the *EBR*, they must meet the leave to appeal criteria under s. 41 of the *EBR*. The leave test has been criticized by some commentators as too onerous and since the enactment of the *EBR* approximately sixteen years ago, relatively few applications have been granted leave to appeal. Out of approximately 102

²⁰ 795833 *Ontario Inc. v. Ontario (Attorney General)* (1990), 17 C.E.L.R. (N.S.) 107.

²¹ Ontario Ministry of Environment, Guide, PIBS 7394e, “Provincial Approval for Renewable Energy Projects” (Toronto: MoE, 2010) p. 17, online: <http://www.ene.gov.on.ca/en/business/green-energy/docs/REP_Guide.pdf>.

²² P. Muldoon and R. Lindgren, *The Environmental Bill of Rights: A Practical Guide*, (Toronto: Emond Montgomery Publication Limited, 1995) p. 89.

applications, as of last year about 25 applications have been granted leave. However, in a number of cases, where leave has been granted, the approval in question was ultimately either amended or revoked. Notable recent examples include: the *Lafarge* case; *Baker v. Ontario (Director, Ministry of Environment)*;²³ *Trent Talbot River Property Owners Association v. Ontario (Director, Ministry of Environment)*;²⁴ and *Lukasik v. Ontario (Director, Ministry of Environment)*.²⁵ Public participation and the leave to appeal provisions have, thus, been instrumental in making changes to Certificates of Approval and other instruments to ensure protection of the environment and human health.

Most disputed approvals, where leave has been granted, have tended to be resolved prior to reaching a hearing through mediation and settlement discussions. However, the option of proceeding to a hearing has been an important factor which has contributed to the negotiations process. An applicant for a Certificate of Approval is likely to be more willing to reach a compromise with individuals who may be potentially impacted, if there is a possibility of the ERT ultimately denying the application at a hearing. The prospect of being faced with a leave to appeal by third parties can also ensure that applicants do not provide false or misleading information as they know the public can challenge this information and bring any critical errors in their application to the attention of the ERT. This is particularly important given that the MoE will be relying on the applicant's own assessment about the proposed activity at a particular site to determine whether it should be subject to registration. The public, therefore, has a vital role to play in the approval process and while the leave to appeal provisions may on occasion be expensive and time consuming, it has proven to be an extremely important way to ensure the MoE is aware of all the facts before it authorizes a business activity to operate in Ontario.

The leave to appeal process, in contrast to a request for review or investigation under the *EBR*, allows the public to take proactive steps to have the Director's decision to issue the Certificate

²³ *Baker v. Ontario (Director, Ministry of the Environment)* (December 22 2008), Toronto, 07-009 to 07-016 (Ontario Environmental Review Tribunal), online: <<http://www.ert.gov.on.ca/files/DEC/07009d1.pdf>>.

²⁴ *Trent Talbot River Property Owners Association v. Ontario (Director, Ministry of the Environment)* (2007) 31 C.E.L.R. (3d) 129.

²⁵ *Lukasik v. Ontario (Director, Ministry of Environment)* 2004 Carswell Ont. 3573 (Ontario Environmental Review Tribunal, (WLeC).

of Approval reviewed independently by the ERT prior to the operation of the facility. The leave to appeal provision, thus, constitutes a core component of the *EBR* regime. The MoE's proposal, as presented, would revoke these fundamental rights in relation to individual registrations and raises serious concerns about the Ontario government's commitment to public participation in the environmental decision-making process.

Recommendation # 4: Individual registrations should be subject to appeals by third parties under the *EBR*.

(c) The Proposed Framework fails to consider "cumulative effects" and the MoE's Statement of Environmental Values

(i) Failure to Consider Cumulative Effects

A fundamental weakness with the approvals system in Ontario has been the failure of the MoE to address the issue of cumulative effects when decision-makers issue Certificates of Approval or other instruments for individual facilities. In areas such as Sarnia, Sudbury, Hamilton and Windsor, for example, individual facilities are approved without consideration of background air quality or other nearby sources of pollution in the vicinity, potentially resulting in air pollution that is disproportionately higher than in other parts of the province. Research has established that areas of the province that have higher air contaminant releases also tend to have higher poverty rates, raising serious concerns about environmental equity considerations regarding the siting and operation of industrial facilities in the province.²⁶ However, the MoE's Discussion Paper does not provide any reference to the issue of cumulative effects and how it will be considered and integrated in the proposed new approval regime for Ontario.

The MoE's failure to consider cumulative impacts in its approvals process was the subject of criticism by the ERT in a decision granting several members of the public leave to appeal the Director's issuance of two Certificates of Approval to Lafarge Canada Inc.²⁷ The Tribunal held that the Director should have assessed the potential cumulative ecological consequences of

²⁶ Pollution Watch, *An Examination of Pollution and Poverty in the Great Lakes Basin*, (Pollution Watch: Toronto) November 2008, pp. 2-4, online: <http://www.pollutionwatch.org/pub/PW_Pollution_Poverty.Report.pdf>.

²⁷ *Dawber v. Ontario (Director, Ministry of the Environment)*, 28 C.E.L.R. (3d) 281 (Environmental Review Tribunal, April 4, 2007) aff'd 36 C.E.L.R. (3d) 191 (Ont. Div. Ct. Jun 18, 2008), leave to appeal to C.A. refused (November 26, 2008).

approving the Lafarge applications before deciding whether to issue the Certificates of Approval to the company.

