



April 16, 2010

Joy Williams, Senior Engineer
Ministry of the Environment
Environmental Programs Division
Program Planning and Implementation Branch
Modernization of Approvals
135 St. Clair Avenue West
Toronto, ON M4V 1P5

Dear Ms. Williams,

Ministry of the Environment's Proposed Legislative Framework for Modernizing Environmental Approvals (February, 2010) EBR Registry Number 010-9143

Introduction

The Ontario Bar Association ("OBA") welcomes the opportunity to comment on the Ministry's proposal to introduce a modernized environmental approvals system described in the Proposed Legislative Framework for Modernizing Environmental Approvals dated February 2010 (the "Framework"). The OBA strongly supports the Ministry's proposed efforts to modernize Ontario's environmental approvals system by enhancing its efficiency and effectiveness. We agree that the current system is unreasonably inflexible and has not kept pace with changes in economic activity or technology to meet the evolving needs of business in Ontario. We also agree that a modernized process could enhance the protection of human health and the environment and greatly improve public transparency in the approvals system. As a result, the OBA strongly supports the Framework's key goals to maintain and, where possible, enhance the protection of the human health and environment, enhance the delivery of service to businesses and improve public transparency and availability of information. Our general comments on the Framework are discussed below. Given the importance of this Ministry initiative, we would be pleased to meet with the Ministry to discuss the Framework in further detail. We also look forward to providing more detailed comments on the enabling legislation and, if passed, the regulatory proposals required to implement the new approvals system.

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 350 of these lawyers belong to our active Environmental Section. Our members have extensive expertise in all

aspects of the Ministry's environmental approvals system 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

Need for Continued Modernization

As identified by the Framework, the chief shortcoming of the current "one-size-fits-all" approach is that it requires all activities to go through the same approvals process, regardless of the complexity or environmental risk of the proposed activity. The current system requires inordinate government resources, which has caused backlogs in approval applications. Regulated entities also find themselves needing multiple approvals for a single site. Companies are also reticent to modify any aspect of an operation, since existing approvals could be lost.

The breadth of activities that require an approval is also problematic. A key determinant in whether a certificate of approval is required is whether the activity may discharge a contaminant into the natural environment. Contaminant is defined to include emissions that "may cause" an adverse effect. The term adverse effect is in turn defined in an extremely broad and vague manner. The result is that regulated entities are often forced to apply for approvals for equipment and processes that have a trivial, if any, effect on the environment. Legal counsel and technical consultants are reluctant to provide an opinion that an approval is not required, even where the contemplated activity is likely to have almost no effect on the environment.

For waste management system approvals, regulated entities find themselves constrained by inflexible certificates of approval and referenced guidance documents that often are not current. This creates needless obstacles in shifting to new waste management technologies and methods.

We also agree that there is a lack of transparency in several respects. Stakeholders often have difficulty in obtaining the supporting documents behind an approval, even though those documents are incorporated by reference into the approval. Even applicants and their consultants face difficulties in viewing their file, which should be available to anyone (subject to privacy laws) without the need for a formal FOI request. Further, in the public comment process, it is not clear how the Director considers comments.

There also can be significant inconsistency between how applications are reviewed by different Ministry reviewers. In our experience, frequent personnel changes at the Ministry often leads to applications being juggled around, causing further delays and a loss of continuity in the review process. Despite some progress on the backlog, applicants still

face long waits for approvals. Delays and uncertainty impose significant costs on the regulated community and society at large. Ministry reviewers often wait weeks to make a request for follow-up information. Lack of any service guarantees lead to uncertainty that translate into costs that ripple through the economy. Ironically, in many cases, the changes sought to be made by an applicant would often improve overall environmental performance.

Finally, approvals are often needlessly complex and contain boilerplate requirements that could (or already are) stipulated by legislation. Amendments to approvals that are being issued in the form of standalone notices rather than consolidated approvals make understanding the current state of an approval unnecessarily difficult for all stakeholders.

Proposed Registry System

The OBA supports, in principle, the development of a tiered approach to environmental approvals. We agree that the development of a registry system for selected lower risk and less complex activities has the potential to decrease the amount of time required to obtain approvals for activities that are predictable and pose little risk to the environment and to allow the Ministry to focus its limited resources on unique and/or complex activities that pose a greater potential risk to the environment. It is our view that this will be beneficial for both regulated entities and for the protection of the environment and human health.

It will obviously be extremely important that the implementing regulations are specific in describing the activities that are required to proceed through the proposed registry system, so that there is no discrepancy about the "tier" within which an activity falls. Further, we recommend that the Ministry consider drafting the enabling legislation to permit a tiered approvals system but not necessarily limit Ministry authority to two tiers. It may be that in the regulation drafting process the Ministry finds it needs additional flexibility to permit, for example, an intermediate level of scrutiny for certain regulated activities.

Further, any discretionary authority for the Ministry to require a certificate of approval instead of a registration must be clear and limited. At present, the Framework identifies two circumstances where the Ministry proposes to retain the ability to impose the requirement for a certificate of approval (instead of a registration); either where the Ministry determines that it would be in the "interest of the natural environment" or "administratively more efficient" for the activity to go through the certificate of approval process. We respectfully submit that these two circumstances are likely too broad and vague and would not provide the requisite degree of regulatory certainty required for an efficient and effective approvals system. While we agree that the Ministry needs to be able to require a certificate of approval where there are unique and notable potential risks, we suspect that these circumstances would likely be few and far between and might be better addressed through a defined compliance tool.

