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Une division de l'Association
du Barreau canadien

Tuesday, October 6, 2009

The Honourable John Gerretsen
Minister of the Environment
12th Flr
135 St Clair Ave W
Toronto ON M4V1P5

Dear Minister,

Re: Comments on proposed Proposal to Amend Ontario Regulation 419/05: Air Pollution - Local Air Quality, **EBR Registry Number** 010-6587

Introduction

The Ontario Bar Association ("OBA") is very concerned about some recent developments in the interpretation of O.Reg. 419/05, the new air regulation under the *Environmental Protection Act*. These concerns will be further exacerbated by some amendments now being considered by your ministry. We are writing to urge you to reconsider, and to follow the long-established recommendations of Mr. Justice McRuer in the Royal Commission on Civil Rights.

Background

The OBA consists of 18,000 lawyers from a broad range of sectors, including those working in private practice, government, non-governmental organizations and in-house counsel. Our members have, over the years, analyzed and provided comments to the Ontario government on numerous legislation and policy initiatives. More than 1,000 of these lawyers belong to our very active Environmental and Municipal Law Sections. Our members have considerable expertise and experience in how environmental laws and policy are interpreted and applied, and represent many points of view. The views expressed herein are the views of the OBA and its Environmental section as a whole, and are not necessarily the views of each individual member or other organizations with which they may be involved.

Comments

Our principal concern relates to the arbitrary discretion that Reg. 419/05 allegedly grants the Director. A proposed new section, 13.1 will worsen this problem:

> ***13.1*** *(1) The Director may give written notice to a person who discharges or causes or permits the discharge of a contaminant from a property stating that the Director is of the opinion that, with respect to those discharges of the contaminant, one of the following is required to accurately determine the value of a parameter specified in the notice that is related to a source of contaminant:*

1. A method of calculation specified in the notice.
2. A sampling or measuring technique specified in the notice.
3. A combination specified in the notice of one or more methods of calculation and one or more sampling and measuring techniques.
(2) Before the Director gives a person a notice under subsection (1), the Director shall give the person a draft of the notice and an opportunity to make written submissions to the Director during the period that ends 30 days after the draft is given.
(3) If the Director is of the opinion that, with respect to discharges of a contaminant from a property, a particular value accurately reflects the value of a parameter that is related to a source of contaminant, the Director may, on the written request of the person who discharges or causes or permits the discharge of the contaminant from the property, give written notice to the person specifying the value and stating the Director's opinion.
(4) Without limiting the generality of subsections (1) and (3), the parameter specified in a notice may include the following:
1. The dimensions of the part of the source of contaminant from which discharges are released into the natural environment.
2. The volumetric flow rate for discharges from the source of contaminant.
3. The temperature of discharges from the source of contaminant.
4. The height above ground level that discharges are released into the air from the source of contaminant.
(5) If a person to whom a notice is given under this section uses an approved dispersion model for the purposes of this Part, the model shall be used with,
(a) a value for the parameter that is determined in accordance with the method, technique or combination specified in the notice, in the case of a notice under subsection (1); or
(b) the value for the parameter specified in the notice, in the case of a notice under subsection (3).

This new section seems very technical. However, its practical effect is to allow the Director to determine whether any Ontario facility is or is not in compliance with the regulation, without giving reasons and without any possibility of appeal. This is an expansion of the existing, unappealable discretion already being exercised by your Standards Development Branch under section 11 of the same regulation.

Our members' recent experience with this discretion has been very troubling. We have repeatedly observed MOE personnel exercising their discretion in an extreme and unreasonable way, in order to force a modelled result that a facility is out of compliance. They call this being "conservative". For example, one facility's predicted emissions were artificially increased by your staff because a competing company had higher emissions, allegedly "proving" that such higher emissions were "possible". This claim was made without comparing the actual process used at the two facilities, nor their emission controls. In other instances, SDB is trying to force site operators to predict unreasonably high levels of roadway dust, contrary to the terms of the authoritative reference, US EPA document AP-42,

In the past, unreasonable predictions could have been easily, if expensively, disproven through actual monitoring. However, your Standards Development Branch takes the position that a mere prediction of noncompliance, even if based on unrealistic assumptions, is itself sufficient to prove non-compliance. We have observed SDB reject actual monitoring

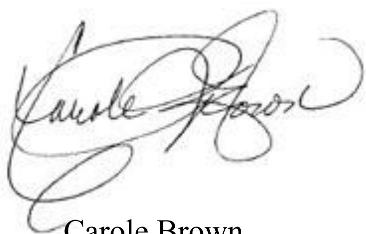
results that conflict with SDB's predictions. In addition, unrealistic assumptions being made by SDB are making it difficult to obtain approvals to build new facilities, or even to install new pollution control equipment.

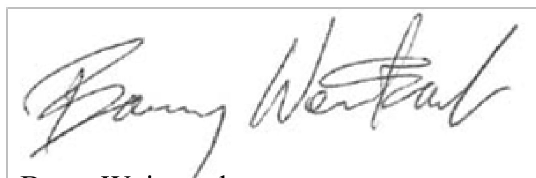
The consequences of being found out of compliance with the *Environmental Protection Act* can be very serious, both for organizations and for their officers, directors, and employees. 40 years ago, in his landmark Royal Commission Report on Civil Rights, Mr. Justice McRuer concluded that no one should be subject to a significant administrative discretion without a right of appeal. That principle has been a central element of Ontario administrative law ever since, and we are dismayed to see that it has not been incorporated in O.Reg. 419/05.

Conclusion

O.Reg. 419/05 gives the Director a vast and untrammelled discretion to control how the regulation is applied, regardless of the actual facts or the accuracy of the Director's approach. Although the consequences for affected companies are significant and adverse, no reasons need be given, and there is no appeal. This problem would be exacerbated by the proposed section 13.1. This is unreasonable and unfair. In accordance with long-standing legal principles, the Director should be obliged to give reasons when exercising any significant discretion affecting the legal position of a regulated organization, and his/her decisions should be subject to appeal to the Environmental Review Tribunal.

Yours truly,





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