In the wake of the *Lafarge* case, stakeholders expressed concern about the failure of the MoE to consider and integrate cumulative effects into Ontario's approval process in order to make the system more protective of the environment and human health. Subsequently, Ecojustice filed an application for review under s. 61 of the *EBR* regarding the need for a new regulatory framework to address cumulative effects.²⁸ The MoE has indicated that it would undertake the review requested by Ecojustice.²⁹ However, the MoE has not announced a timeline for the completion of the review. In the meantime, the ECO has contracted ENVIRON EC (Canada) Inc. to complete two research projects on how different jurisdictions address the issue of cumulative effects of air contaminants in airsheds and to assess the feasibility of adapting the approaches used in other jurisdictions to Ontario's regulatory framework. These reports have been completed and have been posted on the ECO's website.³⁰

CELA and Ecojustice have also made recommendations to the MoE about the need to incorporate cumulative impacts into the approvals system. They have urged the MoE to implement a legislated planning process to ensure that pollution in heavily contaminated areas is reduced to protect the environment and human health.³¹ This includes providing statutory authority to the Minister of the Environment to designate an area of the province as a

²⁸ Ecojustice, *Application for Review under Section 61 of the Environmental Bill of Rights, 1993 Concerning the Need for Regulatory Amendments for Pollution Hot Spots*, (Toronto: Ecojustice, January 29, 2009) online: <<http://www.ecojustice.ca/media-centre/press-releases/chemical-valley-residents-demand-new-law-for-ontarios-pollution-hot-spots?searchterm=hotspots>>.

²⁹ Letter from Debra Sikora, Assistant Deputy Minister, Corporate Management Division, Ministry of Environment and John Lieou, Assistant Deputy Minister, Ministry of Environment to Ms. Ada Lockridge and Mr. Ronald Plain, dated May 11, 1009.

³⁰ Environ EC (Canada) Inc., *Jurisdictional Review of Regulations for Air Quality Management*, (Mississauga, Ontario, May 2009) online: <http://www.eco.on.ca/eng/uploads/eng_pdfs/2009/2009AirQuality1.pdf>. Environ EC (Canada) Inc., *Feasibility of Adapting Regulations for Air Quality Management to Ontario's Existing Regulatory Framework*, (Mississauga, Ontario, May 2009) online: <http://www.eco.on.ca/eng/uploads/eng_pdfs/2009/2009AirQuality2.pdf>.

³¹ Ecojustice and Canadian Environmental Law Association, *Briefing Paper Regarding Cumulative Effects Under Ontario Pollution Law*, November 2, 2009.

‘cumulative air contaminant reduction area’ and the preparation of a ‘contaminant reduction plan’ for that area.³²

The ECO has cautioned that when the MoE is required to off-load or deregulate sectors from the Certificate of Approval process the “consequent decrease in regulatory oversight may present risks to the environment and human health. ‘Low risk’ facilities still produce impacts to the environment. Indeed, the cumulative impact of several low-risk facilities located closely together (as they commonly are) can be significant.”³³ Given these concerns, the MoE’s failure to address how cumulative impacts will be considered in the context of the proposed registration system, particularly in the areas of the province that are already disproportionately exposed to high levels of pollution, constitutes a glaring omission.

At present, if a facility requires a Certificate of Approval under the *Environmental Protection Act, (EPA)* to discharge pollutants into the air, the applicant must show compliance with the point of impingement standards set out in O.Reg. 419/05.³⁴ Compliance is demonstrated by preparing and submitting with the application for an approval, an Emission Summary Dispersion Modelling (ESDM) report, which assesses property line concentrations of emissions from the facility using local meteorological information and local site conditions.³⁵ The intention of this regulation is to protect local communities and the local environment from exposure to air pollutants.

It is important to note that all approvals of air emissions include a site specific assessment to estimate pollution levels to ensure the environment and local communities are provided with adequate protection from exposure to harmful substances. It is unclear if such an analysis could, or would, be undertaken for an activity or a facility subject to the registry process. Without a local site specific assessment, as presently required through the Certificate of Approval process, it would not be possible to assess whether activities that emit air contaminants are in compliance with the point of impingement standards under O.Reg. 419/05.

³² Ibid.

³³ Environmental Commissioner of Ontario, *supra* note 11, p. 41.

³⁴ *Environmental Protection Act (EPA)*, R.S.O. 1990, c.E.19 as amended, Section 9; O.Reg 419/05, Air Pollution- Local Air Quality (O.Reg 419/05), Section 22.

³⁵ O.Reg 419/05, Section 26.

Consequently, activities or facilities subject to the registration process could potentially be in violation of Ontario's air standards which seek to protect the environment and human health.

While the ESDM report constitutes a critical component for ensuring compliance with O.Reg 419/05, the regulation fails to require that cumulative impacts such as background concentrations and emissions from other neighbouring sources be assessed as part of the ESDM report.³⁶ This constitutes a fundamental flaw in the regulatory framework governing air approvals in Ontario. The MoE, therefore, needs to make the integration of cumulative effects into the approvals process a priority over matters of administrative efficiencies, including "delay." The MoE needs to expeditiously establish and implement a regulatory framework which requires decision-makers to consider the potential cumulative impact in a rigorous, predictable, meaningful manner when issuing Certificates of Approval and other instruments. This should be done before the Ministry takes any further steps to establish a two-tiered approvals regime in Ontario.

Recommendation # 5: The MoE needs to establish and implement a regulatory framework which requires decision-makers to consider the potential cumulative impacts in a rigorous, predictable, meaningful manner when issuing Certificates of Approval and other instruments.

Recommendation # 6: The MoE should establish a regulatory framework which considers the potential cumulative impacts in the approval process, prior to taking any further steps to establish a two-tiered approval system in Ontario.

