



environmental
defence

December 6, 2019

Mirek Tybinkowski
Great Lakes and Inland Waters Branch
40 St. Clair Avenue West
Toronto, ON
M4V 1M2

Cc: Jerry DeMarco, Commissioner of the Environment

Dear Mr. Tybinkowski,

Re: ERO Notice #019-0773 "Proposal to transfer requirements from Ontario's industrial effluent monitoring and limits regulations into Environmental Compliance Approvals and revoke the regulations".

Please consider this letter as our official comments regarding the proposal to revoke the municipal industrial strategies for abatement (MISA) regulations and transfer the regulations' requirements into individual Environmental Compliance Approvals (ECAs).

Our feedback is centered on fundamental disagreement that, as the Environmental Registry (ERO) notice states, "revoking these regulations will not change any requirements applicable to the currently regulated facilities as the requirements will be first transferred into individual ECA's for the facilities."¹ While the requirements included in the nine MISA regulations will be incorporated into ECAs, the proposal states that the facilities will then have the opportunity to apply for ECA amendments for changes such as, but not limited to: "wastewater treatment processes, with consideration of the assimilative capacity of the water body receiving the treated effluent". If the regulations are revoked, facilities will have an opportunity to apply for standards less stringent than the regulations.

¹ ERO Notice #019-0773: <https://ero.ontario.ca/notice/019-0773>

Removing the regulatory baseline for 113 of Ontario's most heavily polluting facilities in nine environmentally damaging sectors is the wrong approach if the Government of Ontario's goal is to hold polluters accountable, as it has stated on several occasions.^{2,3} In order to achieve that goal, the MISA regulations should be updated and expanded to new facilities operating in Ontario across the nine industrial sectors. Transferring requirements of a legal regulation to a site based ECA represents a weakening of that requirement. Currently, an ECA requirement can only be imposed upon a regulated facility if it is more stringent than the regulatory requirements, and cannot undermine them. If the MISA regulations are revoked, facilities will be able to apply for changes to requirements that could allow more toxic effluent to be released into receiving water bodies. Fundamentally, this does not increase accountability on polluters.

Our submission will detail why the MISA regulations should not be revoked and instead should be updated, strengthened, and reviewed regularly. We will use data from the Government of Ontario's annual environmental penalty reports to highlight facilities in consistent non-compliance with regulatory requirements (Figure 1), and emphasize the need to maintain regulatory oversight (Figure 2). We conclude with three recommendations (pg.8). We trust these comments will be dually considered.

The need to update MISA regulations

The MISA regulations were developed in the early 1990s and were based on the best available technology at the time. Environmental Defence agrees that the regulations are out of date, and need addressing. Revoking the regulations is not an appropriate way to address that need. The MISA regulations are a strong and effective component of Ontario's framework on addressing industrial toxic contamination in our waters. They include strong measures such as limits on concentration and total loading of harmful pollutants, as well as testing for acute lethality for freshwater species. The MISA program has led to significant reductions in toxic discharges into Ontario waters, and has been regarded as "one of the great success stories in Canadian environmental policy, leading to major reductions in discharges of both conventional and toxic pollutants from the sector."⁴

² ERO Notice #019-0750: <https://ero.ontario.ca/notice/019-0750>

³ News Release "Ontario taking action to protect the environment and hold polluters accountable": <https://news.ontario.ca/ene/en/2019/10/ontario-taking-action-to-protect-the-environment-and-hold-polluters-accountable.html>

⁴ Winfield, M. 2012. The Blue-green Province: The Environment and the Political Economy of Ontario

The goal of the MISA program was “virtual elimination of persistent toxic contaminants” from Ontario’s waterways⁵. Based on the fact that there were 38 MISA regulation violations in 2018 and 149 violations in the past 5 years, virtual elimination has not yet occurred⁶. At the time of the program’s inception, the stated goal was to review and re-examine the regulations frequently in order to adjust the requirements based on new technology coming available or changing conditions of the receiving water body. At the time, the Ministry of the Environment committed itself to adjust the regulations when “better technology has been developed, or industry abatement standards have improved, or the receiving body of water is suffering, newer and lower limits will be imposed”.⁷

In the 25 years since the MISA program’s inception, along with a significant reduction in toxic effluent in Ontario waters, there have also been technological advancements that would allow facilities to achieve lower concentrations and volumes of toxic effluent. We agree that the regulations need to be updated to include new technology and more stringent wastewater standards should be set accordingly. The Government of Ontario has received recommendations on how to approach updates to the MISA program from both industry and environmental stakeholders. The proposal to revoke the regulations suggests the government heeded the advice of industry and disregarded recommendations by the Environmental Commissioner of Ontario and the environmental community.

An unbalanced approach to reviewing the MISA program

In an August 2017 article in ChemNews, the Chemistry Industry Association of Canada details their recommendations to the government’s Red Tape Challenge consultation. Their recommendation regarding the MISA program is to:

“Eliminate the MISA regulations and transfer all relevant water discharge requirements into each facilities’ Environmental Certificate of Approval to enable greater adaptability and Ministry engagement based on changes to operation or other factors.”⁸

⁵ Municipal-Industrial Strategy for Abatement (MISA): A Policy and Program Statement of the Government of Ontario on Controlling Municipal and Industrial Discharges into Surface Water, ISBN 0-7729-7200-1, (Toronto: Queen’s Printer for Ontario at p. 7.)

