



BY FACSIMILE AND MAIL

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CC: Gord Miller, Environmental Commissioner of Ontario
The Honourable John Gerretsen, Ontario Minister of the Environment

Dear Ms Grant:

**Re: Amendments to Ontario Regulation 419/05: Air Pollution - Local Air Quality
(O.Reg. 419/05), including Sector-Based Approach to Regulation
EBR #: 010-6587**

Please find enclosed Lake Ontario Waterkeeper's comments on the above-noted matter. If you have any questions or comments, please do not hesitate to contact Joanna Bull, counsel for Lake Ontario Waterkeeper, at joanna@waterkeeper.ca or (416) 861-1237.

Yours truly,

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BACKGROUND

Lake Ontario Waterkeeper (LOW) works to protect and restore Lake Ontario to a swimmable, drinkable, fishable lake. While we do not focus on air quality, air pollution is a significant concern because airborne pollutants precipitate and enter waterbodies, including the lake and the rivers and streams that feed it. Coal-fired power plants emit mercury that is deposited in water, enters the food chain, and kills or contaminates aquatic organisms. Uranium emissions from nuclear power or fuel plants enter the air and precipitate into water. Accordingly, LOW has conducted research, taken samples, and engaged in legal proceedings in cases where industrial air pollution has exceeded standards or violated the law.

Regulation 419/05 was promulgated under Ontario's *Environmental Protection Act* in 2005 to set air pollution limits for polluting facilities. To protect against health and environmental effects, the regulation sets limits on the emission of potentially harmful contaminants, including toluene, phosphoric acid, lead, mercury, lithium, and trichloroethylene.

If a facility cannot meet the standard set in *Regulation 419/05* within the stated time-frame, it must apply to the Ministry of the Environment ("the Ministry") for a site-specific, and potentially contaminant-specific, exemption to the law. When the Ministry receives a request to create a site-specific alteration to a standard, it decides whether to issue the exemption on the basis of technical or economic information provided by the company, including: an Emissions Summary and Dispersion Modeling (ESDM) report; a Technology Benchmarking Report; an Economic Feasibility Analysis (optional); a summary of pre-consultation with local stakeholders; and an action plan to implement and monitor progress.

In summary, companies subject to *Regulation 419/05* have two options:

1. Comply with the air standard(s) in the regulation by the dates specified, or
2. Ask the MOE to approve a site-specific altered standard for their facility based on the technical or economic reason they cannot comply with the regulation.

The proposed amendment to the regulation would allow companies to choose a third option:

3. Comply with technical standards for their specific sector, such as metal mining or forestry. If this option is taken, the standards in *Regulation 419/05* no longer apply to the facility.

As the Ministry's website says, "Ontario Regulation 419/05, Air Pollution - Local Air Quality (O.Reg 419/05) is the cornerstone of the ministry's efforts to protect local air quality".¹ In LOW's view, the proposed amendments to the regulation undermine the significant effort that the Ministry devoted to creating effective air emissions regulations in this province as recently as 2005. The proposed changes would weaken a strong law, reducing transparency, accountability, and public participation in environmental decision-making. Such a change would constitute a shameful "back door" style of legislative change with potentially harmful consequences for people and the environment.

COMMENTARY

The Ministry must consider facilities that do not meet air emissions standards on a site-specific basis.

Currently, if a facility does not meet air emissions standards, it must undergo a detailed site specific review by the Ministry. Under the proposed changes, if a facility that exceeds the standards opts to comply with the sector specific technical standards, no detailed site specific review will occur. The proposed sector-specific technical standards could be met without the production of an Emissions Summary or Dispersion Modeling report, a Technology Benchmarking Report, a summary of pre-consultation with local stakeholders, or an action plan to implement and monitor progress. The aim of this reduced level of scrutiny is to "reduce regulatory burden".²

¹ Ministry of the Environment, "Setting Air Quality Standards in Ontario", accessed online September 2009 at: <<http://www.ene.gov.on.ca/en/air/ministry/standards.php>>.

² Proposed Amendments to Ontario Regulation 419/05, MOE Report June 2009 at 4.

According to the Ministry's Statement of Environmental Values (SEV):

The Ministry adopts an ecosystem approach to environmental protection and resource management. This approach views the ecosystem as composed of air, land, water and living organisms, including humans, and the interactions among them.

The Ministry considers the cumulative effects on the environment; the interdependence of air, land, water and living organisms; and the relationships among the environment, the economy and society.

The SEV requires the Ministry to apply an ecosystem approach to decisions, consider potential cumulative effects, and use a precautionary, science-based approach. Among other things, the SEV means the Ministry must consider existing contamination in the area, sensitive local populations and species, and unique geographic or meteorological characteristics. For instance, for facilities emitting air pollution near the shores of a large body of water like Lake Ontario, the Ministry must consider how shoreline fumigation will magnify the effects of pollutants in the local environment (as described in the attached paper by Dr. Henry Cole).

In *Lafarge Canada v. Ontario (Environmental Review Tribunal)*, the Ontario Superior Court of Justice found that a failure to explicitly consider and apply the SEV when the Ministry makes a decision on approvals and permits is grounds for review by the Environmental Review Tribunal.³ At paragraph 60, the court explained:

Under an ecosystem approach, decisions are made by measuring the effects on the system as a whole, rather than on their constituent parts in isolation from each other. Therefore, it was reasonable for the Tribunal to have concluded that without assessing the specific potential cumulative ecological consequences of approving the Lafarge applications, and given the concern that the CofAs were made in the face of uncertainty about environmental risk from the adverse affects of [the proposal], the Directors' decision was unreasonable because of the failure to take into account SEV principles.⁴

It is essential that facilities exceeding emissions standards continue to be evaluated on a site-specific basis to ensure that important differences in the way pollutants are dispersed and circulated are accounted for. Allowing facilities to exceed the standards set for human and environmental health without considering site-specific characteristics is at odds with the required ecosystem, precautionary, science-based approach.

