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Sent via email and online ERO comment submission

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Dear Shannon Boland:

Re: ERO NOTICE #019-2972 – Modernizing environmental compliance practices of the Ministry of the Environment, Conservation and Parks

Ecojustice is a national charitable environmental law organization with an extensive history of efficiently and effectively holding polluters accountable in Ontario. Ecojustice goes to court and uses the full force of the law to protect what Ontarians value most — the air we breathe, the water we drink, and a safe climate.

Ecojustice appreciates the opportunity to provide comments on this policy proposal, and submits comments on seven specific areas of concern: the compliance approach and purpose; referrals of “low-risk incidents”; voluntary versus mandatory measures and penalties; administrative monetary penalties; criteria for referrals to investigation; polluter accountability through transparency of information; and mandatory consideration of cumulative effects in evaluating health and environmental consequences and risk.

Overall, Ecojustice has serious concerns that the Ministry’s proposal will undermine its stated goal of increasing accountability. These concerns arise in a broader context where the Ministry has repeatedly advanced legislative and policy changes that hamper its ability to enforce compliance by polluters, despite stated intentions to the contrary. Ecojustice and other environmental stakeholders have raised similar concerns about past proposals. For example, Ecojustice identified numerous deficiencies that the Ministry introduced into the administrative monetary penalties framework in 2019, Environmental Defence expressed the need to update and strengthen municipal-industrial strategies for abatement regulations rather than revoke them¹,

¹ Environmental Defence, “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” (2019) Retrieved from <https://www.ontarioriversalliance.ca/wp-content/uploads/2019/12/2019-12-06-EnviroDef_ERO_019-0773-MISA-Regs.pdf>

while the Ministry's own front-line officers raised serious concerns that legislative changes to the *Environmental Protection Act* "handcuff" their oversight and enforcement powers, and pose a threat to the health of Ontarians and their environment.² These concerns have gone unaddressed. While we make recommendations in these comments to ensure that the proposed compliance policy aligns with the Ministry's stated accountability goal, "modernization" of this or any other policy cannot remedy the significant accountability and enforcement gaps introduced by these previous legislative changes, and our comments should be read in that context.

This pattern – of aiming to increase accountability through changes that do exactly the opposite – continues here.

The compliance approach and purpose

The proposal's stated purpose of its compliance approach undermines the Ministry's stated goal of better holding polluters accountable. Section 4 of the proposed new compliance policy describes the Ministry's compliance approach. The description begins by explaining the Ministry's focus on potential risk to the environment and human health, but then goes on to suggest that focusing on high-risk activities will reduce the burden on polluters that "try to follow Ontario's laws." This approach is inappropriate: polluters who try to follow the law may nevertheless cause high-risk pollution, and should be held accountable when they do.

The following paragraph goes on to explain the Ministry's commitment to helping businesses focus on creating jobs and staying competitive. Similarly, the purposes section references the economy. This unfortunately leaves the impression that the Ministry will balance its environmental and health protection mandate against extraneous economic considerations that fall outside the Ministry's statutory mandates. This language renders decisions made under the policy vulnerable to legal challenge; the Ministry's front-line officers and directors are neither qualified nor legally empowered to consider those extraneous considerations when they make decisions.

To ensure that the final policy actually accords, and is perceived to accord, with the Ministry's stated objective and the legal constraints within which it operates, Ecojustice recommends that all of the text under heading 4 ("Compliance Approach") after the second sentence of the first paragraph, and the reference to economy in the purpose section, be deleted.

Referrals of "low-risk incidents"

In this case, Ecojustice has serious concerns about the proposal to refer what the Ministry describes as "low-risk incidents" to other agencies. The proposal provides no information about the capacity – including adequate financial and human (both in staffing numbers and expertise)

² OPSEU, "Listen to environment inspectors and withdraw Bill 132: OPSEU" (2020) Retrieved from <<https://opseu.org/news/listen-to-environment-inspectors-and-withdraw-bill-132-opseu/110583/>>

resources – of those other agencies to take any compliance measures with respect to these incidents. The referral tool lists municipalities and local authorities as the response agencies for almost all of the incident categories. Municipalities differ significantly in their capacity to oversee response to such incidents and it can be expected that many small municipalities or local authorities across the province will have significantly less capacity than the Ministry to enforce compliance by these types of polluters. Absent a clear plan, including appropriate and sustainable funding³ and training, to develop and maintain adequate capacity for these agencies, Ecojustice is concerned that the proposed referral tool will simply encourage the Ministry to abdicate responsibility for protecting the environment and human health with respect to these incidents, create new opportunities for polluters to evade scrutiny and accountability, and undermine the Ministry's stated goal of better holding polluters accountable.