⁶ Environmental penalty Annual Reports 2014-2018: <https://www.ontario.ca/data/environmental-penalty-annual-report>

⁷ Environmental Commissioner of Ontario, *Back to Basics Clean Water Vol 2* (Toronto: Environmental Commissioner of Ontario, 2018) at 85.

⁸ Fusso, Don. ChemNews, August 3, 2017: <http://members.canadianchemistry.ca/ChemNews/ChemNewsDetails/ArticleID/1051/Addressing-regulatory-burden-in-Ontario-a-priority-for-the-chemistry-sector>

This recommendation has been wholly satisfied in the ERO posting (#019-0773). On the other hand, recommendations from the environmental community have been ignored.

In the 2018 “Back-to-Basics” report by the Environmental Commissioner of Ontario, a recommendation to retain and update the MISA program was made. The Commissioner details the failure on the part of the MECP to follow up on their stated promise to regularly review and update the MISA requirements.⁹ The need to bring the MISA regulations and approvals up to date is emphasized, and the report states that:

“The ECO recommends that the MECP update the limits in the MISA regulations and environmental compliance approvals, to require industries to use the best available technology to minimize toxic substances discharged into Ontario waters, and to require industries to virtually eliminate discharges of persistent toxic substances.”¹⁰

In addition to the Commissioner report, strong recommendations by the Canadian Environmental Law Association (CELA) regarding the revocation of the MISA program were made on January 28, 2019 in their official comments on the proposed Made-In-Ontario Environment Plan.¹¹ Their submission also highlights the needs for the MISA program to be updated to include more stringent limits on wastewater effluent for Ontario’s most heavily polluting sectors.

In the January 2019 brief, CELA recommends:

“That the MISA regulations governing nine industrial sectors not be repealed. CELA recommends the discharge limits in the MISA regulations and environmental compliance approvals be updated. CELA recommends that industries be required to use the best available technology to minimize discharges of toxic substances and virtually eliminate discharges of persistent toxic substances.”¹²

The above recommendations by the Commissioner of the Environment and CELA are approaches that, if implemented, would increase accountability for polluters in Ontario and modernize the MISA program. However, the ERO posting is clearly a

⁹ Saxe, supra note 7

¹⁰ Saxe, supra note 7

¹¹ Nadarajah, R. Environmental Registry Notice 013-4208 – Proposed Made-in-Ontario Environment Plan, Canadian Environmental Law Association Submission: <https://cela.ca/wp-content/uploads/2019/07/1238-CELA-Response-Ontario-Environmental-Plan.pdf> pg. 23-27

¹² Nadaraja, supra note 11

reflection of industry lobbying rather than a balanced approach to both sets of recommendations. The content of this ERO notice demonstrates a total disregard for feedback by the environmental community.

While the notice attempts to assure the public that the current level of environmental oversight will be maintained, the non-regulatory nature of ECAs leaves facilities able to apply for requirements on wastewater effluent that are less stringent than the MISA requirements. The ability for a facility to apply to lower their concentration or total volume limits was confirmed in a telephone meeting between Environmental Defence and MECP on October 30, 2019.¹³ As a follow up to that meeting, Environmental Defence was granted access to the list of 113 facilities currently regulated by the MISA program, across nine sectors. Environmental Defence cross referenced the list of facilities with the last five years of annual environmental penalty reports. The results clarify why industry has lobbied to revoke the MISA requirements and allow facilities to apply for less stringent standards.

Industries are incentivized to seek weaker standards

Although the MISA program has been in place for a quarter century, there are still many facilities that are consistently unable to meet the regulatory requirements. Figure 1 shows facilities that are “repeat offenders” and have either paid significant fines for MISA regulation violations or have multiple offences through 2014 to 2018.

¹³ Phone communication with Mr. Mirek Tybinkowski, MECP October 30, 2019.