(ii) Failure to Consider the MoE's Statement Environmental Values

It is also very surprising that the MoE's Discussion Paper does not indicate how the MoE's Statement of Environmental Values (SEV) has been considered and applied in the proposed legislative framework for modernizing the approvals system. Section 11 of the *EBR* requires the Minister to take every reasonable step to ensure the SEV is considered when environmentally

³⁶ Letter from Joseph F. Castrilli, Counsel, Canadian Environmental Law Association & Elaine MacDonald, Senior Scientist, Ecojustice to Minne deJong, Manager, Human Toxicology and Air Standards Section, Ministry of Environment dated, September 29, 2009, online: <http://www.cela.ca/sites/cela.ca/files/677Reg419_05LocalAirQuality.pdf>; Letter from Joseph F. Castrilli, Counsel, Canadian Environmental Law Association & Elaine MacDonald to Catherine Grant, Engineer Specialist, Air Standards and Risk Management, Environmental Sciences and Standards Division, Standards Developments Branch, Ministry of Environment dated September 8, 2009, online: <<http://www.cela.ca/sites/cela.ca/files/671-OReg41905.pdf>>.

significant decisions are made within the Ministry. The MoE has indicated that the modernization exercise will involve updating possibly four or more statutes, amending 40 new regulations as well as enacting new regulations.³⁷ Yet, there is not a single reference to the MOE's SEV in the Discussion Paper, nor an explanation of how SEV principles will be considered and applied as the MoE develops a new approvals regime.

Recommendation # 7: The MoE needs to indicate to the public how it has considered and applied the MoE's SEV in its proposal to develop a new approvals regime for Ontario.

(d) The Proposed Framework Lacks Details about a Monitoring and Compliance Strategy

The MoE Discussion Paper states that "... the Ministry is proposing to introduce a system where the appropriate tools would be applied to achieve the best environmental outcomes for each type of activity being considered."³⁸ Presumably the MoE would want to assess the effectiveness of the establishment of a registration process in protecting the environment and human health. However, there is no indication in the MoE's Discussion Paper as to how the Ministry would go about assessing industry's compliance under the registration process or the environmental performance of these companies.

(i) Monitoring

Other jurisdictions, such as Massachusetts, which have adopted a permit-by-rule system for certain sectors, have established an evaluation methodology which assesses the effectiveness of their program. The Massachusetts Department of Environmental Protection (DEP) Environmental Results Program (ERP) has an evaluation methodology aimed at tracking results, targeting inspections and providing compliance assistance through outreach activities and workbooks.³⁹ The MoE needs to establish a similar strategy for activities which are subject to the registration process. A key component of this strategy should include compulsory monitoring for those industries subject to the registration process. The monitoring requirement should be specified in regulation to have the force of law. This is essential to ensure that the

³⁷ Kevin Perry, *supra* note 4, p. 4.

³⁸ Discussion Paper, p. 6.

³⁹ See: http://www.mass.gov/dep/service/about_11.htm.

pollution control technologies are operating effectively and to assess the releases of contaminants into the environment.

Monitoring requirements specified in regulation should include the following:

- Monitoring and sampling location
- Frequency of monitoring or sampling (e.g. twice a week or twice a month)
- Types of sample (e.g. on-line or composite)
- Parameters to be measured
- Monitoring methods
- Analytical methods
- Data recording, record keeping and reporting requirements.

The MoE should ensure that the monitoring data is made available to the public to ensure transparency and accountability by industry and government.

Recommendation # 8: The MoE needs to establish monitoring requirements in regulations for those activities which will be subject to the registration process to ensure that their pollution control technologies are operating effectively and to assess the releases of contaminants into the environment.

Recommendation # 9: The MoE should ensure that the monitoring data is made available to the public to ensure transparency and accountability by industry and government.

(ii) Compliance and Enforcement strategy

The MoE's Compliance Policy Manual which sets out the Ministry's approach to compliance and enforcement should be revised to include industries subject to the registration process.⁴⁰ The MoE needs to develop a compliance and enforcement strategy for these industries, which should include an evaluation methodology designed to target facilities for inspections to ensure that they are meeting regulatory requirements and to assess industry-wide compliance.

⁴⁰ Ontario Ministry of Environment, *Compliance Policy: Applying Abatement and Enforcement Tools*, (Toronto: MoE, May 2007).

Information about industry-wide compliance for activities subject to the registration process should be made publicly available to increase industry and government accountability. The MoE should provide an indication of how it will deal with complaints from the public in the event that an activity subject to the registration process causes adverse impacts to the natural environment and human health.

The MoE also needs to provide details about how staff and resources will be re-allocated to address inspections for activities subject to the registration process. The MoE should not proceed with the establishment of the registration process until it provides a detailed strategy on how it would assess compliance for activities subject to the registration system.

Recommendation # 10: The MoE needs to establish a compliance strategy for activities which are subject to the registration process. This includes the establishment of an evaluation methodology designed to target facilities for inspections to ensure that they are meeting regulatory requirements, as well as an assessment of industry-wide compliance.

Recommendation # 11: Information about industry-wide compliance for activities subject to the registration process should be made publicly available to increase industry and government accountability.

Recommendation # 12: The MoE should indicate how it will deal with complaints from the public in the event that an activity subject to the registration process causes adverse impacts.

Recommendation # 13: The MoE should provide details on how staff and resources will be re-allocated to address inspections of activities subject to the registration process.

Recommendation # 14: The MoE should not proceed with the establishment of the registration process until it provides a detailed strategy on how it intends to assess compliance for activities subject to the registration process.

(e) Legal Implications of Registration and Regulatory Negligence

(i) The Legal Implications of Registration

The MoE's Discussion Paper does not provide any clarification about the legal nature and status of activities subject to the registration. It is not precisely defined whether activities which operate subject to the registration process will be deemed to have statutory authority to carry out the activity. If they are deemed to have statutory authority to undertake the activity pursuant to regulation, this will have significant ramifications on the public's rights to bring a civil action against an activity operating under the registration process which causes adverse

impacts. The defence of statutory authority provides that “if the legislature expressly or implicitly says a work can be carried out but which can only be done by causing a nuisance, then the legislation has authorized an infringement of private rights. If no compensation is provided in statute, all redress is barred.”⁴¹ The defence of statutory authorization applies to claims in private nuisance, public nuisance, Rylands and Fletcher and to riparian rights.⁴²

The issuance of a Certificate of Approval, however, does not provide a defence to the approval holder from an action arising from the approved activity.⁴³ There have been some lower court decisions which have extended the statutory authorization defence to Certificates of Approval. However, these decisions are at odds with the Supreme Court of Canada’s pronouncement on this issue in *British Columbia’s Growers Ltd v. Portage la Prairie (City)*.⁴⁴ Legal commentators have also noted that these recent decisions “attach unwarranted significance to the issue of a Certificate of Approval and fail to recognize that its purpose is to ensure that an undertaking is operated in accordance with government accepted procedures.”⁴⁵

The establishment of a registration system, thus, can have serious consequences on the public’s right to bring civil actions for damages arising from activities covered by this system. The defence of statutory authorization in conjunction with the Crown immunity clause, discussed below, means that the public will not have recourse to civil remedies for adverse impacts caused by activities subject to the registration system.