Voluntary versus mandatory measures and penalties

Ecojustice has concerns that there is too much discretion in the application of the policy's measures and penalties. Sections 4, 4.1, and 4.2 do not require provincial officers, ministry staff, or the ministry to do anything, other than in relation to spill reports as outlined in section 4.1.1. The general approach throughout the policy should be more like that outlined in section 4.1.1, which requires reporting of incidents and responsive action from ministry staff, including ensuring the persons responsible for an incident take responsive action and document and publish a record of the actions taken.

Further, with such high levels of discretion, the compliance categories recommended in the Informed Judgement Matrix (IJM) outlined in section 4.2.1 should be adjusted to better ensure polluter accountability. Any incident with high health and environmental consequences should be Compliance Category IV. Any incident with moderate health and environmental consequences should be at least Compliance Category III, and for Likelihood of Compliance levels D and E it should be IV. That a responsible person appears more willing to comply does not mean that they should avoid meaningful accountability for the harm they cause. Such factors may be relevant in, for example, the calculation of a penalty amount, but they should not absolve the polluter from enforcement action. That is particularly the case where there is uncertainty as to the polluter's willingness to comply. The policy and the IJM does not identify objective criteria against which the health and environmental consequence is assessed. In section 4.2 of the policy reference is made to "firm and swift" action for any incident that *could* result in "significant" health and/or environmental consequences. These are not defined and it is not clear how this risk is assessed. These statements are also not translated into the IJM, which refers to health **and** environmental consequence and does not use potential significance, but rather an actual impact on a spectrum from not impacted to critical. None of these are clearly defined in table 2. The policy should specify the types of actions, such as referral to investigations and enforcement,

³ See for example the Office of the Environmental Commissioner of Ontario's report, "Doing Less with Less: How shortfalls in budget, staffing and in-house expertise are hampering the effectiveness of MOE and MNR" (2007) Retrieved from <<https://www.auditor.on.ca/en/content/reporttopics/envreports/env07/2007-Less-with-Less.pdf>>

laying of charges and issuing of orders which flow from differing degrees of potential health or environmental consequences.

The measures and penalties applied should generally be those that have mandatory components (administrative monetary penalties, tickets, orders, investigation, amending/suspending/revoking permission) rather than those with only voluntary components (compliance promotion, notice of violation, letter, inspection report, compliance plan). The measures and penalties need to restore harm done and prevent future harm. General trends in environmental law show the inadequacy of voluntary compliance in addressing environmental damage, land/species conservation, and climate change.⁴ Unfortunately, Ontario does not buck these trends.

Administrative monetary penalties

Administrative monetary penalties outlined in section 5.6 can be useful compliance tools when used appropriately. In recent amendments to various environmental laws, Ontario touted such penalties as a key plank of a plan to increase polluter accountability. To realize this goal, these penalties must be used more frequently and at higher quantum than have been issued in the past. According to the Government of Ontario's environmental penalty annual reports⁵, there have only been around \$1.5 million of penalties awarded to 25 unique responsible persons since 2018, including some of the most profitable corporations in Canada, such as Imperial Oil and Suncor Energy. In this context, the value of penalties issued to date is financially insignificant to many of these polluters. Financially insignificant penalties do not drive accountability.

To encourage more accountability, the compliance policy should aim to integrate with existing policies about administrative monetary penalties, including the *Guideline for Implementing Environmental Penalties (Ontario Regulations 222/07 and 223/07)*. In particular, the compliance policy should clarify that when calculating the quantum of an environmental penalty, the compliance category of the incident is a relevant consideration and that higher compliance categories warrant more serious penalties.

Criteria for referrals to investigation

Referrals for investigations, as outlined in section 5.7, should be mandatory in high-risk circumstances. Section 5.7 currently makes referrals for investigation completely discretionary. Section 5.7 should require the ministry to refer for an investigation any incident within Compliance Category III or IV on the Informed Judgement Matrix. Referring for investigation incidents with high and critical health and environmental consequences where the responsible

⁴ See for example the Auditor General of Ontario's "2016 Annual Report" (2016) Retrieved from <https://www.auditor.on.ca/en/content/annualreports/arreports/en16/v1_305en16.pdf> at p319-320; or see for a specific example the failure of voluntary compliance measures to address phosphorus volume in the Environmental Commissioner of Ontario's "Good Choices, Bad Choices." (2017) Retrieved from <<https://auditor.on.ca/en/content/reporttopics/envreports/env17/Good-Choices-Bad-Choices.pdf>> at p149, 155, 157-159

⁵ Ministry of Environment, Conservation and Parks, "Environmental penalty annual report" (2021) *Government of Ontario*, Retrieved from <<https://data.ontario.ca/dataset/environmental-penalty-annual-report>>

person is unwilling to comply or willfully violating requirements helps ensure that these incidents will be adequately addressed and these polluters will be adequately held accountable for their actions.

