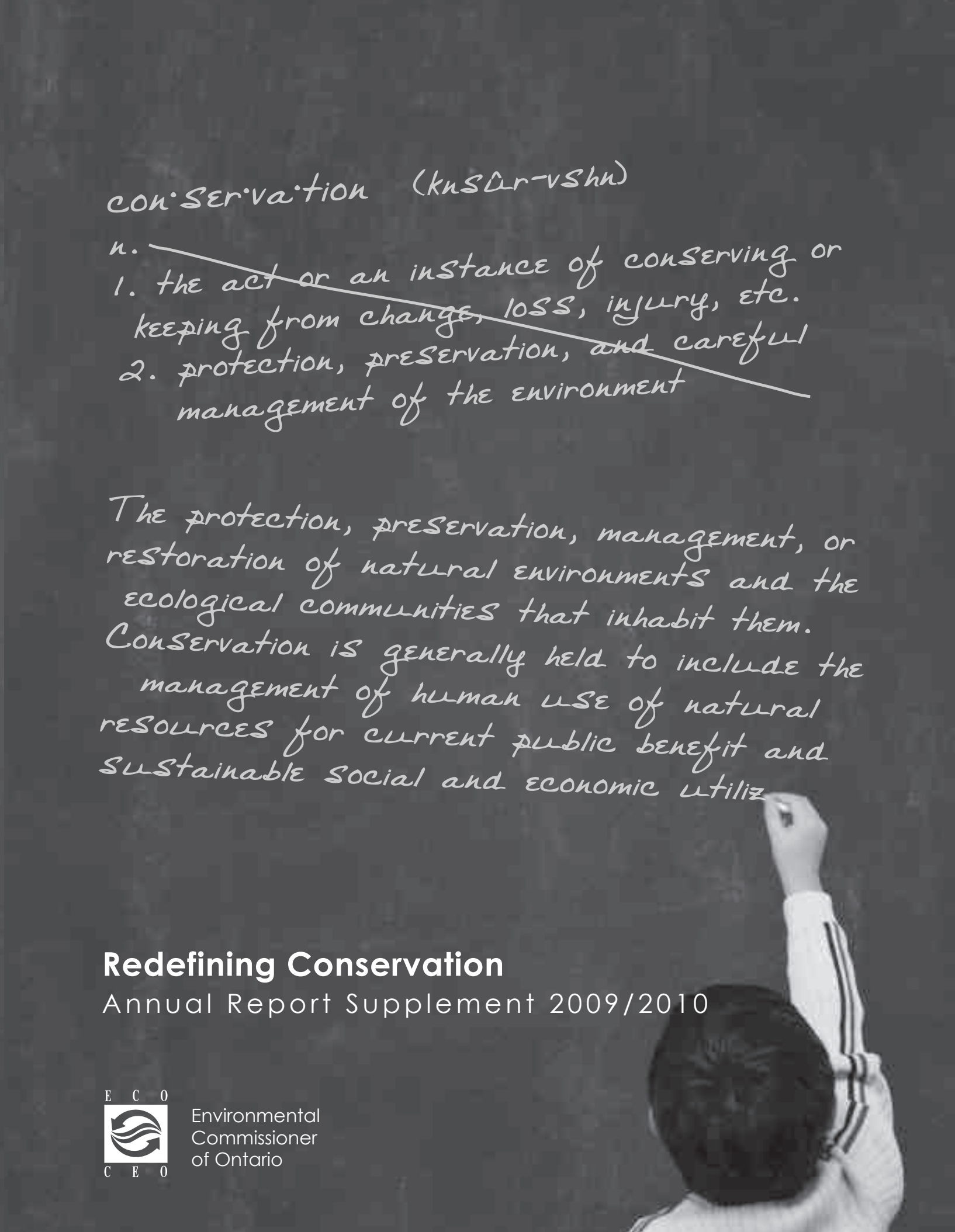

Redefining Conservation

Annual Report Supplement 2009/2010

E C O
C E O
Environmental Commissioner of Ontario

ABBREVIATIONS

Legislation

ARA *Aggregate Resources Act*
BCA *Building Code Act, 1992*
CAA *Conservation Authorities Act*
CEAA *Canadian Environmental Assessment Act*
CEPA *Canadian Environmental Protection Act*
CFSA *Crown Forest Sustainability Act, 1994*
CWA *Clean Water Act, 2006*
DADA *Dead Animal Disposal Act*
EAA *Environmental Assessment Act*
EBR *Environmental Bill of Rights, 1993*
EPA *Environmental Protection Act*
EPAA *Environmental Protection Amendment Act (Greenhouse Gas Emissions Trading), 2009*
ESA *Endangered Species Act, 2007*
FIPPA *Freedom of Information and Protection of Privacy Act*
FSQA *Food Safety and Quality Act*
FWCA *Fish and Wildlife Conservation Act, 1997*
GEA *Green Energy Act, 2009*
GEGEA *Green Energy and Green Economy Act, 2009*
GHA *Gasoline Handling Act*
LRIA *Lakes and Rivers Improvement Act*
LSPA *Lake Simcoe Protection Act, 2008*
MAA *Mining Amendment Act, 2009*
NMA *Nutrient Management Act, 2002*
NSCA *Nuclear Safety and Control Act*
ORMCA *Oak Ridges Moraine Conservation Act, 2001*
OWRA *Ontario Water Resources Act*
PGA *Places to Grow Act, 2005*
PLA *Public Lands Act*
PPA *Provincial Parks Act*
PPCRA *Provincial Parks and Conservation Reserves Act, 2006*
SDWA *Safe Drinking Water Act, 2002*
TRA *Toxics Reduction Act, 2009*
TSSA *Technical Standards & Safety Act, 2000*
WDA *Waste Diversion Act, 2002*

Provincial Ministries

EDU Ministry of Education
ENG Ministry of Energy (former)
MAA Ministry of Aboriginal Affairs
MCS Ministry of Consumer Services
MEDT Ministry of Economic Development and Trade
MEI Ministry of Energy and Infrastructure
MGS Ministry of Government Services
MMAH Ministry of Municipal Affairs and Housing
MNDM Ministry of Northern Development and Mines (former)
MNDMF Ministry of Northern Development, Mines and Forestry
MNR Ministry of Natural Resources
MOE Ministry of the Environment
MOF Ministry of Finance
MOHLTC Ministry of Health and Long Term Care
MOL Ministry of Labour
MRI Ministry of Research and Innovation
MSBCS Ministry of Small Business and Consumer Services (former)
MTO Ministry of Transportation
OMAFRA Ontario Ministry of Agriculture, Food and Rural Affairs
TOUR Ministry of Tourism (former)

Terms and Titles

1,1-DCE dichloroethylene
AMO Association of Municipalities of Ontario
ANSI Area of Natural and Scientific Interest
AOC Area of Concern
AOU Area of the Undertaking
APGO Association of Professional Geoscientists of Ontario
BCCA Basic Comprehensive Certificate of Approval
BMA Bear management area
BPMs Best Practices Manuals
BSE Bovine Spongiform Encephalopathy
CA Conservation Authority
CCME Canadian Council of Ministers of the Environment
CDW Federal-Provincial-Territorial Committee on Drinking Water
CE Collingwood Ethanol
CEF Cervid Ecological Framework
CFIA Canadian Food Inspection Agency
CHD Canadian Hydro Developers Inc.
CIELAP Canadian Institute for Environmental Law and Policy
Class EA Class Environmental Assessment
C of A Certificate of Approval
CO_2 Carbon dioxide
COA Canada-Ontario Agreement Respecting the Great Lakes Basin Ecosystem
COSSARO Committee on the Status of Species at Risk in Ontario
CPU Certificates of Property Use

CSoQGs Canadian Soil Quality Guidelines
dBa decibels
DFO Department of Fisheries and Oceans (Federal)
DNA deoxyribonucleic acid
EA Environmental Assessment
ECO Environmental Commissioner of Ontario
EEE Electrical and Electronic Equipment
EMP Elk Management Plan
ENGO Environmental Non-Governmental Organization
EPR Extended Producer Responsibility
ERR Environmental Review Report
ERT Environmental Review Tribunal
ESDM Emission Summary and Disperson Modelling
ESP Environmental Screening Process
ESR Environmental Study Report
FIT Feed-in Tariff
FMP Forest management plan
FMZ Fisheries Management Zone(s)
GGH Greater Golden Horseshoe
GHG Greenhouse Gas(es)
GTA Greater Toronto Area
GWP Global warming potential(s)
HWIN Hazardous Waste Information Network
IC&I Industrial, commercial & institutional
IDF Intensity, duration and frequency
IDS Integrated Database System
IESO Independent Electricity System Operator
IFO Industry Funding Organization
ISP Industry Stewardship Plan
kW Kilowatt
LIMO Landfill Inventory Monitoring Ontario
LSPP Lake Simcoe Protection Plan
LSRCA Lake Simcoe Region Conservation Authority
MEA Municipal Engineers Association
MHSW Municipal Hazardous or Special Waste
MW Megawatt
NDPEG Forest Management Guide for Natural Disturbance Pattern Emulation
NEC Niagara Escarpment Commission
NMP Nutrient Management Plan
NPRI National Pollutant Release Inventory
OEB Ontario Energy Board
OES Ontario Electronic Stewardship
OFA Ontario Federation of Agriculture
OFAH Ontario Federation of Anglers and Hunters
OFIA Ontario Forest Industry Association
OGWA Ontario Groundwater Association
OMA Ontario Medical Association
OMB Ontario Municipal Board
OPA Ontario Power Authority
OPG Ontario Power Generation
ORC Ontario Realty Corporation
O. Reg. Ontario Regulation
ORMCP Oak Ridges Moraine Conservation Plan
ORTP Ontario Resource-Based Tourism Policy
OSSGA Ontario Stone, Sand and Gravel Association
OTS Ontario Tire Stewardship
PEO Professional Engineers of Ontario
PHU Public Health Unit
PMAC Provincial Management Advisory Committee
PO Provincial Officer
POI Point of Impingement
PPS Provincial Policy Statement
PSW Provincially significant wetland
PTTW Permit to Take Water
PWQO Provincial Water Quality Objective(s)
QP Qualified person
RA Risk assessment
REA Renewable Energy Approval
REFO Renewable Energy Facilitation Office
RESOP Renewable Energy Standard Offer Program
RFP Request for Proposal
RSA Resource Stewardship Agreement
RSC Record of Site Condition
SARO Species at Risk in Ontario
SEV Statement of Environmental Values
SNC South Nation River Conservation Authority
SOS Save Ontario's Species
SRO Surface rights only
STP Sewage Treatment Plant
SWMP Stormwater Management Planning and Design Manual
TCE Trichloroethylene
TLUP Temagami Land Use Plan
ToR Terms of Reference
TSSA Technical Standards and Safety Authority
UNESCO United Nations Educational, Scientific And Cultural Organization
URT Upper Risk Threshold
WCI Western Climate Initiative
WDO Waste Diversion Ontario
WEEE Waste Electrical and Electronic Equipment
WMU Wildlife management unit
YEC York Energy Centre

PREFACE: INTRODUCTION TO THE SUPPLEMENT

Welcome to the Supplement to the Environmental Commissioner of Ontario's 2009/2010 Annual Report. This year's Supplement consists of nine sections. It addresses the reporting year of April 1, 2009 to March 31, 2010. The following summary provides a short guide to the various sections of the Supplement, and discusses their contents and context within the reporting responsibilities of the Environmental Commissioner of Ontario.

Section 1 – Unposted Proposals and Decisions

Under the *Environmental Bill of Rights, 1993* (*EBR*), prescribed ministries are required to post notices for environmentally significant proposals on the Environmental Registry for public comment. Once a ministry has made a decision on how it will proceed, it must update the proposal notice with a decision notice. When it comes to the attention of the ECO that a ministry subject to the *EBR* has made an environmentally significant proposal or decision without first posting a notice on the Registry, we review that proposal or decision and make inquiries to that ministry to determine whether the public's participation rights have been respected. For this reporting period, 11 unposted proposals were singled out by the ECO and are described in Section 1.

Section 2 – Ministries' Use of Information Notices

Significant differences exist between the requirements ministries must meet for regular proposal notices posted on the Environmental Registry under section 15, 16, or 22 of the *EBR* and information notices created under section 6 of the *EBR*. When regular proposal notices are posted on the Registry, a ministry is required to consider public comment and post a decision notice explaining the effect of the comments on the ministry's decision. The ministry is also obligated to consider its Statement of Environmental Values in its decision-making. In terms of public accountability and transparency, this process is far superior to the posting of an information notice. However, in cases where provincial ministries are not required to post a regular proposal notice, they can still provide a public service by voluntarily posting an information notice. These notices keep Ontario's residents informed of important environmental developments.

As presented in Section 2, six ministries posted information notices during the 2009/2010 reporting year. The ECO's review found that while some of these postings constituted acceptable and even commendable uses of information notices, sharing important information with the public, others were unacceptable and should have been posted as regular proposal notices for full public consultation.

Section 3 – Ministries' Use of Exception Notices

Under the *EBR*, there are limited circumstances in which ministries may proceed with an environmentally significant decision and then inform the public through an "exception notice," instead of following the normal process of posting a proposal notice for prior public notification and consultation. Exception notices may be used in cases of emergency, or when another equivalent public participation process takes place instead.

Section 4 – Decision Reviews

Each year the ECO reviews a sampling of the environmentally significant decisions made by ministries prescribed under the *EBR*. During the 2009/2010 reporting year, 1,945 decision notices were posted on the Environmental Registry, most of them for site-specific permits or approvals. Seventy-seven of these decision notices were for policies, Acts and regulations. Whether the ECO conducts a detailed review on a ministry decision depends on the decision's environmental significance and on the public's interest in

the decision. Section 4 of this report consists of detailed reviews undertaken by the ECO for 22 selected decisions by five ministries.

Sections 5 & 6 – Applications for Review and Investigation

Under the *EBR*, Ontario residents can file "applications for review," asking government ministries to review an existing policy, law, regulation or instrument if they feel the environment is not being protected, or to review the need for a new law, regulation or policy. The public can also make "applications for investigation," asking ministries to investigate alleged contraventions of environmental laws, regulations and instruments. The ECO reviews applications for completeness, and forwards them to the appropriate ministry.

In Sections 5 and 6, the ECO reviews the applications received and reports on the handling and disposition of these applications by the ministries. Section 5 provides a summary and review of applications for review, while Section 6 addresses applications for investigation. Applications that have been received, but which the ministries have not responded to yet, are briefly summarized.

In the 2009/2010 reporting year, the ECO completed reviews of 26 applications for review and 11 applications for investigation. The ministries agreed to carry out *EBR* reviews or investigations for nine of these 37 applications. In five cases where ministries denied the request for a review or an investigation, the ECO disagreed with the ministry decision, believing that the issues deserved scrutiny under the *EBR*.

Section 7 – *EBR* Leave to Appeal Applications

For certain instruments issued by ministries, e.g., certain certificates of approval or permits to take water, Ontario residents have 15 days to seek leave to appeal the decision after it is posted on the Environmental Registry. If leave is granted, the dispute can proceed to a full tribunal hearing. The ECO posts notices on the Registry of these leave to appeal applications, and updates them once the appropriate appeal tribunals have made their decisions. This section provides a summary of the 10 new leave to appeal applications under the *EBR* that were filed during the 2009/2010 reporting year.

Section 8 – Status of ECO and Public Requests to Prescribe New or Existing Ministries for Laws, Regulations or Processes under the *EBR*

The ECO constantly tracks legal and policy developments at the prescribed ministries and in the Ontario government as a whole, and encourages ministries to update the *EBR* regulations to include new laws and prescribe new government initiatives that are environmentally significant. Section 8 discusses how the ministries go about prescribing new laws, regulations and ministry processes under the *EBR*, and provides two summary tables outlining the status of ECO and ministry efforts to keep the *EBR* in sync with various recent Acts, regulations and ministry processes.

Section 9 - Undecided Proposals

The ECO is required under section 58(2)(c) of the *EBR* to report annually on all proposals posted on the Environmental Registry within the reporting year that have not had a decision notice posted by of the end of that year. This report is available by special request from the ECO.

SECTION 1

ECO REVIEWS OF UNPOSTED DECISIONS

SECTION 1: ECO REVIEWS OF UNPOSTED DECISIONS

Public participation in environmental decision-making is at the heart of the *Environmental Bill of Rights, 1993* (*EBR*). Under sections 15, 16 and 22 of the *EBR*, prescribed ministries are required to post notices of environmentally significant proposals for policies, Acts, regulations and instruments on the Environmental Registry. Proposed ministries and the Technical Standards and Safety Authority are required to post certain environmentally significant proposals for public comment for a minimum of 30 days before decisions are made on them. The ministry must also consider all comments received through public consultation, post a decision notice on the Registry to notify the public when a proposal is implemented, and explain the effect of public comments on the decision.

When it comes to the attention of the Environmental Commissioner of Ontario (ECO) that a ministry subject to the *EBR* has made an environmentally significant proposal or decision without posting a proposal notice on the Environmental Registry, the ECO reviews that proposal or decision to determine whether the public's participation rights have been respected.

The ECO's review of unposted proposals and decisions includes cases where ministries post information notices on the Environmental Registry when proposal notices under sections 15, 16 or 22 of the *EBR* should have been used.

Such inquiries can lead to one of several outcomes. The ministry may provide the ECO with legitimate reasons for not posting the proposal or decision on the Environmental Registry. For example, the proposal or decision may not in fact be environmentally significant, or it may fall within one of the exceptions allowed by the *EBR*. In other cases, if the ministry has not yet implemented the proposal or decision, it may agree to post a notice on the Registry and allow public input. Finally, in certain cases, the ministry may choose not to rectify the situation, because the decision has already been made, or, unlike the ECO, they do not regard the decision as environmentally significant, or for some other reason. In such cases, the ECO believes that the ministry has not adhered to the requirements of the *EBR* and has deprived the Ontario public of notification and comment rights.

While the ECO monitors decision-making in all prescribed ministries, in 2009/2010, ECO staff made inquiries on specific proposals and decisions made by the Ministry of the Environment, the Ministry of Natural Resources, the Ministry of Municipal Affairs and Housing, and the Ministry of Consumer Services. Twelve policies, regulations and instruments, summarized below, were identified by the ECO as unposted proposals or decisions. Each summary provides information on the proposal or decision, explains the ministry's response to the ECO's inquiry, and discusses whether this response was adequate under the *EBR*.

In addition to monitoring ministries' compliance with their Registry posting obligations under the *EBR*, from time-to-time the ECO contacts ministries to remind them of potential upcoming *EBR* notice requirements. For example, this year the ECO sent an urge-to-post letter to the Ministry of Municipal Affairs and Housing (MMAH), with respect to Bill 196 (*Barrie-Innisfil Boundary Adjustment Act, 2009*) (see Section 1.3.1). Similarly, the ECO may ask a ministry to post an information notice to inform the public about an environmentally significant proposal that does not fall under the ministry's *EBR* posting obligations. As an example, the ECO this year contacted the Ministry of the Environment to propose that new regulations under the *Lake Simcoe Protection Act* be posted, despite the fact that the Act had not yet been prescribed.

The ECO was pleased this year with the prompt responses provided in most cases by the ministries when queried regarding potential unposted items. Although the ECO did not always agree with the cases made by the ministries, the timing of the responses and the level of consideration provided by the ministries in addressing our concerns was heartening.

On the other hand, the reasons for not posting provided by ministries were not always convincing. In particular, the ECO remains concerned that many environmentally significant decisions are still being made in Ontario with little or no public awareness or opportunity to comment. This is happening because ministries are sometimes defining plans as implementation, rather than policy, calling guidelines and manuals educational, rather than policy, or burying small but often environmentally significant decisions inside larger, more administrative policies, regulations, or Acts.

The examples that follow are from this reporting year and contain what the ECO considers to be examples of all of the above.

Ministry of the Environment
- Classifying *Pesticide Act* instruments under the *EBR.*
- Proposed extension of the Ministry of Northern Development and Mine's Declaration Orders
- Water Supply Well – Requirements and Best Management Practices Manual
- Changes to Code of Practice for Class EAs

Ministry of Consumer Services
- Policy, Rules for Cremation Rituals re Scattering of Ashes

Ministry of Municipal Affairs and Housing
- Bill 196, *Barrie-Innisfil Boundary Adjustment Act, 2009*

Ministry of Natural Resources
- Regulation amendment allowing aircraft to land in Sandbanks Provincial Park for a limited time
- Wasaga Beach Provincial Park Action Plan
- Extension of deadline for phase-out of all private leases in Provincial Parks
- The Bear Wise Program
- The Elk Management Strategy

1.1 Ministry of Consumer Services – Policy

1.1.1 Guidelines for the Scattering of Cremated Human Remains

Description
- In July, 2009, a new set of guidelines for the scattering of cremated human remains was published on the Ministry of Consumer Services (MCS) website.
- The guidelines allow such activities to take place on occupied or unoccupied Crown land, without obtaining government consent, provided that the ceremonies are conducted in an environmentally responsible manner.
- Individuals and family members who partake in such rituals are asked to ensure that only "a handful of leaves and flowers" (assuming that any other materials are necessary) accompany the remains.
- The ECO contacted MCS in the fall of 2009 to enquire as to why this policy, which appears to have environmental implications, was not posted on the Registry.

Ministry Response
- On November 13, 2009, the MCS Deputy Minister wrote the ECO to address this concern.

- In its response, the ministry stated that although it administers the *Funeral, Burial and Cremation Services Act, 2002*, it does not regulate the scattering of ashes off cemetery property. MCS considers the guidelines as education, rather than policy.
- MCS further stated that ministry staff will be working with other ministries and municipal representatives over the coming months to determine whether the guidelines as currently posted on the MCS website are sufficient or whether additional communications may be appropriate to educate the public about this practice. MCS indicated that it would be in a better position after this consultation to determine whether the ECO's request to post on the Environmental Registry was appropriate.

ECO Comment

- The ECO is disappointed that MCS has decided to view the guidelines as education, rather than as ministry policy.
- The ECO's view is that information organized and presented for the first time as the government's position on a particular issue is, by definition, policy. As such, if it has environmental implications (as this policy definitely does), it should be posted as a regular proposal notice on the Environmental Registry.

The ECO will be monitoring this issue and encourages MCS to post any amendments to the guidelines as they are developed.

1.2 Ministry of the Environment – Regulation

1.2.1 Classifying *Pesticide Act* Instruments under the *EBR*

Description

- On April 22, 2009, the Ministry of the Environment (MOE) filed O. Reg. 166/09, revoking the previous *Pesticides Act* instrument classifications of O. Reg. 681/94 under the *EBR* and replacing them with new instrument classifications based on O. Reg. 63/09, the newer general regulation under the *Pesticides Act*.
- The amendment of O. Reg 681/94 included a new instrument – a proposal by the Ministry of Natural Resources (MNR) to enter into an agreement with a body responsible for managing a natural resources management project, if that project involves the use of a prescribed pesticide.
- This instrument had not been part of the consultation on O. Reg 63/09. Therefore, the ECO contacted the ministry and asked why the regulation (O. Reg 166/09) was not posted on the environmental registry for public comment.

Ministry Response

- On June 30, 2009, the ministry replied that the amendments were made primarily to update references in O. Reg. 166/09 to Regulation 914 by replacing them with references to the new O. Reg. 63/09 and were not thought to cause a significant environmental impact.

ECO Comment

- The ECO believes that this regulation should have been posted. A new instrument was included in the revisions and the public did not have a chance to comment. The fact that all of the other amendments were largely administrative in nature should not be used as a rationale for creating a new instrument without a registry posting.

1.2 Ministry of the Environment – Regulation

1.2.2 Extension of the Ministry of Northern Development, Mines and Forestry's Declaration Orders

Description

- On January 21, 2009, the Ministry of the Environment (MOE) posted an information notice on the Environmental Registry about two declaration orders – MNDM-3 (Disposition of certain or all rights to Crown resources) and MNDM-4 (Mine Hazard Rehabilitation Activities – issued under the *Environmental Assessment Act* (*EAA*) (sections 3.1(3) and 3.2 respectively).
- These declaration orders exempt these activities from *EAA* requirements. The information notice explained that the then Ministry of Northern Development and Mines (MNDM), now the Ministry of Northern Development, Mines, and Forestry (MNDMF), asked MOE to extend these declaration orders to December 2012 in light of the ongoing work on the modernization of the *Mining Act*. The rationale for MNDM's request was that "[t]his timeframe would allow for a Class Environmental Assessment (EA) to be developed and approved covering the activities subject to MNDM-3 and MNDM-4 as well as any additional activities identified following a re-evaluation of their *EAA* requirements."
- MOE stated that it was considering MNDM's request. MOE's rationale for using an information notice was that "notices of extension of MNDM-3 and MNDM-4 are not instruments, policies, Acts or regulations under the *Environmental Bill of Rights, 1993* (*EBR*) and are therefore not required to be posted for public comment."
- On February 10, 2009, the ECO wrote to MOE, with a copy to MNDM, to express its concern that MOE did not post a regulation proposal notice, as section 16 of O. Reg. 73/94 made under the *EBR* states that orders made under *EAA* sections 3.1(3) and 3.2 (and any changes made to them) are deemed to be regulations for the purposes of the *EBR*. The ECO urged MOE to re-post the notice as a regular proposal on the Environmental Registry to provide for full public notice and comment as required under the *EBR*.
- On June 10, 2009, MOE posted a further information notice to advise the public that the Minister had decided "to extend the expiry date of the Declaration Orders until December 31, 2012 subject to the MNDM satisfying new requirements related to the development of a Class Environmental Assessment (Class EA) for its' activities."

Ministry Response

- MOE responded to the ECO by a letter dated March 18, 2009.
- MOE explained in its letter that it does not believe that a regulation proposal notice is required because the conditions of the declaration orders provide the authority for the Minister to extend their expiry date without preparing new declaration orders. MOE takes the position that "extending the Orders does not constitute the making of a regulation for the purposes of the *EBR*," and therefore a regular notice was not required.
- MOE further stated that it had voluntarily posted an information notice "in order to promote an open and transparent decision-making process" and that "the intent of the Information Notice is to advise the public of the proposal and also to invite the public to submit written comments to MOE."

ECO Comment

- The ECO believes that MOE should have posted a regular notice regarding the extension of these declaration orders. The ECO has consistently taken the position that a regular notice should be posted on the Environmental Registry to give notice not only of environmentally significant regulations, but of any environmentally significant amendments (such as extending the expiry date) to such regulations. The ECO is disappointed that MOE did not re-post the notice as a regular notice in accordance with the *EBR*.
- The ECO urges MOE to make better use of the Environmental Registry in the future in its administration of the *EAA*.

1.2 Ministry of the Environment - Policy

1.2.3 Water Supply Wells – Requirements and Best Management Practices Manual

Description

- In March, 2009, MOE indicated that it was developing two Best Practices Manuals (BPMs) to help implement amendments to Regulation 903, made under the *Ontario Water Resources Act*. These manuals were for water supply wells and for test holes and dewatering wells (see ECO's 2008/2009 Annual Report, page 133).
- MOE also indicated that these documents would be posted on the Environmental Registry as Information Notices.
- On May 12, 2009, the ECO wrote to MOE urging the ministry to post the BPMs as regular proposal notices, to provide for full public notice and comment, as required by the *EBR*. The ECO pointed out that the manuals would clearly be environmentally significant policy documents.

Ministry Response

- On May 26, 2009, MOE responded to the ECO's urge-to-post letter.
- In this correspondence, the ministry stated that the intent of the manuals is essentially to explain the Wells Regulation (Regulation 903), provide best practices, and offer clarification to the industry and other stakeholders with respect to the many questions the ministry had received on the Wells Regulation. As such, the ministry had decided that the manual was not a program, plan, objective, guideline, or set of criteria for decision-making and thus did not need to be posted on the Registry.
- The ministry's letter further stated that an external stakeholder committee had been set up for the purpose of reviewing and providing comment on the draft manuals and that as part of this process the Ontario Groundwater Association (OGWA) had posted the draft manual on their website, making it publicly available.
- Finally, the ministry's letter stated that all comments and recommendations from the stakeholder groups had been consolidated into the final version of the manuals.
- On January 21, 2010, MOE posted "Water Supply Wells - Requirements and Best Management Practices Manual" as an information notice.

ECO Comment

- The ECO disagrees with the ministry's decision to post these documents as information notices and is extremely disappointed that the ministry has done so with at least one manual to-date.
- MOE's argument for not posting appears to the ECO to be somewhat contradictory. If the BPMs are not new policy, but only expansion and clarification of existing policy, it begs the question as to why so much external input was required. If many comments and recommendations from external sources were incorporated, as indicated by MOE, it would seem to suggest that new elements of policy have in fact been adopted.
- If new policy elements are included within the BPMs, it follows that these documents should be posted as regular proposal notices on the Environmental Registry. By not doing so, the ministry

has denied the right of the general public to comment on significant environmental policy in the proposal stage via the Registry.

1.2 Ministry of the Environment - Policy

1.2.4 Changes to Code of Practice for Class EAs

Description

- In November, 2008, MOE posted a decision notice on the Environmental Registry regarding two documents dealing with the Environmental Assessment process in Ontario. One was titled: "Code of Practice: Preparing, Reviewing and Using Class Environmental Assessments in Ontario." The original proposal had been posted in August, 2007.
- In early 2010, it came to the ECO's attention that a 2009 version of this document was available on the MOE website and that some changes had been made from the 2008 version posted on the Registry.
- On March 4, 2010, the ECO contacted the ministry and requested a list of the changes made in the document, in order to be able to determine whether or not the revised version should have been posted on the Registry.

Ministry Response

- As of June 1, 2010, the ECO has not received a response from MOE.

ECO Comment

- The ECO will continue to request information on this potential "unposted" and will comment in the next reporting year.

1.3 Ministry of Municipal Affairs and Housing – Act

1.3.1 Bill 196, *Barrie-Innisfil Boundary Adjustment Act, 2009*

Description

- Bill 196, the *Barrie-Innisfil Boundary Adjustment Act*, *2009* was given first reading in the Legislature on June 4, 2009 and passed by the Legislative assembly in December 2009. The Act adjusted the boundaries between the City of Barrie and the Town of Innisfil so that 2293 hectares (ha) of land were annexed from the latter to the former municipality.
- On August 5, 2009, the ECO wrote to the Deputy Minister of the Ministry of Municipal Affairs and Housing (MMAH) to urge him to post a proposal on the Environmental Registry.
- The ECO argued that the Act would make existing farmland available for both residential and industrial applications, activities with significant environmental implications.
- The ECO recognized in this correspondence that this proposed amendment to the *Municipal Act, 2001*, had been discussed in a planning proposal, entitled "Simcoe Area: A Strategic Vision for Growth", which was at that time posted as a proposal on the Environmental Registry. The ECO also acknowledged that the posted document included statements that the City of Barrie would be "required to ensure consistency with the Provincial Policy Statement and conform to the Growth Plan, both of which are aimed at curbing sprawl."
- Nevertheless, the ECO indicated to the ministry at that time its position was that the Ontario public had the right to the benefits of direct consultation via the Registry on Bill 196.

Ministry Response

- On August 28, 2009, MMAH responded with a letter stating that adjusting the boundary between the two municipalities would not affect land use designations already in place and that it therefore did not consider Bill 196 to have environmental implications and was not prepared to post it on the Environmental Registry.
- The letter also emphasized the role of vision paper mentioned above in protecting the natural environment.

ECO Comment

- The ECO is disappointed that MMAH did not post a proposal notice for the Act on the Environmental Registry. The ECO believes the *Barrie-Innisfil Boundary Adjustment Act, 2009* is an environmentally significant piece of legislation, given the fact so much farmland was transferred to a growing municipality. The Ontario public should have been given the opportunity to provide direct input.

1.4 Ministry of Natural Resources – Regulation

1.4.1 Regulation Amendment Allowing Aircraft to Land in Sandbanks Provincial Park

Description

- In November, 2009, an amendment was made, via O. Reg. 422/09, to O. Reg. 347/07 (Provincial Parks: General Provisions), made under the *Provincial Parks and Conservation Reserves Act*, allowing the landing of aircraft in Sandbanks Provincial park for a temporary period of time (November 22 to 30, 2009).
- In March, 2010, the ECO contacted the Ministry of Natural Resources (MNR) to enquire as to why this regulation amendment was not posted, as the Act is prescribed.

Ministry Response

- The ministry responded on March 15, 2010. MNR explained that the purpose of the amendment was to allow a company to land aircraft on the beach in the park for a temporary period of time as part of a film production.
- The ministry correspondence further stated that ministry staff had determined that there would be no significant environmental impact associated with this activity – no threats to wildlife, plants, or the ecological integrity of the park were anticipated – and that therefore the amendment had not been posted.

ECO Comment

- Although the ECO agrees with MNR that the environmental impact of the activity was likely to be minor, the ECO believes the regulation amendment should have been posted as a proposal notice on the environmental registry. Other stakeholders may not have felt the same and should have had the opportunity for input.
- The ECO urges MNR to post these types of amendments in the future for public consultation.

1.4 Ministry of Natural Resources – Policy

1.4.2 Wasaga Beach Provincial Park Action Plan

Description

- In February 2009, MNR released an action plan for dealing with an invasive plant, known as Common Reed or *Phragmites australis*, in Wasaga Beach Provincial Park.
- This is a non-native (European) variety of a native grass. It negatively affects the habitat of the piping plover, a species regulated under the *Endangered Species Act, 2007*.
- The plan had not been posted as a proposal notice on the Environmental Registry; instead, MNR chose to treat the action plan as a Category A project under its parks class environmental assessment, "A Class EA for Provincial Parks and Conservation Reserves" (Class EA-PPCR), which is intended for projects judged to have low net negative environmental effects or public agency concerns. MNR is not required to consult the public on Category A projects.
- MNR stated that the plan included a project goal, short and long-term objectives, a steering committee with external agencies participating, detailed approaches to managing the vegetation, direction for communication and stewardship activities, and the requirement of a re-assessment in three years.
- On May 25, 2009, the ECO wrote to MNR to express deep concern that the MNR's choice not to use the Environmental Registry had the effect of limiting public scrutiny by circumventing the proper *EBR* public consultation process as well as limiting the ECO's ability to report to the legislature regarding this policy and the related public consultation.
- The ECO argued that the plan was in fact a policy, as defined by the *EBR*, and that the class environmental assessment itself directs that it is not intended to be used for the preparation of management direction or policies.

Ministry Response

- MNR responded on July 15, 2009, stating that it did not agree that the Wasaga Beach Action Plan constitutes policy under the *EBR*.
- The ministry stated that management of phragmites falls under project ID 20, "Control invasive vegetation and insect species" in the Class EA-PPCR, as a pre-screened Category A project.
- MNR further stated that the park's larger planning process was currently underway and would include public consultation and a policy proposal notice on the Registry.

ECO Comment

- When MNR uses the Environmental Registry for park management plans, it generally maintains a high standard of practice that the ECO has previously commended.
- MNR also develops, as in this case, more detailed plans for protected areas that focus on specific issues. Over the years, these have been referred to by a variety of names, such as implementation plans or resource management plans. However, under whatever name MNR chooses, plans are policies for the purposes of the *EBR*.
- The ECO believes that when the ministry seeks to implement a project that is described policy the Class EA-PPCR applies.
- Therefore, the ECO does not agree with MNR that the Wasaga Beach Action Plan is not policy.
- The ECO urges MNR to take a closer look at its practices in this regard, so that what has become a chronic misinterpretation of its *EBR* responsibilities can be clarified and corrected.

1.4 Ministry of Natural Resources - Policy

1.4.3 Deadline for Phase-out of All Private Leases in Provincial Parks

Description

- On November 2, 2009, MNR posted on the Registry a notice (Environmental Registry #010-8203) proposing changes to the Ontario Parks Phase Out Policy. This proposal proposes a lifetime extension for those private tenure and commercial harvesting permits and licenses in select provincial parks (set to have expired in 2009).
- The ECO is concerned that the ministry had already made a *de facto* environmentally significant decision *within* this proposal notice, without the benefit of public consultation. The proposal notice states that "until this review is complete and decisions are made, the affected activities will not be phased out as originally scheduled by December 31, 2009."
- It had been MNR policy since 1989 to phase out all forms of existing tenure issued by the Crown for private use in provincial parks by no later than January 1, 2010.
- On January 7, 2010, the ECO wrote MNR to express strong concern regarding both the policy's proposed lifetime extensions and the means by which the phase-out had been dropped without the benefit of a specific *EBR* posting.

Ministry Response

- On March 1, 2010, MNR's response to the ECO letter stated that the policy proposal on the Registry included the opportunity to comment on the proposed change of the phase out policy (to lifetime extensions) and therefore the purposes of the *EBR* had been served.
- The ministry acknowledged that it would have been ideal to have posted the proposal earlier, so that a decision could be made prior to the scheduled phase-out date, but that the complexity of the proposed policy had required additional time, delaying the review.
- The ministry also acknowledged that the delay had resulted in the continuation of the current activities, but argued that these activities had been ongoing since at least 1989 and that allowing them to continue until a decision was reached could not be considered environmentally significant.

ECO Comment

- The ECO strongly disagrees with MNR's decision not to post the extension of the phase-out deadline as a separate proposal on the Registry.
- In our 2006/2007 Annual Report, the ECO stated that "Due to political pressure, governments of the day have routinely renewed these leases, despite a clear commitment in MNR policy that cottages within protected areas are inappropriate." The current decision to extend the long-held deadline without appropriate and timely consultation certainly gives the impression that a similar story has occurred once again.
- The ECO also disagrees with the proposed lifetime extensions of existing leases, for the same reasons.

1.4 Ministry of Natural Resources - Policy

1.4.4 The Bear Wise Program

Description

- MNR's Bear Wise Program is designed to reduce "preventable causes of human-bear conflict in Ontario." It focuses on community awareness and education and includes a website and a bear information and reporting line.

- In 2009, the ECO became aware that MNR had implemented changes in the program, based on an extensive and commendable public consultation program in 2008.
- Accordingly, the ECO contacted MNR in June, 2009, to ask why the changes had not been posted as a proposal on the Environmental Registry.

Ministry Response

- MNR responded that the evaluation had focused on "operational elements of the Bear Wise Program" and had been undertaken with internal MNR staff and stakeholders directly involved in the delivery of the activities included in the program.
- Because the changes were operational in nature, such as "improved internal communications with partners" and developing fact sheets with "more direct and concise language", MNR's opinion was that the changes were not environmentally significant and therefore did not need to be posted.

ECO Comment

- The ECO encourages MNR to use the Environmental Registry in similar situations in the future.

1.4 Ministry of Natural Resources - Policy

1.4.5 The Elk Management Plan

Description

- In July, 2009, MNR sent a letter soliciting the ECO's participation in the development of an Elk Management Plan (EMP) for Ontario, including comments on the proposed content of the plan.
- The ECO responded later the same month with a query as to why the ministry was not planning an EBR posting as part of the initial consultation process.

Ministry Response

- The ministry sent a response on August 26, 2009.
- MNR argued that it had consulted widely during its development of the Cervid Ecological Framework (CEF), an overarching provincial policy for the management of all cervid species in Ontario, and that these previous consultations had included Environmental Registry postings, as well as questionnaires and meetings with the general public and stakeholders.
- The ministry stated that it intended to post the proposed EMP on the Environmental Registry once it had been developed and that the input received from the CEF consultations would inform the development.

ECO Comment

- The ECO disagrees with MNR's decision not to post early versions of the EMP on the Environmental Registry.
- The ECO believes that the Environmental Registry is a powerful tool for consultation that promotes accountability and transparency in government decision-making. Accordingly, the ECO encourages MNR and all other prescribed ministries to use the Registry as an integral part of their consultation processes, from the early stages to the final proposal.

SECTION 2

ECO REVIEWS OF INFORMATION NOTICES

SECTION 2: ECO REVIEWS OF INFORMATION NOTICES

2.1 Use of Information Notices

In cases where provincial ministries are not required to post a proposal notice on the Environmental Registry for public comment, they may still provide a public service by posting an "information notice" under section 6 of the *Environmental Bill of Rights*, *1993* (*EBR*). These notices keep Ontarians informed of important environmental developments.

Ministries should use an information notice only when they are not required to post a regular notice for public comment (under sections 15, 16 or 22 of the *EBR*). Significant differences exist between regular proposal notices posted on the Environmental Registry and information notices. With regular proposal notices, a ministry is required to consider public comments and post a decision notice explaining the effect of comments on the ministry's decision. The Environmental Commissioner of Ontario (ECO) then reviews the extent to which the Minister considered those comments when he or she made the final decision. Ministries must also consider their Statement of Environmental Values in the decision-making process. Moreover, third-party appeal rights are only available for instruments if they are posted as regular proposal notices. Overall, regular proposal postings provide greater public accountability and transparency than information notices.

As described in more detail in the ECO's 2000/2001 Annual Report, if a prescribed ministry decides that it is appropriate to seek public comment on a policy, Act or regulation proposal through the Environmental Registry, the correct procedure is to post a proposal notice, not an information notice. Soliciting comments through information notices causes confusion for the public. The ECO accepts that it may be appropriate for ministries to use information notices to solicit comments on initiatives that are clearly exempted from the *EBR* posting requirements. For example, an information notice could be used for *Environmental Assessment Act* exceptions and regulations that are not prescribed under the *EBR*. The ECO encourages ministries in this situation to post a follow-up notice informing the public about the decision and how comments were considered.

During the 2009/2010 reporting year, six ministries posted a total of 122 information notices. However, for the purposes of reporting on year-to-year trends, the ECO does not include previously posted notices (as ministries often post updates on information notices) or notices that relate to forest management plans. In 2009/2010, ministries updated 21 previously posted notices and seven new notices relating to forest management plans. Accordingly, for ECO's reporting purposes, the ministries posted 94 new information notices in 2009/2010.

Ministry	Number of Information Postings
Energy and Infrastructure (MEI)	2
Environment (MOE)	45
Municipal Affairs and Housing (MMAH)	7
Natural Resources (MNR)	30
Northern Development, Mines and Forestry (MNDMF)	7
Transportation (MTO)	3

Good Uses of Information Notices

During this reporting period several ministries used information notices appropriately to inform the public about initiatives that are legally accepted from the requirement to post regular proposal and decision notices. For example:

- MOE posted a notice informing the public of Health Canada's consultation on the Canadian Drinking Water Quality Guideline document, Fluoride in Drinking Water (Environmental Registry #010-7777). Ontario Drinking Water Quality Standards are generally adopted from Canadian Drinking Water Quality Guidelines. MOE stated that once the Health Canada document is finalized, it will conduct its own consultation by posting a separate policy proposal on the Environmental Registry.

- MOE used an information notice to advise the public that it is rescinding its H-4 Research Management Document (Environmental Registry #010-9388). The document identifies the methods used by the ministry to select, approve and administer projects supported by the Research Advisory Committee (RAC). MOE stated that the RAC no longer exists and some of its responsibilities were transferred to MOE's Environmental Innovations Branch. MOE identified that this decision is administrative and does not have an impact on the environment.

- MTO posted a notice informing the public that a proposed regulation for electric bicycles was posted on Service Ontario's Regulatory Registry for public comment (Environmental Registry #010-6943). The regulation was made under the *Highway Traffic Act*, which is not prescribed under the *EBR* for posting regulation proposals.

- MTO used an information notice to advise the public it is initiating an update of the Transit-Supportive Land Use Planning Guideline (1992) (Environmental Registry #010-8200). The ministry stated that "[r]ecent provincial initiatives aimed at managing growth, curbing urban sprawl and supporting transit, along with complementary changes to key aspects of Ontario's planning system, provide the [MTO] with an opportune time to update the Guideline." MTO identified that a draft of the guideline will be posted as a separate proposal notice on the Environmental Registry.

- MNR posted a notice to inform the public about prescribed burns scheduled to be conducted during 2009 (Environmental Registry #010-6173). MNR stated that for each prescribed burn, an operational plan is prepared and lists the location, size, purpose and burn proponent for each scheduled burn. MNR invited the public to submit comments on draft prescribed burn plans, available at MNR District or Ontario Parks offices.

Inappropriate Uses of Information Notices

On several occasions ministries used information notices inappropriately during this reporting period, stating that the initiatives were not "policy decisions" for a variety of reasons. For example:

- MOE and MNR should have posted regular proposal notices for Bill 212, *Good Government Act, 2009* (Environmental Registry #010-8295 and #010-8561). The *Good Government Act, 2009*, which passed in December 2009, is an omnibus Bill that makes amendments to a number of statutes, including the *EBR* and some Acts prescribed under the *EBR*. Although most of the amendments were administrative in nature, the ECO believes that some changes were environmentally significant. For example, the Act amended the *Fish and Wildlife Conservation Act, 1997* to allow landowners, with the Minister's authorization, to protect their property by harassing, capturing or killing elk.

- MOE should have posted a regular proposal notice for the Water Supply Wells – Requirements and Best Management Practices Manual (Environmental Registry #010-8451). The intent of the document is to "assist persons making decisions under or related to the [*Environmental Protection Act*] and [the] *Ontario Water Resources Act*" and provides direction to assist "in defining site-specific effluent limits, which then may be incorporated into certificates of approval or control orders." The ECO believes that the information notice contained an environmentally significant policy proposal. (For further details, see Section 1 on "Unposted Decisions" in this Supplement.)

- MNDMF should have posted an exception notice or a regular instrument proposal for the Kerr Mine Tailings Ponds emergency order to rehabilitate a mine hazard (Environmental Registry #010-8585). The emergency order was issued under section 148(2) of the *Mining Act*, which is a prescribed Class

I instrument under the *EBR*. In a situation when the delay in waiting for public comment would result in danger to public health or safety, harm or serious risk to the environment, or injury or damage to property, ministries can use an emergency exception notice on the Environmental Registry. The ECO believes it is inappropriate to use an information notice for prescribed instruments. However, the ECO is pleased that MNDMF later posted an exception notice to inform the public that further Minister's directions under the *Mining Act* were issued for the same site. (For further details on this notice, see Section 3 "Exception Notices" in this Supplement.)

Ministry Decisions that are not Prescribed

Various ministries voluntarily posted environmentally significant decisions as information notices because they fall under ministries, acts, or instruments that are not prescribed under the *EBR*. Examples this year include:

- MOE posted 27 information notices for the approval of terms-of-reference documents prepared by multi-stakeholder Source Protection Committees under the *Clean Water Act, 2006* (*CWA*). A Source Protection Committee terms of reference document is not prescribed as an instrument under the *EBR*. However, the *CWA* requires MOE to publish notices on the Environmental Registry once the documents are approved by the Minister of the Environment.

- MNR posted 23 information notices for proposed permits and agreements issued under the *Endangered Species Act, 2007 (ESA)*. These permits and agreements are not yet prescribed as instruments under the *EBR;* however, on January 27, 2010 MOE posted a regulation notice indicating that it proposes to prescribe some *ESA* permits and agreements as instruments under the *EBR*. (For further information, see Part 3.3 on "Species at Risk: Progress to Date and the Path Ahead" of this Annual Report.) The ECO notes that in our Special Report (February, 2009), we recommended that "all instruments that may be issued pursuant to the *ESA* and its regulations be prescribed under the [*EBR*]." In addition, the ECO requested that the MNR post information notices for all instruments issued under the *ESA* until these instruments are prescribed under the *EBR*.

- In May 2009, MEI posted an information notice for a proposed regulation to remove local barriers to renewable energy installations (i.e., roof or wall mounted solar photo voltaic and solar thermal water/air and ground source heat pump) under the *Green Energy Act, 2009*. At that time, the *Green Energy Act* was not prescribed under the *EBR*. In September 2009, MOE did prescribe the *Green Energy Act* under the *EBR*. For more information, refer to Part 2.1 on the *Green Energy and Green Economy Act* of this Annual Report.