Recommendation # 15: The MoE should provide the public with a clear statement of the legal meaning and status of the registration system and whether the registration system would provide a defence of statutory authorization to proponents.

⁴¹ M.D Faieta, et al, *Environmental Harm: Civil Actions and Compensation*, (Toronto: Butterworths Canada, 1996) p. 242.

⁴² Ibid.

⁴³ Ibid., p. 257.

⁴⁴ *British Columbia’s Growers Ltd v. Portage la Prairie (City)*, [1966] S.C.R. 150.

⁴⁵ M.D Faieta, et al, *supra* note 41, p. 257.

(ii) Regulatory Negligence

When the Ontario government previously considered adopting a permit-by-rule system in Ontario, it amended the *Environmental Protection Act (EPA)* to include a clause precluding regulatory negligence actions in relation to any matters arising out of, or in relation to this new system. The Crown immunity clause under section 177.1 of the *EPA* states:

No action or other proceeding shall be brought against the Crown, the Minister or an employee or agent of the Crown because of anything arising out of or in relation to a matter carried on or purported to be carried on pursuant to a regulation that exempts a person from the requirement to obtain a license, certificate of approval, provisional certificate of approval, renewable energy approval or permit.

The enactment of a Crown immunity clause was a clear indication that the government was concerned about potential liability arising from the introduction of a permit-by-rule system in Ontario. The MoE Discussion Paper indicates that the registration system would apply to “lower-risk or less complex activities, while still continuing to be protective of the environment and human health.”⁴⁶ If the MoE is confident that replacement of the approval requirement with a registration system will not result in adverse impacts to the environment and human health there is no need to retain the Crown immunity clause under the *EPA*. Accordingly we recommend that the MoE revoke section 177.1 of the *EPA*.

Recommendation # 16: The MoE should revoke the Crown immunity clause provided in section 177.1 of the *EPA* before establishing a registration system for “lower-risk, less-complex activities” in Ontario.

IV. SPECIFIC COMMENTS ABOUT THE PROPOSED FRAMEWORK

(a) The MoE Needs to Provide information about the Permit-By-Rule Systems in Other Jurisdictions

The MoE’s Discussion Paper states that it has “looked at comparable leading jurisdictions to identify best practices most relevant to Ontario relating to the structure and delivery of approvals processes.”⁴⁷ However, the Discussion Paper does not indicate the impact that the

⁴⁶ Discussion Paper, p. 5.

⁴⁷ Discussion Paper, p. 4.

adoption of such as system had on pollution and the environmental performance of business operations in these jurisdictions.

We note that some jurisdictions which have utilized the permit-by-rule system include those with serious pollution problems. In the U.S. for example, the state of Texas utilizes a permit-by-rule system. In 2004, the Commission for Environmental Cooperation (CEC) ranked Texas facilities as reporting the largest on-site releases of any North American jurisdiction.⁴⁸ That same year the CEC ranked Ontario as having the largest total release of pollutants for all North American jurisdictions.⁴⁹ Given the serious pollution problems facing this province, the MoE needs to undertake comprehensive and thorough research on the use of permit-by-rule in other jurisdictions. The MoE has undertaken some initial work on this issue and recently posted a report on its website which provides a preliminary analysis about the practices in other jurisdictions.⁵⁰ However, more detailed information is required about the regulatory framework governing the permit-by-rule systems which have been implemented in other jurisdictions. This includes a review of: how other jurisdictions make a determination about whether to include an activity in a permit-by-rule system; whether and how cumulative effects are considered; opportunities for public input and transparency; and monitoring and compliance. The MoE also needs to make the background documents which formed the basis of its analysis and conclusions of its inter-jurisdictional review. This information should be made publicly available before the MoE takes any further steps to establish a two-tiered approval system in Ontario.

Recommendation # 17: The MoE needs to undertake a comprehensive and thorough review of the permit-by-rule systems which have been adopted in other jurisdictions. This includes a review of: how other jurisdictions make a determination about whether to include an activity in a permit-by-rule system; whether and how cumulative effects are considered; opportunities for public input and transparency; and monitoring and compliance. The MoE also needs to make the background documents which formed the basis of its analysis and conclusions of its inter-jurisdictional review. This information should be made publicly

⁴⁸ Commission for Environmental Cooperation. *Taking Stock: 2004 North American Pollutant Releases and Transfers*, (Montreal: Commission for Environmental Cooperation, 2007), p. 48. The 2004 Taking Stock report was the last one which provides a ranking of North American jurisdictions in terms of pollutant releases and transfers.

⁴⁹ Ibid.

⁵⁰ Ontario Ministry of Environment, "Modernization of Approvals, Inter-jurisdictional Comparison of Alternative Approval Methods: Overview and Best Practices" (March 2010), online: <http://www.ene.gov.on.ca/en/business/mofa/includes/Phase2InterjurisdictionalResearchReport.pdf>.

available before the MoE takes any further steps to establish a two-tiered approval system in Ontario.

(b) Registration process should only apply to routine, simple activities with very little chance of causing adverse effects to the environment or public health and safety.