The compliance policy also should in section 5.7 require the ministry refer for an investigation where a responsible person is a repeat violator. Many of the 25 responsible persons noted in the administrative monetary penalties section above have been awarded multiple administrative monetary penalties over the years, which suggests administrative monetary penalties are insufficient to change these polluters' behaviours. Further, there may be repeat violators who did not receive an administrative monetary penalty. After the ministry investigates a repeat violator, Crown prosecutors can prosecute where it is appropriate to do so.

Polluter accountability through transparency of information

The compliance information made available through section 6.0 of the policy is usually outdated (e.g., an annual report) by the time the public can access it. While this information is valuable, and should continue to be shared, the delay in publishing it reduces transparency and accountability.

To hold polluters accountable, the compliance policy should enhance transparency of information by requiring proactive public posting of compliance steps the ministry is taking or proposes to take. Currently, there is no easy way for the public to access current or proposed provincial officer orders, director orders, or administrative monetary penalties. Often, the only way to access this information is through a *Freedom of Information and Protection of Privacy Act* request, which is neither efficient nor effective for anyone involved.

The compliance policy can achieve this by requiring that the ministry to post specific compliance steps taken or proposed to be taken onto a publicly available database. The ministry already does this to some extent for permissions (section 5.8) that are posted to the Access Environment map database, and for some types of director orders (section 5.5.3) that are posted to the Environmental Registry of Ontario. The policy should add a section 6.1 requiring the ministry to post all issued and contemplated provincial officer orders, director orders, administrative monetary penalties, compliance plans, inspection reports, and notices of violation and letters to a publicly available database like Access Environment or the Environmental Registry of Ontario. Two examples of this type of database used in other jurisdictions are the Alberta Energy Regulator Compliance Dashboard⁶ and the United States Environmental Protection Agency's Enforcement and Compliance History Online database⁷.

⁶ Alberta Energy Regulator, "Compliance Dashboard" (2021) Retrieved from <<http://www1.aer.ca/ComplianceDashboard/index.html>>

⁷ United States Environmental Protection Agency, "Enforcement and Compliance History Online" (2021) Retrieved from <<https://echo.epa.gov/>>

If the Ministry chooses to finalize the proposed referral tool despite the deficiencies identified above, it should also publish information about its decisions to refer matters to other agencies to this database.

Publishing compliance information empowers citizens to take steps to protect their health and that of their families. Publication of this information also drives compliance in and of itself, as polluters are strongly incentivized to clean up their act to protect their public reputation.⁸

Mandatory consideration of cumulative effects

The Ministry's Statement of Environmental Values requires it to consider "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" when it is drafting new policies.⁹ Yet, there is no mention of cumulative effects in this proposal.

The compliance policy should account for the cumulative effects of incidents in how it evaluates health and environmental consequences by changing the criteria in Table 2 (section 4.2.1) to make it mandatory for the provincial officer to account for the cumulative effects of incidents. Table 2 outlines the criteria for each consequence level. It does not mention cumulative effects. Evaluating with a cumulative lens more accurately captures the risk and consequences of an incident. While an incident may in isolation have low consequences on the environment, it may have high consequences when factoring in other pollution – whether incident-based or background. Failing to consider these cumulative impacts will inevitably lead to under-estimating the consequences of incidents and will externalize those consequences to the environment and Ontarians. This reduces polluter accountability.

The compliance policy should change the definitions of "incident" and "risk" found in Appendix 1 to account for cumulative effects. "Incident" should include a second sentence that ensures that cumulative effects are accounted for in evaluating whether an event or occurrence has the potential to result in an adverse impact. "Risk" should include a second sentence making clear that the severity of the actual or potential environment or human health consequences are evaluated in the context of cumulative effects.

⁸ Pineiro-Chousa et al, "Managing Reputational Risk through Environmental Management and Reporting: An Options Theory Approach" (2017) *Sustainability* Retrieved from <<https://www.mdpi.com/2071-1050/9/3/376/pdf>> at p2: "Environmental performance is related to corporate reputation and customers' satisfaction, and normally it can be expected that bad environmental performers will be penalised with a bad reputation and that good environmental performers will be rewarded with a good reputation" and p9: "if environmental disclosure is no longer a voluntary activity and becomes mandatory, [...] companies have the need to protect themselves against potential damages derived from reputational threats".

⁹ Government of Ontario, "Statement of Environmental Values : Ministry of the Environment and Climate Change" (2021) Retrieved from <<https://ero.ontario.ca/page/sevs/statement-environmental-values-ministry-environment-and-climate-change>>

We appreciate you reading our recommendations, and look forward to ongoing discussion to support the goal of better holding polluters accountable.

Sincerely,

A handwritten signature in blue ink, appearing to be 'A. Luba', with a stylized flourish at the end.

Andrew Luba
Ecojustice