- During this reporting period, MNDMF posted six information notices for amendments to mine closure plans. Although new mine closure plans are classified as instruments under the *EBR*, in 2001 MNDMF decided not to classify amendments to mine closure plans (if proposed by the licensee) under the *EB*R. The ECO noted in our 2005/2006 Supplement to our Annual Report (page 18) that "[t]hese amendments can be as environmentally significant as the original closure plans, and they must be approved by MNDM[F]." The ECO continues to encourage MNDMF to classify mine closure plan amendments as instruments under the *EBR* in order to provide opportunities for public participation through regular proposal notices on the Environmental Registry in the future.

The ECO supports the ministries' approach to posting information notices for proposals and decision that are not prescribed. However, as previously recommended, the ECO continues to urge the government to prescribe new government laws and initiatives that are environmentally significant under the *EBR* within one year of implementation to ensure that these decisions are appropriately posted. (See Section 8 of this Supplement for a more detailed discussion of the issue of prescribing ministries and Acts.)

Cage Aquaculture Licenses – Fishy Public Consultation

On the picturesque shores of Georgian Bay, among white pines and cottages, lie a number of floating cages used to raise rainbow trout. Cage aquaculture is a method of fish farming that involves growing fish in cages or "net pens," suspended in a lake, river or ocean. Rainbow trout aquaculture started in this area in 1982 and accounts for approximately 75 per cent of Ontario's trout production. There are ten sites in Georgian Bay that use large marine-type cages, typically between 6 – 20 cages per operation. While Ontario allows cage aquaculture operations in the Great Lakes, most United States natural resource agencies do not allow or promote cage culture in public waters. Cage aquaculture in waters over public land, such as the Great Lakes, is controversial because of the potential impacts on local water quality and native fish species and the aquatic ecosystem.

Untreated waste such as fish feces, uneaten food and medications can flow from the cages into the lake or river and impact water quality. Researchers estimated that the annual loadings in the North Channel of Lake Huron and Georgian Bay from cage aquaculture included 15 tonnes of phosphorus, 90 tonnes of nitrogen and 500 tonnes of solid waste in 1999. The native aquatic community can also be impacted by cage aquaculture operations, mostly from fish that escape from the aquaculture facility. For example, there can be ecological harm through introduction of farmed fish that are not indigenous to the area; loss of genetic fitness of indigenous fish through interbreeding with farmed fish; spread of fish pathogens to natural populations; and loss or degradation of fish habitat including eutrophication or increased sediment in the bottom of the lake. Many shoreline residents and non-government organizations strongly oppose cage aquaculture in the Great Lakes.

The Ministry of Natural Resources (MNR) issues licences to cage aquaculture operators under O. Reg. 664/98 (Fish Licensing) of the *Fish and Wildlife Conservation Act, 1997*. Cage aquaculture licences are prescribed instruments under the *Environmental Bill of Rights, 1993* (*EBR*). MNR is required to post aquaculture licence proposals on the Environmental Registry for full public consultation if the operator is required to submit a detailed ecological risk analysis to MNR or if the operation is in water covering Crown Land (e.g., the Great Lakes). A risk analysis is used to determine what effect escaped fish might have on the ecology and genetics of the fish that live in the receiving waters. Under the *EBR*, there is no requirement to post fish licences for cage aquaculture operations on private land.

Despite these licences being prescribed instruments, it is MNR's position that *EBR* provisions for consultation or appeal do not apply to licences for cage aquaculture in the Great Lakes or over Crown Land. For these types of operations, MNR applies its Class Environmental Assessment for Resource Stewardship and Facility Development (Class EA), under the *Environmental Assessment Act* (*EAA*) to issue licences. Ministries are exempt from *EBR* consultation and appeal provisions if an instrument is part of a project approved under the *EAA*. Additionally, MNR's policies direct that a detailed ecological risk analysis is only required in exceptional circumstances.

Since 2004, MNR has only posted one aquaculture licence on the Environmental Registry as an instrument proposal – it has used information notices with comment periods for 11 new and amendments to existing licences instead. In March 2010, MNR posted four of these information notices on the Environmental Registry for the reissuance of aquaculture licences in Georgian Bay and around Manitoulin Island (Environmental Registry #010-9601, #010-9363, #010-9362 and #010-9361). In all four cases, MNR classified the aquaculture licences as category A projects – potential for low negative environmental effects and public or agency concern – under its Class EA. Category A projects are intended to include minor administrative procedures, low intensity facility development and routine resource stewardship projects. Furthermore, as identified within the Class EA, public consultation, project evaluation, or environmental study reports are not required for this project classification.

In our 2004/2005 Annual Report, the Environmental Commissioner of Ontario (ECO) criticized MNR for "ignoring the spirit of the *EBR* and failing to provide full public consultation on most … aquaculture licences, despite growing public interest and despite the clear intent of the *EBR*'s O. Reg. 681/94, Classification of Proposals for Instruments." If MNR continued to exempt Great Lakes cage aquaculture from *EBR* instrument requirements, the ECO also encouraged MNR to revise O. Reg. 681/94, after full public consultation and recommended that MNR develop transparent and accountable processes related to approvals. Significant differences exist between regular proposal notices posted on the Environmental Registry and information notices. With regular proposal notices, a ministry is required to consider public comments and post a decision notice explaining the effect of comments on the ministry's decision (for more information on Information Notices, please see Part 9.3 of this Annual Report).

The ECO is seriously concerned that MNR continues to classify cage aquaculture licences in the category of lowest concern, given long-standing public anxiety with cage aquaculture in the Great Lakes and the potentially damaging impacts to the aquatic environment. By MNR classifying cage aquaculture projects as category A, MNR absolves itself of all public consultation requirements when issuing licences, through its Class EA process and through the *EBR*. The ECO is disappointed that – five years later – MNR continues to circumvent the essence of the *EBR*, without a revision to O. Reg. 681/94 or addressing cage aquaculture approval consultation weaknesses. The public deserves better public consultation on cage aquaculture licences in the Great Lakes.

In 2004, MNR identified a forthcoming policy to guide aquaculture on Crown Land in its aquaculture policy statement (FisPo.9.1.1.). Unfortunately, as of March 2010, the MNR has not released its policy for aquaculture on Crown Land for public consultation. MNR has, however reposted a proposal on the Environmental Registry for its Coordinated Application, Review and Decision Guidelines for Cage Aquaculture Sites in Ontario under the *Fish and Wildlife Conservation Act* and regulations. The ECO will report on this decision in a future Annual Report.

Summary of all New Information Notices Posted during the 2009/2010 Reporting Year

Registry Number	Type	Title	Ministry's Rationale for Information Notice	Date Published
Ministry of Energy and Infrastructure				
010-6455	MEI Regulation	Removing Local Barriers to Renewable Energy Installations: Proposed Regulation	Act not prescribed under the *EBR*	May 12, 2009
010-7533	MEI Policy	Renewable Energy Strategic Sourcing Initiative	Inform the public and potentially interested vendors about stimulus funding program	August 17, 2009
Ministry of the Environment				
010-4981	OMAFRA Regulation	Information note concerning proposed amendments to Regulation 347 under the *Environmental Protection Act*	OMAFRA has primary responsibility for the posting of this notice. MOE is using the Registry to draw the public's attention to the notice posted by OMAFRA	April 27, 2009
010-5753	MOE Report	Release of two updates: "Update: Drive Clean Program Emissions Benefit Analysis and Reporting – Light Duty Vehicles and Heavy Duty Non-Diesel Vehicles – 2006, 2007" and "Update: Drive Clean Program Emissions Benefit Analysis and Reporting – Heavy Duty Diesel Vehicles (HDDV) – 2006, 2007"	There is no decision involved with this notice	April 30, 2009
010-6803	MOE Report	The Advisory Council on Drinking Water Quality and Testing Standards' "Report and Advice on the Ontario Drinking Water Quality Standard for Tritium"	MOE is not consulting on the report; report is available for information	June 9, 2009
010-6606	MOE Regulation	Extension of the Ministry of Northern Development and Mines' Declaration Orders.	Notices of extension of MNDM-3 and MNDM-4 are not instruments, policies, Acts or regulations under the *EBR* and are therefore not required to be	June 10, 2009

Registry Number	Type	Title	Ministry's Rationale for Information Notice	Date Published
			posted for public comment	
010-5993	MOE Regulation	Revocation of O. Reg 469/91 made under the *Environmental Assessment Act* and Regulations 358 and 359 of the Revised Regulations of Ontario, 1990	Regulations have either expired or no longer have any practical or legal effect; no impact on the environment	September 1, 2009
010-7792	MOE Regulation	Regulation made under the *Toxics Reduction Act, 2009*	Act was not yet prescribed under the *EBR*	September 18, 2009
010-7777	MOE Report	Health Canada's Consultation on the Canadian Drinking Water Quality Guideline document "Fluoride in Drinking Water"	Inform the public and stakeholders of Health Canada's consultation	September 28, 2009
010-2074	MOE Policy	Community Go Green Fund	Predominantly financial or administrative in nature; not subject to the Notice of Proposal process under the *EBR*	October 19, 2009
010-8173	MOE Instrument	One Year Extension of Nestle Waters Canada's Permit to Take Water to allow for low flow groundwater monitoring in Mill Creek	Amendment has received appropriate and equivalent consultation	November 3, 2009
010-8448	MOE Regulation	General Regulation made under the *Toxics Reduction Act, 2009*	Act was not yet prescribed under the *EBR*	December 4, 2009
010-8295	MOE Act	*Good Government Act, 2009*	Changes would not have a significant effect on the environment	December 15, 2009
010-8762	MOE Instrument	Order under section 3.2 of the *Environmental Assessment Act* declaring the acquisition of, demolition of structures on, maintenance and management of, and disposition of the property at 445 Argyle Street South, Township of Oneida, Caledonia, not subject to the requirements of the	Order has no potential for significant effects on the environment	January 19, 2010

Registry Number	Type	Title	Ministry's Rationale for Information Notice	Date Published
		Environmental Assessment Act		
010-8451	MOE policy	Water Supply Wells – Requirements and Best Management Practices Manual	Not prescribed under the *EBR* for public consultation	January 21, 2010
010-8875	MOE Regulation	Amendments to O. Reg. 253/06 made under the *Environmental Assessment Act* and O. Reg. 254/06 made under the *Environmental Protection Act*, to extend the application of the two regulations provisions by one year for Plasco Trail Road Inc.'s plasma gasification demonstration project	Amendments could not have a significant effect on the environment	February 4, 2010
010-9058	MOE Policy	Electronic Certificates of Approval Library	Notice is to advise the public of library	February 12, 2010
010-8206	MOE Regulations	Revocation of eight regulations under the *Environmental Assessment Act* no longer considered to have any practical effect	Regulations have either expired or no longer have any practical effect ; no significant effect on the environment	February 9, 2010
010-9388	MOE Policy	Rescinding H-4 Research Management Document	Administrative change; does not have an impact on the environment	March 19, 2010
MOE Source Protection Terms of Reference				
010-6336	MOE Instrument	Terms of Reference for the Niagara Peninsula Source Protection Area	Advise public that the document has been approved by the Minister	April 14, 2009
010-6357	MOE Instrument	Terms of Reference for the Upper Thames River Source Protection Area	Advise public that the document has been approved by the Minister	April 20, 2009
010-6358	MOE Instrument	Terms of Reference for the Lower Thames Valley Source Protection Area	Advise public that the document has been approved by the Minister	April 20, 2009
010-6359	MOE Instrument	Terms of Reference for the St. Clair Region Source Protection Area	Advise public that the document has been approved by the Minister	April 20, 2009

Registry Number	Type	Title	Ministry's Rationale for Information Notice	Date Published
010-6560	MOE Instrument	Terms of Reference for the Cataraqui Source Protection Area	Advise public that the document has been approved by the Minister	May 11, 2009
010-6561	MOE Instrument	Terms of Reference for the Catfish Creek Source Protection Area	Advise public that the document has been approved by the Minister	May 11, 2009
010-6562	MOE Instrument	Terms of Reference for the Kettle Creek Source Protection Area	Advise public that the document has been approved by the Minister	May 11, 2009
010-6583	MOE Instrument	Terms of Reference for the North Bay – Mattawa Source Protection Area	Advise public that the document has been approved by the Minister	May 11, 2009
010-6616	MOE Instrument	Terms of Reference for the Essex Region Source Protection Area	Advise public that the document has been approved by the Minister	May 25, 2009
010-6457	MOE Instrument	Terms of Reference for the Halton Region Source Protection Area	Advise public that the document has been approved by the Minister	May 25, 2009
010-6458	MOE Instrument	Terms of Reference for the Hamilton Region Source Protection Area	Advise public that the document has been approved by the Minister	May 25, 2009
010-6607	MOE Instrument	Terms of Reference for the Lakehead Source Protection Area	Advise public that the document has been approved by the Minister	May 25, 3009
010-6715	MOE Instrument	Terms of Reference for the Ausable Bayfield Source Protection Area	Advise public that the document has been approved by the Minister	June 8, 2009
010-6717	MOE Instrument	Terms of Reference for the Greater Sudbury Source Protection Area	Advise public that the document has been approved by the Minister	June 8, 2009
010-6716	MOE Instrument	Terms of Reference for the Maitland Valley Source Protection Area	Advise public that the document has been approved by the Minister	June 8, 2009
010-6877	MOE Instrument	Terms of Reference for the Lakes Simcoe and Couchiching-Black River	Advise public that the document has been approved by the	June 29, 2009

Registry Number	Type	Title	Ministry's Rationale for Information Notice	Date Published
		Source Protection Area	Minister	
010-6976	MOE Instrument	Terms of Reference for the Severn Sound Source Protection Area	Advise public that the document has been approved by the Minister	July 13, 2009
010-6975	MOE Instrument	Terms of Reference for the Nottawasaga Valley Source Protection Area	Advise public that the document has been approved by the Minister	July 13, 2009
010-6980	MOE Instrument	Terms of Reference for the Grand River Source Protection Area	Advise public that the document has been approved by the Minister	July 13, 2009
010-6981	MOE Instrument	Terms of Reference for the Long Point Region Source Protection Area	Advise public that the document has been approved by the Minister	July 13, 2009
010-6993	MOE Instrument	Terms of Reference for the Raisin Region Source Protection Area	Advise public that the document has been approved by the Minister	July 20, 2009
010-6998	MOE Instrument	Terms of Reference for the South Nation Source Protection Area	Advise public that the document has been approved by the Minister	July 20, 2009
010-7405	MOE Instrument	Terms of Reference for the Toronto and Region Source Protection Area	Advise public that the document has been approved by the Minister	August 17, 2009
010-7404	MOE Instrument	Terms of Reference for the Central Lake Ontario Source Protection Area	Advise public that the document has been approved by the Minister	August 17, 2009
010-7403	MOE Instrument	Terms of Reference for the Credit Valley Source Protection Area	Advise public that the document has been approved by the Minister	August 17, 2009
010-7198	MOE Instrument	Terms of Reference for the Saugeen Valley Source Protection Area	Advise public that the document has been approved by the Minister	August 17, 2009
010-7197	MOE Instrument	Terms of Reference for the Northern Bruce Peninsula Source Protection Area	Advise public that the document has been approved by the Minister	August 17, 2009
010-7196	MOE Instrument	Terms of Reference for the Grey Sauble Source	Advise public that the document has been	August 17, 2009

Registry Number	Type	Title	Ministry's Rationale for Information Notice	Date Published
		Protection Area	approved by the Minister	
Ministry of Municipal Affairs and Housing				
010-7254	MMAH Regulation	O. Reg. 230/09	*EBR* does not apply to a proposal to make a Minister's Zoning Order under subsection 47(1) of the *Planning Act*	August 10, 2009
010-7605	MMAH Regulation	O. Reg. 255/09	*EBR* does not apply to a proposal to make a Minister's Zoning Order under subsection 47(1) of the *Planning Act*	August 26, 2009
010-7704	MMAH Regulation	O. Reg. 300/09	*EBR* does not apply to a proposal to make a Minister's Zoning Order under subsection 47(1) of the *Planning Act*	September 8, 2009
010-7703	MMAH Regulation	O. Reg. 231/09	*EBR* does not apply to a proposal to make a Minister's Zoning Order under subsection 47(1) of the *Planning Act*	September 8, 2009
010-8205	MMAH Regulation	O. Reg. 396/09	*EBR* does not apply to a proposal to make a Minister's Zoning Order under subsection 47(1) of the *Planning Act*	October 30, 2009
010-8675	MMAH Regulation	O. Regs. 464/09, 465/09, and 466/09	*EBR* does not apply to a proposal to make a Minister's Zoning Order under subsection 47(1) of the *Planning Act*	January 4, 2010
010-9344	MMAH Regulation	O. Reg. 55/10	*EBR* does not apply to a proposal to make a Minister's Zoning Order under subsection 47(1) of the *Planning Act*	March 12, 2010
Ministry of Natural Resources				
010-6236	MNR Regulation	Ontario Fishery Regulation Changes under the *Fisheries Act* in Fisheries Management Zone 18	Act not prescribed under the *EBR*	April 22, 2009; December 4, 2009
010-6173	MNR Policy	2009 Prescribed Burns	To provide general notice to the public	April 29, 2009
010-6647	MNR Regulation	Ontario Fishery	Act not prescribed	May 15, 2009

Registry Number	Type	Title	Ministry's Rationale for Information Notice	Date Published
		Regulation changes under the *Fisheries Act* for Lake Trout on Lake of the Woods, Kenora District, MNR	under the *EBR*	
010-6945	MNR Report	Five-Year Environmental Assessment Report on Forest Management, April 1, 2003-March 31, 2008	Provide general notice to the public	June 26, 2009
010-7360	MNR Regulation	Impending amendment of O. Reg. 230/08 (Species at Risk in Ontario List) in response to COSSARO report received June 11, 2009	Changes to the Species at Risk in Ontario (SARO) List are mandatory	August 11, 2009
010-7705	MNR Instrument	Water Management Plan for the Minden Lake/Gull River - Review of Draft Plan	Not prescribed under the *EBR*	August 31, 2009
010-8247	MNR Report	Joint Proposal for Lightening the Ecological Footprint of Logging in Algonquin Park, by the Ontario Parks Board of Directors and the Algonquin Forestry Authority Board of Directors	Not a policy proposal or decision	November 6, 2009
010-8465	MNR Policy	Request for additional scientific information to be considered in the development of recovery strategies for five species (Eastern Flowering Dogwood, Ogden's Pondweed, Redside Dace, Deerberry, and Spotted Wintergreen) under the *Endangered Species Act, 2007*	Seeking scientific information relevant to the preparation of recovery strategies for select species at risk	December 8, 2009
010-8464	MNR Policy	Additional time required to prepare recovery strategies for Eastern Pondmussel and Red Knot rufa subspecies under the *Endangered Species Act, 2007*	To provide general notice to the public	December 8, 2009
010-8562	MNR Regulation	A regulatory provision to allow limited time sale and disposal of lake sturgeon	No environmental significance	December 14, 2009

Registry Number	Type	Title	Ministry's Rationale for Information Notice	Date Published
		inventories currently on hand from lawful commercial harvest activities prior to listing of Lake Sturgeon from Great Lakes-Upper St Lawrence River and Northwest Ontario populations as Threatened under the *Endangered Species Act, 2007*		
010-8561	MNR Act	Bill 212, *Good Government Act, 2009*: Schedule 22 – Ministry of Natural Resources	Amendments are predominantly administrative in nature	December 16, 2009
010-8539	MNR policy	Lake Simcoe lake trout stocking program reduction	To provide general notice to the public	December 17, 2010
010-9195	MNR Regulation	Impending amendment of O. Reg. 230/08 (Species at Risk in Ontario List) in response to COSSARO report received December 18, 2009	Changes to the Species at Risk in Ontario (SARO) List are mandatory	February 18, 2010
010-9361	MNR Instrument	North Wind Fisheries Ltd., *FWCA* s. 47(1) – Issuance of an Aquaculture licence for cage culture of rainbow trout at existing operational site	*EBR* does not apply to projects under the Class Environmental Assessment for MNR Resource Stewardship and Facility Development Projects	March 9, 2010
010-9362	MNR Instrument	Cold Water Fisheries Inc., *FWCA* s. 47(1) – Issuance of an Aquaculture licence for cage culture of rainbow trout at existing operational site	*EBR* does not apply to project under the Class Environmental Assessment for MNR Resource Stewardship and Facility Development Projects	March 9, 2010
010-9363	MNR Instrument	Meeker's Aquaculture, *FWCA* s. 47(1) – Issuance of an Aquaculture licence for cage culture of rainbow trout at existing operational site	*EBR* does not apply to project under the Class Environmental Assessment for MNR Resource Stewardship and Facility Development Projects	March 9, 2010
010-9601	MNR Instrument	Aqua-Cage Fisheries Limited, *FWCA* s. 47(1) – Issuance of an Aquaculture licence for	*EBR* does not apply to projects under the Class Environmental Assessment for MNR	March 31, 2010

Registry Number	Type	Title	Ministry's Rationale for Information Notice	Date Published
		cage culture of rainbow trout at existing operation	Resource Stewardship and Facility Development Projects	
MNR *Endangered Species Act* Permits and Agreements				
010-6088	MNR Instrument	Permit under clause 17(2)(c) of the *Endangered Species Act, 2007* for Removal of 22 Butternut Trees by Drain Bros. Excavating Ltd.	Not prescribed under the *EBR*	April 7, 2009
010-6556	MNR instrument	Permit under clause 17(2)(c) of the *Endangered Species Act, 2007* for Removal of two Butternut Trees by the MTO	Not prescribed under the *EBR*	May 1, 2009
010-6679	MNR Instrument	Agreement under section 11 of O. Reg. 242/08 made under the *Endangered Species Act, 2007* in respect of American eel for the operation of the Robert H. Saunders Power Dam	Not prescribed under the *EBR*	May 22, 2009
010-6974	MNR Instrument	Agreement under section 23 of O. Reg. 242/08 under the *Endangered Species Act, 2007* for Removal of one Butternut tree by 4043782 Canada Inc at Forest Creek Estates draft approved plan of subdivision, 2661 Britannia Road (Lowville) Burlington	Not prescribed under the *EBR*	July 3, 2009
010-7068	MNR Instrument	Permit under clause 17(2)(c) of the *Endangered Species Act, 2007* for Removal of one Butternut Tree by Sydenham Holdings Incorporated	Not prescribed under the *EBR*	July 6, 2009
010-7651	MNR Instrument	Permit under clause 17(2)(d) of the *Endangered Species Act, 2007* to allow impact to one endangered species (Eastern Foxsnake) and seven threatened species (Butler's Gartersnake,	Not prescribed under the *EBR*	September 8, 2009

Registry Number	Type	Title	Ministry's Rationale for Information Notice	Date Published
		Dense Blazing Star, Willowleaf Aster, Colicroot, Dwarf Hackberry, Common Hoptree, Kentucky Coffee-tree) during construction of Windsor-Essex Parkway portion of Detroit River International Crossing (DRIC) Project		
010-7754	MNR Instrument	Permit under clause 17(2)(c) of the *Endangered Species Act, 2007* to allow advanced construction works for the Windsor-Essex Parkway portion of the Detroit River International Crossing (DRIC) Project to impact Willowleaf Aster (threatened species)	Not prescribed under the *EBR*	September11, 2009
010-7779	MNR Instrument	Permit under clause 17(2)(c)of the *Endangered Species Act, 2007* for Removal of Butternut trees by Metrus Development Inc. in the Town of East Gwillimbury (Holland Landing)	Not prescribed under the *EBR*	September 11, 2009
010-7920	MNR Instrument	Stewardship agreement made under section 16 of the *Endangered Species Act, 2007* to assist in the recovery of Atlantic salmon (Great Lakes population) in Lake Ontario	Not prescribed under the *EBR*	October 5, 2009
010-8379	MNR Instrument	Permit under clause 17(2) (c) of the *Endangered Species Act, 2007* for Removal of one Butternut tree and the harm of a second Butternut tree by 31 Union Street East Incorporated	Not prescribed under the *EBR*	November 20, 2009
010-8832	MNR Instrument	Permit under clause 17(2) (c) of the *Endangered Species Act, 2007* for removal of two Butternut trees by Spallacci & Sons Limited	Not prescribed under the *EBR*	January 19, 2010

Registry Number	Type	Title	Ministry's Rationale for Information Notice	Date Published
010-9080	MNR Instrument	Agreement under Section 23 of O. Reg. 242/08 of the *Endangered Species Act, 2007* for removal and transplanting of Butternut trees and transplanting and propagation of American Ginseng by the City of Ottawa to enable a road extension	Not prescribed under the *EBR*	March 5, 2010
010-9085	MNR Instrument	Permit under section 17(2)(c) of the *Endangered Species Act, 2007* to allow Metrus Development Inc. to contravene sections 9 and 10 relating to Redside Dace for the purpose of constructing a school and park at Lot 6, Concession 3 WHS in Brampton, ON	Not prescribed under the *EBR*	March 5, 2010
MNR Forest Management Plans				
010-6904	MNR Instrument	Major Amendment to the Martel Forest Management Plan for the period April 1, 2006 to March 31, 2026 – Public Information Centre and 30-day Review	Not prescribed under the *EBR*	June 12, 2009
010-7992	MNR Instrument	Contingency Forest Management Plan for the Cochrane Area Forest for the two-year period April 1, 2010 to March 31, 2012- Review of the Draft Contingency Forest Management Plan	Not prescribed under the *EBR*	October 9, 2009, February 22, 2010
010-8495	MNR Instrument	Contingency Forest Management Plan for the Gordon Cosens Forest for the two-year period April 1, 2010 to March 31, 2012 – Review of the draft Contingency Forest Management Plan	Not prescribed under the *EBR*	December 1, 2009,
010-8655	MNR Instrument	Forest Management Plan for the Whitefeather Forest for the 10-year period April 1, 2012 to March 31, 2022 –	Not prescribed under the *EBR*	December 18, 2009

Registry Number	Type	Title	Ministry's Rationale for Information Notice	Date Published
		Invitation to Participate		
010-9239	MNR Instrument	Major Amendment to the Forest Management Plan for the Lake Nipigon Forest for period April 1, 2006 to March 31, 2011– Public Information Center and 30-Day Review Period	Not prescribed under the *EBR*	February 19, 2010
010-9241	MNR Instrument	Forest Management Plan for the Kenora Forest for the 10-year period April 1, 2012 to March 31, 2022 – Invitation to Participate	Not prescribed under the *EBR*	February 19, 2010
010-9240	MNR Instrument	Forest Management Plan for the Whiskey Jack Forest for the 10-year period April 1, 2012 to March 31, 2022 – Invitation to Participate	Not prescribed under the *EBR*	February 19, 2010
Ministry of Northern Development, Mines and Forests (MNDMF)				
MNDMF Amendments to Mine Closure Plans				
010-6953	MNDMF Instrument	Musselwhite Mine 2009 Closure Plan Amendment	Proposed amendment to the Musselwhite Mine 2005 Closure Plan Amendment	June 23, 2009
010-7696	MNDMF Instrument	Amendment to the Cochenour Wilanour Complex CP	Proposed amendment to the Wilanour Mine Closure Plan 2004 certified June 23, 2000	September 2, 2009
010-7695	MNDMF Instrument	Amendment to the Mishi Pit (April 2002) Closure Plan	Proposed amendment to the Mishi Pit 2002 Closure Plan that was previously posted on the Registry, but has recently been returned to the proponent for re-filing at a later date	December 11, 2009
010-8585	MNDMF Instrument	Kerr Mine Tailings Ponds	This is an Emergency Order to the proponents of the Kerr Mine Tailings Ponds	December 14, 2009
010-8646	MNDMF Instrument	David Bell Mine 2009 Closure Plan Amendment	This is a proposed amendment to the David Bell Mine 1994 Closure Plan	December 22, 2009
010-8670	MNDMF Instrument	Golden Giant Mine 2009 Closure Plan Amendment	This is a proposed amendment to the	January 5, 2010

Registry Number	Type	Title	Ministry's Rationale for Information Notice	Date Published
			Golden Giant Mine Closure Plan submitted in 1997	
010-9229	MNDMF Instrument	Amendment to the Kremzar Mine Closure Plan	This is a proposed amendment to the Kremzar Closure Plan Closure Plan accepted September 1993	February 24, 2010
Ministry of Transportation				
010-6943	MTO Regulation	The Future of Electric Bicycles ("e-bikes") in Ontario	Act not prescribed under the *EBR*	June 26, 2009
010-7257	MTO Policy	Ontario Transportation Demand Management Municipal Grant Program: A Program to Encourage Cycling, Walking, Transit, and Trip Reduction	Announcing the Ontario Transportation Demand Management Municipal Grant Program for 2009-2010	August 5, 2009
010-8200	MTO Policy	Update of Ontario's Transit-Supportive Land Use Planning Guideline	To alert public that the MTO is initiating an update of the guideline; draft guideline will be posted as a proposal notice for public comment, once completed	November 3, 2009

SECTION 3

USE OF EXCEPTION NOTICES

SECTION 3: USE OF EXCEPTION NOTICES

3.1 Use of Exception Notices

In certain situations, the *Environmental Bill of Rights, 1993 (EBR*) relieves prescribed Ontario ministries of their obligation to post environmentally significant proposals on the Environmental Registry for public comment.

There are two main instances in which ministries can post an "exception" notice to inform the public of a decision and explain why it was not posted for public comment. First, ministries are able to post an exception notice under section 29 of the *EBR* when the delay in waiting for public comment would result in danger to public health or safety, harm or serious risk to the environment, or injury or damage to property (the "emergency" exception). Second, ministries can post an environmentally significant proposal as an exception notice under section 30 of the *EBR* when the proposal will be or has already been considered in another public participation process that is substantially equivalent to the requirements of the *EBR* (the "equivalent public participation" exception).

During the 2009/2010 reporting year, 14 exception notices were posted on the Environmental Registry by the Ministry of the Environment (MOE) and the Ministry of Northern Development, Mines and Forestry (MNDMF). MOE and MNDMF together posted 13 exception notices for instruments and MOE posted one exception notice for a policy. In all but one case, MOE and MNDMF relied on the "emergency" exception. The Environmental Commissioner of Ontario (ECO) believes that all notices posted on the Environmental Registry in 2009/2010 were acceptable uses of the exception provisions provided in the *EBR*. For example:

MOE's Use of the "Emergency" Exception:
In June 2009, MOE posted an exception notice on the Environmental Registry for orders issued under the *Environmental Protection Act* and the *Ontario Water Resources Act* to Marathon Pulp Inc. The company filed for bankruptcy and MOE issued work orders to ensure that environmental matters were addressed for a pulp mill, two waste disposal sites and associated industrial sewage works at the site. The ECO believes that MOE's use of exception notices for orders issued to Marathon Pulp Inc. was acceptable.

In July 2009, MOE posted eight exception notices on the Environmental Registry relating to the issuance of emergency Certificates of Approval for temporary waste disposal sites in Toronto under the *Environmental Protection Act*. On June 22, 2009, City of Toronto workers declared a strike which disrupted numerous municipal services, including the collection, transfer and disposal of waste in Toronto. MOE issued temporary emergency approvals for the City's contingency plans for dealing with waste during the labour disruption, such as private waste transfer stations. The ECO believes that MOE's use of exception notices for the emergency waste disposal sites in Toronto was acceptable.

MOE's Use of the "Equivalent Public Participation" Exception:
In August 2009, MOE posted an exception notice for the Wheatley Harbour Area of Concern Remedial Action Plan (RAP) – Stage 3 Report and the publicly supported decision to delist this area of concern, under the Canada-Ontario Agreement (COA) Respecting the Great Lakes Basin Ecosystem. MOE stated that considerable public outreach activities had been undertaken during the life of the Wheatley Harbour RAP since its initiation in 1987, such as the use of public meetings, questionnaires and newsletters. The ECO believes that MOE's use of an exception notice for the Wheatley Harbour Area of Concern Remedial Action Plan – Stage 3 Report was acceptable.

MNDMF's Use of the "Emergency" Exception:
In March 2010, MNDMF posted an exception notice for the issuance of a Minister's direction order for work at the Kerr-Addison mine tailing ponds and dam. The mine tailing spillway and dam were at risk of catastrophic failure and the Minister directed MNDMF staff to do work to prevent, eliminate and improve any adverse effects. Previous to the exception notice, MNDMF had inappropriately posted an information

notice on the Environmental Registry (Environmental Registry #010-8585) for an order issued to the proponents under the *Mining Act* to rehabilitate the mine hazard (for more information, please refer to Section 2 of the Supplement to this Annual Report). The ECO believes that MNDMF's use of an exception notice for the Minister's direction order related to the Kerr-Addison mine tailings ponds and dam was acceptable.

All Exception Notices Posted During 2009/2010 Reporting Year

Registry Number	Type	Title	Ministry's Rationale for Exception Notice	Date Published
Ministry of the Environment				
010-7031	MOE Instrument	Marathon Pulp Inc. (*EPA* s. 17) – Order for remedial work. (*EPA* s. 18) – Order for preventative measures. (*EPA* s. 44) – Order for conformity with act for waste disposal sites. (*OWRA* s. 32) – Order for preventative measures for facilities discharging into water	To protect human health and the natural environment, and to prevent, decrease or eliminate adverse effects, it is important that the work described in this Order be undertaken.	June 26, 2009
010-7396	MOE Instrument	Brydon Waste Transfer Corp. (*EPA* s. 31) – All emergency Certificates of Approval for a waste disposal site	A delay in issuing these emergency approvals may have resulted in a significant risk of harm to the environment, property and public health.	July 30, 2009
010-7407	MOE Instrument	Fenmar Transfer Station and Recycling Inc. (*EPA* s. 31) – All emergency Certificates of Approval for a waste disposal site	A delay in issuing these emergency approvals may have resulted in a significant risk of harm to the environment, property and public health.	July 30, 2009
010-7418	MOE Instrument	Canadian Resource Company Ltd. (*EPA* s. 31) – All emergency Certificates of Approval for a waste disposal site	A delay in issuing these emergency approvals may have resulted in a significant risk of harm to the environment, property and public health.	July 30, 2009
010-7419	MOE Instrument	Can-Sort Recycling Limited (*EPA* s. 31) – All emergency Certificates of Approval for a waste disposal site	A delay in issuing these emergency approvals may have resulted in a significant risk of harm to the environment, property and public health.	July 30, 2009
010-7420	MOE Instrument	Vaughan Transfer and Recycling Inc. (*EPA* s. 31) – All emergency Certificates of Approval for a waste disposal site	A delay in issuing these emergency approvals may have resulted in a significant risk of harm to the environment, property and public health.	July 30, 2009

Registry Number	Type	Title	Ministry's Rationale for Exception Notice	Date Published
010-7423	MOE Instrument	Mavis Waste Transfer Corp. (*EPA* s. 31) – All emergency Certificates of Approval for a waste disposal site	A delay in issuing these emergency approvals may have resulted in a significant risk of harm to the environment, property and public health.	July 30, 2009
010-7425	MOE Instrument	Waste Management of Canada Corporation (*EPA* s. 31) – All emergency Certificates of Approval for a waste disposal site	A delay in issuing these emergency approvals may have resulted in a significant risk of harm to the environment, property and public health.	July 30, 2009
010-7427	MOE Instrument	BFI Canada Inc (*EPA* s. 31) – All emergency Certificates of Approval for a waste disposal site	A delay in issuing these emergency approvals may have resulted in a significant risk of harm to the environment, property and public health.	July 30, 2009
010-7486	MOE Instrument	Superior Fine Papers Inc. (*EPA* s. 18) – Order for preventative measures	In order to protect human health and the natural environment, and to prevent, decrease or eliminate adverse effects, it is important that the work in Order be undertaken as soon as possible.	August 5, 2009
010-7248	MOE Policy	Wheatley Harbour Area of Concern Remedial Action Plan – Stage 3 Report, June 10, 2009	Environmentally significant aspects of the proposal had already been considered in a process of public participation under the *EBR* or any other Act that was substantially equivalent to the process required under the *EBR*.	August 25, 2009
010-8704	MOE Instrument	Inter-Recycling Systems Inc. (*EPA* s. 18) - Order for preventative measures	Delay in giving notice to the public and allowing for public participation would result in: (a) danger to the health or safety of any person; (b) harm or serious risk of harm to the environment; or, (c) injury or damage or serious risk of injury or damage to any property.	December 29, 2009
Ministry of Northern Development, Mines and Forestry				
010-9293	MNDMF Instrument	Minister directs employees and agents to do work to prevent, eliminate and ameliorate adverse effect - *Mining Act* s.148(5)	Delay in giving notice to the public and allowing for public participation would result in: (a) danger to the health or safety of any person; (b) harm or serious risk of harm to the environment; or (c) injury or damage or serious risk of injury or damage to any property.	March 1, 2010
010-9348	MNDMF Instrument	Rancor Wood Recycling Inc. / Randy Harold Corfield.	Delay in giving notice to the public and allowing for public participation would result in: (a) danger to the health or	March 12, 2010

Registry Number	Type	Title	Ministry's Rationale for Exception Notice	Date Published
		Approval for a waste disposal site. - *EPA* s. 27	safety of any person; (b) harm or serious risk of harm to the environment; or (c) injury or damage or serious risk of injury or damage to any property.	

SECTION 4

ECO REVIEWS OF SELECT DECISIONS ON ACTS, REGULATIONS, POLICIES, AND INSTRUMENTS

SECTION 4: ECO REVIEWS OF SELECT DECISIONS ON ACTS, REGULATIONS, POLICIES, AND INSTRUMENTS

Review of Posted Decision:

4.1 Regulations for the Management and Disposal of Deadstock in Ontario

Decision Information:

Registry Number: 010-4842
Proposal Posted: October 20, 2008
Decision Posted: April 27, 2009
Comment Period: 46 days
Number of Comments: 24
Decision Implemented: March 27, 2009

Description

On April 27, 2009, the Ministry of Agriculture, Food and Rural Affairs (OMAFRA) posted a regulation decision notice (Environmental Registry #010-4842) on the Environmental Registry (Registry) entitled "Regulations for the Management and Disposal of Deadstock in Ontario," which describes the options available to the livestock industry for the safe disposal of dead animals.

Background

Every year a small percentage of animals on Ontario farms die before they are used for the production of food or animal products. Of the nearly 215 million animals on Ontario farms – poultry, cattle, swine, sheep, goats, horses, and other species – an estimated 15 million perish annually because of natural causes, inter-animal competition, accidents or disease. Livestock die on farms and during transportation to other farms, auction markets and slaughter houses. Close to 80,000 tonnes of deadstock annually requires proper treatment. Safe disposal of livestock mortalities contributes to a healthy clean environment.

In our 2002/2003 Annual Report, the ECO said that unsafe deadstock disposal can compromise food safety, pose animal and public health risks, and contaminate soil, surface and groundwater and recommended that OMAFRA develop financial support programs for deadstock disposal and alternative approaches for safe disposal of deadstock. The ECO also recommended that the Acts regulating deadstock disposal be prescribed under the *Environmental Bill of Rights, 1993* (*EBR*) so that Ontarians have the opportunity to raise their concerns about the improper handling of dead animals through the Registry.

Until March 2009, the *Dead Animal Disposal Act, 1990 (DADA)* and Regulation 263 (Reg. 263) under the Act was OMAFRA's primary mechanism dictating deadstock disposal practises. *DADA* and Reg. 263 offered three disposal methods for only five species (cattle, swine, sheep, goats, and horses) that had died from any cause other than slaughter. Unless refrigerated, the carcass had to be disposed of within 48 hours of its death by:

1) burying it under at least two feet of soil
2) having it picked up by a provincially licensed collector
3) composting it under at least 60 centimetres of biodegradable material, such as sawdust

Up until a relatively few years ago, to deal with a dead animal on his or her farm an Ontario farmer would have preferred to pick up the phone and call a licensed deadstock collector. Collectors would hand farmers a reasonable payment for the deadstock and then they would make a profit by selling the animals to a rendering plant where the dead animal was processed to yield fat and other substances that can be used in products such as animal feed or soap bars. That meant that an animal, dead or alive, would eventually bring some money to the farmer.

When mad cow disease was found in Canada, dead animals turned from a source of income for farmers, collectors, and renderers to a liability. Because rendering does not destroy prions, the agents believed to cause transmissible spongiform encephalopathy diseases, rendering products began losing market share. Avian flu and swine flu only compounded the problem and strained the relationship between livestock producers and the rendering industry even more. Renderers began charging collectors for taking the dead animals and these costs were passed on to the farmers. The new reality meant that when an animal died, the farmer had to face costs if he or she was to dispose of it through the services of a licensed collector.

Recognizing the challenge to the industry, OMAFRA put transitional funding measures in place. From 2003 to 2008 the Ontario government provided close to $20 million to support an affordable deadstock collection system in Ontario. Transitional funding, as its name suggests, was a temporary measure. The government subsidy would continue, said the Minister of Agriculture, Food and Rural Affairs in Question Period on February 22, 2006, until a more sustainable plan for managing deadstock was in place.

The same year the first instalment of transitional funding was given out, OMAFRA created the Provincial Management Advisory Committee (PMAC), comprised of stakeholders from the agricultural, municipal and environmental sectors. From July 2003 to spring 2004, PMAC reviewed options for the on-farm disposal of dead farm animals. On October 30, 2006, producer organizations, deadstock collectors, renderers, environmental groups and other stakeholders attended OMAFRA's information session on options for deadstock disposal. On February 20, 2008 – a few months before Ontario farmers would bring dead animals to the provincial Legislature to demand continued funding for deadstock disposal – OMAFRA posted a regulation proposal notice (Environmental Registry #010-4842) on the Registry inviting Ontarians' comments on a new framework regulating deadstock. During the proposal posting period, OMAFRA held stakeholder sessions in various locations in the province on the content of draft regulations.

Explaining that its intention is to provide greater flexibility to the livestock industry and also to minimize food safety risks and animal, human, and environmental health risks, OMAFRA posted the regulation decision notice on April 27, 2009 describing the new deadstock disposal regulatory framework:

- *The Dead Animal Disposal Act, 1990 (DADA)* has been repealed and Regulation 263 under the Act has been revoked; they have been replaced with the following two new regulations:
  - The Disposal of Deadstock Regulation (O. Reg. 105/09) under the *Food Safety and Quality Act, 2001 (FSQA),* governs the off-farm management and disposal of deadstock.
  - The Disposal of Dead Farm Animals Regulation (O. Reg. 106/09) under the *Nutrient Management Act, 2002 (NMA)* provides for the on-farm management and disposal of dead farm animals.
- In addition, O. Reg. 110/09 under the *Environmental Protection Act, 1990 (EPA)* amends Ontario Regulation 347 – General - Waste Management Regulation, removing deadstock as a defined waste under that regulation. This completes the new deadstock-disposal regulatory framework.

Off-farm Disposal (FSQA):
Ontario Regulation 105/09 sets out the standards and requirements for transport, management, and disposal of deadstock off-farm. The regulation expands the list of species to which the standards apply to include, among others, poultry, ponies and donkeys, ratites and rabbits, and alternative livestock, such as alpaca, bison, deer, and llamas. It prohibits the processing of deadstock as food for human consumption and provides additional options for the disposal of deadstock for off-farm custodians – i.e., persons responsible for the care of and having control over an animal that is deadstock immediately before the animal died. These options are:

1) using the services of a licensed collector;
2) delivering it to a disposal facility, i.e., a transfer station, salvaging facility, rendering facility, or composting facility, the operator of which has a license under this regulation to operate such a facility;

3) delivering it to a farm operator;
4) delivering it to an approved waste disposal site;
5) delivering it to a veterinarian for a post mortem activity.

The regulation also sets out the six types of licences that may be issued under the regulation and the licensing requirements for collectors, brokers, salvaging facilities, transfer stations, composting facilities, and rendering facilities. Collectors need licences to transport, receive, and handle regulated dead animals or composting material from dead animals. Brokers need licences to obtain meat from another broker or a disposal facility, to denature, package and label such meat, and to receive, store, handle, distribute or sell said meat. Salvaging facilities need licences to receive, handle or store regulated dead animals for salvaging purposes. That is, processing regulated dead animals into saleable raw products such as raw meat and fat or feeding such animals to captive wildlife. Transfer stations need licences to receive, store or handle dead animals, to organize dead animals into lots for transfer, or to sell or otherwise dispose of such animals from the transfer station. Composting facilities need licences to receive, handle, store, sell or otherwise dispose of regulated dead animals, composting material or cured compost. Rendering facilities need licences to receive, handle or store dead animals for rendering purposes. That is, processing deadstock into products such as fat and protein meals. Licences issued under this regulation must be renewed every three years.

The regulation requires that collectors, brokers, and disposal facility operators keep records for three years. Additional record-keeping requirements are stipulated for composting facilities.

The regulation also sets out a number of rules for central composting facilities. Such facilities may receive up to a million kilograms of regulated dead animals, composting material and cured compost per year, may not hold more than 9,000 cubic metres of such material at one time and must keep such material on pads or soil that provide specific permeability and durability requirements, and are specific minimum distances from lot lines, highways, residences, and water sources.

Under the regulation, a director may exempt a custodian or a licencee from the regulation provisions in emergencies with a view to securing food quality and safety.

On-farm Disposal (NMA):
Ontario Regulation 106/09 sets out the requirements for on-farm management and disposal of dead animals. As with O. Reg. 105/09, the regulation expands the list of species to which the standards apply to include, among others, poultry, ponies and donkeys, ratites and rabbits, and alternative livestock, such as alpaca, bison, deer, and llamas. It also expands the list of options for producers, who can now dispose of deadstock on the farm by:

1) burying it
2) incinerating it
3) using disposal vessels
4) composting it, or

remove deadstock from their farm by:

1) using the services of a licensed collector, or
2) delivering it themselves to licensed deadstock disposal facilities, waste disposal sites approved under the *EPA*, or a veterinarian for post mortem activities
3) delivering it to an anaerobic digester

The regulation sets out location requirements, maximum weight of deadstock, and minimum distances from lot lines, highways, residences, drainage tiles, and water sources for burial pits, on-farm incinerators, on-farm composting sites and disposal vessels. It also sets out on-farm composting requirements, collection requirements, and deadstock, composting material and regulated compost transportation requirements. Under the regulation, farm operators are required to keep records of deadstock disposal and regulated compost application for two years.

The regulation gives the power to a director to exempt a producer from the regulation provisions in emergencies with a view to maintaining the sustainability of an agricultural operation and avoiding the discharge of materials containing nutrients into the natural environment.

Ontario Regulation 110/09:
In order to harmonize the new deadstock regulations, O. Reg. 110/09 amends Reg. 347. The amendments clarify that activities relating to the disposal of dead animals under the new framework are exempt from waste disposal requirements under Part V of the *EPA* and Reg. 347.

Implications of the Decision

OMAFRA's new regulatory framework is an effort to help farmers deal with the new economic reality created in the wake of the mad cow disease crisis. It increases the number of options livestock producers can use to deal with deadstock. The framework is also geared toward environmental protection by enshrining requirements for disposal methods into legislation.

The analysis below explains how the new framework, despite the increased number of deadstock disposal options it provides, burdens farmers with their costs and by doing so, increases risks to the environment.

The Landfill Option:
One of the easiest and the least costly legal disposal option for deadstock is landfilling. Collecting and rendering have become expensive, but it is unclear whether farmers will turn in greater numbers to the other options provided by the new regulatory framework because they, too, involve substantial costs. Disposal vessels and incineration are expensive. Composting requires very good management and close observation of the process, placing demands on the limited time of farmers. On-farm burial is constrained by climate, soil type and groundwater considerations. In summary, the deadstock-management options that farmers now have at their disposal involve greater effort on their part and/or new equipment costs. Given these economic, place, and time-constraint barriers, landfilling might appear to be a cheaper legal alternative. This possibility is enhanced by the fact that, under the *DADA,* farm owners were only allowed to dispose of animals off-farm through the services of a licensed collector, while under O. Reg. 106/09, the farm operator has the authority to deliver their dead animals to approved waste disposal sites. Economic, place, and time-constraint factors in other words, tend to mitigate against the on-farm disposal options provided in the framework.