The decision to require facilities engaged in a particular activity to register, instead of obtaining a Certificate of Approval for the activity, would be made through regulation.⁵¹ Consequently, at this point in time, it is premature to provide detailed comments on the suitability of certain activities for the registration process.

However, at this point we would reiterate that a permit-by-rule system, if implemented, should only apply to routine, simple activities with very little chance of causing adverse effects to the environment or public safety and health. We are concerned that certain aspects of a facility operation may be selected for the registration process by satisfying only some of the criteria in the risk evaluation process. We note that in the past when the MoE had considered a permit-by-rule system it proposed to include activities which had the potential to cause serious adverse impacts on the environment and to public health and safety. These included municipal waste transfer/processing sites, the utilization of biosolids (e.g. sewage sludge) on agricultural lands and unlimited one-time takings of ground water.⁵²

The registration process should also not apply to any activities which emit substances subject to the *Toxic Reduction Act, 2009 (TRA)*.⁵³ The *TRA* is the core of Ontario's toxic reduction strategy

⁵¹ Discussion Paper, p. 9.

⁵² R. Nadarajah & M. Winfield, Comments on the MoE's Proposal for Standardized Approvals Regulations and Approvals Exemption Regulations EBR Registry No. RA8E0008.P at p. 3. In 2005, the Ontario government established a permit-by-rule system for the management of nutrients, which are materials such as manure and biosolids. Under O. Reg 511/05 which amended O. Reg 267/03 under the *Nutrient Management Act*, the government exempted certain new livestock operations from the requirement to have their Nutrient Management Strategy and Nutrient Management Plan approved by the Ontario Ministry of Agriculture, Food and Rural Affairs. The ECO has expressed concerns that these changes would weaken accountability and compliance with regulatory requirements. See Environmental Commissioner of Ontario, *Neglecting Our Obligations: Annual Report 2005-2006* (Toronto: ECO, 2006), pp. 112-116.

⁵³ *Toxics Reduction Act, 2009*, S.O. 2009, c.19.

and substances which are included on the *TRA* list should be regarded as having significant environmental impacts by virtue of their classification. Consequently if a substance is on the *TRA* list it should be subject to review and scrutiny under the Certificate of Approval process.

Recommendation # 18: The registration process should only apply to simple routine activities which have a very little chance of causing adverse effects to the environment or public safety and health.

Recommendation # 19: The registration process should not apply to activities which emit substances subject to the *Toxic Reduction Act, 2009*.

(c) The MoE should consider the prior conduct of an applicant in its risk evaluation process

The MoE's Discussion Paper states that the activities which will be considered for the registration process will be based on an "objective analysis of several factors."⁵⁴ This includes assessing the risk posed by the activity to the environment and human health based on a number of criteria including the complexity of the activity, the types of emissions from the activity, how close the activity is to receptors such as daycares, residences, wetlands etc.⁵⁵ The MoE's risk evaluation criteria should not be limited to simply operational matters but should also include the prior conduct of the applicant. This includes factor such as lack of cooperation with the MoE during previous inspections, failure to notify the MoE forthwith of any discharges into the environment, providing false or misleading information to the MoE and prior convictions.

Recommendation # 20: The MoE needs to include the prior conduct of applicants as a criterion in its risk evaluation process. This includes factors such as lack of cooperation with the MoE during previous inspections, failure to notify the MoE forthwith of any discharges into the environment, providing false or misleading information to the MoE and prior convictions.

⁵⁴ Discussion Paper, p. 9.

⁵⁵ Ibid., p. 9-10.

(d) The MoE's Registry

We support the MoE's decision to provide online tools to enhance government to business interaction related to the approvals process.⁵⁶ We believe that the MoE's decision to post information submitted through the approvals process on a publicly available registry will improve public transparency. However, it is not clear how this database might be integrated with the existing EBR registry, at least in relation to those activities which would still be subject to the approval requirements, and whether interested members of the public will have to monitor and search two separate databases in order to stay fully apprised of approval activities within their community. The MoE Discussion Paper states that information submitted through the Certificate of Approval process would be publicly available.⁵⁷ It is not clear whether this includes only the application form for a Certificate of Approval or also includes reports and other documents submitted by applicants. We recommend that the MoE make all information submitted by applicants through the Certificate of Approval process as well as the registration process publicly available. The MoE also needs to take measures to ensure that the public does not confuse the MoE registry with the EBR registry.

Recommendation # 21: The MoE needs to provide more information about whether the MoE's registry will be integrated with the EBR Registry at least in relation to those activities which would still be subject to the approval requirement. The MoE needs to make all information submitted by applicants through the Certificate of Approval process as well as the registration process publicly available. The MoE needs to also take measures to ensure that the public does not confuse the MoE registry with the EBR registry.

(e) Single Site-Wide, Multi-Site and System-Wide Approvals

The MoE is proposing to establish legislative authority to allow it to establish a single, site-wide Certificate of Approval which would cover all media as well as multi-site and system-wide Certificates of Approval.⁵⁸ This proposal could have serious environmental and health implications. It is not clear if the use of this process would allow a facility to move activities around within a company, without an approval, such as from a remote area to one where the

⁵⁶ Ibid., pp. 8-9.

⁵⁷ Ibid., p. 8.

⁵⁸ Ibid., p. 17.

population density is higher. Moving activities around within a facility may have implications for emissions modelling, which is site and spatially specific, and could undermine compliance with the point of impingement standards under O.Reg 419/05. Moreover, it is not clear whether the MoE proposal to issue single site-wide or multi-site and system-wide Certificates of Approval will be used to avoid the existing mandatory or discretionary hearing requirements in environmental legislation.

The MoE needs to consider alternative ways to streamline applications for Certificates of Approval which involve multi-media, multi-site or system-wide considerations. This may involve having a one-window approach within the EAAB to provide co-ordinated assistance for applicants whose applications involve multi-media, multi-site or system-wide considerations.