Figure 1: "MISA Regulation Violations – Repeat Offenders"¹⁴

MISA Regulation Violations - Repeat Offenders

Year	Facility	Order #	Violations in the order	Penalty
2014	Bruce Power	117	2	\$ 13,000.00
2018	Bruce Power	184	1	\$ 8,125.00
2016	Bruce Power	157	1	\$ 8,125.00
2014	Bruce Power	126	1	\$ 6,084.70
2014	Bruce Power	116	1	\$ 1,283.40
	Bruce Power Total			\$ 36,618.10
2016	Carmeuse Lime	155	10	\$ 36,456.00
2017	Carmeuse Lime	159	8	\$ 16,794.00
	Carmeuse Lime Total			\$ 53,250.00
2018	Domtar	182	9	\$ 47,911.50
2018	Domtar	183	6	\$ 24,235.25
2017	Domtar	164	4	\$ 21,345.60
2011	Domtar	79	13	\$ 16,438.50
2015	Domtar	143	3	\$ 3,447.15
2015	Domtar	147	2	\$ 1,300.00
	Domtar Total			\$ 114,678.00
2016	Imperial Oil	154	2	\$ 36,950.00
2015	Imperial Oil	144	2	\$ 13,000.00
	Imperial Oil Total			\$ 49,950.00
2015	Resolute FP Canada	136	9	\$ 73,125.00
2014	Resolute FP Canada	111	2	\$ 6,500.00
	Resolute FP Canada Total			\$ 79,625.00
2018	Shell Canada	180	3	\$ 49,892.25
2017	Shell Canada	163	8	\$ 31,892.25
	Shell Canada Total			\$ 81,784.50
	Grand Total			\$ 415,905.60

Domtar Corporation serves as a good example of a frequent offender, and one that has faced significant penalties for MISA regulation violations. In the last five year period their compliance has not improved and fines have increased. Facilities, such as the ones listed in Figure 1, are clearly incentivized to seek lower standards through an ECA rather than be bound to the stronger MISA regulations. Although the MISA regulations were set a quarter century ago it is clear that many facilities still struggle to comply with the standards. Rolling MISA regulations into ECAs, then revoking the regulations, will allow facilities who struggle to comply with stronger regulations to seek out lower standards in site specific ECAs.

The last five year review on environmental penalties was published in 2015. There is a proposal to revoke the requirement for five year review reports in Bill 132 *Better for People, Smarter for Business Act* therefore it is uncertain if an updated

¹⁴ Environmental Penalties Annual Reports: 2014, 2015, 2016, 2017, 2018: <https://www.ontario.ca/data/environmental-penalty-annual-report>

report will be available.¹⁵ In the absence of such a report, Environmental Defence has taken the annual report data for environmental penalties and isolated fines levied for violations of MISA regulation requirements. Figure 2 details the total fines placed each year, for the past five years, for MISA regulation violations across the nine regulated sectors.

Figure 2: Total MISA Regulation Penalties 2014-2018¹⁶

Year	Total MISA Regulation Penalties
2018	283,641.15
2017	192,092.00
2016	63,669
2015	151,438.60
2014	64,169.58
Total	\$ 755,010.33

Figure 2 demonstrates that fines levied for MISA violations have been steadily increasing since 2014. From 2017 to 2018 for example, nearly \$100,000 more in fines were collected, primarily for violations of acute lethality limits and total suspended solids concentration limits. This demonstrates that facilities covered by MISA regulations are not improving their environmental compliance.

Reviewing the environmental penalties data and isolating for fines levied for MISA violations shows that many facilities still struggle to meet the MISA standard. In our view, this proves that many facilities among Ontario's nine most heavily polluting industries are not ready to be un-regulated. Facilities who are consistently in non-compliance are strongly incentivized to apply for weaker regulations in their site specific ECAs. Conversation with MECP has confirmed that individual ECAs for these facilities can consider the receiving water body and loosen requirements on total

¹⁵ Bill 132, *Better for People, Smarter For Business Act*, Schedule 9, cl 18

¹⁶ Environmental penalties supra note, 14

volume versus concentration.¹⁷ Meanwhile, the MISA regulations have provided an unequivocal and minimum standard which ECAs could not be weaker than. Removing this regulatory backstop is the wrong direction for environmental compliance in Ontario, and will make facilities less accountable and able to pollute more toxic effluent. The data (Figures 1 and 2) show that there is no basis to prove industry compliance has improved to the point of not needing regulatory oversight. Therefore, we strongly recommend that the MISA regulations be retained, as consistent non-compliances indicate they are necessary.

Recommendations

Environmental Defence and the undersigned organizations have three recommendations to the MECP in regards to this proposal:

1. Retain the MISA regulations and update the requirements to include use of the best available technology toward virtual elimination of toxic pollution in wastewater effluent.
2. Accept the recommendations of the Environmental Commissioner of Ontario in the 2018 Back-to-Basics report, and of the Canadian Environmental Law Association in their January 2019 Made-in-Ontario Environmental Plan brief.
3. When reviewing environmental policy in Ontario, we urge the MECP to take a balanced approach and integrate feedback from the environmental community, rather than solely satisfy the demands of industry.

Thank you for the opportunity to provide comments. We trust they will be dually considered. Please contact us with any questions or to organize a meeting to discuss the above recommendations.

Sincerely,



Kelsey Scarfone
Water Programs Manager

This submission is endorsed by the following organizations (pg. 9):

¹⁷ Mirek, personal conversation, supra note 13



Women's Healthy Environments Network

Cassie Barker, Executive Director
Women's Healthy Environment Network



Alice Casselman, Founding President
ACER Association for Canadian Educational Resources



SIERRA
CLUB
ONTARIO

Lino Grima, Great Lakes Campaign
Sierra Club Ontario



Linda Heron, Chair
Ontario Rivers Alliance

BRIGHTER WORLD



Dr. Gail Krantzberg, Professor
Engineering and Public Policy Program
McMaster University