Illegal Dumping:
The difficult economics of deadstock management raise other environmental concerns. Quite often it is at the discretion of the landfill operator whether dead animals will be accepted at the landfill or not, so this form of disposal may not be an option in some areas. Also, tipping fees, which may vary considerably, may render the trip to a landfill not worth it. High landfill fees, high fees by collectors, and difficult or expensive on-farm options, all without government financial support, could potentially combine to create the conditions for illegal dumping, with its associated risks to health and the environment.

Environmental Implications of On-Site Disposal Options:
The new regulatory framework provides an array of options for deadstock disposal on the farm, from incineration and burial to composting and disposal vessels. The decentralization of the process, however, does not come with a guarantee that all farmers will comply with the new regulations. Non-compliance by some farmers could create localized pollution problems, invisible to regulators and the public and resulting in soil, surface water and groundwater contamination.

Inspections and Enforcement:
Under the old regulations, OMAFRA was solely responsible for enforcing the *DADA*. Under section 15 of the *DADA*, inspectors appointed by the Minister and directors could enforce the Act by inspecting farms and requesting records and under section 27 of Reg. 263. Inspectors could inspect vehicles used in the transportation of dead animals and receiving or rendering plants.

Under the new regulations, OMAFRA shares the responsibility of enforcing the new regulatory framework with MOE. The above provisions are found under Part IV of the *FSQA* and Part IV of the *NMA*. OMAFRA is solely responsible for the administration of the *FSQA* as it relates to matters of deadstock disposal, while it shares responsibility with the Ministry of Environment (MOE) for the administration of the *NMA.* With regards to deadstock matters, MOE has the lead on the *NMA* and performs the inspections on the farm. A complaint that deadstock has not been disposed of, according to the regulations, is filed with MOE. An MOE Agricultural Enforcement Officer visits the farm for an inspection and, if corrective action is required, determines whether the use of abatement or enforcement tools is warranted.

This process occurs outside the public eye. Improperly disposed of deadstock could be contaminating soil, surface and groundwater but Ontarians do not have the means to be informed of such violations and their potential environmental or health consequences.

Environmental Bill of Rights, 1993 and the Role of the Public in the Decision-making Process:
The decentralized process of disposing deadstock could result in the diminished capacity of the ministries to adequately monitor deadstock disposal activities, increasing the need for public input, scrutiny and participation. Unfortunately, the public does not have the ability to use the *EBR* to request investigations of alleged contraventions of the regulations that govern the safe disposal of animal mortalities.

As of April 2010, Ontarians cannot yet use the *EBR* to ask the ministry to review the *FSQA and* O. Reg. 105/09. However, OMAFRA has been working towards prescribing the *FSQA* under the *EBR* (Section 8 of this Supplement). On January 27, 2010, regulation proposal notice (Environmental Registry #010-8535) to amend O. Reg. 73/94, which specifies which ministries, Acts and regulations are subject to the different provisions of the *EBR,* was posted on the Registry. If implemented, the amendment will prescribe matters related to the disposal of deadstock, generally, and amendments to or the replacement of O. Reg. 105/09 for the purposes of posting of regulations and for whistle blower provisions under the *EBR*.

Off-farm disposal under the *FSQA* involves licences, including licences to operate a transfer station, salvaging facility, composting facility, and rendering facility. Such licences clearly fall under the definition of instruments under the *EBR.* Siting of any of the facilities mentioned above can have important environmental consequences and can affect plant, animal and human health. Because OMAFRA is not proposing to classify *FSQA* instruments under the *EBR* the public will not have the opportunity to comment on them through the Registry or appeal ministry decisions on such instruments, limiting their right for public participation when environmentally significant decisions are made.

Because the *NMA* has been prescribed under the *EBR* only for reviews, Ontarians are not given the right to use the *EBR* to apply for an investigation when a member of the public observes unlawful behaviour by a farmer who contravenes O. Reg. 106/09 as it relates to the disposal of dead animals on a farm. Ontarians are also deprived of their right to sue for causing harm to a public resource or over a public nuisance.

Major Scale Emergency:
In a minor scale emergency, such as a barn fire, Part IX of O. Reg. 105/09 and Part VI of O. Reg.106/09 give the power to an OMAFRA director to authorize an applicant to store, dispose of, transport or otherwise deal with deadstock in a manner that would not otherwise be permitted under these regulations.

In a major scale emergency, under Part V, section 29 of the *EPA*, the Minister of the Environment has the authority to act in the public interest and require municipalities to accept dead farm animals at their disposal sites. Municipalities, in this case, would have to cooperate. As of January 1, 2010, in Ontario there were over 1.7 million cattle, 2.9 million hogs, and 0.2 million sheep. Ontario is also the largest chicken producer in Canada with about 200 million chickens, or one third of the total country production, in 2008. It is unclear whether municipal landfills would have the capacity to manage this kind of situation.

The H5N1 avian influenza began in China in 1996. The foot-and-mouth disease epidemic began in the United Kingdom in 2001. The H1N1 swine flu epidemic began in Mexico in 2009. In each of their wakes, huge numbers of animals had to be destroyed to minimize the spread of viruses. During the course of the foot-and-mouth disease outbreak in the U.K., about six million sheep, cattle, and pigs had to be destroyed. Closer to home, 19 million poultry had to be destroyed and disposed of during the avian flu outbreak in British Columbia in 2004, amidst residents blocking entrance to local landfills to halt plans to dispose of diseased deadstock near their communities and municipal officials criticizing the provincial government for lack of consultation with local authorities.

The Ontario government has signed an emergency response plan with the federal government in the event of a major disease outbreak. (See "Other Information" section below.)

Public Participation & *EBR* Process

Public consultation on the proposal for this decision was provided for 46 days, from October 20, 2008 to December 05, 2008. As was noted above, OMAFRA held five stakeholder consultation sessions during the same period in Guelph, Kingston, London, Verner and Alfred. As a result of posting the proposal on the Registry, the ministry received a total of 24 comments. The following is a summary of the main points raised by the commenters.

Funding

The shift in the economics of the deadstock disposal since the bovine spongiform encephalopathy (BSE) crisis has been a primary concern among stakeholders who submitted comments on the Registry.

- A number of commenters asked that the government provide financial support to deadstock collectors. They also requested mandatory government-funded pick-up of dead animals that contain Specified Risk Materials (tissues that, in infected cattle, typically contain the agent that causes BSE).
- One poultry producer asked that OMAFRA and MOE fund the development of a central incineration unit for rural Ontario farmers.
- The Association of Municipalities of Ontario (AMO) expressed concern with the removal of the provincial transitional funding for deadstock collectors. The cost of having the carcasses of dead farm animals picked up by collection companies is higher now for livestock producers. The AMO claims this will leave livestock producers with two options: manage the carcass on-site or deliver it to the nearest landfill. The AMO believes that this practice will exacerbate the problem of limited landfill capacity that municipalities are facing and will raise landfill operational costs.
- Some commenters asked the government to make impacted farms and all on-farm mortality disposal options eligible for funding from financial assistance programs to assist producers make the transition to full compliance with the dead animal disposal requirements

OMAFRA replied that funding is not part of the regulations and no changes were required to address the issue.

Record-keeping Requirements

A few commenters expressed concern about the record-keeping requirements, which they described as burdensome and time-consuming. They asked that OMAFRA do away with the requirement for the farmer's three-year record-keeping for animals that are disposed of off-farm and instead require that such records be kept for one year only. In response, OMAFRA changed the requirement to two years.

Composting

Some commenters asked for more flexibility with regards to off-farm transfer of composted mortalities, saying that it is not always possible for the composted material to remain on the farm. Subsection 15.(2) was added to the final O. Reg. 105/09, permitting the move of regulated compost from the land on which

it was composted to other land owned by the operator, i.e., the person who owns or controls a farm operation.

One commenter thought that farm operators who compost deadstock on-farm were allowed to remove compost from the site where it was composted only after bacteriological testing. OMAFRA was asked to remove the requirement, as it would add significant costs for on-site composting. It must be noted that bacteriological testing requirements as set out in sections 78 and 79 of the O. Reg. 105/09 do not apply to on-site composters but to approved composting facilities.

One commenter asked that on-farm composting disposal sites should be allowed to hold more that the proposed maximum of 600 cubic metres of composting material or regulated compost and have a footprint bigger than the proposed maximum footprint of 600 square metres. OMAFRA did not change the requirement. The commenter also asked for the removal of the proposed 100-metre minimum distance between composting sites. The ministry approved the request provided that composting takes place in fully enclosed structures; otherwise, the 100-metre requirement stays.

Deadstock as Source of Renewable Energy

The Cement Association of Canada brought forward its potential role in managing by-products from the animal harvesting industry by using rendered products as alternative renewable fuel in cement kilns, "a practise which provides options for the disposal of Specified Risk Materials and deadstock while improving environmental performance and economic competitiveness of Ontario's cement manufacturers," as they said. OMAFRA did not make any changes to the regulations to address this issue and responded that rendered products that become unsaleable after leaving a rendering facility are a waste and are regulated under the *EPA.*

Dwindling Landfill Capacity

The AMO expressed concern regarding the authority given the Minister of the Environment to require a municipality to accept agricultural waste, dead farm animals, and composted material from dead animal composting facilities if it is in the public interest. The AMO stated that there is not enough landfill capacity to accept large amounts of such waste. The AMO was also concerned with the ability of the government to manage potentially enormous amounts of deadstock due to an emergency situation and expressed their misgivings that this part of deadstock management was going ahead before the government had finalized their emergency plan. OMAFRA responded that ministerial discretion would ensure proper management of this material in an animal health emergency and did not make any changes with respect to these comments.

Definition of "Custodian"

The Ontario Livestock Auction Market Association asked that auction market operators be excluded from the definition of 'custodian' under section 1(1) of O. Reg. 105/09. The definition states that the term 'custodian' refers to a person who was responsible for and had control over an animal immediately before the animal died. The Association claimed that the new regulatory framework "may very well drive more livestock which are dead or disabled into auction markets in order to avoid the cost of disposal." The Association asked that the definition of 'custodian' be restricted to the producer and transporter only. OMAFRA did not grant the request.

Burial

Some commenters expressed concerns over the on-farm burial requirement that the lowest point of a burial pit must be at least two metres above the top of the uppermost identified bedrock layer or aquifer. They stated that bedrock in some areas is just below the surface of the soil. OMAFRA responded by changing the requirement to 0.9 metres. Commenters also brought up the issue of the abundance of abandoned gas and oil wells in Ontario, which will make the burial pit requirement for a minimum distance from various types of wells very hard to meet. Indeed, the undocumented location of an estimated 30,000

such wells in Ontario may result in some Ontario farmers being out of compliance with section 10(5) of O. Reg. 106/09, which stipulates that burial pits must be specific minimum distances from wells. OMAFRA did not change the requirements.

Too Many Regulations

One commenter appeared to be frustrated with the new regulatory framework, stating "I have found the easiest way to deal with deadstock is to sell off all of my animals and not raise anymore." The commenter also said that Ontario farmers compete against imported meat from jurisdictions with almost zero regulations. Another commenter argued against the regulatory framework saying that it seems reasonable for nature to deal with some of the deadstock. The commenter used the example of coyotes disposing of a deer that dies on their field. The commenter felt that the government is burdening the farmers with regulations and that "this is one of the reasons farmers are becoming a dying breed." OMAFRA did not specifically address these comments. It offers, though a generic statement on the registry, that the new framework maintains the protection of the environment, animal health and food safety.

Just the Right Number of Regulations

Some commenters were enthusiastically in favour of the new regulatory framework. The Ontario Federation of Agriculture welcomed the inclusion of more farmed animal species and the additional disposal options. The Ontario Independent Meat Processors Association applauded the proposed regulatory framework stating that it should prevent meat from deadstock from entering the food chain and that it would help sustain their industry.

SEV

In June 2009, OMAFRA stated that the ministry took into consideration its Statement of Environmental Values in deciding to post the proposed regulation of the Registry for comment. OMAFRA also said that most comments received were very supportive of the proposed regulations and that some comments proposed changes that were taken into consideration in finalizing the regulation. Finally, OMAFRA also said that the standards for the management and disposal of deadstock created a system that is workable and sustainable for the livestock industry while ensuring the protection of the environment.

Other Information

Canada and the Province of Ontario's Foreign Animal Disease Emergency Response Plan

The purpose of the Canada and the Province of Ontario's Foreign Animal Disease Emergency Response Plan is to describe the roles of the key primary and supporting government agencies to deal with a foreign animal disease outbreak in Ontario.

The Canadian Food Inspection Agency is the primary federal agency. OMAFRA, the Ministry of Municipal Affairs and Housing and Emergency Management Ontario are the primary supporting provincial agencies.

The plan identifies four functional areas: Mitigation and Prevention, Preparedness, Response, and Recovery. The activities and programs of the third functional area, Response, are designed to address the immediate and short term effects of the emergency, i.e., the disposal of infected, exposed and dead animals. In case of a foreign animal disease outbreak there are protocols in place that will call for the destruction of all potentially infected and exposed animals within a specified geographic area. Disposal of the likely huge numbers of euthanized animals will be a major issue.

The plan does not provide step-by-step direction for individual agencies. It is an overarching framework which seeks to coordinate the response of a multitude of agencies from various levels of government and industry. The specific response to the disposal of the affected animals will be based on local

infrastructure. Legislative authority for disposal falls to provincial and local governments. They are critical participants in developing and approving disposal plans.

Standard operating procedures that will describe specific steps must be developed by each agency. The only provision of the new regulatory framework of deadstock disposal in Ontario that is relevant to a massive scale emergency is section 29 of the *EPA* that allows the Minister of the Environment to ask municipalities to accept agricultural waste and deadstock in their landfills when it is in the public interest to do so.

However, landfill capacity in Ontario is dwindling. Ontario will most likely have to dispose of deadstock in its own landfills only as it will be highly unlikely that other jurisdictions (e.g., other provinces or the U.S.) will accept it.

ECO Comment

The ECO is pleased with OMAFRA posting the current deadstock regulations on the Environmental Registry although they were not required to do so.

The ECO is pleased to see that OMAFRA continues to develop alternatives to on-farm burial of deadstock as was recommended in our 2002/2003 Annual Report.

The potential for more on-farm burials and other forms of disposal will place an increased responsibility on OMAFRA and MOE to carry out inspections and enforcement, to ensure that deadstock is properly disposed of, both on- and off-farms across Ontario. The ECO believes that in this situation, stronger public input, scrutiny, and participation is called for.

The ECO urges that both the *NMA* and the *FSQA* be prescribed for the full gamut of rights under the *EBR*. The ECO finds it disappointing that Ontario residents continue to have limited opportunities to use the *EBR* if they have concerns about the siting of facilities for the disposal of dead farm animals or the treatment of deadstock by farmers on individual farms.

The regulatory framework under the *NMA* and the *FSQA* is designed to address routine livestock mortalities as well as small scale emergencies such as barn fires. Large scale emergencies (such as disease outbreaks) will be managed under the Foreign Animal Disease Emergency Response Plan. The ECO urges OMAFRA and MOE to ensure that detailed roles and responsibilities under this plan are developed promptly and clearly conveyed to all participating agencies and stakeholders.

Review of Posted Decision:

4.2 *Green Energy and Green Economy Act, 2009*

Decision Information:

Registry Number: 010-6017
Proposal Posted: February 24, 2009
Decision Posted: January 14, 2010
Comment Period: 30 days
Number of Comments: 674
Decision Implemented: May 14, 2009

Description

Overview

On May 14, 2009 Ontario's energy policy landscape underwent a fundamental transformation. With the passage of the *Green Energy and Green Economy Act, 2009* (*GEGEA*), the government put in place a policy framework that has the potential to significantly shift Ontario towards a "greener" energy path. The

GEGEA is a wide-reaching piece of legislation that not only enacted the stand-alone *Green Energy Act, 2009* (*GEA*), but also amended 18 statutes and repealed two others. The *GEGEA* represents a major change to the institutional and regulatory framework for electricity and renewable energy initiatives in the province and, while establishing policy at a high level, its full implementation will require significant regulatory and policy changes over the next few years.

Background

In order to reduce greenhouse gases and other air emissions, the Ontario government has committed to phasing-out the use of coal to generate electricity. Since 2003, coal-fired generation has decreased and the government's goal is to eliminate coal as a fuel source by the end of 2014. To both offset the loss of coal, as well as to shift the province towards a greener energy mix, various policies and programs have been implemented over the years to help facilitate the development of electricity generated from renewable sources. In the recent past, programs offered by the Ontario Power Authority (OPA − the province's electricity planning and procurement agency) have included the Renewable Energy Standard Offer Program, the Northern Hydroelectric Initiative and the Renewable Energy Supply III program.

In August 2007, the Ontario government released its Climate Change Action Plan (Plan) which not only reiterated the government's commitment to phase-out coal, but also established targets for greenhouse gas emissions for 2014, 2020 and 2050. As well, the Plan stated that coal would be replaced by a "mix of energy from clean, renewable sources such as hydro, biomass, wind and solar" and that the "government's energy plan [would] result in a 50 per cent increase in clean renewable electricity capacity by 2015".

Along with the laudable goal of reducing provincial greenhouse gas emissions, a further driver for change in this area is the perceived need to replace or refurbish a significant portion of Ontario's electricity infrastructure over the next 20 years. According to the OPA, 25,000 megawatts (MW) of the province's overall current generation capacity of 35,485 MW will either need to be rebuilt, conserved or replaced within this timeframe.

The underlying goals of the *GEGEA* are to: stimulate the economy; improve the environment by reducing greenhouse gas emissions; and transform the electricity infrastructure in Ontario. Key elements of the *GEGEA* are designed to facilitate the development of renewable electricity generation, promote increased energy conservation and efficiency, and enhance the capability of the electricity grid to effectively transmit and distribute energy across the province. The government predicts that new investments in clean energy will result in economic growth, and that 50,000 jobs will be created over three years as the Act is implemented.

The *GEGEA* was introduced as Bill 150 on February 23, 2009 and received Royal Assent less than three months later on May 14, 2009. The Act is comprised of 12 schedules each of which were substantially in force as of March 2010, including Schedule A which enacted the *GEA*. The only key provision not yet proclaimed in force as of August 2010 is section 3 of the *GEA* which gives purchasers a right, unless waived, to home energy efficiency information from the seller.

Promoting Renewables

The *GEGEA* contains several key initiatives that are designed to promote the development of renewable energy generation in Ontario. Along with changing the electricity procurement rules by requiring the development of a Feed-in Tariff program, the *GEGEA* also laid the groundwork for a streamlined approvals process for renewable energy projects, as well as the development of a smart grid in Ontario.

Feed-in Tariff Program:
One of the key tools contained within the *GEGEA* to promote renewable energy generation was the commitment to move forward with a Feed-in Tariff (FIT) program. While Ontario's other programs, such as the Renewable Energy Standard Offer Program (RESOP), were extremely successful in generating applications for renewable energy projects, several barriers that prevented both actual project

development and the participation of community groups became evident between 2006 and late 2008. As a result, the RESOP program was reviewed with the goal of designing a FIT program that would address the identified hurdles.

Similar to a standard offer program, a FIT is a policy tool that is designed to encourage the wide-spread adoption of renewable energy sources. There are two key elements of a FIT program that enhance the expansion of renewable energy. The first focuses on grid access and ensures that renewable energy producers are guaranteed a connection to the grid. The second focuses on the price such that the amount received for the electricity produced is set at a level, and for a period of time, that guarantees a reasonable return on investment. The overall goal of a FIT program is to provide a stable environment so as to increase investor confidence and investment in renewable energy projects.

Schedule B of the *GEGEA* amended the *Electricity Act, 1998* and gave the Minister of Energy and Infrastructure the authority to direct the OPA to develop a FIT program which includes both of these key elements. Along with stimulating the growth of renewable energy other policy objectives, such as creating jobs and increasing the participation of local communities in renewable projects, were incorporated. As such, further amendments to the *Electricity Act, 1998* allow the Minister to set minimum Ontario content requirements, and to direct OPA to facilitate participation by community and Aboriginal groups in the development of new renewable energy projects.

In order to ensure that renewable energy projects have access to the grid, key changes were also made under the *GEGEA* to the *Electricity Act, 1998* granting renewable projects both a right to connect and priority access to the electricity grid. Under a new section 25.36, transmitters and distributors must connect a renewable energy generation facility if the connection request is made in writing and the "applicable technical, economic and other requirements" have been met. A new subsection was also added to section 26 granting "priority connection access" to transmission and distribution systems for renewable energy generators.

A Streamlined Process for Renewable Energy Approvals:
Schedule G of the *GEGEA* contained a second key tool designed to encourage the rapid development of renewable energy generation. Pursuant to this schedule, Part V.0.1 was added to the *Environmental Protection Act* (*EPA*), creating a new class of approvals for renewable energy projects. Four months later, Ontario Regulation 359/09 – Renewable Energy Approvals, was brought into force and established a new, streamlined approvals process which must be followed to proceed with a renewable energy project. (To see the ECO's review of O. Reg. 359/09, please see section 4.11 in this Supplement.)

Along with the addition of a new class of approvals, the appeals section of the *EPA* was also amended to provide third parties with a direct right to appeal renewable energy approvals (REAs). This amendment, which affords an appeal right similar to that available to residents who wish to challenge municipal zoning by-laws under the *Planning Act*, is a change from the *Environmental Bill of Rights, 1993* (*EBR*) leave to appeal provision. Accordingly, rather than being required to apply for leave to appeal, any resident of Ontario may, within 15 days of an REA decision notice being posted on the Environmental Registry, request a hearing before the Environmental Review Tribunal (ERT).

A second change relates to the test that must be met by the appellant. Under the *EBR*, leave to appeal would be granted where an appellant could show that no reasonable person could have made the decision and that "significant harm to the environment" could result from the decision to issue an approval. Under the amended *EPA*, there is no longer a requirement to show the decision to grant the approval is unreasonable, however a higher level of harm must be established. In particular, the grounds upon which a person can request an ERT hearing are limited and the appellant must demonstrate that the project will cause "serious harm to human health, or serious and irreversible harm to plant life, animal life or the natural environment." If the ERT determines that the project will cause the alleged harm, it has the power to either revoke or alter the decision, or order MOE to take further action.

In order to facilitate the development of renewable energy projects, section 11(1) of the *GEA* established a Renewable Energy Facilitation Office (REFO) within the Ministry of Energy and Infrastructure (MEI) to

serve as a first point of contact for project proponents and help guide them through any required approvals processes, including the new Renewable Energy Approvals process established by O. Reg. 359/09. The stated objectives of the office are to facilitate the development of renewable energy projects, to assist proponents with satisfying approval requirements which may exist provincially and federally and to provide proponents with information "in respect of interactions with local communities."

Smart Grid:
At present, the Ontario power grid primarily serves as a mechanism for moving electricity in a one-way direction from generators to consumers. A smart grid, on the other hand, is defined as a "two-way system that monitors and automatically optimizes the operation of the interconnected elements of the power system – from the generator through the high-voltage network and distribution system, to end-use consumers and their thermostats, appliances and other household devices." By using advanced information-based technologies, smart grids have the capacity to increase grid efficiency, reliability and flexibility, with benefits for both consumers and the environment.

The technologies underlying a smart grid can both facilitate the amount of renewable energy fed onto the grid, as well as contribute to conservation efforts. Given that wind and solar both generate electricity on an intermittent basis, smart grid technologies will need to accommodate this variable generation in order to balance supply and demand on the electricity grid. As well, as the number and distribution of smaller generators (such as small scale solar and wind) increases, the operational challenges of incorporating increasingly diverse energy resources will correspondingly grow.

From a conservation perspective, the Ontario Smart Grid Forum asserts that a smart grid can provide enhanced information to consumers which will allow them to "gain greater control over their electricity usage to lower costs, improve convenience and support growing environmental awareness." When combined with time-of-use pricing, the installation of smart meters (which provide consumers with timely information on price and consumption), is an initial key step towards realizing the full conservation potential of a province-wide smart grid.

Through the *GEGEA*, amendments were made to the *Electricity Act, 1998* to grant new powers to Cabinet to regulate the development of a smart grid, to assign responsibilities for its development, and to prescribe communication standards which may be required. As of March 2010, draft smart grid regulations had not yet been released under the *Electricity Act, 1998*. Several Ontario distributors, transmitters and the Independent Electricity System Operator (IESO − an agency that monitors overall supply and demand to ensure system reliability) have undertaken smart grid-related activities such as smart meter deployment and advanced metering infrastructure and are planning to incorporate other smart grid technologies in their future investment plans.

A final provision designed to encourage the development of renewable energy projects is section 5 of the *GEA*. Pursuant to this section Cabinet may designate, through regulation, specified renewable energy projects, energy sources, or energy testing projects. These designations would allow such projects to proceed, or sources to be used, and to exempt them from any designated local legal barriers which may prevent or restrict their use. The legal barriers that are being targeted are those typically found in municipal by-laws, condominium by-laws, encumbrances on real property, or agreements. In February 2010, O. Reg. 15/10 − Designations Re Section 5 of the Act, under the *GEA* came into force. Under this regulation, energy installations which utilize roof or wall mounted solar photovoltaics, roof or wall mounted solar thermal air or water technology, and ground source heat pump technology are permitted for use (despite any legal restrictions) provided that they are installed in compliance with the Ontario Building Code. The regulation also identifies those legal barriers that remain in force to protect certain cultural, health, safety and environmental considerations, such as tree protection by-laws.

Promoting Conservation and Efficiency

Along with promoting renewable energy, the *GEGEA* was also designed to promote conservation and energy efficiency initiatives across the province. The *GEGEA*, and the *GEA* in particular, contains several key provisions that are designed to foster a "culture of conservation". Various groups, such as

homeowners, government operations and public agencies, are targeted within the legislation and specific provisions exist to shift each towards lower overall energy use. Implementation details will be further developed through regulation and subject to *EBR* notice and comment procedures for regulation proposals.

Section 3 of the *GEA* stipulates that purchasers of residential properties have the right to receive, from the seller, information about the energy consumption and efficiency of the property for sale. While it is mandatory for a seller to provide such disclosure prior to accepting an offer to purchase, the right to receive this information may be waived, in writing, by the purchaser. As of August 2010, this section had not been proclaimed in force.

Section 6 grants Cabinet the authority to require that public agencies such as government ministries and municipalities, as well as other prescribed public agencies and consumers, prepare energy conservation and demand management plans. As well, public agencies may be required to achieve prescribed targets and meet prescribed energy and environmental standards including standards for energy conservation and demand management. The authority also exists under the *GEA* for Cabinet to require that public agencies incorporate energy conservation and energy efficiency in both their purchasing policies, as well as in their capital investments. As of August 2010, regulations prescribing public agencies and consumers had not yet been passed. It is anticipated, however, that universities, colleges, schools and hospitals will be prescribed for the purposes of this section, as well as large industrial and commercial energy consumers.

Section 10 of the *GEA* is intended to aggressively promote energy efficiency within government operations and stipulates four principles that the provincial government must follow in constructing and managing government facilities. These include:

- clear and transparent reporting of energy use and associated greenhouse gas emissions;
- planning and designing facilities to ensure energy efficiency;
- making environmentally and financially responsible investments in government facilities; and
- using renewable energy sources to provide energy for government facilities.

With the approval of Cabinet, the Minister of Energy and Infrastructure may also issue directives relating to energy consumption and greenhouse gas emissions, as well as minimum energy and environmental standards for new construction or major renovations of government buildings.

Other sections of the *GEA* also address conservation issues. Section 4, for example, allows Cabinet to designate goods, services and technologies which assist with energy conservation and to remove any legal barriers which may exist to their use. Referred to as the 'clothesline clause', this section reflects the situation in the past where legal barriers existed, such as municipal by-laws, to prevent the use of regular clotheslines.

Part III, entitled Energy Efficiency and Efficient Use of Water, replaces in substance the repealed *Energy Efficiency Act* that was originally enacted in 1988 and covered the energy efficiency of appliances and equipment. This part of the *GEA* provides general powers to establish energy efficiency standards for appliances and products and places restrictions on the sale of those items that do not meet the prescribed standards. As well, it requires that energy efficiency labelling for appliances accurately reflect the appliance's performance. The inclusion of water efficiency is a new consideration that was not contained within the *Energy Efficiency Act*. In April 2010, MEI posted a proposal notice on the Environmental Registry to develop a minimum water efficiency standard for toilets. The proposed regulation, under the *GEA*, would require that all toilets sold in the province use six litres of water or less per flush. As well, amendments would be made to regulations issued under the former *Energy Efficiency Act* to both establish and update energy performance standards for various electronic products.

Apart from the above provisions in the *GEA*, the *GEGEA* amended several other pieces of legislation to promote conservation efforts. As mentioned previously, one of the goals behind developing a smart grid pursuant to amendments made to the *Electricity Act, 1998* is to assist with conservation efforts. As well,

amendments made to the newly named *Ministry of Energy and Infrastructure Act* (formerly the *Ministry of Energy Act*), adds conservation considerations to the ministry's objectives. Lastly, the general grant-making authority of the Minister was amended to specifically allow providing grants "to encourage energy conservation and to encourage the use of renewable energy sources."

The *Building Code Act, 1992* was also amended such that energy and water conservation are explicitly stated as central purposes of the Ontario Building Code with respect to construction and demolition. In addition, the *GEGEA* requires the Ministry of Municipal Affairs and Housing to undertake a review of the Building Code, with a focus on energy conservation standards, within six months of the *GEGEA* coming into force and, at a minimum, every five years thereafter. The current Building Code dates from 2006 and so the ECO anticipates that a new code will be released by the end of 2011. Finally, pursuant to other amendments made to the *Building Code Act, 1992*, a Building Code Energy Advisory Council has been established to provide advice on how to enhance the Building Code to increase energy efficiency and promote green technologies.

A further key *GEGEA* amendment relating to conservation, as well as renewable energy, was to the *Ontario Energy Board Act, 1998*. In particular, these amendments fundamentally change the mandate and role of the Ontario Energy Board (OEB). Whereas the former primary role of the OEB was to serve as an economic regulator of natural gas and local electric distribution companies, the OEB is now to serve as an agent of change due to the addition of new responsibilities. Not only must the OEB continue to consider the protection of consumer interests on issues such as price and reliability, and promote economic efficiency, the *GEGEA* requires it to consider three new objectives while exercising its duties. These objectives are to:

1) promote electricity conservation and demand management;
2) facilitate the implementation of a smart grid;
3) promote the use and generation of electricity from renewable energy sources.

Given that the OEB is a key decision-maker in the electricity system, the inclusion of these objectives is of central importance in moving the electricity system along the path envisioned within the *GEGEA*.

Also under the *Ontario Energy Board Act, 1998* new provisions were included to raise monies to cover the costs of conservation or renewable energy programs administered by MEI. Pursuant to section 26.1, the OEB is required to assess certain categories of persons or classes of persons, and all money collected is to be paid into a special purpose fund. In March 2010, O. Reg. 66/10 – Assessments for Ministry of Energy and Infrastructure Conservation and Renewable Energy Program Costs, made under the *Ontario Energy Board Act, 1998* came into force. This regulation requires the OEB to assess a special levy on the IESO and local distributors in proportion to the amount of electricity they distribute. The IESO and local distributors are to recover the cost of this levy from their customers. A small charge per kilowatt-hour of electricity consumed is to be collected from customers of local distribution companies. The goal is generate approximately $53.7 million in additional revenue to fund MEI conservation and renewable energy programs. Questions have been raised, however, as to whether the levy represents an indirect tax and is thereby unconstitutional. A motion has been brought before the OEB to determine whether the board has the jurisdiction to issue the assessment if the legislation is, in fact, unconstitutional.

In order to determine the success of any conservation initiatives, it is important to both monitor and report on the progress being made. In this regard, the *GEGEA* amended the *Environmental Bill of Rights, 1993* to expand the Environmental Commissioner of Ontario's (ECO) reporting mandate. The new mandate requires that the ECO report annually to the Speaker of the Assembly on the progress of activities in Ontario to reduce, or make more efficient use, of various forms of energy such as electricity, natural gas, propane, oil and transportation fuels. In order to obtain the necessary information to produce the energy report, the ECO's powers were expanded. Under the revised section 58.1(3) of the *EBR*, the ECO may require information be provided by various actors within the energy field including the OEB, the OPA, the IESO and other agencies, ministries and persons who may be prescribed by regulation at a future date. As well, requests may also be made to electricity transmitters and gas distributors.

Along with reporting on energy conservation, the amended *EBR* also requires the ECO provide a separate Annual Report on the progress of activities in Ontario to reduce greenhouse gas emissions. For the purposes of the greenhouse gas report, however, similar information gathering powers were not granted. Rather, the ECO may require information from prescribed persons or classes of persons. To date no such persons have been prescribed for this section.

Implications of the Decision

Paves the Way Towards Increased Distributed Energy and Away from Centralized Power Systems:
By promoting smaller, localized energy projects through the microFIT (10 kW or less) and FIT (over 10kW) programs, the *GEGEA* facilitates the development of a distributed electrical grid which allows electricity to be used closer to where it is generated. There are a number of benefits which result from a more distributed electrical grid including a reduction in the amount of energy lost as heat when transmitting power over long distances. As well, the system is less dependent upon a few highly centralized generation sources and therefore can be more reliable in the event that some part of the system fails or is interrupted.

Allows the Production Mix to Shift:
By giving priority to conservation and renewable energy in the supply mix, as well as by guaranteeing secure pricing for renewable generation, the *GEGEA* puts in place the regulatory framework which is necessary to help shift production away from fossil-fuel based generation. It remains unclear what impact this will have on the requirements for additional nuclear generation.

Renewable Energy Approvals - Third Party Appeals Are Open to All, But Probably Harder to Win:
The amended *EPA* now grants third parties a right to appeal and, unlike under the appeal provisions of the *EBR*, no requirement exists to show that the decision to grant an REA was unreasonable. However, a relatively narrow and stringent test must be met for an appeal to succeed. Not only is the scope of an appeal limited to impacts on the environment and human health only, the threshold which must be supported by evidence – irreversible and/or serious – is a high one to meet. This high burden of proof lies on the appellant and, while it does establish a more inclusive appeal process, it will no doubt limit the number of appeals that will be brought forward, and succeed, at the Environmental Review Tribunal. Indeed, it is very difficult to imagine what type of harm would meet the 'irreversible' threshold or how members of the public would present sufficient scientific evidence to meet this test.

Public Participation & *EBR* Process

On February 23, 2009, Bill 150, the proposed *Green Energy and Green Economy Act*, was introduced in the Ontario Legislature for first reading. The next day MEI posted a proposal notice on the Environmental Registry, including a brief overview of the proposed legislation. Links were provided to both a *Green Energy Act* home page housed on MEI's website, as well as to a draft version of Bill 150. MEI provided a 30-day comment period, between February 24 and March 26, 2009. On March 11, 2009, Bill 150 was referred to the Standing Committee on General Government. In April 2009, seven days of public hearings were held in four cities across Ontario. As a result of comments submitted through both the Environmental Registry and the legislative process, Bill 150 went through substantial revision at the standing committee before it was tabled in the Legislature for third reading. Bill 150 received Royal Assent on May 14, 2009. MEI posted a decision notice on the Environmental Registry on January 14, 2010.

A keen interest was shown in the proposed legislation. During the standing committee hearings, approximately 130 presentations and over 300 written submissions were made. Through the Environmental Registry, MEI received 674 comments on the draft Bill. As indicated below, several changes were made to the *GEGEA* in response to both the significant amount of public input received via comments submitted through the Registry, as well through the standing committee process.

The majority of the comments submitted through the Environmental Registry were from individuals, along with a large number of municipalities. As well, community groups, environmental non-governmental organizations (ENGOs), the renewable energy industry, ratepayer groups, and others participated in the public input process. In general, strong support was expressed for both moving away from fossil-fuel based electricity production by increasing Ontario's renewable energy supply, as well as promoting conservation measures. Many commenters heralded the Bill as being "very ambitious" and a "visionary path forward" and suggested amendments with a view to help achieve the goals of the legislation. Several commenters spoke strongly in favour of the conservation measures and felt these should receive particular emphasis from the government. Other commenters, however, were highly critical of the government's approach and argued that the proposed legislation would be too expensive, unrealistic and risky.

From a process perspective, many commenters critized the speed with which the proposed legislation was introduced and rapidly ushered through legislative approval. Given the sweeping changes that the Bill contained, many felt that the 30-day comment period under the *EBR* did not allow sufficient time to assess the bill's potential impact and provide sufficient commentary. Other commenters expressed concern that the Bill left open many unresolved issues, and that it would become law without the public understanding certain key details.

A significant portion of the commenters raised concerns about the proposed amendments to the *Planning Act* which would remove much municipal control over local land-use planning decisions. The Ontario Bar Association suggested that caution should be exercised and that the removal of municipal controls "must be carefully balanced against the need to ensure that a renewable energy project makes sense in terms of its relationship with other land uses." Many individuals expressed concern, and even outrage, at the perception that the provincial government was removing local, democratic controls over planning considerations that would have a direct impact on their lives and property. The majority of municipalities that commented were also critical of a centralized approach and many indicated that they already had developed policies and guidelines to respond to renewable energy project applications. While there were no significant amendments to address these planning concerns, a provision was included in the *GEA* stating that the "Act shall be administered in a manner that promotes community consultation" and that proponents are required to consult with municipalities, as well as the public and Aboriginal communities, as stipulated by O. Reg. 359/09.

Another key area of concern was wind projects and the manner by which these would be regulated under a streamlined approvals process. Of overwhelming concern to individual commenters (particularly those living in rural areas) were the potential health, as well as property value impacts for people living close to wind turbines. Many recommended that setbacks of one to two kilometres should be applied. Many commenters felt that the government should conduct more health impact studies prior to any further turbines being approved and constructed. In response to these concerns, the government announced that it would establish an academic research chair to examine the potential public health effects of renewable energy projects. In February 2010, the Ontario government announced that the position had been awarded to the University of Waterloo.

Concerns were expressed regarding the potential impact of wind turbines on protected areas or are as with high natural heritage value. Many members of the public were clearly distressed about the Niagara Escarpment and the possibility that wind turbines might be allowed in this UNESCO Biosphere Reserve. The Niagara Escarpment Commission (NEC) recommended that the government maintain the Niagara Escarpment Development Permit System and not put wind turbine approvals under the new renewable energy approval system in order to safeguard the natural heritage features of the escarpment. Many individuals questioned whether hydroelectric projects should also be caught within a streamlined approvals process given their impact on fish, groundwater protection and natural stream flows.

Many commenters focused on the efficacy of renewable energy projects and argued that Bill 150 would not achieve the desired goal of reducing greenhouse gas emissions. Focusing on wind in particular, these commenters argued that because wind is intermittent and unpredictable, back-up fossil-fuel generation from natural gas plants will be required. Citing the experiences of other jurisdictions,

questions were raised about whether the promised emissions reductions would actually be realized. Questions also were raised as to whether the promised number of jobs – 50,000 – would actually be created and some commenters argued that the government had not provided sufficient evidence to substantiate this promise.

While encouraged that the proposed legislation would be instrumental in promoting renewable electricity generation, several commenters expressed their disappointment that other renewable technologies, which provide either space heating or cooling, were not included. In particular, many felt that combined heat and power, geothermal, solar thermal, or deep water cooling technologies could play an important role in energy conservation and so should be similarly promoted and facilitated. In response, the government indicated in April 2009, that it is "reviewing future policy opportunities to address energy technologies including geothermal, solar thermal, combined heat and power and small scale wind."

A reoccurring concern expressed by many commenters focused on the potential increase in electricity costs due to the rate structure under the proposed FIT program, as well as the costs associated with upgrading the transmission infrastructure. Due to the economic impacts of the recession, many felt that consumers were not in a position to bear higher electricity costs and expressed worry about the impact that higher energy costs would have on vulnerable energy consumers like low-income residents. In part to address these concerns, the OEB is now required, as one of its objectives, to promote electricity conservation and demand management while "having regard to the consumer's economic circumstances."

Bill 150 contained a provision that would have made it mandatory for people to disclose the energy efficiency rating of their home when selling. The implication of this was that home owners would have likely had to pay for an energy audit of the house to obtain this information prior to selling. The goal of this provision was to help purchasers understand the home's energy use and to provide an additional incentive to undertake retrofit actions that would reduce household energy consumption. Many commenters, including several from the real estate industry, strongly objected to this requirement. In the view of the Ontario Real Estate Association, mandatory home energy audits would "impose unnecessary costs on home sellers,…act as yet another barrier to home-ownership, and in the end, …not contribute to [the] stated goal of improved energy conservation." The suggestion was made that the government should instead expand its existing home energy audit rebate program. Others, however, argued in support of mandatory energy audits on the grounds that this would help raise awareness of household energy consumption. In response to these concerns, the Bill was amended such that the purchaser of a home has the right to receive information about the home's energy efficiency, but can waive this right in writing if so desired.

Bill 150 also proposed several inspection, enforcement and penalty provisions relating both to mandatory home audits, as well as minimum energy efficiency standards for appliances and products. It is noteworthy that the provisions replicated, for the most part, powers that existed under the now-repealed *Energy Efficiency Act*. Strong opposition was expressed to extending these provisions to home energy audits as "serious overkill…[that]…conjures up visions of the green secret police" entering one's home. In response, the inspection, enforcement and penalty provisions relating to both energy efficiency standards, as well as home energy audits, were removed entirely from the Bill. In practice, therefore, no enforcement provisions now exist to ensure compliance with energy efficiency standards and home energy ratings, key conservation aspects of the *GEA*.

A few commenters urged the government to strengthen the provisions regarding energy efficiency standards and suggested that the Bill be amended to "ensure that energy and water efficiency standards enacted under the act are consistent with the highest standards currently in place in North America." As well, it was recommended that the Bill should require that all efficiency standards be regularly reviewed and updated.

While many commenters supported the development of a renewable energy facilitation office, others felt that the mandate of the office, which focuses solely on assisting project proponents, should be more balanced. A suggestion made by the Canadian Environmental Law Association was that the mandate of

the office should be expanded to work with and assist the public's participation in consultation processes. As well, several commenters argued that the proposed provisions relating to the confidentiality of documents provided to the office were too stringent and would decrease both transparency and accountability. To ensure credibility of the approvals process, it was suggested that all studies and assessments conducted by a proponent, and submitted to the REFO, be made publicly available.

MEI responded to some of these concerns by modifying the provisions relating to the confidentiality of information supplied by a proponent to the REFO and stipulated certain circumstances where the information received could be disclosed. No changes were made, however, to the mandate of the office and the role that it could play in assisting the public.

Several comments were submitted with regard to the proposed FIT program and the directions that may be given by the Minister to the Ontario Power Authority (OPA). It was originally proposed that the Minister would have the authority to direct OPA to establish measures to facilitate Aboriginal participation in project development. Many commenters recommended that this authority be expanded to facilitate the participation of small-scale, community-based or municipal projects. The *GEGEA* incorporated some of these suggestions and the Minister has the power to direct OPA to include the participation of groups and organizations, as well as municipalities. In a September 2009 ministerial directive, the Minister directed OPA to establish a community energy partnerships program, an aboriginal energy partnerships program and a municipal renewable energy program.

A number of organizations raised concerns about the future electricity supply mix and strongly urged that no caps be imposed upon the amount of renewable generation fed into the grid. Related to this were concerns about the role of nuclear in the supply mix and the manner by which nuclear supply can constrain the future expansion of renewable alternatives. In response to concerns around a possible increase in nuclear procurement, the *Electricity Act, 1998* was amended to clarify that any additional authority given to the Minister for electricity procurement should focus only on renewable energy sources, energy efficiency and conservation, but not nuclear.

SEV

In response to a request by the ECO for a copy of MEI's Statement of Environmental Values considerations in developing the *GEGEA*, MEI indicated that it had "not recorded how the SEV was considered in decision-making." Nevertheless, the ECO was informed that:

> MEI staff did consider the proposed decision and concluded that the passage of the MEI statutes that formed part of the *Green Energy and Green Economy Act, 2009* were consistent with the ministry's then-current Statement of Environmental Values (the Ministry of Energy, Science, and Technology SEV), in particular, its strategic directions to encourage environmentally sustainable energy production and use, and to encourage efficient energy production and use and conservation of energy.

The ECO is somewhat disappointed in how MEI considered its SEV given the importance of this legislative initiative. In the past, the ECO has indicated that SEVs should be used as a guidance document for ministries to use when making decisions that might affect the environment. In the case at hand, however, MEI would appear to have applied its SEV in an apparent "after the fact" manner to justify its decision, rather than using it to guide decision-making throughout the development of the *GEGEA*. In December 2009, MEI posted a policy proposal notice on the Environmental Registry seeking comment on a new SEV for the ministry.

Other Information

On September 24, 2009, the Minister of Energy and Infrastructure exercised his new powers under the *Electricity Act, 1998* and issued a policy directive to the OPA to develop a FIT program. This was effectively a *post hoc* exercise as the program was launched immediately and OPA began accepting applications one week later on October 1, 2009.

The FIT program is designed for renewable energy projects over 10 kilowatts (kW) in size. A similar microFIT program was designed for projects 10 kW or less. The program rules outline the prices that are to be paid to renewable energy projects in Ontario. Since the cost to supply renewable electricity varies with the type of generation (i.e., wind versus solar) and project size, the FIT program establishes different prices based on these factors. For example, a biomass project over 10 MW in size will receive 13.0 cents per kilowatt-hour (¢/kWh), whereas a landfill gas project the same size would receive 10.3 ¢/kWh. In both cases, smaller projects would also receive slightly higher prices. As well, location plays a role in determining the price that will be paid for the electricity generated. For example, all onshore wind projects will receive 13.5 ¢/kWh, whereas all offshore wind projects will receive 19.0 ¢/kWh.

In keeping with the government's objective of increasing the participation of community and Aboriginal groups, these groups receive higher prices for their projects under the FIT program. Moreover, for technologies that generate a steady amount of electricity (and are not intermittent such as wind or solar), the FIT program provides an additional financial incentive to encourage such projects to shift production to peak periods when the electricity is most needed.

To provide financial certainty for developers, most FIT contract terms are for 20 years. Given the longer life span of hydroelectric facilities, the program establishes a 40-year term for water power projects. Along with the pricing schedule, the OPA established domestic content requirements for all solar photovoltaic and wind projects (over 10 kW in size) that are intended to incent development of Ontario-based suppliers and manufacturers. The minimum amount of domestic content required will increase over time.

In December 2009, the OPA announced that 700 microFIT contracts had been offered for small-scale renewable energy projects, mainly for residential rooftop solar power systems, since the program start date of October 1, 2009. With a combined capacity of about 8.6 MW, these proposed projects would provide sufficient energy for about 1,000 homes. By April 2010, the OPA had received nearly 8,500 microFIT applications from a variety of producers, including homeowners, schools, farmers and small businesses. Of these, OPA had issued nearly 3,000 conditional offers. The offers are contingent upon the applicant obtaining approval to connect to the electricity grid from their local distribution company.