Recommendation # 22: The MoE needs to provide more details about single site-wide, multi-site and system-wide Certificates of Approval as this proposal could have serious environmental and health implications.

Recommendation: # 23: The MoE needs to consider alternative ways to streamline approvals that involve multi-media, multi-site or system-wide considerations, including having a one-window approach within the EAAB to provide co-ordinated assistance for applicants whose applications involve multi-media, multi-site or system-wide considerations.

(f) Operational Flexibility

We are concerned about the MoE's proposal to allow for 'operational flexibility' within operational parameters established by the Ministry. These include, but are not limited to, the size of the facility, quality and quantity of emissions (i.e. a facility could make changes as long as it demonstrates it is in compliance with applicable standards) and the nature of the facility's operations.⁵⁹ The use of 'operational flexibility' in Certificates of Approval has implications for compliance with the point of impingement standards under O.Reg. 419/05.

We are strongly of the view that the 'operational flexibility' provided in Certificates of Approvals should not permit an increase in the quantity or quality of emissions as this may have significant adverse impacts on the environmental and human health. Allowing a facility to alter its operations at a subsequent date may result in adverse impacts, given that conditions surrounding the site may have changed. A day care or another sensitive receptor, for example,

⁵⁹ Ibid., p. 18-19.

may have been established in close proximity to a facility after the issuance of the Certificate of Approval.

Furthermore, 'operational flexibility' may also result in altering the calculation of the concentrations of emissions at the property line (due to changes in the proximity of the emission source to the property line or because of a change in the nature of the emission source) of air contaminants which are regulated under O.Reg 419/05. Consequently, allowing 'operational flexibility' in Certificates of Approval may have implications on a facility's compliance with regulatory standards.

Recommendation # 24: Any "operational flexibility" provided within a Certificate of Approval should not result in an increase in the quality or quantity of emissions into the natural environment.

(g) Transition and Continuous Improvement

The MoE is proposing to institute an approach that would result in the transition of existing approvals to the new process and the regular update of approvals.⁶⁰ The MoE has also indicated that it could add, as a condition of approval, the requirement to submit an application for review of the approval at some point in the future. This would allow the MoE to review and update approval requirements on a continuous basis.

We support the MoE decision to review and update approval requirements on a continuous basis. The MoE needs to develop a guideline for staff at the EAAB to provide guidance as to when an application for review should be submitted in the future.

Recommendation # 25: The MoE should develop a guideline to provide staff of the EAAB guidance as to when an application for review of the approval should be submitted in future.

(h) Quality and Complete Submission Requirements

The MoE's Discussion Paper indicates that a "significant portion of the application packages that the Ministry receives are either incomplete or of poor quality. On an application by application basis, addressing this issue costs the Ministry time and resources which, in turn, affects how quickly approvals can be processed."⁶¹ The MoE is proposing to impose regulatory

⁶⁰ Ibid., p. 19.

⁶¹ Ibid., p. 17.

requirements related to the quality of submissions and completeness of the application as well as sign-off requirements by appropriate or accountable persons.⁶² The MoE may also reject an application if the application fails the quality and completeness requirements.⁶³

We support the MoE's proposal to impose regulatory requirements related to the quality and completeness of the application as well as the sign-off requirements by appropriate persons. We also support the MoE's proposal to reject an application if it fails to meet the quality and completeness requirements. These measures should significantly reduce delay in processing applications for Certificates of Approval. In fact, the implementation of these measures alone may reduce delay within the approval system to such an extent that it could make the establishment of a two-tiered approval system unnecessary. We recommend that the Ministry monitor the reduction in delay as a result of implementing these measures before it takes steps towards establishing a two-tiered approval system in Ontario.

Recommendation # 26: CELA, EcoJustice and CIELAP support the MoE's proposal to impose regulatory requirements related to the quality of submission and completeness of the application as well as the sign-off requirements by appropriate persons.

Recommendation # 27: CELA, EcoJustice and CIELAP recommend that the MoE monitor and assess the reduction in delay as a result of implementing measures related to the quality of submission and completeness of the applications.

Recommendation # 28: CELA, EcoJustice and CIELAP recommend that the MoE monitor the reduction in delay as a result of implementing measures related to the quality and completeness of applications for Certificates of Approval before taking any further steps to establish a two-tiered approval system in Ontario.

(i) Financial Assurance and Environmental Clean-up

The MoE is proposing changes to the financial assurance requirements to allow the Ministry to assign responsibility for clean-up costs to parent companies where financial assurance is absent or inadequate.⁶⁴

⁶² Ibid.

⁶³ Ibid., p. 18.

⁶⁴ Ibid., p. 20-21.

The recent case of *Detox Environmental Ltd. v. Director, Ministry of the Environment*, highlighted the significant shortcomings of the MoE’s practice regarding the sufficiency of financial assurance.⁶⁵ In that case, the ERT indicated that the sufficiency of financial assurance had come up in situations involving MoE approvals and urged the MoE “to properly review its policies and guidelines on financial assurance, and most importantly, its practices in setting financial assurance amounts so that Ontario’s current and future taxpayers do not shoulder the burden of unfunded environmental liabilities.”⁶⁶ The ERT stated that “[w]ithout the proper implementation of the financial assurance program, principles relating to polluter pays, cost internalization, intergenerational equity and pollution prevention will be undermined.”⁶⁷

We strongly support the MoE’s proposal in regards to financial assurance as these changes will ensure there are adequate funds for future clean-up and to manage environmental conditions at a site.

Recommendation # 29: CELA, Ecojustice and CIELAP strongly support the changes proposed to allow the MoE to assign responsibility for clean-up to the parent company where financial assurance is absent or inadequate.

(j) Harmonization of Existing Hearing Requirements

The MoE is proposing to replace and harmonize the existing hearing requirements under the new Certificate of Approval process.⁶⁸ The MoE is proposing that the Ministry have discretion in all cases to require that a hearing be held prior to making a decision on an application and have the ability to refer the entire approval application or only parts of the approval being considered to the ERT.