Finally, while we understand the need for a requirement to update registrations on a reasonable basis, the Ministry must keep in mind that regulated entities in Ontario already shoulder a heavy regulatory burden and reporting requirements for low-risk activities that are subject to the proposed registration system should be minimal.

Proposed Certificates of Approval

As noted above, the OBA supports, in principle, the development of a tiered approach to environmental approvals. The OBA also strongly supports the proposed issuance of single, site-wide certificates of approval, greater operational flexibility within given operational parameters and allowing for multi-site and system-wide approvals. Many regulated entities already have, on a more limited basis, some operational flexibility through comprehensive certificates of approval. Our experience suggests that this operational flexibility benefits businesses and protects the environment.

"Lafarge Factors"

In Lafarge, it was found that the Ministry had failed to take into account, among other matters, (i) its Statement of Environmental Values on the ecosystem and precautionary approaches and (ii) the common law rights of area landowners. These "Lafarge factors" have created significant regulatory uncertainty in Ontario's environmental approvals system and have the potential to delay the implementation of innovative and improved environmental technologies in Ontario. It is the OBA's view that the Ministry's modernized environmental approvals system must expressly address the ongoing regulatory uncertainty caused by the "Lafarge Factors". The OBA's Environmental Section recognizes the complexity of addressing the "Lafarge factors" and has had extensive discussions regarding potential regulatory responses to fairly and rationally address this issue. If helpful, we would be pleased to meet with the Ministry to discuss in further detail.

Transition and Continuous Improvement

The transition provisions for the proposed registry system will be key to the success of the proposed modernization process. It will be critically important to ensure that parties who are required to register under the new regulation will have ample time to do so. The deadlines will need to be clearly established. This will give the parties the opportunity to plan adequately. Based on our experience, the complexities and expenses to re-submit applications are significant and allowing sufficient time for this process will be necessary. Along those same lines, it is not clear whether the new regulation for a particular low-risk activity could require something that was not required under the existing certificate of approval. If so, some work might have to be done to demonstrate compliance with the new regulation. If this is the case (and for low-risk activities this should be limited), parties may require time to retrofit to ensure they can comply with the new regulatory requirements.

Simply put, the period of time between when the regulation comes into force and when an existing certificate of approval is no longer valid must be reasonable.

Similarly, the transition dates to submit applications for review of existing certificates of approval must be carefully discussed with stakeholders to ensure such dates are commercially reasonable. We also agree that there needs to be some amount of flexibility in the transition dates to accommodate amendments to existing certificates of approval before the transition dates are triggered. Finally, the OBA supports, in principle, the proposed Ministry authority to review and update approval requirements on a reasonable basis moving forward. However, such statutory authority must be carefully considered as any regulatory uncertainty regarding approval requirements could have potentially significant impacts on future investment decisions in Ontario.

Financial Assurance

Financial assurance requirements generally call for regulated entities to demonstrate adequate financial resources to fund future environmental obligations. In the wake of the recent global economic crisis, concerns have increased regarding the adequacy of existing environmental financial assurances in Ontario. As a result, the OBA would support Ministry initiatives to ensure that the person to whom an approval is issued provides adequate financial assurance (including a review of current Ministry financial assurance guidelines). While the calculation of such assurance can be complex, it is our experience that regulators and the regulated community generally have the requisite expertise to accurately estimate adequate financial assurances for regulated facilities and we encourage the Ministry to continue to enhance its expertise and energies in this area.

However, the Framework states that the Ministry is proposing statutory changes that would allow the Ministry to "assign" responsibility for clean-up and costs to a parent company where financial assurance was absent or inadequate. While the Framework does not provide details regarding such proposed assignment, the OBA would not support statutory amendments to authorize the Ministry to impose direct statutory liability on shareholders in the context of a subsidiary's inadequate environmental financial assurance. This would further undermine the corporate law principle of limited liability pursuant to Ontario's environmental laws and could have potentially significant and far reaching impacts on investment decisions in Ontario. In the OBA's view, the Ministry already has sufficient statutory remedies regarding financial assurance, which simply need to be administered in a more commercially-reasonable manner consistent with prudent environmental and engineering practices to ensure environmental health and public safety in Ontario. As a result, we respectfully submit that the Ministry does not reasonably require additional statutory authority to impose direct statutory liabilities on shareholders in the context of a subsidiary's inadequate environmental financial assurance.

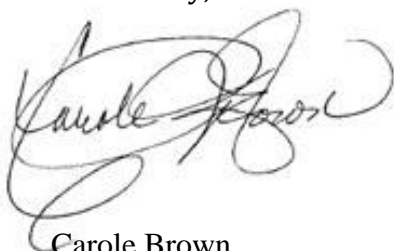
Conclusion

In general, the OBA strongly supports the Ministry's proposed efforts to modernize Ontario's environmental approvals system and we look forward to providing our more detailed comments on the enabling legislation and, if passed, the regulatory proposals required to implement the new approvals system. Again, given the importance of this Ministry initiative, we would be pleased to meet with the Ministry to discuss the Framework in more detail.

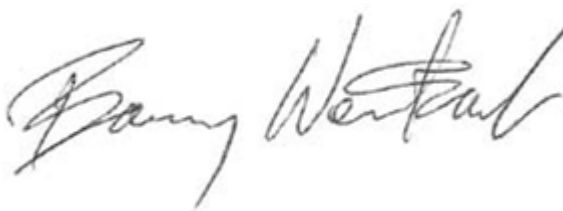
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Yours truly,



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