In January 2010, the government announced that it had entered into a sole-source contract with a consortium led by Korea-based Samsung C&T Corporation and the Korea Electric Power Corporation. Samsung has agreed to invest $7 billion in Ontario to construct and operate four manufacturing facilities between 2013 and 2015 that will produce wind turbine towers, wind blades, solar inverters and solar assemblies. As well, Samsung has made a commitment to deliver 2,000 MW of wind power and 500 MW of solar power, with construction of these energy projects to begin in 2012. This amount will triple Ontario's current renewable wind and solar energy generation and these projects, according to government estimates, will displace 40 megatonnes of carbon dioxide over their 25-year lifetime. Strong concerns were expressed by many companies in the energy sector about how the agreement was reached, and the reservation of transmission capacity for Samsung, as each may have a detrimental impact on other participants in the FIT program.

The OPA subsequently announced in March 2010, that 510 medium-scale projects, out of 956 eligible applications, had been approved under the FIT program. A large majority of the projects are for rooftop solar power installations and are spread across the province. Ranging in size from 10 kW to 500 kW, the proposed projects have a total generating capacity of 112 MW which is sufficient electricity for more than 13,000 homes. Due to their relatively small size, the projects do not require upgrades to the electrical transmission and distribution grid. They can, therefore, be connected relatively quickly and without the detailed impact assessments that are necessary for larger projects.

In April 2010, the government announced that contracts worth $8-billion had been offered by OPA for 184 large-scale projects (over 500 kW) under the FIT program. Seventy-six of the projects are for ground-mounted solar photovoltaic, while 47 are for on-shore wind and 46 are waterpower projects. Thirteen of the projects are bio-energy, one is for rooftop solar and one is an off-shore wind project. In total, the

contracts have a combined generating capacity of 2,421 MW – an amount sufficient for 600,000 homes. A significant number of economically viable projects are in the queue and will be required to wait until more transmission connection capacity is available or approved.

ECO Comment

The ECO supports the key objectives of the *GEGEA* and recognizes the need to increase fossil-free electricity production. The ECO is somewhat concerned, therefore, with the dramatic erosion of public goodwill that occurred during the legislative process. Moving the province away from the use of fossil fuels to generate electricity, and reducing the associated negative environmental impacts, are positive goals that garnered wide public support. In its efforts to begin rapid implementation of the *GEGEA*, and to achieve the hoped for economic stimulus and green industry development, the Ontario government pushed Bill 150 through the legislature at breakneck speed – rarely has proposed legislation of this scope received such rapid passage. This antagonized some stakeholder communities and has resulted in a strong and significant backlash that may undermine some of its positive elements. To address some of these concerns, the government should ensure that proponents truly engage with affected communities and municipalities and take local concerns into account when moving ahead with renewable energy projects.

While an increase in renewable energy production is no doubt important, the ECO urges that enhanced conservation measures be given top priority. Accordingly, the ECO would suggest that all agencies involved in the Ontario electricity market, including the Ontario Energy Board, the Ontario Power Authority, and the Independent Electricity System Operator, place conservation measures at the top of their respective agendas in carrying out their duties within the evolving electricity policy landscape.

The *GEGEA* has created an enormous opportunity for the future development of renewable energy. Accordingly, the ECO strongly urges the government not to set any targets, or caps, on conservation and renewable generation but rather ensure that future electricity plans leave open a wide window of opportunity for the continued growth and expansion of conservation and renewable electricity generation.

As indicated, amendments that were made resulted in the removal of inspection and enforcement provisions related to energy efficiency standards from the *GEA*. This is an unfortunate situation from the ECO's perspective because it means that the government has passed a law, key provisions of which cannot be enforced. As well, there are implications for public rights afforded under the *EBR*. The *GEA* is a prescribed Act for the purposes of the *EBR*. Because it is prescribed, the public has the right under section 74(1) of the *EBR* to apply for an investigation of alleged contraventions. Without any enforcement or penalty provisions, however, it is unclear whether MEI would in fact proceed with an investigation or how it would be conducted when no "teeth" exist within the Act to ensure compliance.

Under the *GEGEA*, the ECO has a new responsibility to monitor provincial progress on both greenhouse gas reductions and energy conservation. As such, the ECO will be a close observer as to whether the anticipated environmental goals of the *GEGEA* are achieved. In fulfilling our mandate, the ECO will assess the efficacy of the expanded powers granted under the amended *Environmental Bill of Rights, 1993*.

In conclusion, the *GEGEA* signals a dramatic, and far-reaching, shift in provincial electricity policy. Many of the specific provisions have not been implemented as of May 2010, and so the devil (or the angel) in the details will be revealed as these are fleshed out. Nevertheless, the ECO strongly supports both the vision underpinning the legislation as well as the direction in which it will hopefully shift the energy marketplace in Ontario.

Review of Posted Decision:

4.3 Amendments to Brownfield Regulation – O. Reg. 153/04

Decision Information:

Registry Number: 010-2364
Proposal Posted: January 25, 2008
Decision Posted: January 6, 2010
Comment Period: 30 days
Number of Comments: 60
Decision Implemented: Filed on March 31, 2008

Registry Number: 010-4642
Proposal Posted: October 6, 2008
Decision Posted: January 6, 2010
Comment Period: 127 days
Number of Comments: 87
Decision Implemented: Filed on Dec. 29, 2009

Description

Overview

Ontario benefits economically, socially and environmentally when brownfields are properly redeveloped. Brownfields are abandoned or underused industrial lands that have the potential to be redeveloped and reused. Many of these lands are prime real estate located within city cores and along waterways. Idle contaminated land can be redeveloped for commercial, residential and recreational purposes and can revitalize the surrounding community. This can improve environmental quality in the area, protect human health and act as an economic driver. Before they can be reused, however, these former industrial lands must be restored.

Redeveloping a brownfield is a complex process that demands a range of technical expertise. In order to protect the public and ensure that redevelopment is completed properly, the *Environmental Protection Act* (*EPA*) and O. Reg. 153/04 under the *EPA* set out detailed requirements for filing a Record of Site Condition (RSC). An RSC, which is prepared by a Qualified Person (QP) as defined in O. Reg. 153/04, is filed with the Ministry of the Environment (MOE) on the Environmental Site Registry to certify that a brownfield property has been assessed and meets the necessary soil, sediment and groundwater standards for redevelopment. An RSC is required when a property is set to change to a more sensitive use as defined in the *EPA* and O. Reg. 153/04. The RSC contains certifications by a QP that the property meets the environmental standards for its intended use. It also provides limited protection from certain ministry orders.

To complete an RSC, an Environmental Site Assessment (ESA) must be conducted. The ESA assesses the condition of the land including the soil, groundwater and sediment. A Phase 1 ESA must be carried out to determine the likelihood that contaminants have affected all or parts of the property. A Phase 2 ESA may be required to determine the location and the concentration of one or more contaminants on the property.

Recently, MOE amended O. Reg. 153/04. The amendments, contained in O. Reg. 511/09 (Records of Site Condition) and O. Reg. 66/08 (Qualified Persons), implement legislative reforms made in 2007 aimed at improving the transparency, predictability and accountability of the RSC process.

The legislative reforms were contained in the *Budget Measures and Interim Appropriation Act, 2007* (Bill 187) that was passed in May 2007. Several statutes were amended including the *EPA*, the *Ontario Water Resources Act* (*OWRA*), the *Mining Act*, the *Proceedings Against the Crown Act*, and the *Escheats Act*.

In January 2008, MOE posted a notice on the Environmental Registry (#010-2364), proposing amendments to O. Reg. 153/04 to change the definition of QPs. This was posted in advance of a sunset clause set to expire on April 1, 2008, that would revoke the previously existing definition of QPs. In late March 2008, MOE filed O. Reg. 66/08 that amended the definition of QPs.

In October of that same year, MOE posted a notice (Environmental Registry #010-4642), proposing several amendments to implement the balance of the 2007 reforms to the *EPA* and the *OWRA*. These proposed amendments included updating the site condition standards and introducing a streamlined modified generic risk assessment for brownfields. In late December 2009, MOE filed O. Reg. 511/09 that brought these amendments into effect.

The ministry, however, did not post decision notices on the Environmental Registry for the filing of either of these amending regulations until January 2010. This was almost 22 months after O. Reg. 66/08 was filed.

The Amendments:
The following are some of the amendments that O. Reg. 66/08 and O. Reg. 511/09 made to O. Reg. 153/04.

O. Reg. 66/08 – Qualified Persons Amendments

One of the more highly contested amendments to O. Reg. 153/04 was the redefining of professions eligible to be QPs. The amendments by O. Reg. 66/08 eliminated chartered chemists, professional agrologists, applied science technologists, certified engineering technologists and architectural technologists from the definition of QP, making them ineligible to file RSCs. The amended regulation currently defines a QP to be professional engineer or geoscientist, or a person holding a limited licence issued by the Professional Engineers of Ontario (PEO) and the Association of Professional Geoscientists of Ontario (APGO). The Environmental Site Registry will include a list of QPs with information on their qualifications.

These amendments, which took effect on April 1, 2008, gave professionals no longer qualifying as QPs an 18-month transition period ending September 30, 2009 to obtain the necessary certifications. At the end of this transition period, only professionals recognized in the amended regulation are eligible to act as QPs and file an RSC.

The amendments do not affect professionals completing risk or site assessments for purposes other than filing an RSC.

O. Reg. 511/09 – Record of Site Condition Amendments

Record of Site Condition Process:
MOE asserts that the amendments will improve the consistency of ESAs, thereby fostering greater confidence in the RSCs that are filed on the Environmental Site Registry. All RSCs will now undergo an administrative review within 30 days of their submission to ensure completeness before being filed. Those that do not meet MOE requirements will be returned to the QP. Some submitted RSCs will be selected for a technical review, which involves greater scrutiny of the information provided in the RSC, and a few of these RSCs will also be subject to a field review that includes site visits. If the review reveals errors or omissions in the RSC, the ministry will notify the QP to correct any concerns before the RSC can be filed. RSCs that pass the administrative and/or technical reviews will be filed on the Environmental Site Registry.

Using standards compiled from various jurisdictions, the amendments provide clearer definitions, objectives and components for Phase 1 and Phase 2 ESAs. A Phase 1 ESA provides preliminary information on the environmental conditions of a property and its findings may trigger a Phase 2 ESA. The amendments outline items required for a Phase 1 and 2 ESA such as: mandatory databases that must be searched in a records review; minimum search distances; requirements for the preparation of conceptual site models; and reports formats and attachments included. The ministry maintains the changes will: help QPs better understand MOE's expectations for completing RSCs; facilitate an efficient review of ESAs by the ministry; and provide greater certainty in the outcomes of ESAs.

Soil, Groundwater and Sediment Standards:
The new Soil, Groundwater and Sediment Standards ("Standards"), which come into effect July 1, 2011, update the 2004 standards that relied on science available from 1985-1996. The development of these standards was a highly contentious process. In March 2007, MOE posted proposed updated standards on the Environmental Registry for public comment (Environmental Registry #010-0149). However, these draft standards were met with a great deal of resistance and were never finalized. Relying on feedback received, MOE modified the draft 2007 standards and included them among the amendments to O. Reg. 153/04. The new Standards update approximately 120 chemicals using science-based methodology, and improved soil and groundwater models and parameterization for certain chemicals. Overall, the updated standards are more stringent than the 2004 standards and the draft 2007 standards.

MOE explains that the updated standards reflect scientific advances that better protect human health and the environment. Mammals and birds are now incorporated into the conceptual model (outlines contaminant exposure pathways), and calculations for plants and soil invertebrates were updated. Physical and chemical parameter data and toxicity and ecotoxicity data were updated along with laboratory reporting limits. Background groundwater standards were revised using the Provincial Groundwater Monitoring Information System database. Subsurface modelling was brought into line with Canadian Council of Ministers of the Environment (CCME) models and new soil to outdoor air and soil to drinking waters models have been added. New models have flexibility for the Modified Generic Risk Assessment (described below).

There are nine tables of standards. New standards were developed for several contaminants: Dioxane - 1,4; Hexane(n); Dichlorodifluoromethane; Petroleum hydrocarbons in non-potable groundwater; Trichlorofluoromethane; and Uranium.

The standards for shallow soil properties and properties within 30m of a waterbody were clarified. These properties are considered to be sensitive sites. Two tables that apply to shallow soil properties, and two tables that apply to properties within 30m of a waterbody were added. The Extract and Groundwater Standards were removed.

Movement of Soils between Properties:
To minimize the likelihood of introducing contaminants to a property, O. Reg. 511/09 adds a section to the regulation to clarify provisions pertaining to the movement of soil from one property to an RSC property. Soil brought to an RSC property can only be used as backfill and must meet generic standards or standards specified in an approved risk assessment that includes a soil management plan. Soil samples must be collected and analyzed prior to the soil being deposited to the property to ensure it meets the standards in Table 1 of the Standards.

For soils that do not meet the Table 1 Standards, the property receiving the soil must be current or former commercial or industrial property where a potentially contaminating activity has occurred or is occurring. The property must already have a contaminant of concern identified on site. There cannot be a previously filed RSC for the property.

Modified Generic (or Tier 2) Risk Assessment:
Previously, owners of properties that do not meet the generic site condition standards could meet the alternative standards specified in a ministry-approved risk assessment (RA) in order to file an RSC on their property. This process, however, was lengthy and required QPs to demonstrate that all aspects of the model used in the RA met ministry standards and protected human health and the environment.

The amendments introduce a streamlined RA process that aims to expedite this process. When changes come into effect July 1, 2011, the modified generic risk assessment can be prepared using a web-based ministry-approved model, which allows QPs to conduct a controlled modification of the ministry's generic site conditions used in an RSC. This model can be adjusted to match site specific conditions such as soil types, fraction of organic carbon, distance to surface water body, minimum depth below grade to the highest water table, aquifer horizontal hydraulic conductivity and gradient. The model also outlines

measures that modify components or pathways such as caps, building restrictions, modified ecological protection, and indoor air pathways.

At the same time that MOE amended O. Reg. 153/04, the ministry also made complementary changes to O. Reg. 73/94 and O. Reg. 681/94 under the *Environmental Bill of Rights, 1993*, to expedite approvals of modified generic risk assessments containing risk management measures published by MOE. As such, Certificates of Property Use (CPU) incorporating these risk management measures no longer will be posted on the Environmental Registry for public notice and comment. The CPU is a document that contains restrictions on the use of the property placed by the ministry before it accepts the risk assessment.

Qualified Persons:
The amendments included conflict of interest rules for QPs. A QP (or their employer) that has an interest in the property subject to an RSC, risk assessment or ESA is prohibited from conducting or supervising the ESA or risk assessment for the property or completing the RSC certification.

Transition:
MOE is allowing an 18-month implementation period ending July 1, 2011, before the amendments come into effect, in order to allow industry to adjust to the changes. MOE recognizes that some complex redevelopment projects underway may not be completed by the July 1, 2011 implementation date. Accordingly, those qualifying under the transition provisions of amended O. Reg. 153/04, will be allowed until July 1, 2013 to submit an RSC based on the 2004 Standards.

Implications of the Decision

Environmental Protection

Encouraging the redevelopment of brownfields has many benefits. Remediation alleviates the risks posed by harmful contaminants present on the property and limits human exposure to toxic chemicals. The restored environment may become suitable wildlife habitat or re-used in a less harmful manner. For many municipalities, encouraging development on brownfields is vital to meet their *Places to Grow* intensification targets. And most importantly, by developing brownfields, there is less demand for developing green spaces for industrial or other purposes.

The new more stringent contaminant standards and updated models and parameters are based on advanced scientific techniques and should better protect the environment. Improved soil and groundwater models better account for different environmental conditions and incorporate a broader array of biodiversity into the models. Combined with stricter requirements for ESAs and soil movement, these amendments should improve the environmental aspect of brownfield redevelopment.

The stricter standards and detailed procedures could increase the costs and timelines of remediating brownfields, which may deter some property owners from pursuing this option. Furthermore, the stricter standards may result in an increased amount of contaminated soil being disposed untreated into landfills rather than being treated onsite or at another facility.

Certainty/Timeliness

Certainty in the RSC process and the timeliness in reaching the final outcome were cited by stakeholders as barriers to the redevelopment of brownfields. The amendments address these concerns through the modified generic risk assessment, clearer rules for Phase 1 and 2 ESAs and administrative and technical reviews prior to the filing of the RSC.

The 30-day RSC review process is more predictable. The increased scrutiny of RSCs submitted for filing will contribute to higher quality RSCs, thereby increasing public and commercial confidence in the RSC process. In turn, this may encourage more financial institutions and developers to become involved in brownfield redevelopment.

The clearer rules and expectations for completing a Phase 1 and 2 ESA also foster greater certainty and confidence by reducing the variability between ESAs. With the new rules, QPs should better understand ministry expectations and the information gathering process they are expected to follow. Moreover, the clearer rules were established in accordance with brownfield processes in other jurisdictions, further bolstering support for the process.

The modified generic risk assessment is now more streamlined as a result of the web-based approved model. Industry pushed for such a process for brownfields that do not meet the generic site condition standards. However, only redevelopment projects that use simple risk management measures and parameters will be able to fully benefit from the modified generic risk assessment.

Accountability

It is uncertain whether the amendments changing the definition of QPs will improve accountability in the RSC process or the quality of RSCs filed. The ministry claims that redefining QPs and limiting the filing of RSCs to professional engineers and geoscientists will ensure accountability and better quality RSCs. MOE's rationale for these changes is that members of a professional association are answerable to their profession by law. Members are subject to disciplinary actions if they do not carry out their duties using the highest professional standards, or fail to ensure their certifications are truthful and accurate.

However, the new QP definition does not specify any particular expertise that a QP must have in order to file an RSC. Many professionals who are now ineligible to be QPs have the requisite environmental expertise and experience in brownfield remediation. They are also regulated by professional organizations, similar to those governing the PEO and APGO. Members of these organizations are also bound by a Code of Ethics and have disciplinary procedures in place to ensure appropriate standards of practice.

Public Participation & *EBR* Process

O. Reg. 66/08 – Qualified Persons Amendments

The proposal notice was posted on the Environmental Registry for a period of 30 days. The notice, which garnered 60 written comments, described the changes to the definition of QPs. Comments were made by professionals and professional associations from the affected fields. As expected, chartered chemists, agrologists, chemical technicians and their associations strongly opposed the amendments and called for changes allowing them to continue to be eligible as QPs. In contrast, engineering and geologist associations and financial institutions supported the amendments, with banks recommending that insurance limits be raised to $2-5 million.

Overall, the majority of the comments received were in opposition to the QP amendments. The comments were detailed and articulate in outlining the detrimental impact of these amendments on scientific professions excluded from acting as QPs.

Qualifications:
Many commenters noted that chemists and agrologists are well-suited to be QPs because brownfield restoration relies heavily on these two sciences. In contrast, they argued that any engineer or geologist can be a QP and sign-off on an RSC without possessing any expertise in environmental sciences. Several commenters proposed that QP eligibility should be restricted to those experienced in brownfield restorations rather than persons with an affiliation to a professional association.

Most who opposed the amendments vigorously disagreed with MOE's justification for the new QP definition, which is that engineers and geoscientists file 98 per cent of RSCs. Chemists, agrologists and engineering technicians dispute the merits of this statistic, stating they perform thousands of Phase 1 and 2 ESAs, however, not all ESAs must be filed with the ministry. They felt that the 98 per cent figure is misleading and underestimates their extensive experience in the field.

Consultation and Transition Period:
Those opposing the amendments commented that the consultation period was not long enough. Many felt that the ministry should have made a greater effort to notify and consult with professionals expected to be affected by the changes. Commenters felt MOE does not fully value the expertise, experience and accountability of these professions, and diminished the hardships the profession will face once they are no longer eligible to be QPs. Some stated that the consultation period should have been extended until a proper reconciliation of differing views could be satisfactorily achieved. In addition, a few commenters pointed out that the transition period was too short to allow excluded professionals time to acquire the necessary qualifications to become QPs. In its decision posting, MOE decided to extend the transition period from 12 months to 18 months.

Accountability:
Another amendment rationale strongly contested by commenters was that the work of engineers and geoscientists was more sound because these professionals are accountable to their regulatory bodies. Associations representing chemists, agrologists and engineering technicians strenuously emphasized that their members are similarly accountable to their associations, and may be disciplined when warranted.

These associations noted that in Alberta, which has a QP system similar to Ontario, agrologists, biologists, and engineering and science professionals are all included in Alberta's QP definition. The associations urged Ontario to adopt Alberta's model and restore the QP status of the excluded professions.

Industry Impacts:
Professions now excluded from QP eligibility also asserted there is a high demand for ESAs and the amendments will result in a shortage of QPs to conduct the assessments, resulting in delays in the brownfield remediation process.

O. Reg. 511/09 – Record of Site Condition Amendments

In addition to the 127-day comment period, MOE held 22 information sessions, including two for Aboriginal participants. The ministry formed two technical stakeholder working groups. MOE conducted desktop demonstration pilot projects for stakeholders to test the impact of the brownfield reforms. Lastly, MOE met with the Ministry of Municipal Affairs and Housing's Stakeholder Advisory Working Group to provide an overview of the regulatory proposals.

The ministry received a total of 87 comments, mainly from municipalities and regional governments, professionals and professional associations, consultants and industries. Overall, stakeholders supported the amendments. However, industry and professional associations provided very detailed and technical analyses of concerns with the provisions and standards and provided recommendations. Due to the highly technical nature of the comments, the following is a general overview of the commonly cited areas of concern.

Off-Site Regulatory Liability Protection:
Environmental groups were concerned that MOE would not take action where contamination spreads to an adjacent property if it is zoned as industrial. Stakeholders expressed reservations that it may be premature to move ahead with these regulatory amendments. The ministry concurred and decided not to include this provision in the amendments. It stated it would continue to work with stakeholders to address this issue.

Updated Standards:
Industry and professional associations submitted that the updated standards were too stringent in certain instances, which would result in more costly clean-ups and discourage brownfield redevelopment. They argued that stricter standards would result in greater landfilling of contaminated materials rather than *in situ* or *ex situ* treatment. MOE disagreed, stating the standards were in line with other jurisdictions.

Streamlined Risk Assessment:
Many industry and professional associations supported the modified generic risk assessment. However, they expressed concern that the streamlined risk assessment process was not flexible and efficient enough to accommodate their needs, and may only be applicable to a few sites. Several professional associations suggested further work with stakeholders was needed to improve this process.

Environmental groups expressed concerns that the Certificate of Property Use would no longer be posted on the Environmental Registry. They recommended that the public should be able to access ministry staff to express their comments and concerns about brownfield redevelopments.

Economic and Administrative Implications:
Many industry and professional associations felt there were additional administrative burdens related to ministry information requests, the ESA requirements, and timelines for review, which would make remediating brownfields a lengthy and costly venture and act as a disincentive for redevelopment. They were concerned that MOE did not fully assess the economic implications of the amendments.

Transition Period:
Some stakeholders suggested that the transition period for the RSC amendments needed to be adjusted to accommodate projects already underway. In response, MOE included provisions related to extended transition periods for existing projects.

SEV

In its SEV consideration note for O. Reg. 66/08, MOE stated that persons defined as QPs have the competence to understand engineering and scientific principles associated with a contaminated site, as well as the knowledge to address the potential effects of contaminants on the environment and people. This is consistent with the science-based approach, and pollution reduction and environmental restoration principles outlined in the ministry's SEV.

With respect to transparency, MOE stated that the amendments protect the public interest by ensuring that brownfield redevelopment projects are overseen by QPs who are members of professional associations.

In regards to O. Reg. 511/09, the ministry's SEV consideration note outlined that updating soil and groundwater standards and implementing the modified generic risk assessment invoked the precautionary/science-based principle, the ecosystem approach, cumulative effects assessments and intergenerational equity. The improved standards will protect human health and the environment because the standards use the latest science to determine the effects on ecosystems.

The ministry noted that a more effective RSC process will fulfil MOE's goal to rehabilitate environmental harms, and strives to make polluters responsible for the clean-up of their contamination. Transparency is fostered through clearer definitions and expectations of the Phase 1 and 2 ESA process, and MOE's review of RSCs before they are filed.

ECO Comment

As noted in the 2007/2008 Supplement to our Annual Report, the ECO is pleased with the 2007 reforms to the brownfields process and MOE's efforts to remove barriers to redeveloping brownfield properties. The ECO supports the amendments that implement the reforms. The modified generic risk assessment, clearer rules for Phase 1 and 2 ESAs, the updated soil and groundwater standards and rules for the movement of soils improve the brownfield remediation process. These science-based amendments rely on the latest models and standards to improve certainty and confidence in the data presented in the RSC.

The ECO appreciates the complexities involved in brownfield remediation. The comments provided by stakeholders were very detailed and highlighted potential provisions that may act as a barrier for

redevelopment. The ECO strongly urges MOE to continue monitoring the effectiveness of the brownfields remediation process to ensure it meets its ultimate goal of encouraging the clean-up of these sites in order to protect the environment and human health.

The ECO is disappointed that Certificates of Property Use will no longer be posted on the Environmental Registry. Although we understand the purpose is to expedite the modified generic risk assessment process, we are concerned about this removal of a public right. Members of the public who may be affected by a brownfield redevelopment will no longer: receive notice of the redevelopment; have an opportunity to comment; or file a leave to appeal. MOE should develop a mechanism where it can still receive and consider comments from the public regarding a redevelopment project (e.g., posting information notices on the Environmental Registry, or posting this information on the Environmental Site Registry).

The ECO commends MOE for the extended comment period and consultations it held for O. Reg. 511/09, and for producing five factsheets on the brownfields amendments and posting them on its website to help the public better understand this complex process.

After reviewing the comments submitted in response to the redefinition of QPs, the ECO questions the ministry's rationale behind removing chemists, agrologists and technicians from the QP definition. The ECO does not believe that limiting QPs to engineers and geoscientists will result in higher quality RSCs or reduced misconduct in the process. Brownfield redevelopment is a complex process that demands knowledge in environmental-based sciences such as chemistry, biology, ecology and microbiology. Many ineligible QPs have worked in the field for years and have acquired a wealth of brownfield remediation expertise. In contrast, any professional engineer can sign an RSC regardless of their specialization or experience.

MOE's QP amendments suggest that the ministry does not want to oversee the accountability and discipline of QPs and would prefer to delegate the responsibility to a professional body. The ECO would have liked to see MOE consider a model similar to Alberta's or, at the very least, include an explanation why such a model would not work in Ontario. The ECO favours a qualification-based eligibility process for designating QPs.

The ECO is concerned that MOE waited almost two years after it filed O. Reg. 66/08 before it posted its decision notice on the new definition for QPs. As a result, the posting went up on the Registry after the transition period expired. Such delays frustrate the public, particularly commenters who were affected by the outcome of MOE's decision. Commenters have a right to gauge whether their comments affected the final decision and to review MOE's response to their concerns.

The ECO will continue to monitor developments in brownfield remediation in the province.

Review of Posted Decision:

4.4 Guideline C-4: The Management of Biomedical Waste in Ontario

Decision Information:

Registry Number: 010-3864
Proposal Posted: October 23, 2008
Decision Posted: January 12, 2010
Comment Period: 60 days
Number of Comments: 19
Decision Implemented: November 2009

Description

Overview

In November 2009, MOE approved its revised Guideline C-4: The Management of Biomedical Waste in Ontario (2009 Guideline). MOE decided to review the 1994 version of Guideline C-4 (1994 Guideline) after a medical waste management company used the *Environmental Bill of Rights, 1993* (*EBR*) to request a review of the 1994 Guideline. For a review of this application, please refer to Section 5.2.2 of this Supplement.

Generators, carriers and receivers of biomedical waste are subject to a number of legislative and regulatory requirements under Part V of the *Environmental Protection Act (EPA)*, Regulation 347 – General-Waste Management, made under the *EPA* (Reg. 347) including:

- Requirements to obtain Certificates of Approval (Cs of A) to transport, collect, receive, handle or process waste (with some exceptions for facilities that generate biomedical wastes and undertake these activities onsite);
- Requirements for all waste disposal sites receiving biomedical waste to obtain Cs of A authorizing the handling of such waste;
- Standards for disposal of biomedical waste;
- Requirements for generators of biomedical waste to register with MOE's Hazardous Waste Information Network (HWIN) and report on the quantities and types of waste they generate. Recent amendments to Reg. 347 exempt waste that is generated, collected and transported from field operations – such as mobile health care providers – directly to a local waste transfer facility from the HWIN requirements. However, these facilities may still be subject to other reporting requirements.

2009 Guideline:
While Regulation 347 sets out a number of requirements for the management of hazardous waste, including biomedical waste, the 2009 Guideline was developed to provide additional guidance the on proper handling of this particular hazardous waste stream.

Section 1.0 of the 2009 Guideline identifies generators, carriers and receivers of biomedical waste as its primary audience and sets out biomedical waste management expectations for these sectors. Sections 2.0 and 3.0 outline the scope of the 2009 Guideline and provide definitions of biomedical waste and biomedical waste generating facilities. Section 4.0 spells out that biomedical waste should be segregated from all other waste and handled in accordance with specific containment, labelling and storage requirements. Sections 5.0 and 6.0 set out specific on-site treatment requirements. Section 7.0 sets out the general requirements for the transportation of biomedical waste and specific vehicle standards for vehicles used to transport biomedical waste. Finally, section 8.0 mandates off-site treatment and final disposal requirements.

Guideline C-4: The Management of Biomedical Waste in Ontario was initially developed in the early 1980s as MOE Guideline 14-05 and was subsequently revised in 1994. MOE noted that since the 1994 Guideline was originally developed in the 1980s, many of its procedures were more than 20 years old and did not reflect current best practices. To minimize the public health and environmental risks associated with biomedical waste, MOE revised the 1994 Guideline in 2009.

Some of the key changes to the 1994 Guideline are outlined in Table 1 below. The table reflects provisions of the 1994 Guideline, the 2008 proposal and the final changes from the proposal as a result of the public consultation process.

Table 1 – Comparison of the 1994 Guideline, the 2008 Proposal and the 2009 Guideline

Guideline C-4: The Management of Biomedical Waste in Ontario		
1994 Guideline	**2008 Proposal**	**2009 Guideline**
Biomedical waste definition was narrow	Proposed to expand definition	Definition expanded to include, among others, "animal blood waste" and "animal anatomical waste"
Contained exemption that allowed generators to transport less than 5 kg of biomedical waste without generator registration and manifesting	Proposed to remove exemption	Exemption removed as per proposal
No maximum storage time limit	Proposed to add a 90-day maximum storage limit	No maximum storage time limit (proposal was not adopted)
Requirements for non-incineration technologies for on-site treatment were weak	Proposed to strengthen requirements for non-incineration technologies for on-site treatment	Requirements for non-incineration technologies were strengthened as per proposal
• Colour coded bags and containers used to indicate destination of waste • One label	• Proposed that no more colour coded bags and containers are required • Proposed three labels to indicate waste composition	Proposal was adopted
Allowed generators to discharge blood, blood products or body fluids into a sewage works	Proposal did not contain provision	2009 Guideline does not contain provision
Single-use disposal containers only	Proposal to use both single-use or reusable containers	Reusable containers may be used for microbiology laboratory waste and/or sharps

During the public consultation process, there was considerable opposition to the proposed removal of the five kg exemption and to the proposed imposition of a 90-day maximum storage limit. In the final 2009 Guideline, MOE did remove the five kg exemption in order to align with the regulatory requirements set out in Reg. 347. However, MOE accepted stakeholder comments and agreed not to adopt the proposed 90-day maximum storage time limit. MOE acknowledged that this would align better with Reg. 347, which requires generators that store subject waste at their facility more than 90 days to report the nature and weight of the waste to the Regional Director.

The 2009 Guideline requires that biomedical wastes treated with non-incineration options reduce the bacterial spores of *B. stearothermophilus* — the most heat resistant organism to thermal inactivation, routinely used in high concentrations to monitor the steam sterilization process of clean medical supplies — within the waste by a level of 99.9999 per cent as opposed to a level of 99.99 per cent as specified in the 1994 Guideline.

The 1994 Guideline required that all biomedical waste containers were to be labelled with the Universal Biohazard Symbol. It also required red waste bags and containers for biomedical waste transported to an incineration facility and yellow ones for waste transported to a non-incineration facility. The 2009 Guideline requires the labelling of the biomedical waste containers with three different symbols: Universal Biohazard, Anatomical and Cytotoxic. The colour-coded container requirement to indicate waste destination is removed.

The provision in the 1994 Guideline allowing generators to discharge blood, blood products or body fluids into a sewage works is also removed. MOE says that it is a local infrastructure issue and that generators should consult with local authorities whether the discharge of such waste into municipal sewer systems is allowed. Another change is that the 2009 Guideline permits the use of reusable containers for the disposal of microbiology laboratory waste and sharps.

Background

Biomedical Waste:
According to the 2009 Guideline, biomedical waste means: a) human anatomical waste; b) human blood waste; c) animal anatomical waste; d) animal blood waste; e) microbiology laboratory waste; f) sharps waste; g) cytotoxic waste; h) waste that has come into contact with human blood waste that is infected or suspected of being infected with any infectious substance (human); or i) a waste containing or derived from one or more wastes described in clauses a) through h).

Until recently data on the quantities of biomedical waste in Ontario were not generally available in an accessible format. In February 2010, however, MOE used the data from its Hazardous Waste Information Network (HWIN) to produce its first public and long-awaited report on hazardous wastes in Ontario. According to the report, with Ontario hospitals being the largest single generator producing approximately 30 per cent of the total biomedical waste, 11,559 tonnes of biomedical waste was shipped in Ontario in 2008. This may seem to be a very small fraction of the total 718,519 tonnes of hazardous waste shipped in the province in the same year but biomedical waste that is not properly treated and disposed of can pose serious hazards to workers, haulers and others.

Improperly disposed of cytotoxic drugs, for example, which are cell-killing drugs used in chemotherapy and radiotherapy, can make their way into lakes and rivers. Even minute concentrations of such chemicals in water can pose a risk to aquatic organisms and to humans. Some of Ontario's cytotoxic waste, along with anatomical waste, is centrally incinerated at the Brampton incinerating facility. The rest is exported to either Saskatchewan or the U.S.

Similarly, needles that enter the regular or recycling waste stream can injure waste haulers, landfill operators and recycling facility workers. Recyclable materials contaminated by biomedical waste cannot be processed by materials recovery facilities. Needles flushed down toilets may cause problems in plumbing and wastewater treatment plants. Sharps disposed of in storm sewers may end up on beaches. Blood-borne pathogens, such as hepatitis and HIV, are transmitted by contaminated needles. Needlestick injuries represent a high cost for health care systems and society in general.

Implications of the Decision

Rules are Not Binding on Waste Generators

The 2009 Guideline will not be legally binding on biomedical waste generators, though they are encouraged to follow it. However, under section 18 of Reg. 347 the generators of biomedical waste are obliged to be registered with the MOE Hazardous Waste Information Network and report on the quantities and types of waste they generate. The ECO asked MOE if it has programs in place to educate or train generators so that they segregate, package, label, and treat waste according to the 2009 Guideline. MOE replied that biomedical waste carriers offer training to their clients in an effort to ensure that biomedical waste is properly segregated, packaged, and labelled before being taken away.

It remains unclear what incentives exist to encourage biomedical waste generators to comply with the revised 2009 Guideline. MOE's random inspections of 47 Ontario hospitals from October 2007 to January 2008 revealed that for the majority of hospitals non-conformance issues were identified. That is, many hospitals failed to follow best management practices identified in a ministry guideline such as the 1994 Guideline. It was only after MOE's inspection blitz that the targeted generators made efforts to comply with best management practices. MOE states that "as of June 2009, all issues identified during the

inspections have been addressed by the hospitals. "Just strengthening the provisions of the guideline does not guarantee that generator's compliance rates will improve.

Rules Apply to New and Existing Cs of A

The provisions of the revised 2009 Guideline will be incorporated into the Certificate of Approval process for biomedical waste management companies. Whenever an application is made for a new or amended C of A the new Guideline will apply. The ECO asked MOE how it will update the numerous Cs of A which were issued before the 2009 Guideline came into effect. MOE explained that existing holders of Cs of A are notified there is a new guideline and that they should follow the updated provisions in the revised guideline.

No Emphasis on Waste Reduction

The 2009 Guideline does not appear to encourage waste reduction. MOE has strengthened the guideline's provisions for the management of biomedical waste once it has been generated; however, it does not really promote upfront waste minimization, the implementation of precautionary plans of action or life cycle considerations of the products used by health care.

MOE maintains that by allowing the use of reusable sharps containers, biomedical waste volumes should be reduced over the long run. MOE also says that 'greener' medical devices and products are a federal government issue.

Public Participation & *EBR* Process

MOE held focused group consultations with selected stakeholders in February and March 2008. MOE posted Proposed Revisions to Guideline C-4 on the Environmental Registry on October 23, 2008 for a period of 60 days. As a result of public consultation, 19 comments were received. Below is a summary of some of those comments.

Small Quantity Exemption

Several commenters, such as the Ontario Association of Medical Laboratories and the Royal College of Dental Surgeons of Ontario, asked that the five kg biomedical waste exemption be maintained. Traumacare Cleaning Services additionally asked that a new exemption of up to 50 kg of biomedical waste be added to accommodate companies that provide specialized cleaning, remediation and decontamination services after accidents, illnesses and death. MOE did not grant the requests. Companies that provide biomedical remediation and decontamination services will continue to require a Certificate of Approval and proper vehicles for the transportation of biomedical waste.

Costs of Refrigeration

Ambiguous wording in the 2008 proposal led some commenters to understand that there was a requirement for the refrigeration of sharps, and they requested its removal. The proposal read: "All other biomedical wastes [except human anatomical and animal anatomical waste] stored for greater than four days after generation should be stored in an area where the temperature is maintained at or below 4 degrees Celsius." The 2009 Guideline clarifies that the refrigeration of sharps is not required.

One commenter felt that the proposed requirement for refrigeration of biomedical waste would financially burden smaller institutions, as they would have to incur capital costs for the purchase of refrigeration units or construction of refrigeration space. Also, the Ontario Hospital Association, after canvassing their membership, said that one small community hospital complained that the lack of a permanent area for the refrigerated storage of biomedical waste on their premises would force them to incur an extra $150 cost per week for waste pick up twice a week. MOE did not change the proposed refrigeration requirement as the proposal already provided the option of fixing human or animal anatomical waste in formaldehyde or other preservative, instead of refrigerating it.

Compliance Challenges for Northern Communities

Another commenter expressed concern over the ability of remote Northern Ontario communities to comply with the proposed guideline. The removal of the proposed maximum 90-day storage requirement was requested as some facilities are accessible only by air in the winter and reaching them may be a problem. The commenter felt that since they provide services to fly-in remote communities that produce very little biomedical waste, the exemption to allow generators to transport less than five kg of biomedical waste should stand. MOE replied that the exemption to allow generators to transport less than five kg of biomedical waste without generator registration and manifesting has been removed to align the 2009 Guideline with the requirements outlined in sections 18 and 19 of Reg. 347, which do not include a small quantity exemption. The ministry noted that the stakeholders who were concerned about the removal of the five kg exemption will benefit from another recent amendment to Reg. 347, which exempts waste generated and collected from field operations (including mobile health care providers and specimen collection centres) that is transported directly to a local waste transfer facility from the subject waste requirements.

Application of Guideline to Individuals

One commenter sought clarification on whether the proposed guideline revisions would apply to individuals who generate biomedical waste off site but in connection with one of the listed facilities. A careful reading of the 1994 and the revised 2009 Guideline indicates that domestic waste is not included in the definition of biomedical waste.

Segregation of Biomedical Waste

One commenter, speaking on behalf of the Ottawa Hospital, argued against the proposed requirement to segregate treated biomedical waste from regular domestic waste saying that "treated biomedical waste is less of a pathological risk to public health and safety than that of regular domestic/municipal waste". The commenter also said that the requirement would "limit the health care industry's ability to effectively manage its own waste by creating the need for a duplicate process." MOE did not withdraw the requirement from the revised guideline.

Storing and Labelling System

The Ontario Hospital Association also said that one hospital commented that it already had a labelling system for its biomedical waste in place and that the new requirement for uniform storage and labelling across the province would lead to it incurring an additional cost. MOE did not change the requirement for the new storage and labelling system.

Alignment of Definitions with Health Canada

The Ontario Veterinary Medical Association (OVMA) asked that the definitions of "animal anatomical waste" and "animal blood waste" be changed to reflect Health Canada's definition of "reportable diseases." MOE agreed to change the definitions in its final 2009 Guideline. OVMA also asked that animal vaccines be removed from the definition of "microbiology animal waste." MOE agreed with the commenter. MOE did not change the restriction of waste stored in a frozen state at OMVA's request.

Guideline Should Be Made into Regulation

A waste hauler that handles and disposes of biomedical waste also expressed its belief that the guideline should be a regulation.

Out-of-Province Disposal

The same waste hauler above also suggested that treated biomedical waste should be allowed to be sent to any disposal site approved to receive such waste, including sites outside the province. MOE agreed with the commenter and changed the Guideline accordingly.

Funeral Establishments

The Ontario Funeral Services Association requested that funeral establishments providing funeral education courses should not be included under the definition of "biomedical waste generating facility." MOE agreed with the commenter and changed the Guideline accordingly.

Pharmacy Distribution System

The Ontario College of Pharmacists encouraged MOE to consider licensing the pharmacy distribution system to transport sharps and drugs to a central site for pick up by a licenced waste management company, explaining that the process would encourage more pharmacists to accept returns of outdated drugs and have them efficiently removed from pharmacies on a regular basis. MOE did not comment on the proposal.

SEV

MOE stated that the policy proposal incorporates the ecosystem approach as articulated in its Statement of Environmental Values (SEV) by providing clear direction and guidance to generators, carriers and receivers of biomedical waste respecting the treatment of waste prior to landfill disposal. MOE also said that the goal of the 2009 Guideline is to help ensure that best management practices are followed and to raise awareness concerning the environmental and health considerations of this waste. Moreover, MOE stated that by promoting best management practices of biomedical waste, including packaging, segregation, strengthened treatment standards, storage and disposal of biomedical waste, the impact on the environment is minimized. The reduction in the creation and release of pollutants results in better protection of environmental and human health. The 2009 Guideline, according to MOE, also contributes to resource conservation by encouraging generators to segregate and treat biomedical waste and to utilize reusable packaging where possible and helps minimize the amount of biomedical waste produced.

ECO Comment

The ECO believes that the potential for public health and environmental benefits is not fully realized by simply revising the biomedical waste guideline instead of converting it into a regulation. For example, strengthening the requirements for proper waste treatment, transportation and disposal means little if biomedical waste does not find its way into the appropriate stream. Carriers and receivers of biomedical waste are legally bound to follow the rules of the guideline, but much still depends on the voluntary participation of waste generators. MOE's own recent inspection results of 47 hospitals shows much scope for improvement by generators. Many factors may be contributing to the weak performance of generators, including lack of training; time pressures for healthcare staff; the costs of biomedical waste services; and rare inspections by the ministry. Given this situation, the ministry could have sent a stronger message by adopting a regulatory approach for generators.

The ECO is pleased that in 2010 MOE published its first report on hazardous waste in Ontario using the data it collects on HWIN. Such clear and plain language reports enhance the quality and accessibility of hazardous waste information in the province. Biomedical waste quantities are not static. Population growth and an aging population will likely result in an increase in the quantities of biomedical waste produced. On the other hand, medical and technological advances may provide for more effective treatments and diagnostic procedures that do not generate as much biomedical waste. MOE should continue to report on trends over time.

The ECO is pleased with the overall public consultation process, including the focused group consultations prior to posting the proposal and the subsequent 60-day public comment period on the Registry. However, the summary of the key changes to the 1994 Guideline and the effects of consultation on the decision that MOE posted on the Registry were rather limited and insufficient for the general public to clearly understand how public comments were addressed and how the 2009 Guideline differs from its predecessor. MOE should keep in mind that the Registry is a source of information not only for specific stakeholders that have an economic or business interest in and knowledge of the subject but for all Ontarians too.

The ECO is pleased with MOE's conducting and publishing the results of the inspection of a number of hospitals in the province. Publishing the inspection results, including the names and compliance rankings of facilities, will likely encourage improved compliance rates. The ECO is worried, however, that MOE appears to have no inspection mechanism in place for smaller biomedical waste generators, who account for 70 per cent of the total biomedical waste generated in the province. MOE should work to address this issue, perhaps by mandating periodic third party audits by independent auditors, periodic ministry inspections or other approaches.

To ensure that the 2009 Guideline is followed by generators, the ECO suggests that MOE should undertake enhanced education, inspection and compliance efforts. Education on source separation and pollution prevention would help biomedical waste generators reduce the amount of biomedical waste they generate. Guidelines are just one of the tools MOE can use to improve the management of biomedical waste. Employee training, effective disposal systems, inspections and even surveillance systems are additionnal ways to improve biomedical waste management.

The ECO recognizes that waste minimization can be a challenging goal for biomedical waste. The globalization of the medical devices industry means that medical products used in Ontario may be produced in different countries under heterogeneous regulatory regimes. This makes it difficult for a single jurisdiction to impose requirements on manufacturers to produce environmentally-friendly products. Moreover, ethical and safety issues may complicate such requirements. Nevertheless, biomedical waste can pose health and environmental risks that may affect the lives of all of us collectively.

The waste minimization goal could include practices such as recycling, source separation and product substitution. Reprocessing medical devices can reduce the waste footprint of the healthcare industry and improve its bottom line. To increase the safety of reprocessed medical devices, stringent regulations need to be in place. Identifying ways to help biomedical waste generators eliminate solid wastes from the biomedical waste stream can have both environmental and financial benefits. Substituting biomedical waste bags and containers with ones made of recycled material can help economize on resources and reduce pollution. Despite being a small player in a global market, Ontario should consider opportunities to promote biomedical waste minimization through the promotion of healthcare products created with a cradle-to-grave view in mind.

Review of Posted Decision:

4.5 Lake Simcoe Protection Plan

Decision Information:

Registry Number: 010-4636
Proposal Posted: January 13, 2009
Decision Posted: June 18, 2009
Comment Period: 62 days
Number of Comments: 137
Decision Implemented: June 2, 2009

Description

Overview

Lake Simcoe is Ontario's largest inland lake, aside from the Great Lakes. The Lake Simcoe watershed is a mix of agricultural, natural and urban lands and is considered a prime cottage and fishing destination. During the 1970s the health of the lake began to deteriorate, notably impairing the ability for lake trout and other cold water fish species to reproduce naturally. Water quality was mainly impacted by the total amount of phosphorus carried into the lake (phosphorus load) from urban and agricultural runoff, sewage treatment plants, septic systems and other sources. While the level of phosphorus in Lake Simcoe has been reduced in recent years, it has not been reduced enough to restore the health of this oligotrophic (clear water) lake and its native aquatic community.

In June 2009, the Ministry of the Environment finalized the Lake Simcoe Protection Plan (LSPP or Plan), established under the *Lake Simcoe Protection Act, 2008 (LSPA)*, to address water quality concerns and other threats to the watershed. The Plan includes a range of targets, indicators and 119 policies aimed at protecting and restoring the ecological health of the watershed.

The Plan's objectives are set within the *LSPA*, including to "protect, improve or restore the elements that contribute to the ecological health of the Lake Simcoe watershed, including water quality, hydrology, key natural heritage features and their functions, and key hydrological features and their functions." Some priorities of the Plan include:

- Restoring the health of aquatic life within the watershed;
- Improving water quality, including reducing loadings of phosphorus to the lake; and
- Improving the health of the ecosystem by protecting and rehabilitating important areas, such as shorelines and natural heritage.

Lake Simcoe Watershed:
Lake Simcoe has a surface area of 722 km and its watershed crosses 23 municipal boundaries (e.g., York and Durham Regions). The Lake Simcoe watershed contains a portion of the Oak Ridges Moraine (regulated under the *Oak Ridges Moraine Conservation Act, 2001*) as well as the provincially designated Greenbelt (regulated under the *Greenbelt Act, 2005*).