⁶⁵ *Detox Environmental Ltd. v. Director, Ministry of the Environment*, (Environmental Review Tribunal) Case No.: 08-155, December 30, 2009. See also *Re General Chemicals Canada Ltd.* (2006), 23 C.E.L.R. (3d) 184 (O.S.C.J.), appeal dismissed (2007) 31 C.E.L.R. (3d) 205 (O.C.A.), and *General Chemical Industrial Products Inc. v. Director, Ministry of the Environment* (Environmental Review Tribunal) Case Nos.: 05-122 to 05-130, 06-216 to 056-224, December 3, 2008 and March 3, 2009).

⁶⁶ *Ibid.*, pp. 20-21.

⁶⁷ *Ibid.*, p. 21.

⁶⁸ *Ibid.*, p. 21.

We need more details about the harmonization of hearing requirements before we can provide comments about this proposal. It is unclear whether the MoE's discretion to refer matters to a hearing would apply to all individual applications for Certificates of Approval or whether it is restricted to those instances where a mandatory hearing requirement is triggered and other environmental approvals are also required. We are strongly of the view that any harmonization exercise should not result in a rollback of the existing hearing requirements under environmental legislation.

The MoE also needs to provide for intervenor funding at hearings to ensure that citizens are able to effectively participate in the hearing process. In this regard, we recommend that the government enact legislation along the lines of the *Intervenor Funding Project Act, 1988 (IFPA)* which ended in 1996 when the government decided not to renew this legislative initiative. The *IFPA* made a significant contribution to ensuring public participation in the environmental decision-making process by providing funding to citizens so that they could effectively prepare and present their case. This, in turn, significantly improved the quality of participation before the tribunals and improved decision-making. The *IFPA* also increased efficiency in the hearing process by promoting scoping and settlement of issues. A survey done a year before the *IFPA* expired indicated that eighty percent of stakeholders, including proponents with experience in the hearing process, favoured continuing this initiative.

Recommendation # 30: The MoE needs to provide more details about its proposal to replace and harmonize the existing hearing requirements so that we can fully assess its implications and provide comments.

Recommendation # 31: The government of Ontario needs to enact legislation consistent with the model of the *Intervenor Funding Project Act, 1988* to ensure effective citizen participation in the environmental decision-making process by administrative tribunals.

(k) Service Guarantees

The MoE is proposing to provide thorough policy guidance, service guarantees for the review of Certificate of Approval applications.⁶⁹ The length of the service guarantee will be dependent on the type of application being processed and will be subject to the submission of a complete application.

⁶⁹ Ibid., p. 22.

We are not opposed to the provision of service guarantees through policy guidance, provided that the MoE provides an appropriate length of time, and adequate staff and resources, to ensure the quality of the review is not compromised in favour of speedier processing time for applications.

Recommendation # 32: The provision of service guarantees through policy guidance should ensure that the quality of review is not compromised in favour of speedier processing time for applications for Certificates of Approval.

V. CONCLUSION

The MoE's proposal to modernize the approvals function fails to provide any details about the underlying factors which are causing delay in the approvals process. The MoE needs to provide the public with details about the rationale to justify such significant changes given that the Discussion Paper states that the approval system which was first established in the 1970's has largely been viewed as effective in protecting the environment.

The MoE Discussion Paper also fails to address the issue of how cumulative effects will be considered and implemented under the proposed two-tiered system. The MoE needs to make assessing cumulative effects under the approval system a priority and needs to address this issue before undertaking to establish a two-tiered approval system in Ontario.

We are also concerned about the types of activities which would be subject to the registration process. The MoE has indicated that the registration process will only apply to activities which could be characterized as lower-risk or "less complex," or that have standard requirements, while continuing to be protective of the environment and human health. However, in the past when the government considered a permit-by-rule system it included activities which have the potential to cause serious adverse impacts on the environment. We reiterate that a registration system, if implemented, should be restricted only to simple routine activities which have a very small chance of causing adverse effects to the environment or to human health.

The proposed new approval regime would negatively impact on the public's legal rights under the *EBR* as well as the common law. In this regard, we are extremely concerned about the MoE's proposal to exempt individual registrations from notice and comment on the *EBR* registry and from leave to appeal by third parties. This proposal, if implemented, would

constitute a drastic rollback of public participation rights under the *EBR*. We strongly recommend that the government not exempt the registration process from the *EBR*.

The proposed regime would also remove the public's rights to pursue civil remedies against proponents and the government for harm arising from activities governed by the registration process as a result of the defence of statutory authority and the Crown immunity clause. The government needs to take measures to ensure the public's right to bring a civil action is not compromised by the proposed new approval regime. In fact, if the matters to be addressed through the registration process are truly 'low-risk', the Crown immunity clause provided in section 177.1 of the *EPA* is unnecessary.

We are supportive of some of the recommendations in the MoE's Discussion Paper. These include the proposal to post information submitted through the approvals process on a publicly available registry and changing the financial assurance requirements to allow the ministry to assign responsibility for clean-up costs to a parent company where financial assurance was absent or inadequate.

However, many of the proposals in the MoE's Discussion Paper to modernize the approval system will require major revisions before they can proceed in a manner which ensures the protection of the environment, human health and the public's right to participate in the environmental decision-making process in Ontario.

VI. SUMMARY OF RECOMMENDATIONS

Recommendation # 1: The MoE needs to provide details about delays in the approvals system. This should include a detailed explanation about the extent of the delays, the reasons for the delays, whether the delays have been caused primarily by factors external to the Ministry such as the submission of incomplete or deficient applications, the extent to which lack of adequate staff and resources is hampering MoE's ability to review applications, whether there are delays throughout the entire approvals system or whether delays exists only in relation to certain types of approvals and whether the time period for reviewing an approval is unduly lengthy or commensurate with the complexity of the application and the potential risk the activity may pose to the environment and human health.