³ *Lafarge Canada Inc. v. Ontario (Environmental Review Tribunal)* [2008] O.J. No. 2460 [QL] [Lafarge].

⁴ *Ibid.* at 60.

Standards set to protect human and environmental health cannot be compromised to reduce “regulatory burden”.

The standards in *Regulation 419/05* were established to protect human and environmental health, such that levels of pollution higher than the limit may be harmful. LOW agrees that is not ideal to exempt facilities on a case-by-case basis, allowing them to bypass emissions limits for five years or more if they show they cannot meet the standards for economic or technical reasons. However, exemptions of this sort should be a rare occasion, rather than the norm. The proposed changes to the regulation would normalize non-compliance, undermining the very purpose of emissions standards and reducing the impetus for facilities to make upgrades or changes that would reduce air pollution. While LOW understands the need for the Ministry to reduce “regulatory burden”, it cannot do so by compromising health or environmental protection.

The public right to consultation must be preserved.

Currently, before a decision that could affect local environmental quality is made, the Environmental Registry provides community members and other affected people with an opportunity to be consulted and to either reject the proposal or help to improve the decision.

To maintain a minimum level of public consultation and participation if the Ministry implements the proposed changes to *Regulation 419/05*, public notice and comment opportunities must be provided through the Environmental Registry for each individual facility that registers for sector-specific compliance. By posting the request by each individual facility, communities impacted by emissions from that facility can be informed of the proposed registration and express any concerns they may have. Local knowledge of cumulative effects, sensitive populations or ecosystems, and unique climate or geographic features can be shared with the Ministry before a decision is made.

In addition to the substance of the right to be informed and consulted, communities must have access to these rights in a timely fashion. The report on the proposed changes notes that facilities could wait for one year after the implementation of a sector-wide standard to register with the Ministry, during which time the company would not need to comply with the air emissions standards in *Regulation 419/05*. This would allow a facility in a particular sector to emit pollution into a community for a year without notification or public participation opportunity. If the proposed changes are implemented, any facility that plans

to emit pollution at levels that exceed the regulated standard must **first** notify and consult with the public. Facilities should be required to abide by the regulatory limit until they either apply for an exemption or apply for registration, at which time the proposal would be uploaded to the Environmental Registry.

There is no need to replace environmental-based standards with discretionary technical standards when the two could co-exist.

Lake Ontario Waterkeeper accepts that establishing technical standards could, in theory, help to reduce air emissions. However, there is no logical connection between the creation and application of technical standards and the elimination of standards based on human and environmental health. Presumably, the two should be linked and work in tandem to ensure facilities are not emitting substances that could harm people or the environment. Technical standards cannot replace environmental or health-based standards.

In many areas regulated by the Ministry, technical standards are not introduced to replace substantive emissions limits. Instead, the Ministry provides industry-specific procedural standards to help facilities comply with the law. An example can be found by looking at the F-series of Procedures established under the *Ontario Water Resources Act (OWRA)*, which govern municipal wastewater systems. Specifically, consider Procedure F-5-5, which provides direction and technical standards for municipalities dealing with combined sewer overflows. These technical standards exist to complement the emissions and water quality standards in the *OWRA*, not to replace them.

Similar guidance documents already exist to help industries navigate *Regulation 419/05*, including Guidelines A-10, A-11, and A-12.⁵ If the Ministry wants to establish technical standards to help industry comply with *Regulation 419/05*, technical standards should be established by way of procedural requirements or guidance documents. This approach could help to avoid a reduction in the accountability, certainty, and transparency that comes from regulated standards.

⁵ Ministry of the Environment, *Regulation 419* Guidance Documents, accessed online at <<http://www.ene.gov.on.ca/envision/air/regulations/localquality.htm#guidancedocs>>.

If the changes are implemented, clear criteria should be established to determine whether a facility should be subject to *Regulation 419/05*.

The proposal includes the creation of a Ministerial power to require a facility to abide by the standards in *Regulation 419/05*. While this appears to be a safeguard for facilities that should not be exempted from the standards, it is actually a shift from universal to highly discretionary standards. Creating discretion where a standard currently applies uniformly can result in reduced fairness and transparency. The change could allow for environmental marginalization and discrimination, since facilities located in communities with less political clout will have less ability to generate “sufficient concern”. LOW submits that uniform, transparent standards should not be replaced by a discretionary system. If the changes are implemented, clear criteria should be established and strictly followed to determine when facilities cannot opt into sector-based standards and must follow *Regulation 419/05*.

RECOMMENDATIONS

In accordance with the concerns summarized above, Lake Ontario Waterkeeper submits the following recommendations:

1. The Ministry must consider facilities that do not meet air emissions standards on a site-specific basis, applying an ecosystem, precautionary, science-based approach.
2. Standards set to protect human and environmental health cannot be compromised to reduce “regulatory burden”.
3. Exemptions to the emissions standards in Regulation 419/05 should be rare, rather than a normalized option for facilities.
4. Public notice and comment opportunities must be provided through the Environmental Registry for each individual facility that registers for sector-specific compliance.
5. If the proposed changes are implemented, any facility that plans to emit pollution at levels that exceed the regulated standard must first notify and consult with the public.
6. Technical standards cannot replace environmental or health-based standards. The two should be linked and work in tandem to ensure facilities are not emitting substances that could harm people or the environment.
7. Uniform, transparent standards should not be replaced by a discretionary system. If the changes are implemented, clear criteria should be established to determine when facilities must follow the standards set in *Regulation 419/05*.