Similar to the rest of southern Ontario, the landscape began to significantly change after European settlers first inhabited the area in the 1800s by converting forested land to agriculture. Today, the watershed is under intense development pressures because of its proximity to Toronto. Areas north of the Greenbelt are currently being targeted by developers, where agricultural and natural lands are being converted to residential and urban lands. In the last 20 years, the population in the watershed has grown substantially and is anticipated to further increase as a direct result of the Growth Plan for the Greater Golden Horseshoe under the *Places to Grow Act, 2005*.

Lake Simcoe is naturally an oligotrophic lake and its fish community has 55 cold, cool and warm water species. Phosphorus occurs naturally in water bodies and is an essential element for all living things. However, increased phosphorus loads into a water body feeds algal blooms and increases aquatic plant growth, a process known as eutrophication. Increased phosphorus loading causes dissolved oxygen concentrations to decrease in the bottom layer of a water body in the summer, which starves cold water fish of oxygen and essentially creates dead zones. Relative to the 1940s, extensive phosphorus loading during the 1970s to 1990s led to eutrophication and hypoxic conditions (low dissolved oxygen levels) in the deep waters of Lake Simcoe.

Lake trout, and other cold water species, depend on cold, well oxygenated water (greater than 7 mg/L of dissolved oxygen), particularly in the summer months, to swim, feed and grow. Natural recruitment of cold water fish species such as lake trout, lake whitefish and lake herring began to decline in the 1960s, 1970s, and 1980s, respectively. Lake trout and lake whitefish populations are maintained or supplemented through hatchery stocking programs. Since 2001 several wild juvenile lake trout have

been captured and natural recruitment of lake whitefish and lake herring population have also occurred. Lake trout, as a top predator, is essential to maintaining the structure of the aquatic community in Lake Simcoe. Hatchery lake trout are currently the dominant predator in Lake Simcoe and have reduced the abundance of rainbow smelt and probably lake herring. Without lake trout, stocked or wild, the fish community would restructure in an undesirable way.

Lake Simcoe Environmental Management Strategy:
The Lake Simcoe Environmental Management Strategy, a multi-partner program, began in 1990 to identify, measure and reduce the sources of phosphorus entering Lake Simcoe. The Lake Simcoe Region Conservation Authority (LSRCA), provincial ministries (e.g., Environment, Natural Resources, Municipal Affairs and Housing), the federal Department of Fisheries and Oceans, and municipalities implemented the strategy in three phases (Phases I 1990-1995, Phase II 1996 -2001 and Phase III 2002-2008). Through a number of initiatives such as agricultural and urban water quality improvement projects, the strategy was successful at reducing the phosphorus loads in the watershed. Despite the success of the strategy, phosphorus loads must be reduced even further to improve the ecological health of the watershed and maintain a native self-sustaining cold water fish community.

Lake Simcoe Protection Act, 2008:
MOE passed the *LSPA* in December 2008. The purpose of the Act is to "protect and restore the ecological health of the Lake Simcoe watershed." In addition to requiring the creation of a LSPP, the Act also establishes a Lake Simcoe Science Committee and a Lake Simcoe Coordinating Committee. The Act enables the province to create regulations for activities that may adversely affect the ecological health of the watershed (e.g., shoreline protection regulation). The ECO reviewed the *LSPA* in our 2008/2009 Annual Report (see pages 25-29).

What is a Watershed?:
The LSPP is unlike any other legislated land use plan in the province, such as the Greenbelt Plan or the Oak Ridges Moraine Plan – it is based on the watershed boundary. A watershed is the catchment area, both land and water, drained by a watercourse and its tributaries. A subwatershed is the catchment area drained by an individual tributary to the main watercourse. A watershed is a linear directional system – downstream is an integration of all that happens upstream. By planning at this scale instead of by political boundaries, land use planners can identify harmful and cumulative impacts to the watershed so that prevention, remediation or improvements can be made at a local level.

Integrated watershed management is the process of managing human activities and natural resources in an area defined by watershed boundaries. As part of this process, watershed stressors (e.g., climate change and growth pressures) and alternative management approaches are evaluated to determine appropriate management practices. Conservation authorities (CAs), as established under the *Conservation Authorities Act*, are organized on a watershed basis and practice the concept of integrated watershed management. Approximately two-thirds of CAs have or are carrying out watershed/subwatershed studies or plans in the province. For example, the LSRCA completed an integrated watershed management plan for Lake Simcoe in June 2008.

There is no comprehensive water policy or legislation in Ontario that guides integrated watershed management planning. For example, the Provincial Policy Statement provides some general watershed management planning guidance and the *Clean Water Act* provides specific guidance focused on municipal drinking water. As a result, interpretation of policies and implementation of integrated watershed management plans vary across the province.

First Steps: Implementing the Lake Simcoe Protection Plan

In February 2010, MOE posted three proposals on the Environmental Registry to facilitate the implementation of the Lake Simcoe Protection Plan (Plan): the phosphorus reduction strategy; the water quality trading feasibility study; and a discussion paper on the shoreline regulation (Environmental Registry #010-8986, #010-8989, and #010-9107, respectively). MOE identified potential amendments to the Plan related to the implementation of the phosphorus reduction strategy, to revise timing for delivery of select strategic action policies and for administrative purposes.

The Lake Simcoe Phosphorus Reduction strategy was developed by MOE and a multi-agency team. The strategy sets sector specific targets, proportionally based on their current phosphorus load contributions. Currently, phosphorus loads to Lake Simcoe come from watershed streams (including runoff from agriculture and urban areas) (56 per cent), the atmosphere (27 per cent), sewage treatment plants (7 per cent), septic systems (6 per cent) and the Holland Marsh and former wetlands that were drained for agricultural use (4 per cent). MOE predicts that if all reductions are implemented successfully, annual phosphorus loadings would be reduced from 71.5 tonnes per year (2006 – 2007) to about 58 tonnes per year by 2045 – a shortfall of approximately 14 tonnes from the LSPP's long term target of 44 tonnes per year.

Water quality trading is a tool that uses economic incentives to improve water quality in an area. The water quality feasibility study, conducted by a team of experts, concluded that the program would be feasible in the Lake Simcoe watershed and could play a meaningful role in reducing phosphorus loads. The study suggested that the program include buyers and sellers of phosphorus reduction credits. For example, potential buyers could include municipal sewage treatment plans and potential sellers could include agricultural lands using best management practices.

The shoreline regulation discussion paper outlines key components for the regulation. For example, the regulation may address removing and establishing vegetation buffers, significant shoreline alteration, fertilizer use and septic systems.

In July 2010, MOE finalized the phosphorus reduction strategy and announced that it would further evaluate a number of issues related to water quality trading in Lake Simcoe. The ECO may report on these initiatives in a future Annual Report.

Implications of the Decision

Legal Effect of the Plan:
The Plan contains 119 policies to be implemented by MOE, MNR and various other partners such as municipalities and the LSRCA. Generally, policies have been assigned timelines for completion and 88 of these policies have commitments to be delivered by June 2010. The policies are divided into four categories. The *LSPA* gives legal effect to the first three:

- Designated – decisions made under the *Planning Act*, *Condominium Act, 1998* and decisions related to prescribed instruments must conform with these policies (e.g., major development applications must be accompanied by a stormwater management plan);
- Have regard to – decisions made under the *Planning Act*, *Condominium Act*, *1998* and decisions related to prescribed instruments must have regard to these policies (e.g., when approving development along the Lake Simcoe shoreline, municipalities should ensure that public access is maintained);

- Monitoring – policies commit public bodies such as ministries, municipalities, and conservation authorities to implement monitoring programs (e.g., by 2011 MNR, LSRCA and MOE will develop a monitoring program for natural heritage and hydrological features' targets and indicators); and
- Strategic action – are legally non-binding and include policies related to research, stewardship, education and outreach and best management practices (e.g., by 2011 MNR, LSRCA and MOE will delineate priority areas for riparian restoration).

Conformity is subject to transitional rules set in O. Reg. 219/09 – General, made under the *LSPA*.

Prescribed instruments are defined in O. Reg. 219/09. These include sewage works approvals under the *Ontario Water Resources Act*, permission under the *Conservation Authorities Act*, *Public Lands Act* approvals, and *Lakes and Rivers Improvement Act* approvals. A decision made by a public body to issue a new prescribed instrument, or to renew or amend an existing prescribed instrument must conform to designated policies in the Plan and have regard to other applicable policies. These public bodies include municipal councils, local boards, ministries, boards, commissions or agencies of the Government of Ontario, including the Ontario Municipal Board. A schedule to the Plan clearly outlines which policies apply to which prescribed instruments.

Plan Policies:
The Plan is organized into chapters that deal with specific policy themes – aquatic life, water quality, water quantity, shorelines and natural heritage, other threats and activities (i.e., invasive species, climate change and recreational activities) and implementation. Each chapter contains targets, indicators and policies. The Plan includes the following key policies:

Aquatic Life
- MNR will review the lake trout and lake whitefish stocking program and establish stocking targets by June 2011. Currently, the lake trout and lake whitefish populations in Lake Simcoe are being maintained by a hatchery stocking program. The conditions of the lake do not fully support the natural reproduction of these species and approximately 100,000 lake trout and 140,000 lake whitefish are being stocked for rehabilitation.

Water Quality
- MOE will review and amend all approvals for existing sewage treatment plants to restrict phosphorus loadings by June 2010 and restrict the establishment of new sewage treatment plants in the watershed, with some exceptions.
- Municipalities, in collaboration with LSRCA, will prepare and implement stormwater management master plans for each settlement area in the watershed within five years and applications for any new major development (e.g., the creation of four or more lots) must demonstrate consistency with these master plans.
- By June 2010, MMAH and MOE will develop a proposal for a regulation under the *Building Code Act, 1992* to designate lands within 100 metres of the Lake Simcoe shoreline and other water bodies as prescribed areas for required on-site sewage system maintenance re-inspections. New septic systems shall not be permitted within 100 metres of the Lake Simcoe shoreline and other water bodies, except in a few circumstances (e.g., would serve an agriculture use, replacements, or for a development proposal of one dwelling).

Shorelines and Natural Heritage
- By June 2010, MOE, in collaboration with MNR, other ministries and regulatory agencies will release for consultation proposed shoreline regulations under the *LSPA*, based on advice from the former Lake Simcoe Science Advisory Committee.
- Development and site alteration, outside of existing settlement areas, is not permitted in Lake Simcoe and within the vegetation protection zone (30 metres or greater from the Lake Simcoe shorelines in built up areas or 100 metres from the remaining Lake Simcoe shoreline, excluding existing settlement areas), except for:
    - Forest, fish and wildlife management;

  - Stewardship, conservation, restoration and remediation undertaking;
  - Existing uses;
  - Flood or erosion control projects but only if they have been demonstrated to be necessary in the public interest after all alternatives have been considered;
  - Retrofits of existing stormwater management works but does not include the establishment of new stormwater management works;
  - Infrastructure, but only if the need for the project has been demonstrated through an EA or other similar environmental approval and there is no reasonable alternative;
  - Low intensity recreation (e.g., non-motorized trail use and unserviced camping on public and institutional land).
- Development, site alteration and structures may be permitted within 240 metres of the shoreline, provided certain conditions are met. For example:
  - An application for development or site alteration within 120 metres of the shoreline, within the shoreline built up areas, shall have a natural heritage evaluation.
- Development and site alteration are not permitted within key natural heritage features (i.e., wetlands, significant woodlands, significant valleylands and natural areas abutting Lake Simcoe), key hydrological features (i.e., wetlands, permanent and intermittent streams and lakes other than Lake Simcoe), and within a related vegetation protection zone (minimum 30 metres), except for:
  - Forest, fish and wildlife management;
  - Stewardship, conservation, restoration and remediation undertaking;
  - Existing uses;
  - Flood or erosion control projects but only if they have been demonstrated to be necessary in the public interest after all alternatives have been considered;
  - Retrofits of existing stormwater management works but the establishment of new stormwater management works are not included;
  - Infrastructure, but only if the need for the project has been demonstrated through an EA or other similar environmental approval and there is no reasonable alternative;
  - Low intensity recreation (e.g., non-motorized trail use and unserviced camping on public and institutional land);
  - New mineral aggregate operations and wayside pits and quarries, with conditions.
- New mineral aggregate operations and wayside pits and quarries shall not be permitted in:
  - Significant wetlands;
  - Significant habitat of endangered and threatened species;
  - Significant woodlands unless the woodland is occupied by young plantation or early successional habitat.
- Where new mineral aggregate operations and wayside pits and quarries are permitted in key natural heritage features and key hydrological features, it must be demonstrated that the features will be maintained or restored and, to the extent possible, improved to promote a net gain of ecological health and that the area will be rehabilitated as soon as possible once extraction stops.
- By June 2011, MNR and MOE will lead the development of a template for municipal site alteration and tree cutting by-laws within the watershed as related to natural heritage features including wetlands and woodlands.

Other Threats and Activities

- By June 2011, MOE will develop a climate change adaption strategy for the Lake Simcoe watershed. The strategy will identify key recommended adaptation actions needed to increase the resiliency of the Lake Simcoe watershed to the impacts of climate change, identify roles and responsibilities for relevant parties, and identify potential amendments to the Plan.

Implementation

- By June 2010, MOE and LSRCA will develop subwatershed guidelines, to provide direction on identifying and prioritizing subwatersheds, preparing evaluations, monitoring and reporting and consultation. Within five years, LSRCA and municipalities will develop and complete subwatershed evaluations for priority subwatersheds. Municipal official plans shall be amended to ensure that they are consistent with the recommendations of the subwatershed evaluations.

Some of the key targets include:

- To reduce phosphorus loadings to 44 tonnes per year into Lake Simcoe to achieve a dissolved oxygen concentration of 7 mg/L (the aquatic life target to restore a native self-sustaining coldwater fish community).
- Achieve a minimum 40 per cent high quality natural vegetative cover in the watershed.

Some of the policies, such as key natural heritage and key hydrological features policies, only apply to areas of the watershed that are outside of the Greenbelt Plan or Oak Ridges Moraine Conservation Plan areas to avoid duplication. The following table provides a summary of key natural heritage and key hydrological features policies within the Lake Simcoe Protection Plan and compares these policies to other natural areas land use policies of the Greenbelt Plan and the Oak Ridges Moraine Protection Plan. Where uses are permitted, these uses may be subject to requirements contained in each of the plans. Interested readers should consult each plan to learn about any requirements.

Existing or Proposed Land Use	Greenbelt Plan Natural Heritage System (Policy Overlay)	Oak Ridges Moraine Conservation Plan Natural Core Areas (Land Use Designation)	Lake Simcoe Protection Plan Key Natural Heritage and Key Hydrologic Features (Policy Overlay)
New mineral aggregate extraction operations	YES (except in significant wetlands, significant woodlands, unless the woodland is occupied by young plantation or early successional habitat, and significant habitat of endangered species and threatened species)	NO	YES (except in significant wetlands, significant woodlands unless the woodland is occupied by young plantation or early successional habitat, and significant habitat of endangered species and threatened species)
Expansion of existing mineral aggregate extraction operations	YES	NO (not beyond boundary of area under licence or permit)	YES
Major recreational uses (e.g., ski hills, golf courses, serviced camp grounds)	YES	NO (only low intensity recreational uses permitted)	NO (only low intensity recreational uses permitted)
New waste management facilities (e.g., landfills, incinerators)	YES	NO	YES
Power transmission corridors	YES	YES	YES
Transportation infrastructure (e.g., public highways)	YES	YES	YES
Human settlement area expansion	NO	NO	NO
Agricultural uses (existing and new)	YES	YES	YES
Water taking	YES	YES	YES
Forest management (including wood harvesting)	YES	YES	YES

Transitional Rules

In June 2008, MOE filed a regulation under the *LSPA* that outlines 'transitional matters' such as how the Plan would apply to proposals in progress when the Plan came into effect on June 2, 2009 (General Regulation – O. Reg. 219/09). For example, under the regulation, transitional rules would apply to applications made under the *Planning Act*, *Conservation Authorities Act*, *Public Lands Act* and the *Lakes and Rivers Improvement Act*. The general regulation also delineates the boundary of the Lake Simcoe watershed, designates participating municipalities for the LSRCA and identifies which instruments are prescribed under the Act. Since the *LSPA* was not prescribed under the *Environmental Bill of Rights, 1993*, MOE did not post a proposal on the Environmental Registry or consult with the public on the transitional regulation.

Advisory Committees

During the development of the strategy to protect Lake Simcoe and the *LSPA*, the provincial government appointed two advisory committees. The Lake Simcoe Science Advisory Committee was comprised of experts with knowledge in water quality, lake and basin ecology, and the impacts of surrounding areas on lake health and aquatic life. The Science Advisory Committee submitted a report to the Minister of the Environment in October 2008 which identified the state of the lake and its tributaries, pressures on the watershed, ecosystem features that should be protected and provided advice on appropriate management of the watershed. The Lake Simcoe Stakeholder Advisory Committee was comprised of representatives from municipalities, farmers and the agricultural sector, tourism, fisheries, business, developers, residents, cottagers and environmentalists. The Stakeholder Advisory Committee provided MOE with advice on "best approaches to improve the long-term future of Lake Simcoe."

The *LSPA* established two new advisory committees to replace the Science and Stakeholder Advisor Committees; the Lake Simcoe Science Committee and the Lake Simcoe Coordinating Committee. The Science Committee will be composed of scientific experts in watershed protection issues and will review environmental conditions of the watershed and provide advice on the ecological health and significant threats to the watershed. The committee can provide advice to the Minister of the Environment on a number of matters including implementation of the Plan, proposed amendments to the Plan and proposed regulations under the *LSPA* (e.g., shoreline regulation). The nine-member Lake Simcoe Science Committee was appointed in March 2010. MOE identified that their first task will be to provide advice on the phosphorus reduction strategy, water quality trading and the shoreline regulation.

The Lake Simcoe Coordinating Committee will include representatives from municipalities, Aboriginal communities, the LSRCA, agricultural, commercial and industrial sectors, environmental organizations and the public. The Coordinating Committee will provide advice to the Minister of the Environment on the implementation of the Plan and assist in monitoring the progress on the implementation of the Plan. Cabinet is responsible for appointing members of both committees. The 12-member Lake Simcoe Coordinating Committee was appointed by the Minister of the Environment in May 2010. MOE identified that the committee will provide input to the policies and measures developed as part of the LSPP, as well as monitor the Plan's implementation and make recommendations for the long term strategy.

Public Participation & *EBR* Process

The proposed protection plan was posted on the Environmental Registry in January 2009 for a 62-day comment period. MOE received 137 comments on the proposal. In addition to comments received through the Registry, MOE stated it addressed comments received through community partner workshops, open houses, First Nations and Métis communities' engagement, and consultations with stakeholders and other provincial ministries in the final Plan.

In general, environmental groups, municipalities, industry and the general public were supportive of a protection plan for Lake Simcoe. For example, Campaign Lake Simcoe, a group of 25 organizations,

praised MOE for the phosphorus targets set within the draft plan and for using a watershed and sub-watershed based approach to planning.

Despite the general endorsement of the Plan, environmental groups and individual commenters were deeply concerned with the transitional and grandfathering rules. The Canadian Institute for Environmental Law and Policy (CIELAP) warned MOE that grandfathering clauses can have damaging effects on the effectiveness of provincial policies aimed at reducing the impact of development on the ecosystem. Campaign Lake Simcoe was concerned that several large shoreline development projects, such as the Big Bay Point marina and resort, at various stages of obtaining planning approvals would be exempt or "grandfathered" from having to conform to the Plan. The group recommended that the Plan be effective as of December 6, 2007 (the date that O. Reg. 60/08, an interim phosphorus regulation was introduced under the *Ontario Water Resources Act*).

Commenters had a variety of specific criticisms of the Plan and recommendations for MOE, as described below.

Mineral Aggregate Operations:
Many environmental groups objected to the draft plan allowing mineral aggregate operations in key natural heritage features and key hydrological features, when specific conditions are met. Campaign Lake Simcoe argued that "[a]ggregate producers get the same free pass they did under Greenbelt legislation and are, 'encouraged to adopt best management practices to reduce water quality impairment'." The group recommended that MOE not allow any new mineral aggregate operations in protected Natural Heritage Features within the watershed.

CIELAP indentified to MOE that provincial planning policies in Ontario tend to prioritize aggregate extraction over environmental protection. As a solution, CIELAP suggested that MOE use the Plan to implement an ECO recommendation. In our 2006/2007 Annual Report, the ECO recommended that "the provincial government reconcile its conflicting priorities between aggregate extraction and environmental protection. Specifically, the province should develop a new mechanism within the [*Aggregate Resources Act*] approvals process that screens out, at an early stage, proposals conflicting with identified natural heritage or source water protection values."

Wetland Protection:
Many commenters criticized the draft plan for the lack of protection for non-provincially significant wetlands in existing settlement areas or in mineral aggregate operations. Campaign Lake Simcoe stated that this contradicts the Plan's target to achieve protection of wetlands and contradicts [the Science Advisory Committee's] recommendation (# 37), to protect all wetlands within the watershed. Campaign Lake Simcoe and Ducks Unlimited recommended that the Plan protect all wetlands, not just provincially significant wetlands.

Phosphorus Loading:
The Building Industry and Land Development Association (BILD) argued that the draft plan was "not balanced in addressing phosphorus loadings…as loadings from sewage treatment plants and developments are thoroughly addressed, while no or little regulations are provided for addressing private urban, rural and shoreline sources as well as agriculture sources." The association expressed concern to MOE that new development will carry the weight of phosphorus reduction targets to the lake. BILD recommended that all contributions of phosphorus loadings incur their proportional share of responsibility.

Stormwater Management:
LSRCA recommended that the province provide funding and guidance to the municipalities and the authority for stormwater master plans. The Conservation Authority identified that the current stormwater policy in Ontario (Stormwater Management Planning and Design Manual, 2003) needs to be updated and recommended that the update incorporate water sensitive urban design principles for more sustainable development.

Septic Re-inspection:
The proposed septic re-inspection program for all lands within 100 metres of the Lake Simcoe shoreline, via regulation under the *Building Code Act, 1992*, was generally supported by municipalities. However, some municipalities (e.g., County of Simcoe, York Region, Township of Brock, and Durham Region) voiced concern to MOE about the additional cost to implement the program. For example, the Township of Brock estimated that there are 1,450 properties within 100 metres of the shoreline and while not all of these would have a septic system, the task to re-inspect would be significant. Municipalities requested additional funding from MOE to support this new initiative.

SEV

MOE provided the ECO with a summary of how the *LSPA*, the Lake Simcoe Protection Plan and the associated general regulation considered and incorporated its Statement of Environmental Values (SEV). For example, the SEV consideration document stated that the Plan "uses an ecosystem approach to treat Lake Simcoe and its watershed as an interconnected system,…is based on science, addressing numerous threats as identified by the scientific community,…[and] sets targets related to each threat and identifies indicators to be used to assess status and progress."

Other Information

Stewardship Funding for Lake Simcoe:
In February 2008, Environment Canada announced $30 million for a five year 'Clean-Up Fund' to preserve and protect Lake Simcoe. The fund will be used to support local projects such as rehabilitation and stewardship of fish and wildlife habitats and controlling pollution from sewage, sewer overflow and storm water.

In July 2009, the provincial and federal governments created the Lake Simcoe Farm Stewardship Initiative, which is combined with the Environmental Farm Plan and related cost share programs. The initiative will help farmers in the Lake Simcoe watershed implement best management practices such as the relocation of livestock and horticultural facilities from riparian areas. The provincial government has committed to provide $3 million over four years and in 2009, provided $750,000 to farmers for 89 environmental projects.

Lake Trout Stocking Program:
In December 2009, MNR posted an information notice on the Registry regarding the Lake Simcoe lake trout stocking program (Environmental Registry #010-8539). The notice identified that "[i]n order to further facilitate the natural reproduction of lake trout in Lake Simcoe, MNR has established a new stocking target of 50,000 yearling lake trout to be implemented starting in the spring of 2010 for a period of 5 years." MNR stated that the target will be reviewed again in 2013 prior to fall egg collections.

Sewage Treatment Plants:
While MOE is drafting a phosphorus reduction strategy and a water quality trading program feasibility study under the Plan, the ministry set interim limits on phosphorus loading from sewage treatment plants (i.e., municipal and industrial) and stormwater facilities around Lake Simcoe. The limits are set within O. Reg. 60/08 Lake Simcoe Protection, made under the *Ontario Water Resources Act*. The ECO reviewed this regulation in the Supplement to our 2007/2008 Annual Report (pages 137-141). In March 2009, MOE posted an exception notice on the Environmental Registry to extend the regulation to March 31, 2010 (Environmental Registry #010-6308) to allow for development of the phosphorus reduction strategy (for more information please see Part 7.4 of our 2008/2009 Annual Report).

Lake Simcoe Growth Strategy and the Barrie-Innisfil Boundary Adjustment Act, 2009:
In June 2009, the Ministry of Energy and Infrastructure posted on the Registry a proposed growth strategy for the Lake Simcoe area entitled Simcoe Area: A Strategic Vision for Growth. The strategy identifies key urban areas for growth (i.e., Barrie, Collingwood, Orillia, Alliston and Bradford) and future employment areas. In addition, the strategy aims to resolve a long standing boundary dispute between the City of Barrie and the Town of Innisfil by introducing legislation to amend the boundary. The *Barrie-*

Innisfil Boundary Adjustment Act, 2009 was passed by the Legislative Assembly in December 2009. In January 2010, the Act transferred approximately 2,293 hectares of land to the City of Barrie from the Town of Innisfil "to satisfy the [c]ity's land requirements until the year 2031 and beyond."

Many environmental groups criticized the strategy because it would allow agricultural lands along the Highway 400 corridor to be converted to residential and employment lands. These groups argued that the strategy is not consistent with the *Places to Grow Act, 2005*, the Greenbelt Plan and the Lake Simcoe Protection Plan and promotes leapfrog development along Highway 400. They believe there is enough land in existing settlement areas to accommodate future growth and there is no need to expand the City of Barrie's boundary into agricultural lands.

ECO Comment

The ECO commends the Ontario government for affording additional protection to the Lake Simcoe watershed through the Lake Simcoe Protection Plan. The Plan is ambitious in its targets and policies, as well as in the timeframes set forth to meet the objectives and priorities of the Plan, such as protecting and restoring the ecological health of the Lake Simcoe watershed. The ECO is pleased that the phosphorus, dissolved oxygen and natural cover targets are consistent with the Lake Simcoe Science Advisory Committee's recommendations. However, the ECO notes that the Plan is inconsistent with the Lake Simcoe Science Advisory Committee's recommendation to protect all wetlands within the watershed, not just those wetlands identified as provincially significant by MNR. For example, new aggregate operations are allowed in non-provincially significant wetlands, with some conditions. Protection at the "provincially significant" level may be appropriate for the Provincial Policy Statement; however, regional watershed plans should be sensitive to the structure and function of wetlands that are smaller in scale and have features which may be important locally.

The ECO is generally pleased with the functions of the Science and Coordinating Committees and the roles both will play in implementing the Plan, such as providing advice on research initiatives and Plan amendments. However, the ECO is concerned that the Science and Coordinating Committees were appointed and began to meet after the shoreline protection discussion paper, Plan amendments, phosphorus reduction strategy and water quality trading feasibility study proposals were posted on the Registry. Although MOE received advice from both committees before finalizing the phosphorus reduction strategy and deciding to further evaluate water quality trading in Lake Simcoe, the ECO believes that both committees should have been in place and provided advice to MOE during the drafting stage. The ECO encourages MOE to fully involve both committees in implementing any relevant aspects of the Plan from this point forward, for example, in developing the subwatershed guidelines or suggesting any further Plan amendments.

The ECO questions whether the policies aimed at protecting key natural heritage features, key hydrological features and shorelines, while providing more protection than the PPS, go far enough. At first glance, the Plan prohibits "development" and "site alteration" within and around these sensitive features. However, upon closer inspection there are many exemptions, with or without conditions, that would allow questionable activities in these sensitive features that could compromise the objectives of the Plan. For example, infrastructure, including landfills and roads, are allowed within key natural heritage and key hydrological features provided the project has been demonstrated through an environmental assessment and there is no reasonable alternative. Also, new septic systems are permitted within 100 metres of the Lake Simcoe shoreline if they serve an agricultural use or a public open space, replace or expand the capacity of an existing system, or service only one dwelling. The ECO cautions that the devil is in the details of the policies and how they are implemented on the ground. The ECO does not believe that the Plan is the "gold standard of sustainability," as the Minister of the Environment has claimed. Some policies are vague and simply provide more hoops for developers to jump through. It would have been simpler and more effective to conserve natural heritage, hydrological and shoreline features through development prohibitions.

The ECO recognises that the watershed is currently under great development pressure and acknowledges MOE's swift action to create and begin to implement the *LSPA* and the Plan. Although the

health of Lake Simcoe's watershed began to decline in the 1970s, the ECO notes that the Ontario government is trying to fix a problem it may have contributed to, through growth targets established in the Growth Plan under the *Places to Grow Act*. Since the south-eastern portion of the watershed is within the Greenbelt, development has been leapfrogging north along Highway 400. For example, the proposed Simcoe area growth strategy increases the combined populations of the City of Barrie and the City of Orillia by 52 per cent or 86,100 people by the year 2031, compared to the 2006 census. The City of Barrie (through the *Barrie-Innisfil Boundary Adjustment Act, 2009*) had its boundary expanded by the province into agricultural lands of Innisfil to accommodate growth.

Simcoe County, located in the western portion of the watershed, was not included in the Greenbelt planning area but is partially covered by the LSPP area. An important policy of the Greenbelt Plan is not included in the LSPP: the extensions to or expansions of Great Lakes or Lake Simcoe water or sewer services to settlements that are not connected is prohibited, except to address human health concerns. This policy restricts the growth of inland communities to within their local environmental carrying capacity, and reserves water services from Lake Simcoe and the Great Lakes for communities located on the shorelines. The ECO strongly encourages the Ontario government to ensure that development does not leapfrog into the Lake Simcoe watershed and add additional stress to this already fragile ecosystem. This problem could be remedied in one of two ways by the province: the Greenbelt should be expanded into Simcoe County or the LSPP should be amended to address this concern.

The ECO has commented in past Annual Reports that the need for site or landscape-level legislation and plans clearly indicates that Ontario's land use planning system (i.e., the *Planning Act* and the Provincial Policy Statement) is failing to protect ecosystem features and functions. While the ECO commends the provincial government for these additional measures, often such measures come too late – once the environment has been degraded to a point of great concern. Rather than implementing measures to fix specific environmental degradation after it has occurred, the government should focus on conserving and protecting all our wildlife, wetlands, forests, lakes and rivers before they are degraded. Integrated watershed management, currently practiced by most conservation authorities, is an excellent example of how natural landscape features can be conserved and protected in Ontario's land use planning context. The ECO believes that the Provincial Policy Statement should be amended to ensure that sufficient protection is provided to all of Ontario's ecologically and hydrologically significant features through integrated watershed management planning. In addition, the Ontario government should create a comprehensive water policy to consistently guide integrated watershed management planning, to be implemented by conservation authorities, across the province.

Review of Posted Decision:

4.6 Used Tires Program Plan

Decision Information:

Registry Number: 010-6037
Proposal Posted: February 27, 2009
Decision Posted: April 9, 2009
Comment Period: 30 days
Number of Comments: 90
Decision Implemented: September 1, 2009

Description

On April 9, 2009, the Minister of the Environment approved the Used Tires Program Plan (Plan) as submitted by Waste Diversion Ontario (WDO) on February 27, 2009. This five-year plan was developed by WDO in co-operation with Ontario Tire Stewardship (OTS) to manage used tires in Ontario – including those from both on-road and off-the-road (OTR) motorized vehicles – from the point of their removal from a vehicle through to final processing and to address the clean-up of existing scrap tire stockpiles in the province. The program, which was implemented September 1, 2009, sets the goal of 90 per cent diversion of on-road tires in the first year of the program and 46 per cent diversion of OTR tires by 2013.

When MOE approved the Plan, it also amended O. Reg. 84/03 – Used Tires, made under the *Waste Diversion Act, 2002* (*WDA*), to name OTS as the Industry Funding Organization (IFO) for the program and outline the structure of its Board of Directors.

Background

Of the over 11 million used tires Ontarians throw away each year, historically only about half have been recycled. The rest have been buried in landfills, shipped out of province to be burned as fuel, or added to the over two million used tires stockpiled across Ontario. The stockpiling and dumping of used tires can cause a number of environmental problems. Tires buried in landfills take up valuable space that could be used for other waste. Furthermore, because tire piles hold water, they can become breeding grounds for pests and mosquitoes, and therefore West Nile Virus (WNV), dengue fever and encephalitis. Tire stockpiles also present potentially serious fire hazards, as illustrated in the notorious 1990 Hagersville fire, when a pile of several million scrap tires burned for 17 days, spewing toxic fumes and contaminating water wells. In contrast, reusing tires or processing them into other products is environmentally beneficial as it reduces the materials and fossil fuels that would otherwise be used to produce a new tire or product.

The Management of Used Tires in Ontario

Used tires are generated both when a vehicle's tires are replaced and when an entire vehicle is scrapped. In Ontario, used tires are either discarded by the consumer and sent to landfill or received by a collector (e.g., a tire retailer, garage, vehicle dealer, or municipal collection depot). A hauler (e.g., a small, independent trucking company) then picks up used tires from collectors and delivers them to a processor. Processors use scrap tires to:

- Manufacture moulded products (e.g., vehicle air handling systems and mats for animal pens and sports facilities);
- Produce crumb rubber (used for sports fields, playground fill, and rubberized asphalt);
- Produce fabricated products (e.g., water troughs and traffic cone bases);
- Produce shred (tire pieces typically used as an aggregate or feedstock for further processing); and
- Burn as fuel.

At any stage during this system, a collector, hauler or processor may cull tires deemed suitable for reuse.

Processing capacity and markets for all of the above end uses, except for tire derived fuel (TDF), are currently present in Ontario and the complete range of options is available in many other jurisdictions. Exported tires are primarily reused in warmer jurisdictions (where winter driving is not an issue) or burned as TDF. The main concern with the burning of tires for fuel is the potential release of harmful air pollutants. In this regard, MOE proposed a two-year ban on tire incineration in 2006 to "allow for the collection of information confirming the environmental performance of facilities using tires as fuel" (see Environmental Registry #RA06E0024); however, to date no decision has been made.

Before September 2009, Ontario was the only Canadian province without a formal used tire management program. Previously, used tire management decisions in Ontario were driven by market economics, with collectors, haulers and processors charging fees to cover the costs of business. OTS argues that this free market system of tire management had several flaws:

- The charging of fees by collectors, haulers and processors encouraged the illegal dumping of tires;
- There were no requirements for being a scrap tire collector in Ontario. In Ontario private landowners can legally store up to 5,000 tires without a Certificate of Approval;
- Without regulation, the province had no information on the number of tires discarded annually and no means of tracking their proper disposal;

- The system did not encourage the movement of scrap tires to local processors or the clean-up of scrap tire stockpiles; and
- The system did not support higher-value recycling or innovation in scrap tire recycling.

OTS also notes that there has been no organized effort to collect and recycle OTR tires in Ontario and that the majority of collected OTR tires have been sent to Quebec or New York to be burned as fuel.

Ontario Government Action on the Diversion of Used Tires

From 1989 to 1993, the provincial government imposed a $5 retail sales tax on every tire purchased in Ontario. The money collected through this tax, however, did not go towards a tire-recycling program but to general government revenues. As a result, consumers not only paid the tax when they purchased a tire, but usually also a disposal fee when they dropped their used tire off at a collector. Although MOE did establish a program to fund initiatives to process tires and develop new products, serious problems were encountered with implementation and most of the funds remained unspent. Not surprisingly, many consumers were upset and the tax was killed in 1993.

The government began taking more effective action on used tires in March 2003. MOE defined and designated used tires as waste under the *WDA* and the Minister of the Environment requested that WDO develop a waste diversion program for used tires. WDO approved a Scrap Tire Diversion Program Plan (STDPP) in September 2004 and MOE posted a proposal for it on the Environmental Registry in December 2004 (see pages 120-123 of the ECO's 2004/2005 Annual Report). The proposed STDPP was withdrawn, however, because it was found to be in non-compliance with the *WDA*. Despite instructions from MOE that brand owners and first importers be designated in the STDPP as fee-paying stewards, OTS had instead designated tire retailers as stewards. Moreover, although the *WDA* prohibits promoting the burning of designated wastes as a diversion strategy, the STDPP had included processing incentives for the burning of tires as a strategy for eliminating stockpiles.

In August 2008, the Minister submitted another program request letter to WDO requesting the development of a new program plan. This new letter stated that "in order to be consistent with principles of the *WDA*, the proposed funding rules should designate and define stewards under the program as brand owners and/or first importers of tires into Ontario." Furthermore, the Minister directed that incineration "shall not be part of the program unless the 3R options are not available or not technically feasible." The Minister also requested that the program address the diversion of all motor vehicle tires, including OTR, industry and farm vehicle tires.

Used Tires Program Plan – Overview

Under the Used Tires Program Plan, "used tires" are defined as tires from all types of passenger and commercial on-road and off-road motorized vehicles, including those from passenger vehicles, motorcycles, buses, aircraft, mobile homes and vehicles involved in mining, logging, agricultural, and industrial activities. The program excludes used tires from toys, bicycles, personal mobility devices and commercial aircraft.

Under the program, stewards – brand owners (including tire manufacturers and major tire retailers) and first importers (companies that import tires for sale in Ontario, including tires installed on vehicles) – are charged a Tire Stewardship Fee (TSF) for every new tire supplied into the Ontario market. The tire fees are $5.84 per tire for new passenger, motorcycle and light truck tires, and $14.65 per tire for new commercial truck tires. Other tires, such as industrial, farm and OTR tires have proportionately higher fees as the costs to collect and recycle these tires are higher. Fees are calculated by estimating the costs of program activities, including program management, collection, transportation, processing, reuse, recycling and, where necessary, disposal. The TSF is remitted by stewards to OTS, which uses the funds exclusively to manage the program.

Tire retailers/dealers, municipalities, and automobile scrap yards are encouraged (but not required) to register with OTS as collectors of used tires and participate in the program. Collectors are paid a handling allowance for each tire collected and provide temporary storage until they have accumulated a sufficient quantity of used tires to call a tire hauler. Collection incentives are $0.88 for passenger and light truck tires and $3.05 for medium truck and OTR tires.

Under the program, any existing relationships between haulers and collectors will continue, however both will have to be registered with OTS. Furthermore, under the program, haulers no longer charge collectors a fee for picking up used tires, but are instead paid by OTS upon delivery of scrap tires to a registered processor. The initial transportation incentives for haulers have been set at an average rate of $1.70 per tonne/kilometre for on-road tires, and $2.12 per tonne/kilometre for OTR tires. To ensure the collection of all used tires in the province, the OTS hauler incentives are designed to account for the distance travelled, the volumes transported, and the types of tires collected. OTS states that transportation incentives will be scaled to ensure sufficient coverage for pick up at northern and other remote generator locations. Moreover, OTS is committed to working with Ontario haulers to refine the hauling rate structure to accurately reflect the true costs of transporting used tires in the province.

Scrap tires delivered to processors are then converted into marketable materials. Registered processors are paid processing incentives from OTS upon proof of sale of processed rubber. To promote the highest end-use of recovered materials, incentives are paid based on a hierarchy of product categories (from highest value to lowest): crumb rubber, fabricated products and tire derived aggregate (shred). The processing incentives are tiered to reflect existing tipping fees and the cost of processing tires into the resultant products. Recognizing the even higher capitalization necessary to produce moulded, extruded and calendared (pressed) recycled rubber products, the program also offers a manufacturing incentive to the producers of these products.

The Plan states that only in cases where no other processing options are available or technically feasible will tires be sent for non-diversion end-uses such as TDF. A registration and manifest system is used to track used tire movement from collectors to haulers to processors. This chain of custody will be regularly verified by OTS by auditing the reported movements of used tires and their final destinations. The payment of incentives to registered collectors, haulers and processors is contingent on the results of these audits.

The Plan includes collection, reuse and recycling targets. The program intends to increase the number of collection sites across the province from 13,800 to 19,500 by 2013 and divert 90 per cent of on-road tires right from Year 1. The program sets the goal of increasing the diversion rate of OTR tires from 14 per cent to 46 per cent by 2013. OTS explains that the lower diversion goal for OTR tires is due to the relatively lower level of development of OTR tire diversion infrastructure and the added complexities of managing OTR tires (e.g., size, composition, and generating locations).

Although the Plan includes targets for the number of medium truck and OTR tires retreaded each year, OTS has no proposed targets for the reuse of tires from passenger vehicles or light trucks.

This is because setting such targets could result in the unsafe reuse of worn tires. The program does, however, allow collectors and haulers to cull reusable tires for resale. Moreover, to support tire reuse, OTS pays haulers incentives for the transport of reusable tires from the collector to the hauler's sorting area and stewardship fees are not levied on retreaded tires.

The program includes a province-wide promotion and education program to help achieve collection and recycling targets. To reduce the number of tires generated as waste in the first place, the education program will also inform Ontarians how to extend the life of their tires. In addition, OTS intends to implement research and development activities to: reduce the amount of tires requiring management; improve the collection and processing of used tires; divert more tires through reuse and recycling; and identify new applications for the use of scrap tire derived products.

In addition to managing and tracking the generation of used tires, the program also includes the objective of cleaning up Ontario's existing stockpiles of scrap tires in three years. MOE estimates that 90 illegal stockpiles across the province hold 2.3 million scrap tires. The Plan states that these tires will be cleaned and sent for processing into value added products or, where all other diversion applications are unsuitable, for use as fuel. OTS indicates that it will assess the stockpiles individually and work collaboratively with MOE to develop a plan to eliminate stockpiles.

O. Reg. 84/03 – Used Tires

The amended regulation directs that OTS be named the IFO for the program and that its board be composed of members appointed by associations representing the rubber industry, the retail industry, and tire and vehicle manufacturers and distributers.

Implications of the Decision

Tire Fees

Under the program, stewards are responsible for reporting on the sale of new tires in Ontario and remitting the appropriate fees to OTS on these sales. This obligation imposes a new cost on stewards that was not borne prior to program implementation. Although it is not explicit in the Plan, it is at the steward's discretion whether or not to shift the cost of the fee forward to the consumer by raising the product price. Likewise, stewards are free to decide whether the fee is included in the product price or added as a separate recycling surcharge. The OTS notes that these fees may have a negative impact on tire sales in areas of Ontario that border other jurisdictions with lower or no tire fees. To date, no other Canadian jurisdiction has applied fees to OTR tires.

Individual stewards that wish to take direct responsibility for managing their obligations under the *WDA* can apply to the WDO for approval of an Industry Stewardship Plan (ISP). Upon plan approval, the industry steward is responsible for implementing the ISP and is exempt from the obligation to submit fees to the OTS. For example, a steward could develop a plan in which it pays collectors and haulers to return its brand of tires to designated processing facilities, giving the steward more control over the costs of the program. Approved ISPs, however, must achieve objectives similar to or better than those in the OTS Plan, and stewards are required to register with and pay fees to OTS unless and until such an ISP is approved.

Incentives for Used Tire Collectors, Haulers and Processors

The program's funding mechanism changes how the management of used tires in Ontario is financed. Previously, most tire retailers and other collectors charged customers a disposal fee for accepting used tires and then paid haulers to take the tires away. Haulers then sold the reusable tires and paid processors to take the remaining tires. Processors were also paid for the products that they produced from the tires. Under the new program, collectors, haulers and processors receive financial incentives from OTS, incentives that aim to eliminate the cost to the consumer of dropping off used tires, increase the rate of tire collection, and encourage the processing of scrap tires into other products.

Increased Tracking of Used Tire Flow

Under the program, OTS tracks and audits used tires from the point of collection through to final destination in order to confirm program performance and eliminate illegal dumping. Vendor qualification requirements also ensure that used tires are collected, transported and processed in a safe and environmentally sound manner.

Increased Used Tire Diversion

The program's province-wide promotion and education campaign will help reduce the generation of used tires and increase the number of tires collected and recycled. Because the payment of incentives to

registered collectors, haulers and processors is contingent on the results of performance audits, there is an incentive for program participants to direct used tires to recycling rather than stockpiling or illegal disposal. Likewise, the tracking of tire flow from collector to processor ensures that used tires are not being stockpiled or sent to other jurisdictions to be used as fuel.

Environmental Benefits

The increased diversion of used tires to recycling will reduce the number of tires dumped illegally or stockpiled indefinitely. Like the program's goal of cleaning up Ontario's illegal stockpiles, diversion efforts will benefit the environment because used tires take up space in landfills and can be fire hazards and pest breeding grounds. Moreover, the reuse and processing of tires will conserve materials and energy that would have been used to produce new tires and rubber products.

Public Participation & *EBR* Process

To support plan development, WDO and OTS consulted with stewards and stakeholders through stakeholder meetings and a consultation workshop with simultaneous webcast. According to WDO, two versions of the draft program plan were posted on the OTS website for comment, with each subsequent version revised to reflect stakeholder comments and suggestions. The final proposed plan was posted on the Environmental Registry in February 2009 for a 30-day comment period. MOE received 90 comments. In April 2009, the Minister of the Environment approved the proposed plan with no revisions except for the correction of an error in the calculation of steward fees.

The majority of commenters on the Plan were supportive of an industry-funded tire diversion program and felt that it is overdue. Many people, including those in the scrap tire, rubber, metal and automobile industries, praised the program as a good step towards eliminating illegal tire dumping, stimulating green economic activity, and protecting the environment.

Tire retailers and dealers, however, generally disapproved of the Plan, arguing that the tire fees are too high compared to neighbouring jurisdictions and that the program would affect their competitiveness with out-of-province retailers. Some commenters also expressed concern that the tire fee would not be applied to tires imported through the "grey market" (i.e., distribution channels that are unofficial, unauthorized or unintended by the original manufacturer), thereby putting Ontario dealers at a competitive disadvantage.

Municipalities expressed support for a program that makes industry responsible for the waste it produces. One municipality, however, noted that it needed more information before determining whether it will become an OTS-registered collector. Suggestions raised by other would-be collectors included: increasing the per-tire collection incentive; basing the collection incentive on weight – rather than number – of tires collected; and providing subsidies to cover the capital costs of building tire-storing facilities.

In general, haulers were concerned that the program would adversely affect their existing business, noting that the industry had been negatively affected even by the announcement of the proposed plan. Haulers urged OTS and WDO to investigate how the Plan "has caused external financial disruptions currently being experienced by the haulers and correct those disruptions or compensate the hauling industry to ensure the ongoing viability of the haulers through the implementation period." Haulers also suggested that OTS (or WDO) establish both a high-level multi-stakeholder steering committee and a hauler technical committee to be consulted during Plan implementation. The Plan indicates that OTS will convene an advisory committee (comprised of haulers, collectors, processors, consumers, non-government organizations and non-collector municipalities) to facilitate ongoing engagement of program stakeholders.

Processors were generally supportive of the program and requested that it be implemented as soon as possible. Some processors, however, wanted the program to offer incentives for the burning of tires as an alternative fuel. In contrast, one environmental organization, Lake Ontario Waterkeeper (LOW), argued that because the *WDA* states that "a waste diversion program developed under this act for a

designated waste shall not promote…[t]he burning of the designated waste," the Plan must explicitly exclude TDF as a disposal option, both for tires processed within the province as well as those exported to other jurisdictions. LOW also encouraged MOE to implement its previously proposed ban on tire incineration.