Recommendation # 2: The MoE needs to provide information about the staffing numbers in its approvals programme and the extent to which delays in processing applications for Certificates of Approval in a timely manner is due to lack of staff capacity.

Recommendation # 3: Individual registrations should be posted on the EBR Registry for a minimum 30-day comment period prior to registration.

Recommendation # 4: Individual registrations should be subject to appeals by third parties under the *EBR*.

Recommendation # 5: The MoE needs to establish and implement a regulatory framework which requires decision-makers to consider the potential cumulative impacts in a rigorous, predictable, meaningful manner when issuing Certificates of Approval and other instruments.

Recommendation # 6: The MoE should establish a regulatory framework which considers the potential cumulative impacts in the approval process, prior to taking any further steps to establish a two-tiered approval system in Ontario.

Recommendation # 7: The MoE needs to indicate to the public how it has considered and applied the MoE's SEV in its proposal to develop a new approvals regime for Ontario.

Recommendation # 8: The MoE needs to establish monitoring requirements in regulations for those activities which will be subject to the registration process to ensure that their pollution control technologies are operating effectively and to assess the releases of contaminants into the environment.

Recommendation # 9: The MoE should ensure that the monitoring data is made available to the public to ensure transparency and accountability by industry and government.

Recommendation # 10: The MoE needs to establish a compliance strategy for activities which are subject to the registration process. This includes the establishment of an evaluation methodology designed to target facilities for inspections to ensure that they are meeting regulatory requirements, as well as an assessment of industry-wide compliance.

Recommendation # 11: Information about industry-wide compliance for activities subject to the registration process should be made publicly available to increase industry and government accountability.

Recommendation # 12: The MoE should indicate how it will deal with complaints from the public in the event that an activity subject to the registration process causes adverse impacts.

Recommendation # 13: The MoE should provide details on how staff and resources will be re-allocated to address inspections of activities subject to the registration process.

Recommendation # 14: The MoE should not proceed with the establishment of the registration process until it provides a detailed strategy on how it intends to assess compliance for activities subject to the registration process.

Recommendation # 15: The MoE should provide the public with a clear statement of the legal meaning and status of the registration system and whether the registration system would provide a defence of statutory authorization to proponents.

Recommendation # 16: The MoE should revoke the Crown immunity clause provided in section 177.1 of the *EPA* before establishing a registration system for “lower-risk, less-complex activities” in Ontario.

Recommendation # 17: The MoE needs to undertake a comprehensive and thorough review of the permit-by-rule systems which have been adopted in other jurisdictions. This includes a review of: how other jurisdictions make a determination about whether to include an activity in a permit-by-rule system; whether and how cumulative effects are considered; opportunities for public input and transparency; and monitoring and compliance. The MoE also needs to make the background documents which formed the basis of its analysis and conclusions of its inter-jurisdictional review. This information should be made publicly available before the MoE takes any further steps to establish a two-tiered approval system in Ontario.

Recommendation # 18: The registration process should only apply to simple routine activities which have a very little chance of causing adverse effects to the environment or public safety and health.

Recommendation # 19: The registration process should not apply to activities which emit substances subject to the *Toxic Reduction Act, 2009*.

Recommendation # 20: The MoE needs to include the prior conduct of applicants as a criterion in its risk evaluation process. This includes factors such as lack of cooperation with the MoE during previous inspections, failure to notify the MoE forthwith of any discharges into the environment, providing false or misleading information to the MoE and prior convictions.

Recommendation # 21: The MoE needs to provide more information about whether the MoE’s registry will be integrated with the EBR Registry at least in relation to those activities which would still be subject to the approval requirement. The MoE needs to make all information submitted by applicants through the Certificate of Approval process as well as the registration process publicly available. The MoE needs to also take measures to ensure that the public does not confuse the MoE registry with the EBR registry.

Recommendation # 22: The MoE needs to provide more details about single site-wide, multi-site and system-wide Certificates of Approval as this proposal could have serious environmental and health implications.

Recommendation: # 23: The MoE needs to consider alternative ways to streamline approvals that involve multi-media, multi-site or system-wide considerations, including having a one-window approach within the EAAB to provide co-ordinated assistance for applicants whose applications involve multi-media, multi-site or system-wide considerations.

Recommendation # 24: Any “operational flexibility” provided within a Certificate of Approval should not result in an increase in the quality or quantity of emissions into the natural environment.

Recommendation # 25: The MoE should develop a guideline to provide staff of the EAAB guidance as to when an application for review of the approval should be submitted in future.

Recommendation # 26: CELA, EcoJustice and CIELAP support the MoE's proposal to impose regulatory requirements related to the quality of submission and completeness of the application as well as the sign-off requirements by appropriate persons.

Recommendation # 27: CELA, Ecojustice and CIELAP recommend that the MoE monitor and assess the reduction in delay as a result of implementing measures related to the quality of submission and completeness of the applications.

Recommendation # 28: CELA, Ecojustice and CIELAP recommend that the MoE monitor the reduction in delay as a result of implementing measures related to the quality and completeness of applications for Certificates of Approval before taking any further steps to establish a two-tiered approval system in Ontario.

Recommendation # 29: CELA, Ecojustice and CIELAP strongly support the changes proposed to allow the MoE to assign responsibility for clean-up to the parent company where financial assurance is absent or inadequate.

Recommendation # 30: The MoE needs to provide more details about its proposal to replace and harmonize the existing hearing requirements so that we can fully assess its implications and provide comments.

Recommendation # 31: The government of Ontario needs to enact legislation consistent with the model of the *Intervenor Funding Project Act, 1988* to ensure effective citizen participation in the environmental decision-making process by administrative tribunals.

Recommendation # 32: The provision of service guarantees through policy guidance should ensure that the quality of review is not compromised in favour of speedier processing time for applications for Certificates of Approval.

CELA Publication #720

ISBN: 978-1-926602-57-8