The Canadian Vehicle Manufacturers' Association (CVMA) was opposed to brand-owners and first importers being held responsible for financing the program, arguing that identifying vehicle manufacturers as stewards would impose an "administratively burdensome and expensive fee" that is "inappropriate given the current economic climate." The CVMA suggested that, in order to be consistent with the approach taken in all other Canadian provinces, Ontario should instead identify tire retailers as stewards. Because it disagrees with the identification of brand-owners and first importers as program stewards, the CVMA requested that its inclusion as an OTS board member be removed from the draft regulation. (Despite this request, the approved regulation still includes the CVMA as an OTS board member.) The CVMA also expressed concerns over: the use of stewardship fees to pay for stockpile cleanup; the cost of fees compared to neighbouring jurisdictions; the inclusion of OTR tires in the program; and the timing and intent of the Plan's consultation.

SEV

MOE documented that it had considered its Statement of Environmental Values (SEV) in making this decision. MOE explained that the Used Tires Program promotes resource conservation because it adopts diversion principles through the promotion of the 3Rs (reduce, reuse and recycle) approach to waste management. MOE stated that the program aims to hold industry accountable for the tires it manufactures or imports and to recover used tires through the promotion of higher end recycling of these materials.

MOE explained that the program protects the environment by eliminating stockpiles around the province, thereby reducing the risk of serious fire hazard and eliminating breeding grounds for mosquitoes and the spread of WNV. In addition, MOE stated that the program embraces the principle of Extended Producer Responsibility (EPR), which requires industry to take responsibility for its products once they reach the end of their useful life. Through EPR, the program will help bring awareness to industry and consumers of the "interdependence between the environment, economy and society."

Other Information

In 1992, MOE assembled a Scrap Tire Task Force, comprised of representatives from industry, environmental organizations, municipalities and the provincial government, to produce an action plan for the management of scrap tires in Ontario. The plan made several recommendations to MOE to eliminate or reduce, to an acceptable level, the number of scrap tires existing in and entering the waste stream.

ECO Comment

The OTS tire fee is not simply the repackaging of the previously imposed tire tax, where a $5-per-tire tax was charged to consumers and the collected money absorbed by the government's general revenues. Under this newly implemented program, it is industry stewards (brand owners and first importers) that are charged fees, and the collected funds are paid directly to OTS to finance a used tire management program. A program such as this one is long overdue.

The ECO applauds MOE for requesting and approving a necessary program in the face of understandable scepticism by some parties. The ECO believes the new system will protect the environment by reducing the number of tires stockpiled across the province as well as those exported for use as fuel. Nonetheless, to gain public confidence after the previous tire tax debacle, MOE must ensure transparent accounting and program operation. The ECO notes that some commenters perceived errors and contradictions in the approved Plan, which could make some stakeholders question the competence of OTS and therefore the credibility of the program. The ECO believes that the most successful program will be one that is supported by all the players involved (e.g., stewards, collectors, haulers, processors

and consumers). The ECO therefore supports the establishment by OTS of a stakeholder advisory committee and strongly encourages OTS to consult the committee often throughout program implementation.

While the *WDA* directs that the burning of a designated waste "shall not be promoted" in a waste diversion program, it does not expressly prohibit the burning of waste. Given that some stockpiled tires have deteriorated too much to be reused or even recycled, the ECO agrees with the Plan's concession that sometimes the only available disposal option is to burn these tires as fuel. To ensure transparency and credibility with the public, the ECO is glad to have learned that OTS intends to disclose the number of scrap tires burned annually as part of the stockpile abatement program.

Finally, the ECO would like to reiterate a recommendation made by MOE's Scrap Tire Task Force almost 20 years ago: the provincial government should revise its own purchasing and funding practices to maximize the use of retreaded tires and to make mandatory the preferential purchase of products manufactured from scrap tires.

Review of Posted Decision:

4.7 Toxics Reduction in Ontario

Decision Information:
Registry Number: 010-4374
Proposal Posted: August 27, 2008
Decision Posted: April 7, 2009
Comment Period: 45 days
Number of Comments: 145
Decision Implemented: April 7, 2009

Decision Information:
Registry Number: 010-6224
Proposal Posted: April 7, 2009
Decision Posted: August 7, 2009
Comment Period: 30 days
Number of Comments: 133
Decision Implemented: January 1, 2010

Decision Information:
Registry Number: 010-7792 and 010-8448
Proposal Posted: September 18, 2009
Decision Posted: December 4, 2009
Comment Period: 45 days
Number of Comments: 813
Decision Implemented: January 1, 2010

Background

Ontario is home to thousands of facilities that routinely use, create and discharge toxic substances through their day-to-day activities. As a result, Ontario is the largest discharger of toxic substances in Canada, and one of the top five dischargers of toxics in North America. Ontario's industries are responsible for releasing 36 per cent of Canada's total reportable chemical discharges into air and 50 per cent of Canada's total reportable discharges into water.

What are Toxics?
"Toxics" are chemical substances that have (or are believed to have) harmful effects on humans, animals and/or the natural environment. Toxic chemicals can be created in various ways – as a by-product during an industrial process, produced deliberately for a specific purpose, or as a breakdown product released during use or disposal – or they may occur naturally in the environment (such as metals and ammonia). In Canada, over 23,000 chemical substances are used commercially for a wide variety of purposes, with many new substances being introduced into the marketplace each year. Exposure to these substances can occur through various media – air, water, soil, food or commercial products – which, depending on the substance, has the potential to result in serious adverse health effects to animals, plants and humans.

The Regulation of Toxics

In Canada, both the federal and provincial governments have some jurisdiction over the control of toxic substances, and each plays an important role in regulating toxics.

Provincial Regulation of Toxics:
The Ontario government has a number of laws that regulate the release of toxic substances into the environment, including:

- The *Environmental Protection Act* (*EPA*) and O. Reg. 419/05, Air Pollution – Local Air Quality, made under the *EPA*, which regulate the release of toxics into the air;
- The *Ontario Water Resources Act* (*OWRA*), the *Clean Water Act, 2006,* and the MISA (Municipal/Industrial Strategy for Abatement) regulations under the *EPA,* which regulate the discharge of toxics into water; and
- The *EPA*, Regulation 347 under the *EPA*, and the diversion programs under the *Waste Diversion Act, 2002*, which regulate the handling and disposal of toxics in waste.

In addition, the province also administers the *Occupational Health and Safety Act*, which protects workers from exposure to chemical substances. In 2008, the provincial government also introduced the *Cosmetic Pesticides Ban Act, 2008* as its first step towards regulating the use of some toxic substances (i.e., pesticides) in Ontario. For the ECO's review of the *Cosmetic Pesticides Ban Act, 2008*, please see Section 4.6 of the ECO's 2008/2009 Annual Report.

Federal Regulation of Toxics:
The *Canadian Environmental Protection Act, 1999* (*CEPA*) is the primary federal statute that regulates toxics. *CEPA* requires the federal government to list and assess substances used in Canada, and sets out tools for managing substances that pose a risk to human health and the environment.

The federal government has identified over 23,000 substances on *CEPA*'s Domestic Substances List (DSL) as being used in Canada. Under *CEPA*, the federal government must evaluate and categorize all 23,000 substances based on the potential for exposure by Canadians, their toxicity to human health and the environment, their persistence in the natural environment, and their potential for bioaccumulation. To meet this requirement, the federal government created the Chemicals Management Plan (CMP) to assess and categorize the thousands of chemicals on the DSL. Through the CMP categorization process, the federal government identified approximately 200 chemical substances for priority risk assessment, and then undertook a more intensive risk assessment process to determine which substances warrant more stringent control. As a result of this (and other) processes, 85 substances have been declared toxic under *CEPA*'s Schedule 1 – List of Toxic Substances, as of December 2009.

In addition, the federal government also administers the National Pollutant Release Inventory (NPRI), which currently lists 347 substances (including the toxic substances) that are subject to monitoring and reporting. Facilities that are subject to the NPRI reporting requirements must report any release of the NPRI-listed substances to the air, water and land, and any disposal or transfer of those substances. Generally, a facility is subject to the NPRI requirements if it manufactures, processes or uses any of the NPRI-listed substances in a quantity greater than the prescribed minimum amount (although some substances, such as dioxins, furans and hexachlorobenzene, do not have minimum thresholds), and for most sectors, if the facility employs more than 10 people. The reported information is then published by Environment Canada as a publicly accessible inventory of pollutant releases and emissions.

Municipal Regulation of Toxics:
Municipalities also have limited powers to regulate toxics through the use of by-laws that are for the "health, safety, and well-being" of the public. In December 2008, the City of Toronto passed a new by-law that requires local facilities and businesses to track and publicly report their use and release of 25 toxic chemicals. This by-law came into effect on January 1, 2010, and is being phased in over four years. In addition, a number of municipalities in Ontario have established sewer use by-laws, which control the quantity of toxic chemicals discharged into municipal sewer systems.

Description

In 2007, the provincial government committed – both during the election campaign and after re-election – to establish a toxics reductions strategy that would reduce pollution and protect the public from toxic chemicals in the air, water, land and consumer products.

As a first step, in January 2008, the province established a panel of experts, the Toxics Reduction Scientific Expert Panel (Expert Panel) to help develop a toxics reduction strategy, make recommendations, and provide advice on priority substances for immediate action. In August 2008, the Ministry of the Environment (MOE) published a proposed strategy to reduce the use and creation of toxic substances in Ontario. In April 2009, the province introduced Bill 167, the *Toxics Reduction Act, 2009* (*TRA*), and two months later, passed the Act. Shortly after, in December 2009, the province filed O. Reg. 455/09, the general regulation under the *TRA*, which provided the enabling provisions for the *TRA*. On January 1, 2010, both the regulation and the *TRA* came into force, concluding a somewhat frenetic 24-month process of policy development, public consultation and legislative and regulatory enactment.

Ontario's Toxics Reduction Strategy

The province's toxics reduction strategy is set out in a discussion document prepared by MOE, in consultation with the Expert Panel, entitled Creating Ontario's Toxics Reduction Strategy. The strategy includes the following three key elements:

1) A toxics reduction statute and supporting regulation, which would establish requirements for certain industrial facilities to: track their use, creation and release of toxic substances; develop toxic substance reduction plans; report information to the ministry regarding those substances; and make some information available to the public.
2) Technical assistance and other support programs to help industry reduce toxics.
3) A user-friendly, web-based information source to better inform Ontarians about toxics.

The discussion document also set out two proposed lists of "toxic substances" and two proposed lists of "substances of concern", which could be regulated in various phases.

The Toxics Reduction Act, 2009

The *TRA*, which forms the core of the toxics reduction strategy, requires all regulated facilities to:

- Track, quantify and detail how all prescribed toxic substances are used, created, destroyed, transformed and released throughout each process at the facility;
- Develop a toxic substance reduction plan for each prescribed toxic substance;
- Prepare and submit a summary of the reduction plan to the ministry and make it available to the public; and
- Prepare and submit an annual report to the ministry on the facility's use, creation and release of toxics and the facility's progress in implementing the toxic substance reduction plan.

The Act sets out some of the details for these requirements, such as the general content requirements for the toxic substance reduction plan, the plan summary and the annual report. However, most of the details setting out how the *TRA*'s requirements apply – i.e., which facilities are subject to the requirements and what substances are regulated – are found in the supporting regulation, O. Reg. 455/09.

O. Reg. 455/09

Ontario Regulation 455/09 sets out many of the essential details of the *TRA* requirements, including:

- Prescribing the list of materials that are toxic substances for the purpose of the Act;

- Prescribing the classes of facilities and other criteria that determine who is subject to the requirements under the Act;
- Establishing the implementation timeline for the requirements under the Act;
- Setting out additional details for the contents of the plans, reports and summaries; and
- Identifying which information must be made available to the public.

The key requirements under the *TRA* and supporting regulation are described below.

Key Provisions under the TRA and the General Regulation

Toxic Substances:
Ontario Regulation 455/09 prescribes the list of toxic substances that are subject to the requirements under the *TRA* and the supporting regulation as:

- Any substance listed in the NPRI Notice, if the substance is in the form specified in the most current NPRI Notice; and
- Acetone.

From this list of over 300 prescribed toxic substances, O. Reg. 455/09 establishes a list of 47 priority substances (or substance groups) to which the regulatory requirements apply immediately (Phase 1). The remaining toxic substances are not subject to the regulatory requirements until January 2012 (Phase 2).

The list of priority substances was developed by the ministry in consultation with the Expert Panel, who identified 34 priority substances by evaluating the NPRI substances based on emission and hazard levels. The other 13 substances on the priority list were identified by Cancer Care Ontario as probable carcinogenic substances. The priority substances include many notoriously hazardous chemicals, such as asbestos, arsenic, benzene, mercury and a number of dioxins, as well as a number of metals and organic chemicals whose toxic properties may, perhaps, be less well known.

Although the list of toxic substances currently mirrors the list of substances under the NPRI, the *TRA* requires the ministry to review the list of toxic substances and consult with experts and the public on possible additions or changes to the list at least once every five years.

Regulated Facilities:
Facilities are required to comply with the *TRA* and supporting regulation for each prescribed substance if:

- The facility engages in manufacturing or mineral processing operations, but only if the mineral processing "involves the use of chemicals to extract, refine or concentrate an ore;" and
- The facility is required to provide information with respect to the substance pursuant to the most current federal NPRI Notice, or, in the case of acetone, is required to provide information pursuant to O. Reg. 127/01 Airborne Contaminant Discharge, Monitoring and Reporting, made under the *EPA*.

Toxic Substance Accounting:
The first step in a regulated facility's obligations under the *TRA* is to identify and describe every stage (and every process within that stage) of the facility's operations that uses or creates a prescribed toxic substance. The facility must then prepare a process flow diagram that gives a visual representation of how the substance moves through the facility, including how it is used or created, and how it is destroyed, transformed, released (into air, land or water) or contained in the product.

The facility must also quantify and record the amount of the toxic substance that is used, created, destroyed, transformed, released or disposed of in each of the facility's processes, and, where applicable, the amount of the toxic substance that is contained in the products that leave the facility. Further, if the amount of the substance that is used/created in a process does not approximately equal the amount of

the substance that is destroyed/transformed/removed from the process, the facility must describe why the sums are not approximately equal.

Regulated facilities were required to begin the accounting process for the 47 priority substances on January 1, 2010. Regulated facilities must begin the accounting for the Phase 2 toxic substances on January 1, 2012. The information obtained from the accounting will form the basis for both the toxic substance reduction plans and the annual reports.

Toxic Substance Reduction Plan:
The next step in a facility's *TRA* obligations is to prepare a toxic substance reduction plan for each prescribed toxic substance that it uses or creates. The plan must:

- Provide basic facility information;
- State that the facility intends to reduce the toxic substance, or explain why not;
- Establish objectives, and ideally targets, for reducing the use and creation of the toxic substance;
- Describe and quantify how the toxic substance moves through each process at the facility;
- Estimate the direct and indirect annual costs related to the use, creation, release, disposal and transfer of the toxic substance;
- Identify at least one option for each of the seven methods prescribed by the regulation for reducing the use and creation of the toxic substance, or, if an option cannot be identified for any category, provide an explanation why not;
- Provide an analysis of the technical and economic feasibility of each option considered by the facility; and
- Identify which (if any) of the options will be implemented, and, if an option is to be implemented, describe the steps that will be taken, the estimated timetable, and the expected results (i.e., the amount of the toxic substance that will be reduced).

Once the plan is complete, it must be certified by the highest ranking employee at the facility with management responsibilities. The Act also includes a provision that would require the plan to be certified by a qualified toxics reduction planner; however, this provision has not yet been proclaimed into force, and the details of the certification requirements for the planner have not yet been finalized. The ministry posted a proposal notice on the Environmental Registry (#010-9349) in April 2010, setting out the proposed qualifications and responsibilities of the toxic substance reduction planners (see Other Information).

Regulated facilities must complete their first toxic substance reduction plan for the Phase 1 priority substances by December 31, 2011. For Phase 2 toxic substances, facilities must complete their first plan by December 31, 2013. All plans must then be reviewed and updated in 2018 and again every five years thereafter. Facilities will also be required to review and update their plans whenever there has been "a significant process change at the facility."

By the same date that the toxic substance reduction plan must be completed, the facility must also prepare a summary of the plan, which must be provided to the ministry and made available to the public.

Annual Reports:
Every year, each regulated facility must prepare a report that summarizes the results of the toxics accounting from that reporting period (i.e., how much of the toxic substance was used, created, transformed, disposed or released, and for some substances, the amount contained in products), and that compares those results with past reporting periods. If there are any changes from the previous year, the report must explain the reason for those changes. Like the toxic substance reduction plan, the annual reports must be certified by the highest ranking employee at the facility who has management responsibilities.

The annual report must also identify any steps taken during the reporting year to help achieve the facility's toxics reduction objectives (as set out in the toxics reduction plan), and describe how effective

those steps were in actually reducing toxics. In addition, the report must set out any changes made during the year, including changes to the methods used to track and quantify substances, process changes at the facility, or amendments to the toxic substance reduction plan, as well as any unusual incidents that may have affected the accounting results.

Regulated facilities must provide their first report to the ministry for Phase 1 priority substances by June 1, 2011 (based on the 2010 information). For Phase 2 substances, facilities must provide their first report to the ministry by June 1, 2013 (based on the 2012 information). Reports must then be provided to the ministry by June 1st every year thereafter.

A portion of the information in the report must also be made available to the public. This includes: basic information about the facility; the amount of the substance used, created and contained in a product (in ranges); the amount of the substance released, disposed of and transferred (in precise quantities); a comparison between the current and previous reporting periods and an explanation for any changes; a summary of steps taken by the facility to implement the reduction options; and the estimated reductions achieved.

Substances of Concern:
The *TRA* also includes a provision that would require regulated facilities to provide information to the ministry on substances of concern. However, this provision has not yet been proclaimed into force, and no substances have yet been prescribed as "substances of concern." The ministry has indicated that the substances of concern will be prescribed in a later regulation.

The intent of this provision is to enable the ministry to gather information on some less understood substances, which are not tracked on the NPRI and for which little information is available. The toxics reduction discussion document released by MOE in 2008 provided a list of possible substances of concern, including a schedule of 20 priority substances and a second schedule of 135 additional substances that could be prescribed in a later phase. Requiring facilities to provide information on a one-time basis on their use and emission of the substances of concerns would assist the ministry in determining which of these substances should be prescribed as a "toxic substance."

Regulation-Making Authority under the TRA:
The *TRA* provides Cabinet with wide regulation-making authority, including the authority to make a regulation that establishes provincial targets for toxics reduction. The Act also includes a provision that would give Cabinet the authority to make a regulation to ban or otherwise regulate the manufacturing, sale or distribution of a particular substance or a product containing that substance. This regulation-making authority would include the power to establish labelling requirements to notify consumers about the content of toxic substances in a product. However, this provision has not yet been proclaimed into force.

Public Disclosure:
To ensure that the public is able to access information about industry's use of toxics, the *TRA* requires regulated facilities to make their plan summaries and portions of their annual reports available to the public. The *TRA* also provides MOE with the authority to disclose these materials to the public. In addition, the Act requires the ministry to prepare and publish an annual progress report that informs the public on the province's progress in implementing the Act.

Implications of the Decision

The *TRA* (and O. Reg. 455/09) seeks to fulfil one of the McGuinty Government's key political commitments: to establish a new strategy to reduce toxics in the environment. The aim of the Act, as set out in its purpose statement, is two-fold:

1) To prevent pollution and protect human health and the environment by reducing the use and creation of toxic substances; and
2) To inform Ontarians about toxic substances.

Reducing the Use and Creation of Toxic Substances

MOE states that the *TRA* is a major step towards meeting the province's commitment to reduce toxic substances in our air, land and water. The province points to the success of the Massachusetts toxics reduction program (on which the Ontario program is largely based), which has demonstrated significant reductions in toxics use and releases since the program was enacted in 1989.

The *TRA* aims to create a new focus on reducing the use and creation of toxics at the very beginning of industrial processes. While the province already has a number of regulations that control chemical substances, almost all of the existing regulations focus on the traditional "end-of-pipe" release of substances into the environment. The *TRA* applies the principle that the best method of eliminating toxics is by never introducing them in the first place.

The *TRA* does not actually impose any requirements on a facility to reduce its use or creation of a toxic substance (at least for now, although in a later phase, restrictions or bans on the use of some toxics could potentially be imposed). However, the Act does require each facility to carefully examine its operations in the context of how it uses toxic substances (i.e., through toxic substance accounting), and to identify and evaluate opportunities to reduce its toxics (i.e., through the toxic substance reduction plan). Facilities will not be obliged to implement any part of their reduction plans. The theory behind the *TRA* approach is that the toxics accounting and planning exercises will highlight opportunities for reduction and encourage facilities to voluntarily reduce their toxics use. In addition, facilities will be required to publicly disclose their toxics accounting reports and summaries of their toxic substance reduction plans, which could create added public pressure to implement the plans.

It is hard to predict how effective the *TRA* will ultimately be at reducing the use, creation, release and exposure of toxics. Many stakeholders argue that the existing federal NPRI program already requires facilities to track and report releases of the very same substances as the *TRA*. These stakeholders question how much more will be gained by the additional layer of *TRA* requirements in driving toxics reductions.

In addition, many stakeholders also question whether the *TRA*'s focus on reducing the *use* and *creation* of toxics provides the greatest benefit to human health and the environment. While reducing the use and creation of toxics should in most cases result in a corresponding reduction in toxics releases and exposure, in some circumstances, where there is no risk of exposure (because the toxics are chemically stabilized or transformed), reducing toxics use may provide no real benefit for human health or the environment.

Informing the Public

The second of the two stated purposes of the *TRA* is to better inform the public about toxic substance use in Ontario. To meet this goal, regulated facilities are required to publish fairly detailed information about their current toxics use as well as their plans to reduce the toxics. The reported information will provide a new source of data not just for the public, but also for government decision-makers, which should help inform future policy decisions relating to the regulation of toxics.

In addition, the Ontario government plans to establish a user-friendly website that will enable the public to monitor the toxic substance reduction planning and reporting progress of facilities and gather information on toxic substances. This new access to information will help Ontarians find out about toxics in their communities and provide them with the necessary information to make informed choices when purchasing products that contain toxic substances.

As with the first goal of the *TRA*, many industry stakeholders believe that this second purpose is already being met through the existing NPRI reporting and disclosure program. However, the *TRA* requirements for reporting and disclosure go much further than the NPRI, and along with the new provincial website, can be expected to provide a broader and more accessible source of information.

New Provincial Powers to Regulate Products

The *TRA* provides controversial new powers – if and when proclaimed – that would authorize the provincial Cabinet to ban or restrict the use of toxics in consumer products, and develop labelling requirements to notify consumers about toxics contained in a product. This authority could extend to provincial regulation of substances that have not been listed as toxic under *CEPA*. New regulatory restrictions could make consumer products safer for the public, while labelling requirements would enable consumers to make more informed decisions when buying products that contain toxic substances. However, many industry stakeholders are strongly opposed to the province regulating consumer products and labelling as these requirements are already regulated by the federal government under the *Hazardous Products Act, Food and Drugs Act* and *Consumer Packaging and Labelling Act*.

Cost and Regulatory Implications for Industry

The *TRA* imposes a number of new requirements on regulated facilities, some of which took effect almost immediately after the Act and regulation were passed. In December 2009, the ministry estimated that these new requirements will affect approximately 2,000 regulated facilities. Facilities will be required to undertake detailed accounting of the input and output of every prescribed toxic substance, at each stage of the facility's process, and to prepare and file a report on the accounting results every year. In tracking and quantifying substances, the regulation sets a fairly high standard, requiring facilities to use the "best available" methods, taking into consideration industry standards and economic achievability. Facilities will also be required to create a detailed plan setting out multiple options for reducing each toxic substance. These requirements go well beyond the facilities' current activities under the NPRI program.

The costs and resources required to comply with the *TRA* are not yet known. The ministry has provided some estimates, but industry stakeholders assert that the costs of the new regulatory burdens will not only be significantly higher than what the ministry projects, but are also grossly disproportionate to the anticipated benefits of the program. In addition, if the provision requiring third-party certification by a qualified toxics reduction planner is proclaimed, this requirement would impose yet another cost on facilities.

The new *TRA* requirements are on top of existing federal tracking and reporting requirements under the NPRI. And, for facilities located in municipalities that have established their own toxics reporting requirements – such as the City of Toronto – there can now be three layers of reporting requirements. In response to significant stakeholder opposition to this potential doubling or tripling of requirements, the ministry did make efforts to minimize duplication and align the *TRA* requirements with the NPRI.

Public Participation & *EBR* Process

MOE undertook consultations on the toxics reduction strategy in three stages: consultation on the proposed general strategy underlying the new legislation; consultation on Bill 167 – the *Toxics Reduction Act, 2009*; and consultation on the new general regulation under the *TRA*.

On August 27, 2008, MOE posted the discussion document Creating Ontario's Toxics Reduction Strategy on the Environmental Registry for public comment, with a 45-day comment period. MOE received 145 comments on this proposal. On April 7, 2009, the ministry posted a decision notice on the Registry for the proposed strategy, stating that it was proceeding with the toxics reduction strategy as described in the discussion document with a few minor, additional elements.

On April 7, 2009, MOE posted another proposal notice on the Registry for Bill 167, with a 30-day comment period. In response to this proposal, the ministry received 113 comments. Two months later, on June 3, 2009, the Act was passed, and, on August 7, 2009, MOE posted a decision notice for the Act on the Registry.

As the *TRA* was not yet prescribed under the *EBR* in September 2009, MOE was not required to use the Environmental Registry to consult with the public on the draft regulation under the Act. Nonetheless, on September 18, 2009, MOE voluntarily posted the draft regulation as an information notice on the Registry for a 31-day public comment period, which was later extended to 45 days. The ministry received 813 public comments on this proposal. On December 4, 2009, the same day that O. Reg. 455/09 was filed, MOE posted notice of its decision (in the form of another information notice) on the Registry.

In addition to the various Registry postings, the ministry held several multi-stakeholder consultation sessions, individual stakeholder meetings, and information sessions with Aboriginal communities.

Public Comments

Many commenters – including individuals, municipal public health units, and environmental, labour and health groups – were supportive of the toxics reduction strategy, Act and regulation, but sought to have the requirements go further. On the other hand, many industry commenters, while supporting the underlying principle of protecting public health and the environment by reducing exposure to toxic substances, strongly opposed the actual strategy, Act and regulation. Following is a summary of some of the key comments provided by the public on the strategy, Act and regulation.

More Elements should be Mandatory:
A large number of individuals and environmental and health groups commented that the *TRA* should include mandatory requirements for facilities to implement the toxic substance reduction plans. These groups also advocated mandatory requirements for facilities to eliminate or restrict the use of the most hazardous toxic substances, as well as mandatory requirements to substitute toxics with safer alternatives. A few environmental groups noted that even Massachusetts, on whose program Ontario's *TRA* is modelled, is moving to legislate mandatory substitutions. Conversely, several industry commenters expressed support for the proposed voluntary approach.

Application of TRA should be Expanded:
Numerous environmental, health and public commenters stated that the scope of the Act is too narrow. These commenters felt that the *TRA* should be expanded to apply to more sectors. Some suggested that all sectors that report to NPRI should be included, while others listed specific sectors that should be covered, including: sewage treatment plants, transportation, energy generation, forestry, hazardous waste treatment, solvent recovery facilities, chemical wholesalers, petroleum bulk terminals, and the oil and gas sector.

Several commenters noted that a large percentage of toxics emissions come from smaller, non-manufacturing facilities. Accordingly, these commenters stated that the *TRA* should apply to smaller facilities – i.e., by lowering the threshold for the number of employees. Similarly, these commenters advocated lowering the minimum threshold for the quantity of toxic substances used or created, particularly for substances that are carcinogenic, reproductively toxic, persistent or bioaccumulative.

Many of these commenters also stated that the *TRA* should apply to more substances beyond those listed on the NPRI, and that more substances should be included in Phase 1. They noted that the proposed Phase 1 substances represent just 1.5% of the total annual tonnage of emissions of NPRI-reportable substances released by *TRA* regulated sectors, and only 1% of the total annual tonnage of emissions of NPRI-reportable substances from all NPRI sectors.

Conversely, industry commenters felt that the NPRI minimum thresholds should be followed, or, given the more onerous burden of the new *TRA* reporting requirements, should even be raised. Many industry commenters stated that the *TRA* should focus only on NPRI substances, as non-NPRI substances are being addressed through the federal Chemicals Management Plan process.

TRA should be Risk-Based:
Many industry commenters stated that the *TRA* should be risk-based, rather than hazard-based. In other words, the *TRA* should regulate substances based on the potential for environmental and human risk,

rather than the inherent toxicity of a substance. These commenters argued that, for the greatest net benefit, the *TRA* should focus on preventing pollution and protecting human health and the environment by reducing toxic releases and exposure, and not on reducing the use and creation of toxics.

Several of these commenters noted that MOE's proposed approach – with its focus on the use and creation of substances – ignores the reality that some substances may be transformed and stabilized through chemical and physical processes. Commenters pointed out some problematic outcomes of focusing on the use and creation of substances that are prescribed as toxics. For example, industries (such as nickel and copper producers) whose primary business is producing an end-product that is itself a "toxic substance" will be required to track the substance and develop a toxic substance reduction plan to reduce the use of this substance, despite the fact that reduction is impractical. Industry commenters also argued that the proposed approach would unfairly stigmatize products that contain prescribed substances as being toxic despite the fact that they do not present a genuine risk of exposure to the public.

Unreasonable Costs Relative to Benefits:
A large number of industry commenters expressed strong concerns regarding the *TRA*'s duplication of the federal NPRI reporting requirements, as well as other provincial regulations that regulate the release of toxics into the environment. These commenters felt that the new *TRA* requirements would add substantial new costs and regulatory burdens to industry, but with very little added benefits over existing regulatory regimes. A few commented that the *TRA* is indeed contrary to the province's commitment to reduce the regulatory burden for businesses.

Many of these commenters suggested that the *TRA* requirements are unnecessary, viewing them as an "administrative data reporting exercise" with little benefit. They argued that implementing this regime would result in negative economic impacts, particularly for small businesses, and would put Ontario manufacturers at a competitive disadvantage compared to manufactures in other provinces and the U.S. These commenters were frustrated that the province had not done a cost-benefit analysis before proposing these new onerous and costly accounting and reporting requirements. Accordingly, the commenters strongly encouraged the province, at several stages, to undertake a comprehensive regulatory impact analysis and economic cost-benefit analysis.

Harmonization with Federal Processes:
Many industry stakeholders commented that, if there is to be overlap with federal requirements, the *TRA* should at least align as much as possible with NPRI reporting (e.g., timelines, thresholds, one-window reporting, etc.) to simplify reporting burdens and minimize costs for industry. These commenters also stated that the *TRA* should adopt the federal CMP approach when assessing and designating any non-NPRI substances, and that the *TRA* should not declare new substances as "toxic substances" beyond those defined as "toxic" under *CEPA*.

Provincial Targets:
Many individuals and environmental and health groups commented that the province should establish provincial targets for reducing toxic substances. Several commenters suggested specific targets, such as a 50 per cent reduction in releases of toxics and 20 per cent reduction in use within five years of the first reporting period. A few noted that the ministry's own Expert Panel had recommended that the province set targets for reductions in toxics use and release.

Regulation of Consumer Products:
Many individuals and environmental and health groups strongly supported the province having authority to regulate toxics in consumer products and develop labelling requirements. Moreover, some of these commenters sought firmer commitments from the province to actually use this regulatory authority. They argued that mandatory labelling is needed to enable consumers to make informed decisions when buying products that contain toxic substances. Conversely, many industry commenters were equally opposed to the province having authority over consumer products and labelling, arguing that this is already appropriately regulated by the federal government.

Certified Planners and Independent Institute:
Many environmental and health groups supported the concept of certified toxics reduction planners. They also supported the establishment of an independent institute to train and certify planners and provide technical and financial assistance to small businesses. Many industry stakeholders, however, commented that both certified planners and an institute were unnecessary as these tasks could be performed in-house.

Confidential Business Information:
Industry commenters raised significant concerns about the need to protect confidential business information. These commenters suggested that facilities should only be required to provide the public with information on emissions and releases (like NPRI), but not on use. They argued that disclosing too much information on the location and nature of toxics raises security risks as well as business competition issues.

Implementation Timelines:
Several individuals and environmental groups advocated for shorter implementation timelines, stating that the proposed phased-in approach is too leisurely. Conversely, some industry commenters stated that implementation of the *TRA* requirements should be delayed.

Incentives and Support:
Some industry stakeholders commented that incentives (such as tax incentives and grants) and positive recognition of industry achievements would help encourage voluntary reductions.

Public Consultation Process:
Many industry commenters felt that the length of the consultation periods, especially for the proposed regulation, was insufficient given the complexity of the content. In addition, several of these commenters expressed extreme disappointment that their input provided during earlier stages of the consultation process was not, in their opinion, duly considered. Many commenters, from all sectors, also noted that the province did not follow a number of recommendations made by its own Expert Panel either.

Ministry Consideration of Comments

Following the consultation on the discussion paper, MOE decided to proceed with the strategy as originally proposed in August 2008, but stated that, in response to the comments, it would add some new elements. This included: increasing financial support to small businesses to develop toxics reduction capacity; developing other initiatives to encourage early implementation; and pursuing the development of training and accreditation of toxics reduction planners.

Following the consultation on Bill 167, in response to comments provided during the public hearings conducted by the Standing Committee on General Government, the province made a few changes to the proposed Act, including:

- Requiring the ministry to prepare an annual report describing progress in implementing the Act;
- Requiring the ministry to consult with experts and the public every five years about possible changes to the threshold criteria that determines who is subject to the Act, and
- Authorizing the ministry to establish regulatory targets for toxics reductions.

In addition, the province deferred proclamation of two of the more controversial provisions in the Act – the certified planner requirements and the substance of concern provisions – as well as provisions related to administrative penalties, until an unnamed date.

The proposed regulation also reflected some comments received during the consultations on the strategy and Act. For example, the proposed regulation included greater alignment with NPRI reporting requirements compared to the discussion document, as well as two additional substances on the list of Phase 1 priority substances.

The ministry made numerous revisions in the final regulation; although very few were substantive. Most of the changes were a rewording of provisions to improve clarity from the proposed draft, which had, in many cases, caused confusion and anxiety among stakeholders. For example, the ministry added a clause to clarify that products manufactured at a food or beverage facility and intended for human or animal consumption were not prescribed as toxic substances. Other amendments to the regulation included: allowing a single plan or report for multiple substances; removing the requirement to conduct uncertainty analysis on tracking methods; and adding new definitions that increase harmonization with the federal NPRI.

One of the more significant changes, however, was the redrafting of the provision that determines when the accounting, reduction plan, summary and annual report requirements apply. In the proposed regulation, substances listed in Part 1 of Schedule 1 to the NPRI notice would have triggered the *TRA* requirements, even if the substance was never emitted or was completely consumed in the manufacturing process. In the final regulation passed in December 2009, the revised provision stated that there must be a "release, disposal, or transfer for recycling" of all substances in order for the Act's requirements to apply. Many industry stakeholders viewed this amendment as a welcome acknowledgement of one of their key concerns. However, on April 1, 2010, MOE again amended O. Reg. 455/09 to include a "rolling reference" to the federal NPRI Notices. Under the NPRI, there is no emission threshold for substances listed in Part 1 of Schedule 1. As a result, these substances will again be captured under the *TRA* even if there is no release, disposal or transfer of the substance.

MOE's final information notice was extremely unhelpful in explaining the myriad of changes made to the regulation. While many of the changes were admittedly minor, the notice failed to adequately describe the substantive changes. In particular, the notice did not even mention the change noted above, which was of great concern to many commenters. Stakeholders and the public would certainly have benefited from a more helpful and descriptive information notice.

By and large, MOE did not address the majority of comments received during the three stages of consultation. However, in most cases, the comments from different stakeholder groups were directly contrary to one another, and so, the ministry could not have satisfied one side without displeasing the other.

SEV

In its SEV consideration documents, MOE stated that the toxics reduction strategy and *TRA* are consistent with an ecosystem approach, as they relate to air, land, water and living organisms, including humans, and seek to protect the environment.

MOE also stated that the toxics reduction strategy and *TRA* would enhance environmental protection by focusing on pollution prevention. MOE noted that the strategy seeks to expand the existing protection of the environment beyond the traditional emissions or "end-of-pipe" approach, by imposing mandatory accounting, planning and reporting requirements that encourage reduction in the use of toxics through pollution prevention.

MOE added that the broader toxics reduction strategy also supports increased public transparency by informing Ontarians about toxics use.

Other Information

When the *TRA* was passed in June 2008, the province announced that it would invest $24 million to help Ontario's industries transform their processes, reduce the use of toxics in their operations, and find greener alternatives. MOE stated that this investment would go towards: grants for small businesses to help defray costs for toxics accounting and planning; grants for early actions by facilities to reduce toxics; technical assistance to help facilities prepare toxic substance reduction plans; and training and accreditation of certified toxics reduction planners.

To further support industry's transition, in September 2009, the province announced that it would invest $13.6 million in a new green chemistry centre, called GreenCentre Canada, located at Queen's University. The centre will connect Ontario universities with industry to help develop commercial alternatives to toxic chemicals and help companies implement the new technologies faster.

On April 1 2010, MOE posted two information notices on the Environmental Registry. The first notice (Environmental Registry #010-9139) advised the public that O. Reg. 455/09 had been amended (through O. Reg. 125/10) to include a "rolling reference" to the federal NPRI Notices and to better align with the NPRI. As the federal government publishes new NPRI Notices annually (often with changes to the reporting rules and requirements), this amendment will enable the *TRA* to remain aligned with the federal NPRI program without MOE having to amend O. Reg. 455/09 every year.

The April 2010 amendments also included a new exemption from the *TRA* requirements for facilities that have determined – through monitoring or testing – that the concentration of dioxins, furans and hexachlorobenzenes released from their facility is less than the level of quantification (LoQ) set out in the NPRI Notice. The LoQ is defined in *CEPA* as "the lowest concentration that can be accurately measured using sensitive but routine sampling and analytical methods." In order to obtain the exemption, the facility must submit a record to the ministry setting out its test results.

The second information notice (Environmental Registry #010-9349) set out some proposed amendments to O. Reg. 455/09 relating to the qualifications and responsibilities of toxic substance reduction planners. The ministry provided a 46-day public comment period for this proposal.

On May 6, 2010, MOE amended the general regulation under the *Environmental Bill of Rights, 1993* (*EBR*) (O. Reg. 73/94) to prescribe the *TRA* under that Act.

ECO Comment

The ECO applauds the Ontario government for its commitment to reducing toxic substances in the environment and supports the key principles underlying its toxics reduction strategy: that facilities should be aware of how they use toxics; facilities should reduce their use of toxics where possible; and the public should be entitled to know where and how toxics are being released into their environment and used in their products.

The ECO also supports the aim of the *TRA* to shift the focus from the "end of pipe" management of chemical substances to the front-end use and creation of these substances. While the existing federal NPRI program focuses on gathering and publishing information on industrial emissions – and is indeed a valuable source of information on industrial releases – the driving intent of the *TRA* is toxics reduction. The *TRA* forces companies to seriously examine their processes, and through this self-examination, identify opportunities to reduce their use and creation of toxic substances.

Although the *TRA* creates new regulatory burdens for industry, the chosen approach seeks to provide flexibility to facilities in reducing toxics. Rather than taking a prescriptive approach, such as mandating reductions of certain toxics (which would presumably impose even greater costs to industry), the province opted to establish a voluntary approach that allows businesses to identify their own economically viable opportunities and operational efficiencies for reducing toxics. This type of program has achieved success in other jurisdictions and is an appropriate approach to regulating the use of toxics in Ontario.

However, while the ECO supports the *TRA*, the ECO has serious concerns about how this new legislation was developed. The province may have proceeded with unnecessary haste in drafting, passing and implementing the *TRA* and its supporting regulation in under two years. While the ECO appreciates the desire for quick action, this objective must be counter-balanced with the need for careful consideration and proper consultation of proposals to ensure that the best policies are made. In this case, it seems that quick drafting and rushed consultations caused unnecessary problems and avoidable stakeholder anxiety. Numerous other amendments to the final regulation, described as "clarifications", could have been avoided through more careful drafting in the first instance.

Most notably, in the proposed regulation, the *TRA* requirements would have been triggered for certain substances even if the substance was never emitted or was completely consumed in the manufacturing process. When the regulation was passed in December 2009, the provision was revised to state that there must be a "release, disposal, or transfer for recycling" for all substances in order for the Act's requirements to apply. However, on April 1, 2010, MOE again amended the regulation to better align with the federal NPRI reporting requirements, with the result that some substances will again be captured under the *TRA* even if there is no release to the environment. The ECO is troubled by MOE's flip-flopping on this provision, which caused confusion for the public. The ECO is even more dismayed that the ministry never even alerted the public to the impacts that these changes will have.

As the *TRA* will impose new costs and regulatory burdens on industry, the province must ensure that the costs being imposed can be justified with a commensurate benefit to the environment and human health. It does not make sense to require facilities to incur large costs to try to reduce toxics use if the potential risk of exposure to the toxics (e.g., nickel in stainless steel products) is non-existent, and further, if there is no genuine possibility for reduction. In addition, by regulating low-risk substances in this way, the province risks confusing and desensitizing the public to what is truly toxic, as well as potentially diverting resources that could otherwise be used to address the more hazardous substances.

The ECO supports the province's decision to defer proclamation of some of the more controversial provisions of the Act (i.e., the certified planner and substance of concern provisions) to allow time for further review and consultation, rather than rushing these provisions through. While the substances of concern provisions could provide valuable new information about little-understood substances, it may be wise to wait and gain some experience from the implementation of the Phase 1 substances before embarking on this next stage.

Finally, the ECO urges MOE to prescribe new acts, such as the *TRA*, under the *EBR* at the same time that the act is passed. In this way, new regulations under those acts can be properly posted as proposal notices on the Environmental Registry. While the ECO is pleased that the ministry posted an information notice for O. Reg. 455/09 and provided a comment period, a proper proposal and decision notice would have alleviated public confusion relating to the right to provide comments and the ministry's obligation to consider these comments under the *EBR*.

Review of Posted Decision:

4.8 Pier 27 Produce (2008) Inc. Permit to Take Water – *OWRA* Section 34

Decision Information:

Registry Number: 010-6378	Comment Period: 30 days
Proposal Posted: April 7, 2009	Number of Comments: 8
Decision Posted: May 20, 2009	Decision Implemented: May 20, 2009

Geographic Area: Lake Simcoe watershed (Maskinonge River subwatershed)

Description

Overview

In May 2009, the Ministry of the Environment (MOE) issued a Permit to Take Water (PTTW) to Pier 27 Produce (the "proponent"), a company that grows carrots, onions, parsnips and beets in the Holland Marsh. This PTTW approved water takings for Pier 27 Produce's food processing and packaging facility of 320,895 litres a day, 365 days per year, for 10 years. The facility is located in the Maskinonge River

subwatershed, in the southern portion of the Lake Simcoe watershed. The water takings will be returned to the subwatershed.

Background

The Maskinonge River flows into east Cook's Bay, in the southern part of Lake Simcoe, with headwaters on the Oak Ridges Moraine. The subwatershed has a drainage area of approximately 60 km^2, accounting for about two per cent of the entire Lake Simcoe watershed. This area is part of Ontario's Greenbelt and is home to a variety of plant and animal species, including the snapping turtle, a species of Special Concern in Ontario. The townships of Georgina and East Gwillimbury are located within the subwatershed.

There have been longstanding concerns with regard to low flow in the Maskinonge River, as well as with the associated problems of algal and weed overgrowth. Reasons for low flow include over-extraction of water for agricultural irrigation (particularly for sod farming, which requires large amounts of water), increasing urban development and stream bank alteration.

In 1998, the Lake Simcoe Region Conservation Authority (LSRCA) released a remedial strategy for the subwatershed. The plan aimed to develop a strategy to eliminate problems at their sources, rather than provide "band-aid" solutions, similar to previous failed attempts to recover stream flow and reduce duckweed overgrowth. However, due to limited funding, the strategy was not implemented on a large scale.

The summer of 2007 was the Greater Toronto Area's driest summer on record. With very low levels of rainfall, the Maskinonge River ran dry.

In 2008, a water budget study by LSRCA found that ongoing extraction in the Maskinonge River subwatershed exceeded 10 per cent of the available supply. This indicated that the subwatershed was stressed and triggered the need for advanced investigations. In 2009, a stress assessment was carried out, confirming the river's stressed status. This study also revealed extremely low levels of groundwater recharge and reserves in the subwatershed, when compared to the adjacent East Holland and Black River subwatersheds.

On April 7, 2009, MOE posted a proposal to issue a PTTW to the proponent for their food processing facility in Keswick. The PTTW was classified as Category 3, for groundwater taking. Groundwater PTTWs are classified as Category 3 if they are new applications for long-term and recurring takings, and as such, have the "potential to cause adverse environmental impact or interference." The MOE's water quantity management policy is "to ensure the fair sharing, conservation and sustainable use of the waters of the Province." When issuing a permit, the MOE Director must consider issues relating to the need to protect the natural functions of the ecosystem, water availability, and the use of the water (including its conservation and purpose).

The final decision on the PTTW was posted on May 20, 2009. The PTTW was issued as proposed, with two additional monitoring requirements. The first required a flow meter be installed to record all water taken daily. These records are required to be kept up to date, and available for MOE inspection upon request. The second required the installation and maintenance of a continuous water level recorder, in a nearby well not authorized for water takings (i.e., a "control" well). The proponent is required to make this data available to MOE upon request.

On June 18, 2009, shortly after this decision was posted, the Lake Simcoe Protection Plan was released. This document noted that the Maskinonge River was "at high risk of depletion (e.g., below the level to maintain base flow)." One of the plan's policies aims to maintain adequate flow to support the subwatershed's aquatic ecosystem. Within two years of the plan coming into effect, MOE and MNR, in collaboration with the LSRCA, will develop "targets for in-stream flow regimes and water extraction limits for the Maskinonge River subwatershed."

Implications of the Decision

The PTTW authorizes the proponent for groundwater takings from two wells, the first taking up to 59,040 litres per day and the second taking up to 261,855 litres per day. Compared with other PTTWs in Ontario, this amount is relatively low. The minimum amount of water taken to require a permit under the *Ontario Water Resources Act* is 50,000 litres per day. As well, the water in this case is not being removed from the watershed. However, as this subwatershed is stressed and has low groundwater recharge levels, the requirements in the PTTW for monitoring and data availability are of key importance. Data collected will contribute to MOE's further understanding of this subwatershed and how these takings are influencing aquifers and reserve levels.

A condition of the PTTW requires the proponent, three years from the issuing of the permit, to submit to the MOE Director the log of daily takings, as well as all water level data from the control well. This data will only be used to assess whether or not to maintain use of the continuous water recorder in the control well; the permit does not specify whether its terms would be re-evaluated when this data is received by the ministry. However, within that three-year period, a number of initiatives related to water quantity in the Maskinonge may be completed and implemented. These include: two new MOE water quantity policies (i.e., Amendments to Ontario Low Water Response policy, Environmental Registry #010-7477; Managing Ontario's Water Resources for Future Generations, Environmental Registry #010-6350); the Maskinonge River Recovery Project's hydrological study; the South Georgian Bay Lake Simcoe Source Protection Plan; and in-stream flow targets in this watershed may be specified through the Lake Simcoe Protection Plan. These studies and policies may provide MOE with previously unavailable information relevant to the PTTW.

The term of the permit gives the proponent some certainty that water will be available for the processing facility for the next 10 years, despite new policy changes or research such as those described above. While it is uncommon for MOE to suspend or reduce a water taking, it has the power to do so.

Public Participation & *EBR* Process

On April 7, 2009, MOE posted a proposal notice for the PTTW on the Environmental Registry for a 30-day comment period. During this time, eight comments were received by the ministry. All commenters were opposed to the proposal.

The primary concern for most commenters was the health of the Maskinonge River and subwatershed. Several noted the water quantity issues in recent years in the Maskinonge and its tributaries, particularly in the summers of 2002 and 2007. One commenter questioned how the proposed takings would contribute to the cumulative impact of water takings in the region. Other commenters requested a moratorium on approving PTTWs in the region until research on the hydrology of the subwatershed, conducted by the Maskinonge River Recovery Project, was complete.

Commenters also expressed concern about well water levels in the area. One commenter stated, "the ministry must provide assurances to local residents that their wells will not be affected and that, in the event of negative impact, the Ministry, as the approval agency, will compensate."

Another commenter noted that the PTTW may be at odds with the upcoming Source Protection Plan, which will be released by the South Georgian Bay Lake Simcoe Source Protection Committee in 2012: "Let's start honouring our water sources now, and not wait three years to know outright that granting applications to take vast amounts of water from the sensitive Maskinonge River watershed is a bad idea for our environment and our future water needs."

MOE's responded to commenters by adding further monitoring conditions in the final PTTW. Combined daily takings from both wells will be metered and reported on, and MOE believes that recordings from a control well will allow for the monitoring of long-term effects. MOE noted that "the terms and conditions of this Permit have been designed to allow for the development of water resources for beneficial purposes, while providing reasonable protection to existing water uses and users in the area."

SEV

MOE did not produce a SEV consideration document for this instrument approval. Although a 2008 court decision found that MOE is required to consider its SEV before it issues prescribed instruments (for a summary, see page 145 of the ECO's 2008/2009 Annual Report), MOE has stated that it requires time to develop appropriate procedures and train staff before incorporating these considerations into regular practice. This PTTW was issued within the period of time identified by the ministry as necessary for this transition.

The PTTW manual was updated in 2005 to incorporate MOE's SEV principles. Therefore, in theory, by using the PTTW manual in developing the permit the ministry will have indirectly considered its SEV principles. The ECO supports this approach as an interim measure until appropriate procedures are developed and implemented.

Other Information

PTTWs generally deal only with water takings and not with what will happen to the water after it is used. In this case, the water will be used for the processing of vegetables, but it is unclear from simply reading the PTTW how the effluent will be cleaned and returned to the subwatershed.

In December 2009, MOE posted a proposal on the Environmental Registry for an Approval for sewage works for Pier 27 Produce at the same industrial site (Environmental Registry #010-8681). This proposal is for a Certificate of Approval (C of A) for "the collection, treatment and disposal of wastewater to the environment." The proposal notes that parameters of concern to be addressed in the C of A include total suspended solids, biological oxygen demand and phosphorus.

The Maskinonge River currently exceeds the provincial water quality objectives for phosphorus. All water samples taken from the river by the LSRCA between 2004 and 2009 were over the provincial standards for phosphorus content set out in the Provincial Water Quality Objectives.

ECO Comment

This PTTW, for a facility needing water to clean and package locally grown vegetables, would appear to have a minimal environmental impact. The amount of water authorized for takings is relatively small; moreover, the water will stay within its own watershed, as it is being used only for processing and not for canning or pickling. However, as the Maskinonge recently ran dry, the process for approving PTTWs in this stressed subwatershed must be rigorous and sophisticated.

The ECO is concerned about the length of the permit's term. The 10-year term appears not to take into account the current research and policy initiatives that may impact water takings in the subwatershed – such as updates to Ontario's Low Water Response policy (Environmental Registry #010-7477), the region's Source Protection Plan, and in particular, the Lake Simcoe Protection Plan. Given the ongoing changes to such water policies at both local and provincial levels, it might have been prudent to grant the proponent a shorter-term permit, facilitating its re-evaluation in light of any new information or policy directions. The ECO encourages MOE, MNR and LSRCA to move swiftly to complete in-stream flow targets for the Maskinonge River subwatershed. Additionally, the ECO hopes that any future water taking strategies, informed by in-stream flow targets and water budgets, will consider existing PTTWs and possible cumulative effects.

Review of Posted Decision:

4.9 Bill 185: *The Environmental Protection Amendment Act (Greenhouse Gas Emissions Trading), 2009*

Decision Information

Registry Number: 010-6467
Proposal Posting: May 27, 2009
Decision Posting: March 10, 2010
Comment Period: 60 days
Number of Comments: 16
Partial Proclamation: January 1, 2010

Description

Overview

On December 3, 2009, Bill 185, the *Environmental Protection Amendment Act (Greenhouse Gas Emissions Trading), 2009 (EPAA)* was passed by the Ontario Legislature and received Royal Assent on December 15, 2009. The Bill amended section 176.1 of the *Environmental Protection Act (EPA),* to allow the government to make the necessary rules and regulations covering the future development of a greenhouse gas cap-and-trade (or tradable permit) system.

Background

The link between rising global temperatures and the release of greenhouse gas (GHG) emissions due to the combustion of fossil fuels has been clearly established. Each decade since the 1970s has been warmer than the one before. Readings of atmospheric GHGs have steadily risen from pre-industrial levels of 280 parts per million (ppm) to over 390 ppm today. Without significant intervention soon, it is expected that atmospheric levels of GHGs could reach 450 ppm within the next few decades. The need to reduce GHGs before we reach a tipping point that some believe could lead to an environmental and human catastrophe is more urgent with each passing day. Governments are looking for ways to use market mechanisms as one way to put a price on carbon emissions to provide an incentive for industrial emitters to reduce their GHG emissions. One of these mechanisms is a cap-and-trade or tradable permit system.

Prior to the enactment of the *EPAA,* Ontario already had authority under the *EPA* to regulate a cap-and-trade system. Ontario Regulation 397/01 – Emissions Trading, has been in place since 2001 for the buying and selling of nitrogen oxide and sulphur dioxide emission credits. The *EPAA* provides the necessary enabling legislation to expand the government's ability to make market-based regulations involving greenhouse gases. The *EPAA* allows the province to set the rules governing how the allowances that underpin a GHG cap-and-trade system will be created, allocated, transacted, reported and verified.

The intent of a cap-and-trade system is to use market-based instruments as one option to enable industrial emitters to meet their emission reduction requirements at a lower cost compared to traditional command-and-control regulatory approaches. Tradable permit systems do not replace regulation: they "work best when they are supported by strong regulatory frameworks." They provide a clear incentive for industrial emitters to go beyond the regulatory minimum in terms of pollution abatement requirements.

The cap is set by the government regulator or responsible authority for a specific sector (or sectors) and is made up of discrete units called "allowances", measured in tonnes (one allowance equals one tonne). Once a cap is set for a sector, allowances (also called "permits") are distributed to individual entities (or companies) within the sector based on consultation, negotiation and historical benchmarks. The allowances can be either allocated free of charge or they can be auctioned. Allowances are essentially rights to emit and are considered valuable assets by companies that acquire them.

Trading involves the transfer of ownership of these allowances from one company to another. Under a typical cap-and-trade system, companies must surrender allowances to the regulatory authority on an annual basis equal to their actual emissions for that year. If a company's reported emissions are less than the allowances it holds (in other words, it is below its cap), then it is in a position to either sell these unused allowances to another company who is over its cap or bank these allowances for future use. If a company's emissions exceed its quantity of allocated allowances, it must either reduce its emissions through plant improvements or purchase allowances from a company with surplus permits, or face a penalty.

While a cap-and-trade system, in and of itself, does not reduce overall emissions, it does establish an incentive to do so: it creates the opportunity to reduce emissions well below the regulated cap – to over-comply – in exchange for the right to sell excess permits to others who need them for compliance purposes. Proponents of tradable permit systems stress that greater emission reductions occur under a cap-and-trade system than under conventional command-and-control regulations because, under the latter, no one is rewarded for over-compliance. Further, the U.S. system for tradable sulphur dioxide allowances has shown that cap-and-trade systems can reduce air pollution significantly, rapidly and cost-effectively.

To ensure the province is on the same page and working in tandem with cap-and-trade developments elsewhere in North America, Ontario joined the Western Climate Initiative (WCI) in July 2008, a collaboration of U.S. states and Canadian provinces working towards a common framework for the design and implementation of a tradable permit system. Other members include British Columbia, Manitoba and Quebec and the U.S. states of Arizona, California, Montana, New Mexico, Oregon, Utah and Washington. The broad design parameters of the proposed WCI system are as follows:

1) Trading program to be launched January 1, 2012;

2) A minimum level of 10 per cent of allowances to be sold through auctioning when the program starts, ramping up to at least 25 per cent through auction by 2020; and,

3) Capped emitters will only be allowed to meet 49 per cent of their reduction burden through the use of offsets (GHG emission reductions in uncapped sectors such as forestry and agriculture) out to 2020.

In addition to the WCI collaboration, senior Ministry of the Environment (MOE) officials maintain a very close working relationship with their U.S. Environmental Protection Agency counterparts in Washington, and with other regional initiatives. Ontario sees this broader linking with other North American initiatives as critical to maintain economic competitiveness and as a key step in supporting the transition to a low-carbon economy.

The *EPAA* is closely tied to two other initiatives:

1) O. Reg. 452/09 – Greenhouse Gas Emissions Reporting Regulation and Guideline (Environmental Registry #010-7889), which took effect on January 1, 2010; and

2) "Moving Forward: A Greenhouse Gas Cap-and-Trade System for Ontario" (Environmental Registry #010-6740). As of June 2010, MOE had not posted a decision notice on this policy proposal.

For a review of O. Reg. 452/09 – Greenhouse Gas Emissions Reporting Regulation and the related Guideline, please refer to Section 4.14 of this Supplement.

The *EPAA* includes provisions that were proclaimed and provisions that have yet to be proclaimed.

EPAA Provisions that have been Proclaimed:
The *EPAA* amends section 176.1 (1) of the *EPA* by allowing Cabinet to make regulations covering a cap-and-trade system "without being limited to emissions trading" with the intent to maintain or improve existing environmental protection standards "in a cost effective manner". This reference to not being limited to emissions trading is significant because it keeps the government's options open to consider other ways to price carbon such as a carbon tax. The proclaimed sections of the *EPAA* give the government the power to make regulations prescribing those persons and facilities to which a cap-and-trade system will apply, the emission allowances will be created, distributed or allocated (free of charge) and how these instruments can be used, traded and/or retired.

In addition, it gives the government the power to set rules dealing with inter-jurisdictional trading of allowances and how these instruments are to be monitored and reported. Further, it clarifies that emissions can be attributed to a person, entity or facility for administrative purposes and includes provisions to designate a person or body for the purposes of administering a cap-and-trade system.

EPAA Provisions that have Not been Proclaimed:
Provisions in the *EPAA* yet to be proclaimed include an amendment to the *EPA's* Interpretations section 1(1) governing the definition of greenhouse gas. The decision notice indicates that this provision will provide flexibility to accommodate additional GHGs within the legislation as knowledge and scientific understanding about climate change advances. Further, the amended *EPA* section 176.1 contains future provisions with respect to options to distribute or allocate allowances "by auction, sale or other means that are not free of charge" and also governs what percentage of these allowances may be allocated by means other than free of charge.

In recognition of the government's receipt of monies paid to the Minister of Finance through the auctioning of allowances, a separate account in the Consolidated Revenue Fund would be created to be known as the Greenhouse Gas Reduction Fund (GGRF). A further amendment to section 176.1 indicates how GGRF funds may be used for "reimbursing the Crown in right of Ontario for costs incurred by the Crown in administering the regulations" and in "carrying out or supporting greenhouse gas reduction initiatives that relate to the sectors of the Ontario economy to which the regulations apply."

A subsection yet to be proclaimed also indicates that, for the purposes of the *Financial Administration Act,* administered by the Ministry of Finance, money deposited to the GGRF "shall be deemed to be money paid to Ontario" for the purposes noted above. In addition, monies may be paid out of the GGRF for the costs of research, programs or infrastructure incurred in "a sector of the Ontario economy" covered by the cap-and-trade legislation. Monies may also be paid out of the GGRF to cover the costs of any GHG reduction initiative that may be "otherwise borne by electricity consumers."

It is unlikely that these provisions will be proclaimed until the government makes a decision on the architecture for its GHG cap-and-trade system. These provisions will also need to wait until the mandatory GHG reporting requirements set out in O. Reg. 452/09 come into effect starting in June 2011 (for the 2010 reporting year).

Implications of the Decision

The *Environmental Protection Amendment Act (Greenhouse Gas Emissions Trading) 2009* is a key component of enabling legislation designed to set a firm foundation for the development of a GHG cap-and-trade system in Ontario. It is supported by a new regulation under the *Environmental Protection Act* – the Greenhouse Gas Emissions Reporting Regulation and Guideline (O. Reg. 452/09). The *EPAA* provides some clarity for Ontario industry as to the rules of engagement in establishing how a tradable GHG permit system will operate in Ontario. It also demonstrates the continued commitment of the Ontario government to price carbon through a tradable permit system as opposed to a carbon tax.

Further, a cap-and-trade regime is being positioned by the province as a key element in its GHG reduction strategy, designed to help Ontario meet its 2020 reduction target to be 15 per cent below 1990 levels of GHGs. In recognition of the economic linkages between Ontario and the rest of North America,

the amendment also sets the administrative foundation for the trading of allowances across jurisdictions. This reflects the province's desire for *linkage:* to ensure that the eventual design of its cap-and-trade system can be harmonized with other North American systems currently under development. Linkage is important because it allows for a larger pool of trading volumes and it improves market liquidity.

Public Participation & EBR Process

The ministry posted the proposal notice on the Environmental Registry on May 27, 2009 and provided the public with 60 days to comment. The ministry received a total of 16 comments focusing on several issues and principles. In addition, the Ontario government agreed to hold one day of public hearings on Bill 185 before the Standing Committee on General Government (SCGG) on November 2, 2009.

Competitiveness and Harmonization Issues:
The majority of commenters stressed the need to ensure that the design, operation and administration of any cap-and-trade system takes into consideration that the Ontario economy is closely linked with the economies of the rest of North America and the global economy. They noted that the challenge for Ontario is finding the right balance between a carbon pricing system that delivers real emission reductions while ensuring harmonization with whatever regime emerges at the federal level in Ottawa and in Washington. (The Government of Canada has indicated its intention to align its climate change policy platform with whatever is developed by the U.S. federal government in Washington.)

At the SCGG hearing, Imperial Oil, Suncor Energy and the Cement Association of Canada stressed the competitiveness issue within the context of alignment with Ontario's major trading partners and the need to achieve GHG reductions using the lowest cost option. They pointed out that if Ontario has unduly stringent caps (or high auction costs) compared to other WCI jurisdictions, then it could put the provincial economy "on an unequal footing."

Regulatory Oversight:
Concerns were raised about the need for clear and transparent rules of engagement to ensure that future cap-and-trade regulations receive wide public consultation and input. Some stakeholders argued that there should be a "legal requirement" in the *EPAA* to ensure that the economic and social implications of cap-and-trade regulations are properly considered and that there is "fair access to information and decision-making, and a transparent process." In addition, there should be provisions to ensure that the carbon accounting done by industry is verified and that there are penalties in place for non-compliance. The need for "good governance and controls around the economy" summarized the concerns well.

Pricing Carbon: Cap-and-Trade or Carbon Tax:
Several commenters voiced a preference for a carbon tax instead of a cap-and-trade regime. Submissions from Imperial Oil Ltd., the Registered Nurses Association of Ontario (RNAO), Union Gas and the Canadian Gas Association (CGA) all raised concerns at the SCGG hearing about the administrative costs and complexities of designing, operating, adjudicating and enforcing a tradable permit system. They noted that a system designed to put a price on carbon must achieve a stable, predictable cost and that a carbon tax should be supported as "a way to provide a much clearer, more stable carbon price signal." Union Gas, on behalf of the Canadian Gas Association, noted that "[c]ap and trade is too speculative, too passive and difficult to create, and has the opportunity for abuse and gamesmanship."

Concern about the potential impact of market speculation on carbon price volatility was also raised by Imperial Oil Ltd., noting that speculative trading of carbon allowances as "derivatives, options or futures" will only increase price volatility and uncertainty. The "actions of emissions allowance brokers and traders aimed at trading on price volatility can too easily take the emphasis away from the real task of reducing emissions."

Unlike the price volatility associated with cap-and-trade, Imperial Oil Ltd. noted that a carbon tax provides a "stable, predictable cost of carbon" and that "having predictable emission prices makes it easier for emitters to make decisions about making investments to reduce emissions." While not necessarily

supporting this point about the benefits of a carbon tax, Suncor Energy did note the need to avoid an "unduly volatile price on carbon dioxide" and that a carbon pricing policy needs to be able to accommodate the long investment time horizons of key industries as well as the capital stock turnover rate "for existing facilities to ensure investor confidence."

Distribution/Allocation of Allowances:
Recognizing the political dislike for any type of tax – carbon or otherwise – a number of presenters at the SCGG hearing weighed-in on the issue of how emissions allowances, once determined by the eventual cap that is set, should be allocated to large emitters. There are two basic options open to the regulator in allocating allowances: distribute them free of charge or distribute them by way of auction. A third option is a combination of the two wherein, in the early stages of the system, the majority of allowances are given free but in the later years, the majority (or all) are auctioned.

The Registered Nurses Association of Ontario (RNAO), Union Gas and the Canadian Gas Association supported 100 per cent auctioning of allowances if a carbon tax is not being considered. It was recommended that the revenue from this auctioning should fund the development of transformative green technologies and a portion should go to protect low- and moderate-income families through a "refundable carbon tax credit."

Interestingly enough, Union Gas did hedge its bets by requesting, in the absence of full allowance auctioning, that natural gas distribution utilities be granted sufficient allowances free of charge for volume growth on their pipeline systems. The rationale for this request is to reflect the likelihood that, under a cap-and-trade system, large industrial emitters may choose to fuel-switch from oil to natural gas to reduce their GHGs. Union Gas stated that, "this activity should not penalize the pipeline system operator who is enabling this positive change."

There were significant differences of opinion amongst large emitters at the SCGG hearing regarding how emission allowances should be distributed. The position of one upstream oil and gas company, a trade association and the cement industry was that allowances should be allocated for free and that access to "credible" offsets for compliance purposes should be maximized to ensure the lowest compliance cost to industry. The position of another upstream oil company, one NGO and Canada's natural gas industry association was markedly different: 100 per cent of allowance should be auctioned and the use of offsets should be strictly limited.

The Status of Offset Credits:
Opinion was divided on the use of "offset credits" (GHG emission reductions in uncapped sectors such as forestry and agriculture) and their potential use by capped emitters to meet their compliance obligations.

The Climate Change Secretariat (CCS) noted in its SCGG hearing submission that it was working with MOE to understand through modeling and related forecasting how GHG trading, including offsets and auctioning, could contribute to the province's greenhouse gas reduction strategy. The CCS also noted that it had developed an estimated range of GHG reductions that could be delivered by a cap-and-trade system by 2020 "depending on the size of the cap and what the price is."

Suncor Energy and the Clean and Reliable Energy Supply Consortium were strong advocates of using offsets for compliance purposes. The former wanted "access to the widest range of domestic and international offsets for lowest cost compliance" purposes while the latter recommended "full and fair access to … credible offsets".

Other SCGG presenters were less sanguine about the benefits of offsets in a cap-and-trade system. The RNAO, Union Gas (UG) and the CGA all urged that offsets be strictly limited in terms of their use for compliance purposes. The UG/CGA position was that offsets should have a limited role because they are complex instruments with significant verification and related administrative burdens to confirm they represent real and permanent reductions occurring outside the capped sectors.

Other Issues:
A concern about "carbon leakage" across jurisdictions was raised by the Cement Association of Canada (CAC) and by Imperial Oil Ltd. at the SCGG hearing. "Leakage" refers to the process whereby a company relocates from one jurisdiction to another to avoid emission restrictions. CAC was concerned that emission caps for the cement industry in Ontario must be done in such a way that cement production does not relocate to a neighbouring jurisdiction with less stringent requirements.

Suncor Energy had specific concerns to avoid a cap-and-trade system that holds "refiners responsible for their customers' emissions". Suncor also stated a preference for the setting of absolute caps on company emissions "with a provision for growth to ensure economic success", a suggestion that seems to imply a desire for an emissions-intensity-based cap, rather than a hard cap.

In addition to its support for the auctioning of emission permits and a preference for a carbon tax, the RNAO was the only presenter at the SCGG hearings to reference the Intergovernmental Panel on Climate Change's (IPCC's) call in 2007 for more aggressive medium-term GHG reduction targets, calling for emission cuts of 25 to 40 per cent by the year 2020. The RNAO was also the only commenter to recognize the link between Bill 185 and Bill 150, the *Green Energy and Green Economy Act, 2009,* suggesting that these two pieces of legislation have "the potential to transform Ontario into a greener province relying increasingly on clean, renewable energy".

Blue-Zone Technologies Ltd recommended that the Bill be amended to expand the definition of greenhouse gases to include three hydrofluorinated ethers (anesthetic gases): isoflurane, sevoflurane and desflurane and their respective global warming potentials (GWPs). The rationale for this position was the recognition and inclusion of these gases and their GWPs by the U.S. *EPA*, the province of British Columbia and the IPCC.

SEV

MOE noted in its SEV consideration the role that a cap-and-trade system will be expected to play in reducing the use of fossil fuels and the release of carbon dioxide emissions into the atmosphere. This in turn contributes to the province's resource conservation and environmental protection commitments. The SEV consideration noted further that the implementation of reinforcing economic and environmental policy frameworks through this cap-and-trade legislation is expected to achieve both environmental and economic benefits. It was also noted the role that a cap-and-trade system will play in helping to achieve the province's Climate Change Action Plan, although the ECO has noted elsewhere that this has yet to be demonstrated with any publicly disclosed targets, forecasts or projections.

ECO Comment

Ontario has yet to confirm the specific design elements of its GHG cap-and-trade system, discussed within its policy proposal "Moving Forward: A Greenhouse Gas Cap-and-Trade System for Ontario" (Environmental Registry #010-6740). A decision on this policy proposal is not expected until the fall of 2010 at the earliest. The challenge for Ontario is to ensure sufficient compatibility between WCI members' respective regulations and what Ontario elects to adopt to allow for trading. Two key issues relate to how emission allowances will be allocated (free or via auction) and the role that offsets should play as a compliance option in Ontario's system.

Allocation Issues and the Role of Offsets:
Ontario plans to have the ability to seek middle ground on the issue of allocating allowances and on the use of offsets, as is permitted under the broad design parameters of WCI. The provisions in the *EPAA* yet to be proclaimed would give the province the power to exercise discretion on that percentage of allowances to be auctioned and the role of offsets as a compliance mechanism to address competitiveness issues. The ECO will carefully monitor how the province exercises this discretion once it has posted its decision on the design of its proposed GHG cap-and-trade system.

The ECO notes that a provision within WCI's design recommendations provides for the WCI to intervene to "address … competitiveness issues" between WCI partner jurisdictions regarding the distribution of allowances if it is determined that a member jurisdiction is favourably considering local industry. It remains to be seen if Ontario will actually cede sovereignty over such a crucial provincial policy issue. This reluctance to cede sovereignty may apply equally to other WCI partners and calls into question the ultimate viability of the WCI as a suitable platform for trading.

Competitiveness and Harmonization (Linking):
The ECO is sensitive to the concerns raised about not placing Ontario industry at a competitive disadvantage. This relates primarily to the final regulation's treatment of the cost of carbon and how this will affect the province's trade position in North America and the rest of the world. This is not an easy task, recognizing the lack of climate change policy direction at the Canadian federal level as of April 2010 and the uncertainty surrounding the climate change agenda in the U.S. Congress.

The concerns expressed by industry about being competitively disadvantaged if Ontario's requirements are more onerous than other jurisdictions will likely need to be balanced against a desire to avoid carbon tariffs or other "border adjustments" if Ontario's requirements are less stringent than those in the U.S.

Further, the ECO noted above that one of the key objectives of Ontario's Climate Change Action Plan, in addition to reducing GHG emissions, is to "support the transition to a low-carbon economy". The ECO notes the important role that the *Green Energy and Green Economy Act, 2009 (GEGEA)* will have in accelerating this transition. If implemented wisely, the *GEGEA* may be the game-changer Ontario needs to begin to achieve more aggressive GHG reduction targets (either through a tradable permit system or by other means). This is especially true as low-carbon-footprint manufacturing industries locate in the province to supply generation equipment as per the recent announcements of the Ontario Power Authority regarding the awarding of nearly 700 contracts under its new Feed-in Tariff (FIT) program.

Cap-and-Trade and Ontario's 2020 GHG Reduction Targets:
The province expects a cap-and-trade system to play a key role in achieving its GHG reduction target by the year 2020. In the ECO's 2008/2009 Annual Greenhouse Gas Progress Report, we noted considerable medium-term risk (to 2020) associated with the government's positioning on the potential GHG reductions in the economy "that may be delivered by a cap-and-trade system." While the province has been reluctant to quantify or even suggest a range of potential GHG reductions that could be delivered by a tradable permit system, the ECO is pleased to note the reference in the CCS's presentation at the SCGG hearings that the CCS has developed a range of GHG reductions that could be delivered by a cap-and-trade system by the year 2020. The ECO looks forward to reviewing these projections to assess their likely contribution to the province achieving its 2020 GHG reduction target to be 15 per cent below the 1990 baseline.

The ECO will also pay particularly close attention to the manner in which those provisions within the *EPAA* that have yet to be proclaimed are implemented. We are particularly concerned about the rules and regulations that may apply to how funds within the proposed GGRF are disbursed. The process governing how these GGRF funds are used by the government must be transparent and accountability must be disclosed. The extent to which the province may be able to control market speculation in so-called "carbon futures" is also very important to prevent carbon price volatility – an issue of considerable importance to the achievement of meaningful GHG reductions while maintaining the competitiveness of Ontario industry.

The Ministry of Finance (MOF) will play a key role in the oversight of the GGRF. As such, the ECO reiterates the concern we raised in the Supplement to our 2003/2004 Annual Report regarding MOE's review of Application R2002008: Prescribing the Ministry of Finance under the *EBR*. MOE's decision stated that a revision of O. Reg. 73/94 to re-instate MOF as a prescribed ministry under the *EBR* was not required. The ECO believes that the oversight and disposition of funds from the GGRF may carry significant environmental effects. This reinforces the argument that the MOF be re-instated as a prescribed ministry under the *EBR*.

The foundation of any trading system is the monitoring and reporting protocols in place that can validate and verify the reductions claimed. The ECO strongly supports the enactment of O. Reg. 452/09 – Greenhouse Gas Emissions Reporting Regulation and Guideline that will be indispensible in both setting historical benchmarks and in establishing fair but meaningful emission caps for sectors of the economy.

In addition, the ECO welcomes anticipated synergies between the initiatives to reduce GHG emissions and related measures supporting the transition to a low-carbon economy. These synergies are particularly well demonstrated in the relationship noted between the *EPAA* and the *GEGEA.* The maxim that "the economy is the solely owned subsidiary of the environment" was never truer than in this context. The need to reconcile the "balance of nature" with the corporate balance sheet is no longer in question. As noted in the ECO's 2008/2009 Annual GHG Progress Report, there is a strong ecological imperative to pursue more aggressive GHG emission reductions in the face of mounting evidence that we are fast approaching an environmental tipping point.

Review of Posted Decision:

4.10 Regulatory Framework for Managing Sewage Biosolids on Agricultural Land

Decision Information:

Registry Number: 010-6515
Proposal Posted: June 29, 2009
Decision Posted: September 18, 2009
Comment Period: 30 days
Number of Comments: 96
Comes into force: Fully in force by January 1, 2011

Geographic Area: Province of Ontario

Description

Background

The application of sewage biosolids to land has long been the subject of controversy. Sewage biosolids (also known as sewage sludge) are considered by some to be a waste that contains dangerous levels of metals, pathogens, industrial chemicals, pharmaceuticals including antibiotics, and personal care products, which when applied on land threaten the quality of our soil, water and air, and endanger human health. Others consider sewage biosolids to be a valuable and inexpensive source of plant nutrients and organic matter, which when properly applied on land condition the soil and improve crop growth while reducing the requirement for more expensive commercial fertilizers.

Environmental Protection Act (EPA) and Regulation 347 – the "EPA Framework":
Since the early 1970s, Ontario has regulated the application of sewage biosolids, pulp and paper biosolids, food processing waste and other materials to land under the *EPA*, Reg. 347 – General Waste Management. Sites, including agricultural fields and golf courses, that received these materials were considered to be waste disposal sites and were required to have an Organic Soil Conditioning Site Certificate of Approval (C of A) issued by the Ministry of the Environment (MOE). Regulation 347 established general requirements for applying these materials, including minimum setbacks from drinking water wells and residential areas. The C of A, which was issued for a five-year period, identified the location of each application site, and the terms and conditions under which these materials could be applied, including quality standards, setbacks, maximum application rates and storage requirements. Haulers of these materials were required to have a C of A (Waste Management System) issued under section 27 of the *EPA* and to comply with Reg. 347.

According to MOE, there were approximately 2,500 active Organic Soil Conditioning Site Cs of A as of December 2009 and about 500 approvals are granted per year.

Agricultural wastes, such as manure, are exempt from most of the waste management requirements in the *EPA* and Reg. 347.

Nutrient Management Act (NMA) and O. Reg. 267/03 – the "NMA Framework":
By the mid-1990s, the public was becoming concerned about the use of manure, sewage biosolids and other materials on agricultural land, golf courses and other sites as a nutrient and/or soil conditioner. Municipalities began passing by-laws regulating these materials, called "nutrient management by-laws," which meant that farmers in different municipalities became subject to different rules. Although some of the by-laws were subsequently overturned by various tribunals or the courts, farmers began to pressure the Ontario government to develop province-wide rules. However before this could be done, the Walkerton tragedy occurred in May 2000. Tragically 2,300 people became ill and seven died as the result of drinking tap water supplied by a municipal well that had been contaminated by manure containing *E. coli* O157:H7. In 2002, Commissioner O'Conner released his report on the tragedy. He recommended that sources of drinking water be protected as part of a multi-barrier approach to providing safe drinking water.

In 2002, the government passed the *Nutrient Management Act* (*NMA*). The purpose of the *NMA* is to manage manure, sewage biosolids and other materials "containing nutrients [e.g., nitrogen, phosphorus and potassium] in ways that will enhance protection of the natural environment." The Act and associated regulation, O. Reg. 267/03, which was passed in 2003 and has been amended several times, established province-wide rules for generating and using, i.e., land-applying, nutrients. Although a few of the rules applied to all agricultural operations, most of the rules were to be phased in over the next few years and would replace the patchwork of municipal by-laws. They were also part of the government's multi-barrier approach to providing safe drinking water.

Box 1: Definitions:

Nutrient – is defined as any material that can be "applied to land for the purpose of improving the growing of crops or for the purpose of a prescribed use."

Agricultural source materials (ASMs) – are nutrients that are generated by an agricultural operation (e.g., dairy farm), such as manure and some washwaters.

Non-agricultural source materials (NASMs) – are nutrients that are not usually from an agricultural source. Some common generators of NASMs are municipal sewage treatment plants (STPs), pulp and paper facilities and food processors. NASMs include sewage biosolids, pulp and paper biosolids, culled fruit and vegetables and food processing waste. Note: some on-farm anaerobic digestor output may be classified as a NASM.

Compost that meets the Compost Guidelines and commercial fertilizer are not managed under the *NMA* framework.

As indicated by the definitions in Box 1, O. Reg. 267/03 created two general categories of materials: "agricultural source materials" or ASMs and "non-agricultural source materials" or NASMs. O. Reg. 267/03 included a schedule for phasing in generators of ASMs and NASMs. By December 2009, only large municipal sewage treatment plants (STPs) and large or expanding livestock operations had been phased in. Some phased-in livestock operations that used nutrients also became subject to the rules for land-applying nutrients; whereas, other users, including cash croppers and golf courses, were deliberately excluded from being subject to O. Reg. 267/03. Small- and medium-sized municipal STPs and generators of pulp and paper biosolids were to be phased in in 2010. Haulers (also called brokers) of NASMs that were applied to agricultural lands under the *NMA* framework were required to obtain a broker certificate issued under the *NMA* framework in addition to a C of A (Waste Management System) under the *EPA* framework.

Phased-in generators were required to prepare five-year Nutrient Management Strategies (NMSs) that included information on the types and volumes of the ASMs and/or NASMs that they generated and

where they would be distributed. For example, a phased-in dairy operation would indicate in its NMS that it will produce "x" amount of cow manure annually and that "y" amount will be applied on its own fields and "z" amount on a neighbour's fields. Similarly, a phased-in municipal STP would indicate that it will produce "x" amount of sewage biosolids annually and that "y" amount will be delivered to farm "a" and "z" amount to farm "b" for land application as a nutrient. In the past five years, Ontario Ministry of Agriculture, Food and Rural Affairs (OMAFRA) has approved, on average, 570 NMSs per year. In total, Ontario's 19 largest municipal STPs and almost 2,800 livestock operations have been phased-in under the *NMA* framework as of December 2009.

Some phased-in livestock operations that land-applied ASMs and all phased-in livestock operations that land-applied NASMs were also required to prepare a five-year Nutrient Management Plan (NMP). The NMP included information on the types, volumes and quality of ASMs and NASMs they will generate and receive, and where and how they will be stored and land-applied. For example, a phased-in dairy operation that generates manure and receives sewage biosolids would indicate that it will land-apply "x" amount of cow manure and "y" amount of sewage biosolids, specifying which fields would receive which material, the application rate, setbacks from wells and surface water, and other information. Phased-in livestock operations that land-apply NASMs were required to have their NMPs approved by OMAFRA and the sites onto which the NASMs were applied, and an Organic Soil Conditioning Site C of A approved by MOE under the *EPA* framework. Although approximately 700 farms are required to have a NMP, only 300 have been approved as of December 2009.

Ontario Regulation 267/03 also established testing, storage and land application rules for ASMs and NASMs. ASMs, such as manure, and NASMs that have inherently low levels of contaminants, such as fruit and vegetable peels, were subject to the same or less stringent provisions than sewage biosolids. In general, O. Reg. 267/03 required all NASMs to be analyzed for their nitrogen and phosphorus content, eleven metals (the "regulated metals") to protect plants and prevent metal accumulation in soil, and a few other parameters. Sewage biosolids were subject to additional (or more rigorous) testing, including *E. coli* , and land application rules because they were considered to pose a higher risk to the environment and human health than other NASMs.

Some Generators of NASMs and Livestock Operations Subject to Both EPA and NMA Frameworks:
As of December 2009, all of the largest municipal STPs in Ontario and less than one-quarter of the livestock operations that have been phased-in under the *NMA* framework have been subject to the provisions of both frameworks for NASMs.

2005 Decision to Amend the EPA and NMA Regulatory Frameworks

In response to feedback from generators and the agricultural community that they should not be required to comply with both regulatory frameworks, MOE, which administers the *EPA* framework, and OMAFRA, which administers the *NMA* framework jointly with MOE, agreed in 2005 to address the situation. The amendments made to the *EPA* and *NMA* regulatory frameworks on September 18, 2009 removed the requirement to comply with the approval requirements of both frameworks and are discussed in more detail in the following sections. Other amendments, including new rules for anaerobic digesters and milking centre washwaters, made on September 18, 2009 will not be discussed in this review.

Most of the amendments will not be fully in force until January 1, 2011, to allow time for training and other implementation requirements to be put into place.

NMA and EPA Regulatory Frameworks Effective January 1, 2011

The amendments reflect a decision to regulate NASMs that are generated or land-applied outside of the farm gate under the *EPA* framework, and to regulate those generated or land-applied inside the farm gate under the *NMA* framework. As a result, OMAFRA, not MOE, will regulate NASMs that are generated onsite by an agricultural operation, or received by an agricultural operation from outside the farm gate (including sewage biosolids from municipal STPs) and applied to agricultural land.

Adding Beneficial Use Rules for NASMs to O. Reg. 267/03:
Although the *NMA* framework always required NASMs to benefit the growing of crops, rules for determining whether or not a NASM qualified were not defined. The 2009 amendments rectify this omission. As of January 1, 2011, NASMs must comply with one or more of the following criteria in order to be applied to agricultural land under the *NMA* framework: (a) total organic matter content greater than 15 per cent of the total weight of the NASM; (b) the ability to increase soil pH; (c) minimum total concentrations of plant available nitrogen, phosphate and potassium as set out in the regulation; or (d) a minimum water content for the purpose of irrigation. The regulation prohibits the application of NASMs that do not meet at least one criterion.

Introducing NASM, Metal and Pathogen Quality Categories into O. Reg. 267/03:
With the 2009 amendments, the government decided to assign each NASM to one of three categories based on its type (source) and its innate risk to the environment and human health. In general, plant-based NASMs, such as fruit and vegetable peels, are assigned to Categories 1 and 2 because they pose a lower risk than animal-based NASMs, such as sewage biosolids and washwaters from processing meat, fish, eggs and dairy products, which are assigned to Category 3.

The government also introduced the following quality categories and criteria for NASMs:

- two quality categories for metals, CM1 and CM2
- two quality cateogires for pathogens, CP1 and CP2. CP1 has two sub-categories: (1) criteria for sewage biosolids and NASMs that contain human body waste, and (2) criteria for all other NASMs; and
- criteria for foreign object content.

The metal and pathogen quality categories affect the minimum mandatory land-application setbacks to wells, surface water, bedrock and groundwater.

Box 2: Categories of NASMs – Examples

Category 1 – culled fruit and vegetables (subject to some conditions) other than cole crops (such as broccoli, brussel sprouts, cabbage) and onions; uncomposted leaf and yard waste; organic matter derived from ethanol production, etc.

Category 2 – organic waste matter from food processors that does not contain meat or fish, such as bakeries and breweries; culled cole crops and onions (subject to some conditions), composted leaf and yard waste, etc.

Category 3 – meat, egg or dairy product washwaters; organic waste derived from fish processing or biodiesel production; sewage and pulp and paper biosolids, etc.
For a complete list of NASMs in each category including conditions, refer to Schedule 4 of O. Reg. 267/03 as amended by O. Reg. 338/09.

The maximum metal concentrations in CM1 are between 5 and 15 per cent of the concentrations allowed in CM2. The CM1 criteria are the same as those being proposed for Ontario "AA" quality finished compost. The CM2 criteria are the same as those currently used for approving Organic Soil Conditioning Site Cs of A for sewage biosolids. The CM2 criteria are also being proposed for feedstock that is used to produce Ontario "B" quality finished compost. (For additional information on the proposed compost quality criteria, refer to Environmental Registry #010-6658.)

The maximum *E. coli* content allowed in CP1 is one-twentieth of CP2. Maximum levels of salmonella, giardia, cryptosporidium, viable helminth ova and total culturable enteric virus were also established for CP1. No maximum levels for these pathogens were established for CP2.

The actual metal and pathogen quality category of a NASM is either assumed based on its NASM category or determined by testing. Category 1 NASMs are assumed to meet the quality criteria for CM1 and CP1 and do not need to be tested unless there is a reason to be concerned. Category 2 NASMs are assumed to meet the quality criteria for CP1, and Category 3 NASMs, CP2. The pathogen quality assumptions do not apply to sewage biosolids or any materials mixed with human body waste – they must always be tested for *E. coli*. Category 3 NASMs may be managed as CP1 if they comply with the CP1 pathogen criteria. No quality assumptions were made for the metal content of Category 2 and 3 NASMs – both must be tested to determine their metal quality categories. Since Category 1 NASMs that

meet the quality criteria for CM1 and CP1 have the least stringent approval, storage and land application requirements and Category 3 NASMs that meet the quality criteria for CM2 and CP2 have the most stringent and costly requirements, O. Reg. 267/03 provides a built-in incentive for generators to produce high quality NASMs.

Land-application of NASMs, which exceed the quality criteria for CM2 or CP2 (i.e., the *E. coli* criterion), and untreated septage onto agricultural land will be prohibited under the *NMA* framework effective January 1, 2011. NASMs that have not been assigned a category may still be managed under the *NMA* framework, subject to OMAFRA approval, or be managed under the *EPA* framework, subject to MOE approval. Land-application of untreated septage with the exception of untreated portable toilet waste onto agricultural land will still be allowed under the *EPA* framework.

Removing the Requirement to Comply with Both Frameworks and Transition Requirements:
In keeping with the decision to use the farm gate as the criterion for determining which NASM regulatory framework should apply, O. Reg. 338/09 removed two major approval requirements:

1) The *NMA* framework was amended to remove the requirements for off-farm generators of NASMs, such as municipal STPs and pulp and paper facilities, to prepare NMSs and haulers of NASMs to obtain broker certificates.
2) The *EPA* framework was amended to remove the requirement for livestock operations and cash croppers to obtain Organic Soil Conditioning Site Cs of A to land-apply NASMs.

Since cash croppers will no longer be required to obtain a C of A to land-apply NASMs, a requirement to obtain approval under the *NMA* framework was added to O. Reg. 267/03. However, if requirements or conditions prevent livestock operators or cash croppers from being able to comply with the NASM requirements in the *NMA* framework, they may apply for approval under the *EPA* framework, which allows one-off situations subject to the sites receiving Organic Soil Conditioning Site Cs of A approved by MOE.

These changes will not be fully implemented until January 1, 2016. MOE will continue to approve five-year Organic Soil Conditioning Site Cs of A for the application of NASMs onto agricultural land until December 31, 2010. These Cs of A will continue to be in force until they expire or are revoked. NMSs for municipal STPs will cease to be in force effective January 1, 2011.

The requirement for haulers of NASMs to obtain a broker certificate under the *NMA* framework was revoked effective September 18, 2009. Existing certificates will remain in effect until January 1, 2011, by which time brokers will be required to have their Cs of A (Waste Management System) granted under the *EPA* framework amended to include transport of NASMs to sites managed under a NASM Plan (see below for a description).

Introducing the NASM Plan:
The amendments introduced a new nutrient management instrument, the NASM Plan (sometimes called a Field Nutrient Management Plan) into the *NMA* framework. Beginning January 1, 2011, farmers that intend to apply or store Category 2 or 3 NASMs will be required to prepare a NASM Plan for each area ("field") of their farm that will receive/store NASMs. The NASM Plan must include information on what types, volumes and quality of NASMs that will be received, and where and how they will be stored and land-applied. If they apply only Category 1 NASMs, they will not have to prepare a NASM Plan.

The NASM Plan has very similar information requirements as a NMP, which is currently used to outline a farmer's plans for storing and land-applying NASMs (and ASMs) but differs in a number of ways. For example:

- NMPs apply to the entire livestock operation; whereas, NASM Plans apply only to the areas where NASMs are stored or land-applied.

- Only livestock operations are required to prepare NMPs and only if they are also required to prepare a NMS and to meet certain other conditions. NASM Plans must be prepared by all cash croppers and livestock operations that store or land-apply Category 2 or 3 NASMs.
- Currently farmers must obtain approval from OMAFRA for NMPs that include receipt of any type of NASM. As of January 1, 2011, OMAFRA approval of NMPs will not be required. Instead the NASM and metal and pathogen quality categories will determine whether or not NASM Plans must be approved by OMAFRA. NASM Plans for Category 2 NASMs that comply with the CM1 and CP1 quality criteria must only be registered with OMAFRA. All other Category 2 NASM Plans and all Category 3 NASM Plans must be approved by OMAFRA.
- NMPs outline a livestock operation's plans for a five-year period; whereas, NASM Plans are for a one- to five-year period.

Preparers of NMPs must consider all ASMs and NASMs that will be applied to land. The same is true for NASM Plans.

The NASM Plan differs from an Organic Soil Conditioning Site C of A in several ways:

- A NASM Plan will be required for Category 2 and 3 NASMs only; whereas, a C of A is required for any NASM that is applied to land.
- A NASM Plan must include information on all of the ASMs and NASMs that will be applied to the field; whereas, the application for a C of A only contains information on the NASMs that will be applied.
- The farmer (or broker) prepares the NASM Plan, which is then approved by OMAFRA; whereas, MOE prepares the approval instrument, i.e., C of A, based on information that was provided in the application for the C of A (which is usually prepared by a broker on behalf of the municipal STP).
- O. Reg. 267/03 establishes a comprehensive suite of rules for managing ASMs and NASMs. OMAFRA verifies that the proposed NASM Plan complies with these rules. On the other hand, Reg. 347 establishes only a few rules and only for managing NASMs. MOE then includes these rules and any additional rules that it believes are necessary as terms and conditions in the C of A.
- The NASM Plan will be available to the public only through a Freedom of Information request; whereas, the C of A is available upon request.

Livestock operations that land-apply NASMs may be required to prepare all three *NMA* instruments, a NMS, NMP and a NASM Plan; whereas, a cash cropper that land applies/stores Category 2 or 3 NASMs will be required to prepare a NASM Plan only.

Introducing Land Application Standards Based on NASM and Quality Categories:
As of January 1, 2011, the existing land application standards outlined in Part VI of O. Reg. 267/03 will be replaced with standards that consider the category of NASM and the quality categories for metals, pathogens and odour. The new Part VI will continue to include maximum rates of application, setbacks from wells and surface water, rules related to application methods, waiting periods for harvesting and grazing, and prohibitions on spreading NASMs under certain circumstances including minimum depth to groundwater. The new Part VI introduces setbacks for single dwellings and other land uses based on the odour quality category (described in the next section) and a requirement for MOE to be notified prior to Category 3 NASMs and Category 2 NASMs that are CM2 are applied to land. Some of the land-application standards, including the restrictions on winter spreading and maximum application rates, have been relaxed particularly for NASMs that pose a lower risk to the environment.

Determining the Odour Quality Category for a NASM and the NASM Odour Guide:
The 2009 amendments also introduced odour quality categories for NASMs and the NASM Odour Guide. Ontario Regulation 267/03 outlines setbacks, storage, land-application and other rules for each odour quality category.

The simplest and cheapest approach for proponents to determine the odour category is to adopt the category that OMAFRA has already assigned to the subject NASM in the Nutrient Management Tables for O. Reg. 267/03. For example, composted leaf and yard waste and bakery washwaters are assigned to OC1, the least odorous category; whereas, organic waste from grease traps and some sewage biosolids are assigned to OC3, the most odorous category. OC1 NASMs generate less than 500 odour units per cubic metre (OUs), while OC3 NASMs generate at least 1,500 but less than 4,500 OUs.

Box 3: Odour Definitions

An **odour panel** is comprised of at least six trained individuals. Samples are diluted with a neutral gas and presented to the panel under controlled conditions in a laboratory and in accordance with the European Standard, EN 13725:2003.

An **odour unit** is the amount of odorant in one cubic metre of neutral gas at the detection threshold of the panel.
Odour sampling in an industrial setting involves taking an air sample at the property line or at a sensitive receptor, such as a residence or daycare, which may be many metres away from the source of the odour. For information on how odours are evaluated in an industrial setting, refer to our 2007/2008 Annual Report, pages 115-118.

The pre-assigned odour quality category may be changed by OMAFRA on a case-by-case basis or by having a sample of the NASM tested by an odour testing facility, where a sub-sample is taken under laboratory conditions and tested by an odour panel. The NASM Odour Guide outlines the sampling and evaluation protocols to be used.

As detailed in Table 1 below, the odour quality category determines how close NASMs can be applied to single dwellings and other land uses under O. Reg. 267/03 and if and by when NASMs must be injected or incorporated into the soil. Ontario Regulation 267/03 does not include setbacks for industrial areas.

Table 1: Setbacks to Various Land Uses and Times to Incorporate NASMs into Soil

NASM	Single Dwelling		Residential/Commercial/ Community/Institutional Area	
Odour Quality Category	**Setback**	**Time to Incorporate***	**Setback**	**Time to Incorporate***
OC1 < 500 OUs	25 m	Not required	50 m	Not required
OC2 ≥ 500 OUs	25 - 90 m	6 hours	50 – 450 m	6 hours
and < 1,500 OUs	> 90 m	Not required	> 450 m	Not required
OC3 ≥ 1,500 OUs	100 – 450 m	6 hours**	200 – 900 m	6 hours**
and <4,500 OUs	> 450 m	24 hours	> 900 m	24 hours

* If the NASM is not injected into the soil, it must be incorporated within the timeframe specified.
** If feasible, OC3 NASMs must be injected at these setbacks. If the physical properties of the NASM prevent it from being injected, then it must be incorporated within the specified timeframe.

Ontario Regulation 267/03 prohibits land application of NASMs that exceed the OC3 criterion.

Under the *EPA* framework, NASMs are normally land-applied to within 90 m of a single dwelling and 450 m of a residential development. However, NASMs may be applied to within 25 m of a single dwelling and 50 m of a residential development if certain conditions are met.

Other NMA Standards are Amended to Reflect the NASM and Quality Categories:
Provisions in Parts VIII – Siting and Construction Standards, and IX – Sampling, Analysis and Quality Standards and Land Application Rates in O. Reg. 267/03 have been added to ensure that agricultural operations that are required to prepare NASM Plans are also required to comply with provisions in these parts. Most of the amendments apply to all NASM categories; however, some are specific to one or more NASM or quality categories. For example:

- Provisions were added to Part VIII that require the most odorous category (OC3) of NASMs to be stored farther away from dwellings and residential/commercial/institutional/community land uses than less odorous NASMs.
- Part IX was amended to remove the requirement to test the soil or the NASM prior to land-applying the lowest risk category (Category 1) of NASM (with some exceptions).
- The sampling and analysis requirements consider one or more of the following: the category of NASM, the application rate of the NASM, whether or not the NASM contains sewage biosolids or other materials containing human body waste, and the source of sewage biosolids (e.g., large STPs, small STPs, or lagoons).
- The formula for calculating the maximum application rate to land is different for Category 1 NASMs than for Categories 2 and 3 NASMs. The Category 1 rate is either 20 tonnes per hectare per year or based on plant available nitrogen and phosphate. The Category 2 and 3 rates are based on plant available nitrogen and phosphate, regulated metals, sodium, FOG (i.e., fats, oils and grease), and boron.

These new provisions in Parts VIII and IX will not come into force until January 1, 2011.

Miscellaneous other Amendments:
Effective January 1, 2011, preparers of NASM Plans will be required to hold a NASM Plan Development certificate issued by OMAFRA.

Agricultural operations that have NASM Plans will be required to keep a copy of the plan, a record of the annual update to the plan, a summary of the previous year's activities and the site characterization (i.e., the results of a hydrogeologic or geotechnical investigation, if one is required). Agricultural operations that apply Category 1 NASMs only (and therefore are not required to prepare a NASM Plan if they comply with certain conditions) will be required to keep records identifying: the NASM application area; the type, quantities and source of NASMs applied; the dates of application; and the results of any sampling and analysis required by O. Reg. 267/03.

Implications of the Decision

When these amendments come into force, OMAFRA will be taking over primary responsibility from MOE for ensuring that proposals (which will be in the form of a NASM Plan instead of an application for an Organic Soil Conditioning Site C of A) to apply NASMs to agricultural land will benefit the growing of crops and protect the environment and human health. Although this is a new responsibility for OMAFRA, it will be able to use its considerable expertise in agricultural matters and the comprehensive set of rules in O. Reg. 267/03 to guide its review of proposed NASM Plans. MOE will continue to be responsible for inspecting and enforcing NASM rules both outside and inside the farm gate.

According to the government, the introduction of NASM and quality categories allowed it to establish "risk-based standards," that is, standards that more closely reflect the actual risk that a specific NASM poses to

the environment and/or human health. Testing and land application standards including setbacks, maximum application rates and the rules for winter application have been eased for many NASMs, which should make it simpler and cheaper to manage NASMs with low metal and pathogen content and less odour. According to the government, the maximum application rate for sewage biosolids will increase from 8 tonnes dry weight/hectare/5 years to approximately 10 – 14 tonnes dry weight/hectare/5 years. As a result of some of these changes, more land should be available to receive NASMs.

The reduced regulatory burden for low risk NASMs may also encourage generators of higher-risk NASMs to improve the quality of their NASMs. For example, generators of CM2 and CP2 NASMs may be encouraged to reduce the metal and pathogen content in their NASMs; and of OC3 NASMs to produce less odorous materials.

The odour quality criteria for NASMs are not comparable to those established for industry because the sampling methods differ. The public will likely be confused by the fact that industrial emissions are required to comply with an odour criterion of one OU, which is hundreds of times lower than the least odorous category of NASM.

Most Ontario agricultural land is not subject to the provisions in the *NMA* because most livestock farms do not generate enough manure or have not expanded since the *NMA* framework came into force. As of December 2009, out of the approximately 25,400 livestock farms in Ontario only about 2,800 (or about 250,000 hectares) have been phased in under the *NMA* framework. Ontario's approximately 29,000 cash crop farms have never been phased in despite being major users of nutrients. The 2009 amendments are unlikely to significantly change these numbers. A few more dairy farms (because of the milking centre washwater provisions) and only a small proportion of cash croppers will be phased in under O. Reg. 267/03 beginning January 1, 2011.

Public Participation & *EBR* Process

MOE and OMAFRA provided two public consultation periods for some components of this decision. During the first consultation, they asked for comments on the plain-language summary entitled "An improved regulatory framework for the management of non-agricultural source materials (NASMs)." The summary was posted as Proposal #010-1436 on the Environmental Registry on September 7, 2007 with a 120-day comment period. Eighty-one comments were received.

During the second consultation, which began in late June 2009, they posted the proposed amendments to O. Reg. 267/03 and Reg. 347 that would remove the duplicative requirements as proposal #010-6515 on the Environmental Registry for a 30-day comment period. Also included in this Registry proposal were proposed amendments to O. Reg. 267/03 for the management of milking centre washwater, updates to the nutrient management and sampling analysis protocols, and the proposed NASM Odour Guide. According to the decision notice, MOE and OMAFRA received 93 submissions during the second consultation. In July 2009, MOE and OMAFRA held four consultation sessions that were attended by over 140 people, including members of the public, representatives of industry stakeholder groups and municipal officials. The ministries also met with various groups on request.

Some of the comments and the government's response from the decision notice for Environmental Registry #010-6515 are summarized below.

Concerns Related to Public Consultation

Almost every commenter requested that the comment period of 30 days for proposal #010-6515 be extended. They gave one or both of the following reasons for their request: (a) during July the agricultural community is busy and other interested parties are not in session or taking holidays; and (b) the proposed amendments are very complex.

According to a commenter, MOE refused to address the council of the City of Oshawa or to take questions from the public at a council meeting of the City of Cobourg. The commenter included an email

from MOE stating "public meetings were not held, as the general public would not be required to follow these sector specific requirements unless they were involved in the business of generation, receipt or land application of NASM." Another commenter noted that MOE met with councillors from the City of Peterborough in private rather than at a public council meeting.

The government explained that a plain language summary of the proposed NASM framework was posted for a 120-day comment period followed by a second consultation for a 30-day comment period. In total, over 170 comments were received.

Concerns Related to Health and Environmental Risks Posed by Biosolids

Many commenters were concerned that sewage and/or pulp and paper biosolids pose risks to the environment and/or human health. Some suggested that more research should be done before any more biosolids are applied to land; others suggested that biosolids should be used to produce energy; and still others indicated that biosolids are first and foremost wastes and should be managed by MOE as wastes under Reg. 347. Several commenters complained that the proposed amendments ignored the advice from the Experts Panel on Sound-Sorb, which recommended that biosolids be composted and managed under Cs of A, administered and enforced by MOE.

According to one commenter, at least 80 per cent of Ontario's farms have tile drains. The commenter was concerned that nutrients and contaminants in sewage biosolids, including pharmaceuticals, were entering surface water within minutes of land-application, affecting the health of fish and amphibians and the quality of water.

Commenters complained that the government has not addressed on-going public concerns about biosolids. One commenter noted that, despite several requests for a policy review, none has been publicized, although MOE claims that a review was done in 2003.

The government indicated that it is committed to protecting water, soil and air resources and that no objective evidence has been found indicating that sewage biosolids properly applied to land has had adverse health effects. The standards were developed by policy experts, agrologists and scientists in MOE and OMAFRA, who reviewed recent research and treatment technologies.

Managing Biosolids through Cs of A

As noted above, several commenters urged the government to continue to manage biosolids as a waste under Reg. 347. They noted that MOE has the expertise needed to ensure that land application is protective of the soil and water resources, including source water for drinking purposes, and to enforce standards. Some commenters noted that, unlike *NMA* instruments, the public does not have to file a Freedom of Information request to obtain a C of A.

Several commenters urged the government to retain the requirement that generators of NASMs prepare NMSs. On the other hand, the Association of Municipalities of Ontario (AMO), Halton Region and several others were supportive of removing this requirement for municipal STPs, suggesting that the preparation of NMSs was time-consuming and costly.

The Ontario Federation of Agriculture (OFA), which supports managing biosolids under the *NMA* framework, cautioned that the public may perceive it as inconsistent to manage biosolids as a waste outside the farm gate and as a nutrient, inside. OFA also noted that the proposed rules outline maximum application rates if the NASM is being applied as a nutrient but not if it is applied to increase organic matter in the soil or the pH of the soil. The OFA disagreed with the proposal to allow biosolids to be land-applied under a C of A if they exceeded *NMA* rules. The OFA contends that doing so may give the impression that the application site is actually a waste disposal site.

The government believes that the new rules strengthen the management of NASMs and explained that all of the rules that were normally contained in the terms and conditions of the Cs of A have been reflected in

the amendments to O. Reg. 267/03, meaning that Cs of A are no longer required. The government also explained that NASMs must meet beneficial use criteria and must comply with criteria for metals and pathogen content; and that OMAFRA approval of land-application plans is required (depending on the quality of the material).

The government also explained that NASM Plans may be available under the *Freedom of Information and Protection of Privacy Act* and that the standards and requirements for land application of sewage and pulp and paper biosolids are now described in O. Reg. 267/03, which is more transparent than an individual C of A.

Concerns Related to Enforcement

Commenters also indicated that there is too little enforcement related to NASMs, which in some cases has led to "significant effects on humans and the environment." One commenter noted that biosolids haulers in Ontario have a "bad track record of environmental compliance," citing Terratec's 43 convictions. Ecojustice noted that the administrative penalties and fines under the *NMA* are much lower than those under the *EPA*.

The government indicated that MOE would continue to be responsible for compliance and enforcement, and will respond to pollution incident reports and continue to conduct proactive inspections under both the *EPA* and *NMA*.

Concerns Related to Protection of Private Drinking Water Supplies

Many commenters were concerned that under the proposed amendments to O. Reg. 267/03 biosolids could be spread to within 15 metres of a private drinking well rather than the 90 metres for municipal drinking wells. Many questioned why drinking water supplies for rural residents should be at greater risk than urban residents. Some commenters noted that Ontario had a separation distance for all drinking water wells of 300 feet (i.e., 90 metres).

The government explained that the amount of water being drawn, i.e., "cone of influence," from around municipal wells is greater than from private wells. The 15-metre setback is consistent with other provincial regulations including the Ontario Building Code.

Concerns Related to Public Notification

Some commenters were concerned that municipalities and other interested groups (such as conservation authorities) would not be notified of proposals for land-applying NASMs and/or that the public would not be notified at all. Peel Public Health suggested that both local and regional municipalities be consulted on proposed NASM Plans and notified upon approval.

The government explained that OMAFRA will notify municipalities when it approves NASM Plans, which is consistent with the current practice of MOE notifying municipalities when it approves Cs of A. The government also noted that the local district office of the MOE must be notified before NASMs are applied, which will assist MOE with planning proactive inspections and responding to questions from the public.

Comments Related to Leaf and Yard Waste

The Municipality of Waterloo supported the proposal to manage leaf and yard wastes as Category 1 or 2 NASMs under the *NMA* framework. The municipality explained that since 1996 its leaf and yard waste has been applied to local farms under a C of A instead of being composted. Although the metal and pathogen content is low, leaf and yard waste has been subject to the same setbacks and testing requirements as biosolids, resulting in less land being available for land application and more complex approvals.

The Composting Council of Canada (CCC) urged MOE to develop an "overall organic residuals strategy" noting that "organic residuals are valuable resources that should be used to create compost ... for the health and productivity of our soil." The CCC noted that it has objected to prior decisions that have favoured one sector's access to organic residuals over others resulting in inequitable control and costs. During consultations on these changes to the regulatory framework for NASMs, the CCC reiterated the above concerns and provided a copy of its 2005 organics strategy.

Some Odour-related Concerns

One commenter noted that, in some areas, a significant portion of NASMs are applied to hay fields and cannot be incorporated, a requirement for odorous NASMs. Some municipal STPs have already or are in the process of upgrading their equipment that could affect the odour category of their sewage biosolids. AMO and Halton Region disagreed with the more stringent rules for land-application of sewage biosolids because of its odour, noting that no such rules apply to manure and that the rules may "fuel negative perceptions" about the quality and safety of NASMs. The City of Hamilton noted that the proposed odour-related setbacks would remove many of the farms that receive biosolids in its area.

The government explained that the regulation of manure and NASMs have very different histories and that the *NMA* framework would decrease the regulatory burden on managing higher quality NASMs. In addition, the setbacks for sewage biosolids were developed by scientists and agrologists from MOE and OMAFRA and were based on the most recent science. The setbacks were set to minimize risk to public health and the environment.

Other Concerns

A couple of commenters recommended that biosolids be used to create green renewable energy rather than applied to land, where they could potentially contaminate soil and water resources with heavy metals, pharmaceuticals (including antibiotics), and pathogens.

The Region of Peel was concerned that Category 1 NASMs may have significant amounts of sodium, which would not be detected, since Category 1 NASMs do not need to be tested if they are land-applied at a rate of less than 20 tonnes per hectare.

The Ontario Forest Industries Association (OFIA) noted that NASMs that do not provide nutrients but are used to improve soils, such as wood ash, are not assigned a NASM category. As a result, wood ash, which is used to increase soil pH, must be managed as a Category 3 NASM. According to OFIA, wood ash would be subject to pathogen testing even though it does not have any pathogens, and metal testing would double under the new rules. In addition, since its wastes are often used in mine reclamation and silviculture, the forest industry will continue to be subject to both regulatory frameworks. The OFIA advised that the new framework will increase costs to all participants, which may discourage some parties from recycling their wastes. The OFIA recommended that a framework be developed to address all land applications of NASMs.

The government did not specifically address these comments in its summary on the public consultation.

SEV

MOE provided a brief statement explaining that the subject decision supports an ecosystem approach, provides environmental protection and promotes resource conservation. MOE explained that the new approach to managing NASMs recognizes the nutrient benefits provided to soils and is based on the quality and level of risk to the environment. NASMs must meet specific quality requirements and be applied to land according to strict rules and standards to "minimize the creation of pollutants that can result in damage to the environment." NASMs must provide nutrients for crops to grow and/or increase organic matter in the soil. Only when the nutrient benefit outweighs the risk to the environment will NASMs be land-applied. NASMs reduce the need for commercial fertilizer and its environmental impacts.

Other Information

According to MOE, approximately 300,000 dry tonnes of municipal sewage biosolids are generated annually in Ontario. Approximately 40 per cent is land-applied, another 40 per cent is landfilled and the remaining 20 per cent is incinerated.

Some of Ontario's pulp and paper biosolids are land-applied as a soil amendment or mulch, or are used in land reclamation. For example, pulp and paper biosolids are land-applied to some vineyards to increase organic matter in the soil. According to the OFIA, pulp and paper biosolids are odourless if they are stored and applied properly. The requirement for pulp and paper facilities that apply their biosolids to agricultural land to prepare NMSs in 2010 was revoked with these amendments.

The Experts Panel on Sound-Sorb was established in 2004 by MOE in response to ongoing concerns that Sound-Sorb, which is a mixture of paper fibre biosolids (PFBs) and mineral soil, may be harming the environment and contaminating groundwater. Sound-Sorb was used to build berms at gun clubs. Although the Panel did not come to a conclusion regarding the safety of applying PFBs to agricultural land for possible risks to human health, agriculture and the environment, it did conclude that PFBs should be managed as a waste with a C of A or with a legal instrument that provides "equal or better protection for human health and the environment at all stages from its generation, through transport, composting and final use in the construction of berms."

ECO Comment

Ontario has almost 5.4 million hectares of agricultural land with much of the prime land being found in southern Ontario. Over the years, the Ontario government has enacted legislation and implemented policies that protect agricultural land from urban sprawl. However, it is not sufficient to protect only the amount of agricultural land available for growing food and bio-fuels, it is also important to protect the quality of agricultural land. Measures that improve organic content in soil, prevent erosion, and minimize contamination from the application of nutrients, pesticides, herbicides and other treatments, help to conserve our soil resources and support a vibrant agricultural industry. The *NMA* and *EPA* provide two regulatory frameworks for achieving these goals.

Regulation of Nutrients Lacks Transparency

When the *NMA* was first introduced, there was an expectation that the general public would gain insight into various agricultural practices and have greater input into practices that may pose a risk to human health, and to the quality of our soil, water and air resources. To a certain extent that expectation has been met. MOE and OMAFRA have diligently posted proposals related to the Act and regulation and have been fairly responsive to feedback. In addition, O. Reg. 267/03, particularly the plain language supporting documentation, has provided the public with greater insight into the management of nutrients. Despite this, much of the site-specific information that the public desires remains shielded from public scrutiny. When the Act was passed, the ECO and others urged the government to make a proposed central registry of NMSs and NMPs public and to prescribe NMSs and NMPs as instruments subject to public comment on the Environmental Registry. The government has steadfastly asserted that these approvals involve confidential matters and should not be made available to the public. The ECO disagrees.

In a meeting with the ECO in 2009, OMAFRA indicated that environmental matters are beginning to drive ministry policy and that transparency is becoming an issue. OMAFRA explained that it is becoming a regulatory agency, which is a new role for it. It also noted that, unlike the *EPA* and *OWRA*, acts administered by OMAFRA, such as the *NMA* and the *Food Safety and Quality Act*, are quite prescriptive, leaving little room for discretion. OMAFRA advised the ECO that it is currently updating its SEV and expects to have a clearer view of which of its instruments should be prescribed under the *EBR* when it is done. The ECO urges OMAFRA to recognize the on-going public interest in how agricultural activities can affect the environment and human health by prescribing NMSs, NMPs and NASM Plans as instruments for public comment under the *EBR*.

While the government asserts that the nutrient management regulation is available to the general public, understanding it is well beyond most people's patience and capability. With its myriad of rules and language that only lawyers and specialized experts fully appreciate, the 2009 amendments to O. Reg. 267/03 add another level of complexity that leaves readers without an appreciation of their impact. Although the government provided a 120-day comment period on the proposed framework, it provided only a 30-day comment period on the proposed amendments. The ECO believes that more time should have been provided and that the government should have anticipated the level of public interest.

Policy Drivers Not Explained

The amendments go far beyond the initial objective of removing the duplicative approval requirements – they introduce a fundamentally new approach to managing NASMs. The factsheets and other supporting documentation were helpful, but the societal, agricultural and environmental objectives that influenced the drafting of the amendments were not clearly described. For example, it is our understanding that the government decided that O. Reg. 267/03 should:

- encourage land-application of organic materials over disposal in landfill sites or use as feedstock in energy-from-waste facilities;
- encourage generators of NASMs to improve the quality of their materials; and
- be one component of a broader organics management program.

As a result, the public was denied an opportunity to understand NASM management and the proposed regulatory changes posted in June 2009 in a broader context. The public was also not advised of the volume or quality of each type of NASM that is generated in the province, which would have been important contextual information for considering options for managing these materials.

The government has provided only very general information on how the quality criteria, setbacks and other standards were established. Information on the government's scientific sources is scant and general in nature. With lack of understanding comes mistrust and fear. Many commenters expressed fear about the safety of their drinking water because the proposed setback for private wells was much less than for municipal wells; others were concerned about the high levels of contaminants in sewage biosolids. The government did provide an explanation for the wells setback in the decision notice and links to the MOE and OMAFRA websites where additional information could be found. However, the information lacks detail and is unlikely to convince anyone who has read or heard about the threats posed by manure and sewage biosolids from other sources. The ECO urges MOE and OMAFRA to identify and make available the technical studies that were used to establish the quality criteria and setbacks, explain what adjustments were made to reflect Ontario's conditions and what assumptions were made in establishing the criteria. The public should also have access to the nutrient, contaminant and odour characterizations for each ASM and NASM. In essence, the ECO believes that the government should prepare and maintain a rationale document (analogous to the brownfields rationale document), which expands on the factsheet Land Application of Sewage Biosolids: Environmental Protection, Science, Policy and the Nutrient Management Regulation, for the materials and rules in O. Reg. 267/03.

Is the Government Eroding Environmental Protection for Agriculture?

Before the original nutrient management regulation was finalized in 2003, the government drastically scaled back the number and types of agricultural operations to be phased in. Although ensuing amendments have required additional agricultural operations to be phased in, the amendments have also delayed the phase-in of many operations. With the latest amendments, the government has claimed that, even though many of the rules have eased under its risk-based approach, the amendments provide the same or higher level of environmental protection without providing evidence, as noted above, to support this statement.

The government has also not published the actual number of farms phased in under the *NMA* framework, or explained how the government plans to measure the impact of the regulation, or even if it plans to do so. It has also advised the ECO that it does not have good information on the volume and quality of NASMs generated in Ontario, which is critical information for determining progress in the management of these materials and future needs. MOE and OMAFRA have dedicated considerable resources to developing and administering the complex *NMA* framework, but with less than five per cent of Ontario's agricultural land phased in (according to ECO calculations) it is increasingly difficult to believe that their efforts have delivered the regulatory framework that was first promised when the *NMA* was enacted in 2002. The ECO does not believe that the 2009 amendments will materially change this statistic. In the Supplement to our 2003/2004 Annual Report, the ECO noted that the people and the environment will not fully benefit from this legislation for many years. Ontarians are still waiting. The ECO urges the government to prepare a report every five years that clearly outlines the nutritional and environmental benefits and costs of the *NMA* framework.

Some commenters asked why manure, which contains high levels of pathogens and various contaminants, has not been subject to many of the same standards as NASMs. In response, the government indicated simply that the different approach for manure was based on historical precedent. A science-based justification for the different approach would be far preferable.

The ECO continues to support the purpose of the *NMA* framework and believes that the decision to keep inspection and enforcement activities related to the application of NASMs onto agricultural land with MOE is critical to building the public's trust in the safety of land-applying NASMs, in particular, and even ASMs. However, the ECO is increasingly concerned with the lack of transparency and documented, quantified benefits, as well as the glacial pace of implementation.

Review of Posted Decision:

4.11 Renewable Energy Approvals Regulation

Decision Information:

Registry Number: 010-6516
Proposal Posted: June 9, 2009
Decision Posted: November 6, 2009
Comment Period: 45 days
Number of Comments: 1264
Decision Implemented: September 24, 2009

Description

Overview

On September 24, 2009, a key component of the government's strategy to shift electricity generation away from fossil fuels and toward renewables was put in place. In order to expedite the development of renewable energy generation facilities, the Ontario government proclaimed into force a new class of approvals for renewable energy projects under Part V.0.1 of the *Environmental Protection Act* (*EPA*). As well, O. Reg. 359/09 – Renewable Energy Approvals, made under this new section of the *EPA* came into force and established a new, streamlined process that must be followed to obtain a Renewable Energy Approval (REA) in order to proceed with a renewable energy project.

The Renewable Energy Approvals Regulation (REA Regulation) constitutes the cornerstone of the province's new approval process for facilities that generate electricity from renewable sources. The REA Regulation integrates all former MOE regulatory approval requirements into a single process which is based on a "one window, one permit" approach. In addition, the government has exempted most renewable energy projects that generate electricity from the requirements under the *Environmental*

Assessment Act (*EAA*). As well, air and waste approvals under the *Environmental Protection Act* (*EPA*), along with permits to take water, well permits, and sewage approvals under the *Ontario Water Resources Act*, are now combined in a single process and approval. Finally, through amendments made to the *Planning Act*, most planning approval requirements no longer apply to renewable energy projects. Collectively, these amendments constitute a fundamental change in the regulatory landscape for renewable energy electricity projects.

Background

Based on the twin goals of stimulating the economy and improving the environment by reducing greenhouse gas emissions, the *Green Energy and Green Economy Act, 2009* (*GEGEA)* was passed by the government in May 2009. The *GEGEA* not only enacted the *Green Energy Act, 2009* (*GEA*), it also amended a number of other pieces of legislation. For a more detailed review of the *GEGEA*, please refer to Section 4.2 in this Supplement. Along with enhancing energy conservation, the preamble of the *GEA* states the government's commitment to "fostering the growth of renewable energy projects, which use cleaner sources of energy, and to removing barriers to and promoting opportunities for renewable energy projects and to promoting a green economy." To help achieve these objectives, the REA Regulation was developed with a view to streamlining the approvals process for renewable energy projects. Combined with the Feed-in Tariff program developed and implemented by the Ontario Power Authority − which provides a financial incentive to develop renewable projects − the government hopes to affect a transformative shift away from fossil-fuel electricity generation and towards a greener energy path.

Prior to the REA Regulation coming into force, the process to gain the requisite approvals for a renewable energy project was often complex, expensive and time-consuming. Two key provincial hurdles existed. For most electricity projects, proponents were required to undergo an environmental screening process under the *EAA*, as well as to obtain a certificate of approval under the *EPA*. Projects were subject to sometimes onerous official plan amendments and/or zoning by-law amendments as required by municipalities.

Through the REA Regulation, the government is endeavouring to expedite the approvals process. The REA is to be co-ordinated with other provincial approvals and, while not specified within the REA Regulation, the government has indicated that a six-month "service guarantee" per project exists. Under this, MOE's goal is to render a decision within six months of receiving a complete application.

The REA Regulation outlines both the process that must be followed to obtain an REA Approval as well as requirements, including the setback distances that apply to specific technologies. The REA Regulation outlines MOE's requirements for review and approval. It should be noted, however, that the Ministry of Natural Resources (MNR) has jurisdiction over some aspects of environmental management (e.g., the protection of provincially recognized wetlands) and so is involved in reviewing proposed REAs to ensure conformity with MNR requirements. In order to coordinate provincial efforts, and avoid duplication, MNR developed an Approval and Permitting Requirements Document for Renewable Energy Projects (Guidance Document), which outlines its information requirements for decision-making on approvals or permits that fall under MNR-administered statutes. This document was also subject to a public consultation process through the Environmental Registry (#010-6708). For the ECO's review of MNR's Approval and Permitting Requirements Document for Renewable Energy Projects, please see Section 4.21 in this Supplement.

Overview of the Process

Determining if a Project is Covered by the Regulation:
Under the *Electricity Act, 1998*, renewable energy sources are those that are renewed by natural processes, including wind, water, bio-energy (i.e., biomass, biogas, biofuel), solar energy, geothermal energy and tidal forces. Only projects that generate electricity from wind, bio-energy and solar, however, are subject to the REA Regulation. Projects that use geothermal or solar for heating, for example, are not covered by the regulation. As well, water power facilities are exempt and will continue to be assessed

under the Ontario Waterpower Association's Class Environmental Assessment for Waterpower Projects or as an individual environmental assessment under the *Environmental Assessment Act*.

The REA Regulation classifies renewable energy projects that use wind, bio-energy and solar according to various criteria, including size and location. Depending upon their classification, some projects may be exempt from the regulation's requirements.

Some projects are exempt due to their size or because they are subject to an alternative approval process. Examples include:

- wind facilities with a name plate capacity less than or equal to 3 kW (Class 1 wind)
- ground-mounted solar less than or equal to 10 kW (Class 1 solar)
- rooftop and wall mounted solar of any size (Class 2 solar)
- regulated mixed anaerobic digestion facilities or anaerobic digestion facilities processing non-regulated waste on farms (as these are regulated pursuant to the *Nutrient Management Act, 2002*)
- all waterpower facilities

The REA Regulation does not apply to certain renewable energy technologies, such as geothermal heating or cooling or solar thermal water or space heating, as these do not generate electricity.

Consultation Requirements:
In order to proceed with most projects, applicants must provide notification of both their intention to engage in the project, as well as the location and time of at least two public consultation meetings. While two meetings are the minimum requirement, MOE encourages applicants to hold additional meetings throughout the project design and study period. Notice of the first meeting must be provided at least 30 days in advance and must be published on two separate days in a local newspaper, posted on the applicant's website and given to landowners within 120 metres of the proposed project location. Further requirements exist to provide notification to residents in unorganized territories, Aboriginal communities and local authorities.

No less than 60 days prior to the final public consultation meeting the applicant must make available to the public all documents and reports related to the project. These documents must be posted on the applicant's website, and paper copies must also be made available for review.

Report Requirements:
For most REA approvals, applicants must submit several different reports. The regulation contains a table that lists a core set of technical reports – and the specific requirements of each – that project proponents must submit before any consideration is given to the application by MOE. These include:

- Project description report – including information on the energy source, generation technology, nameplate capacity, location, negative environmental effects;
- Construction plan report – including details on negative environmental effects within 300 metres and mitigation measures to be taken;
- Design and operations report – including information on existing natural features, plans for handling water and waste;
- Decommissioning plan report – including procedures to demolish the facility and restore the site; and a
- Consultation report – including details of public, municipal and Aboriginal consultation, what concerns were raised and how they will be addressed.

Additional reports may be required depending upon the location, equipment or technology used. These include:

- Effluent management plan report – including plans regarding sewage generation, treatment and disposal, and any necessary mitigation measures;
- Emission summary and dispersion modelling report – report must comply with existing reporting requirements for local air quality, unless Director feels report is not required;
- Hydrogeological assessment report – including information to assess and control possible underground leachate;
- Noise study report – report must comply with existing MOE requirements for acoustic assessment reports;
- Odour study report – including sources of odour, negative effects and mitigation measures;
- Surface water assessment report – including information on impacts to proximate surface water;
- Off-shore wind facility report – describing nature of existing environment, negative environmental effects and mitigation measures; and a
- Wind turbine specifications report – technical information.

All applicants (except for those constructing small wind projects) are also required to submit reports relating to possible impacts on natural features and water bodies located nearby the proposed site. Natural features are defined as: Areas of Natural and Scientific Interest (ANSIs); coastal, northern or southern wetlands; valleylands; wildlife habitats; or woodlands. As part of the planning process, applicants are required to conduct both a review of public records, as well as a site investigation, in order to determine the proximity of the proposed project to provincial parks, conservation reserves, natural features, or ANSIs. If the project is on Crown land (or private land where MNR permits are required), the applicant will also be required to assess the project's proximity to wildlife habitat for fish, birds, beavers, as well as species and habitats protected under the *Endangered Species Act, 2007*. Once completed, the applicant must evaluate the significance or provincial significance of each feature using criteria established or accepted by MNR, and have MNR confirm the conclusions reached.

As a result of these activities, applicants are required to submit five additional reports outlining their findings and conclusions. These include a:

- Natural heritage assessment records review report – a report outlining the documents reviewed to determine the nature and location of natural features;
- Natural heritage assessment site investigation report – a report outlining the results found by physically investigating the site;
- Natural heritage evaluation report – a report outlining the significance of each natural feature identified by the records review and site investigation;
- Water records review report – a report outlining the documents reviewed to determine the nature and location of water features; and a
- Water site investigation report – a physical investigation to confirm conclusions reached by the water records review.

In conjunction with these reports, applicants may also be required to provide further information to other ministries to obtain certain permits. For example, archaeological and heritage assessment reports may be required, along with approvals under the *Ontario Heritage Act*, from the local municipality or the Ministry of Culture. Finally, where there may be a potentially negative impact on any species or habitat protected under the *Endangered Species Act, 2007*, the applicant will be required to describe the potential negative effects and the methods they propose to avoid or eliminate the effects. If there is no manner by which the effects can be avoided or eliminated (even after changes to the project have been considered), the applicant must apply for and be granted a permit from MNR in order to continue with the project.

Submission Process:
Once an applicant has complied with all requirements, they may submit their application to MOE for review. The appropriate ministries will conduct an initial review to assess whether the submission addresses all the requirements contained in MOE's REA Regulation, MNR's Guidance Document (if applicable), as well as those required by any other authorities that have jurisdiction over aspects of the

project. If the submission is deemed incomplete, the applicant will be notified and provided an opportunity to address the missing requirements. REAs are classified instruments for the purposes of the *EBR* so if the application is deemed complete MOE will post an instrument proposal notice on the Environmental Registry for a minimum 30-day public review and comment period. Where other permits and approvals are subject to public notice requirements, additional notices may be posted on the Registry.

After considering an application, MOE may issue, renew or amend an REA (with terms and conditions if deemed necessary), or refuse to issue, renew or amend, an REA.

Hearings/Appeals:
If dissatisfied with the decision, an applicant (proponent) may, as per the pre-existing provisions of the *EPA*, request a hearing by the Environmental Review Tribunal (ERT) within 15 days of the decision. Pursuant to *GEGEA* amendments, a third party right to appeal REAs now exists under the *Environmental Protection Act*. This is a new right. Any person within Ontario may, within 15 days of an REA decision notice being posted on the Environmental Registry, request a hearing before the ERT. There is a hurdle, however. In order to succeed at the hearing, the appellant must demonstrate that the project will cause "serious harm to human health, or serious and irreversible harm to plant life, animal life or the natural environment." The REA is not automatically stayed, or suspended, during the duration of the ERT process, however the appellant may request that the ERT exercise its power to do so.

The ERT has six months to hold a hearing and render a decision on a third party appeal, however this period may be extended upon mutual agreement or to ensure a fair hearing. If the ERT determines that the project will cause the alleged harm, it has the power to either revoke or alter the decision, or order MOE to take further action.

Requirements Relating to Specific Technologies

Part II of the REA Regulation establishes a classification for each type of renewable energy generation facility. The requirements relating to each technology, including whether an REA is necessary and the setback distances for noise, property-lines, roads and railways, are determined according to the classification given to each individual project.

Wind:
The REA Regulation establishes five wind facility classes based on a project's electrical power output (kW or MW) and turbine sound power level ("loudness"). As shown in Table 1, larger wind projects are subject to a 550-metre setback from the nearest receptor (i.e., residence), but can be reduced upon consent or where ambient noise levels are at a certain threshold.

Table 1: Requirements for Wind Facilities

Class of Wind Facility	REA Required?	Name Plate Capacity (kW Generated)	Setback Requirements for Noise, Property-lines, Road and Railways
Class 1 (tiny)	REA not required.	Less than or equal to 3kW (enough for a dishwasher or fridge)	No mandatory setbacks.
Class 2 (small)	REA required, but requirements are simplified and no mandatory setbacks apply.	More than 3kW and less than 50kW (enough for a small group of houses or to supplement a small commercial operation)	No mandatory setbacks.
Class 3 (quiet)	REA required, but requirements are streamlined. Must meet property and road, but not noise setbacks.	More than or equal to 50kW	Noise - 550 m setback not applicable if "loudness" is less than 102 dBA. Evaluated on a site-specific basis. Property line – Setback equals the height of the turbine (without

			the blades). Can be reduced through agreement with neighbouring land owner or by showing that there will be no adverse impact. Roads/railways – Setback is the length of the blade plus 10 m.
Class 4 (large)	REA required. Subject to all requirements, including property, road and noise setbacks.	More than or equal to 50kW	Noise – 550 m setback applies if "loudness" is equal to or greater than 102 dBA. Setbacks increase depending on the number of turbines installed and sound level. Can be reduced if ambient noise exceeds 40 dBA. Property line – Setback equals the height of the turbine (without the blades). Can be reduced through agreement with neighbouring land owner or by showing that there will be no adverse impact. Roads/railways – Setback is the length of the blade plus 10 m.
Class 5 (offshore)	REA required. Are of various size and configuration. May be subject to Class 4 requirements with additional coastal/natural study requirements.	All sizes.	No minimum setback distances are established in the regulation. Siting is assessed in the required Off-shore Wind Facility Report.

Solar:
The REA Regulation establishes three solar facility classes based on a project's electrical power output (kW or MW) and location. The REA requirements do not assess the land classification (e.g., prime agricultural land) for ground-mounted solar facilities. Rather, the Feed-in Tariff program addresses this issue and prohibits the development of solar projects over 100 kW on certain classes of agricultural land.

Table 2: Requirements for Solar Facilities

Class of Solar Facility	REA Required?	Name Plate Capacity (kW Generated)
Class 1 – at any location	REA not required (nor other Certificate of Approval)	Less than or equal to 10kW
Class 2 – roof or wall mounted	REA not required (nor other Certificate of Approval).	More than 10kW
Class 3 – ground mounted	REA required and must conduct a noise study to demonstrate project can remain below 40 dBA.	More than 10kW (could power 5-10 mid-sized homes)

Anaerobic Digestion Facilities:
Anaerobic digestion refers to the process whereby bacteria converts energy stored in organic matter into a gas, which is then burned to generate electricity. The REA Regulation establishes three anaerobic digestion facility classes based on the location and size of the facility, as well as the feedstock material (biomass, farm material, or source separated organics) being used. An REA is required for each class of facility, but the applicability of some requirements (including certain public consultation provisions and the

reports required) will depend upon the class of facility being considered. In general, the requirements are less stringent when the facility is farm-based. Exemptions also exist for regulated mixed anaerobic digestion facilities, and for farm-based anaerobic digestion facilities that already have an approved Nutrient Management Strategy under the *Nutrient Management Act, 2002* and did not previously require a certificate of approval for waste.

If the facility is based on a farm, it will typically require a setback distance of 250 metres from any building used by humans. Where the impacts of the facility can be mitigated, the setback may be reduced to 125 metres. Larger facilities will have to submit noise, odour, and emission summary and dispersion modelling reports explaining how negative impacts will be addressed.

Thermal Treatment Facilities:
Thermal treatment refers to the burning of wood or other solid organic material. The REA Regulation establishes three categories depending on the location and size of the facility, as well as the feedstock (woodwaste or other biomass) material being used. An REA is required for each of these three classes, but the applicability of some requirements (including certain public consultation provisions and the reports required) will depend upon the class of facility being considered. In general, the requirements are less stringent when the facility is farm-based.

Similar to that for anaerobic facilities, a 250-metre setback distance is required from any building used by humans but may be reduced for farm-based operations.

Setback Requirements for Natural Features and Water

The REA Regulation also establishes a number of setback distances for renewable energy projects from natural features and water bodies as outlined below.

Natural Features:
As previously indicated, as part of the planning process, applicants are required to evaluate the significance, or provincial significance, of each identified natural feature. In general, the minimum setback distance for those features identified as significant or provincially significant is 120 metres. (For earth science ANSIs, however, the setback is 50 metres.) In many instances, however, projects may be constructed within the 120-metre limit if an Environmental Impact Study Report outlines measures that will be taken to mitigate any negative environmental effects.

Renewable energy projects are not permitted within southern or coastal wetlands that are designated as provincially significant. As well, such projects are not permitted within provincial parks or conservation reserves except in limited situations. For example, a project may be allowed if it is generating electricity for a community that is not connected to the grid or where the electricity is to be used by facilities within the park or conservation reserve as defined under the *Provincial Parks and Conservation Reserves Act, 2006*.

Water:
Similar to the process for natural features, applicants are required to conduct both a records review and site investigation to determine the location of nearby water bodies such as lakes, streams and springs. In general, a 120-metre setback also applies to these water bodies although this may be reduced with the submission of a report that outlines the negative environmental impacts and how these will be mitigated. A larger setback of 300 metres has been established for some “lake trout” lakes given the sensitivity of the species to changes in their ecosystems. Generally, transmission lines and other associated structures may be located within 30 metres of a water body and may be reduced further with the submission of a mitigation report.

Provincial Policy Plan Areas:
Where a project is proposed within an area covered by a provincial policy plan (such as the Oak Ridges Moraine Conservation Plan, the Greenbelt Plan or the Lake Simcoe Protection Plan), extra requirements exist regarding natural heritage and/or water protection. In general, these additional requirements relate

to the applicable setbacks, which can be reduced if an environmental impact study report is prepared and confirmed. Where a project is proposed for the area covered by the Niagara Escarpment Plan and a development permit is required under the *Niagara Escarpment Planning and Development Act*, such permit must be obtained prior to submitting the REA application. Accordingly, any proposal to develop a renewable energy project on the Niagara Escarpment must first be presented to the Niagara Escarpment Commission (NEC) for review and approval. If the project does not meet the protection criteria established by the NEC, it will not be considered for an REA.

Implications of the Decision

Changes the Role of Local Municipalities:
A major shift under the REA process is that a significant amount of municipal control and authority over the approvals required for renewable energy facilities has been removed. Under the *Planning Act*, municipalities have the power to enact official plans and zoning by-laws to both permit and restrict the use of land. Prior to the amendments made by the *GEGEA*, renewable energy proponents had to either comply with these documents, or bring an application to municipal council requesting a variance or an amendment to the official plan or relevant by-law in order to obtain planning approval. Subsequent to the amendments, renewable energy projects are no longer required to comply, for example, with municipal official plans or zoning by-laws, nor do demolition control provisions continue to apply. Certain aspects of municipal control, such as building permits issued under the Building Code, however, were not affected by these changes and will still be required. The implications of these changes are quite significant in that almost all the controls that municipalities have normally relied on to regulate development no longer apply to renewable energy undertakings. While theoretically this may result in the permitting of renewable energy facilities in locations that would have been previously prohibited under standard planning principles, the REA Regulation contains mandatory consultation provisions that allow municipalities to raise issues of concern during the planning stages.

Promises a Faster Approach:
As indicated above, a key objective of the REA Regulation is to expedite the approvals process such that a decision is made on each application within six months. The success in meeting this service guarantee will likely depend upon internal capacity within the ministry, as well as the adequacy of the applications submitted. To assist with this process, the *Green Energy Act, 2009* established a Renewable Energy Facilitation Office under the Ministry of Energy and Infrastructure (MEI) to serve as a first point of contact for proponents and to guide them through the approvals process.

Some Protections Exceed the Provincial Policy Statement (2005) While Others Do Not:
The Provincial Policy Statement, 2005 (PPS) provides broad direction on provincial land use planning and dictates what activities may occur in certain areas. Within the PPS electric power generation is defined as “infrastructure” and the PPS places almost no constraints as to possible locations for infrastructure projects. As indicated above, the REA Regulation specifically prohibits renewable energy generation within provincially significant southern and coastal wetlands. As such, the REA Regulation exceeds the protections that are provided within the PPS for these areas. It does not, however, extend this same protection to other natural heritage features such as significant wildlife habitat, significant woodlands or species at risk habitat.

Restricts the Discretion of Conservation Authorities:
Under the authority of the *Conservation Authorities Act* (*CAA)*, conservation authorities (CAs) are community-based environmental agencies that work together to implement local natural resource management programs on a watershed basis. Conservation authorities regulate development in river or stream valleys, large inland lakes shorelines, hazardous lands and wetlands. With regard to these areas, a permit must be obtained from the appropriate CA if a proposed development is deemed to affect “the control of flooding, erosion, dynamic beaches or pollution or the conservation of land.” Under a *GEGEA* amendment to the *CAA*, however, the authority of CAs to refuse permission or impose conditions within a permit for a renewable energy project is limited to taking steps to “control pollution, flooding, erosion or dynamic beaches.” In other words, CAs are not able to deny permits to renewable energy projects even if they are of the opinion that the project might affect the “conservation of land”.

Broadens the Scope of Assessment under Part V.0.1 of the Environmental Protection Act:
Under section 1(1) of the *Environmental Protection Act*, "natural environment" is narrowly defined and is restricted to air, land and water. Accordingly, when MOE reviews an application for a current permit or approval, the purpose of so doing is to protect and conserve the "natural environment", narrowly defined. Rather than using this more restricted definition, the newly added Part V.0.1 of the *EPA* defines "environment" more broadly by giving it the same meaning as contained within the *Environmental Assessment Act.* Under the *EAA*, "environment" includes not only air, land and water, but also plant, animal and human life, social, economic and cultural conditions, built environments and more. Given that the purpose of Part V.0.1 is to protect and conserve this more broadly defined "environment", this raises the possibility that terms and conditions that are imposed on a project may relate not only to protecting the natural environment, but also to the social and economic environment as well. Accordingly, MOE will need to evaluate and balance these diverse, and sometimes competing priorities, while making decisions on REA applications.

Exempts Renewable Energy Projects from EAA *Requirements:*
When the REA Regulation was passed, amendments were also made to three regulations under the *EAA* to exclude certain renewable energy projects from the application of the *EAA.* Ontario Regulation 116/01 - Electricity Projects, was amended so as to exempt most renewable energy generation facilities from having to comply with the screening process prescribed by O. Reg. 116/01. Regulation 334 – General, was amended such that renewable energy generation facilities and renewable energy testing facilities that are carried out by the Crown, municipalities or public bodies are exempt. Finally, O. Reg. 101/07 - Waste Management Projects, was amended to create an exemption for renewable energy generation facilities that are also waste disposal sites.

Public Participation & *EBR* Process

MOE posted the regulation proposal notice on the Environmental Registry on June 9, 2009. The notice was comprehensive and included links to several other critical components. A link was provided to an MOE document entitled Proposed Content for the Renewable Energy Approval Regulation under the *EPA*, rather than a draft regulation. Links were also provided to:

- the *Green Energy Act, 2009*;
- a *Green Energy Act* homepage through MEI;
- five other regulations that MOE proposed to amend in order to consolidate the REA process, including amendments to regulations made pursuant to the *Environmental Bill of Rights, 1993*;
- an MNR document outlining its proposed approval and permitting requirements for renewable energy projects; and
- information on consultation sessions.

MOE provided a 45-day comment period and held six public information sessions. These sessions were held very shortly after the proposal was posted on the Registry and fell within a two-week time period between June 15 and June 25, 2009. As well, a dedicated telephone line was established for public inquiries. Given the level of interest and complexity of this regulation, the extra effort on the part of MOE in establishing a phone line, providing an extended comment period, and holding public information sessions is to be applauded. The level of public interest in the proposal is reflected by the fact that 1,264 comments were filed with MOE, with 553 in writing and 711 received online.

Commenters on the proposed regulation included: members of the general public; community groups; ratepayer associations; environmental non-governmental organizations (ENGOs); the renewable energy industry; municipalities; conservation authorities; agricultural representatives; and others. In general, there was strong support for increasing Ontario's renewable energy supply, however, concerns existed as to the impact such projects would have on residents and the local environment. In general, comments on the proposed regulation echoed those that were submitted on Bill 150.

While comments were submitted for all types of renewable energy projects, the vast majority focused on wind turbines and, in particular, the proposed mandatory minimum setback for turbines of 550-metres. Many commenters (particularly individuals, but also community groups and ratepayer associations), expressed strong concerns that this distance was insufficient due to potential negative health impacts associated with turbine noise and urged the government to conduct further health studies before allowing any further wind developments. As well, several commenters expressed concern that the draft amendments to the *EPA*, requiring proof of "serious and irreversible" harm to human health in order to sustain an appeal, set too high a threshold given the perceived human health impacts. Many members of the public related their personal experiences with living in close proximity to wind turbines – both positive and negative. Safety concerns, the potential impact on local property values and livestock, along with the possible impact on local economies that rely on tourism dollars, were also key issues raised.

Other commenters (consisting of members of the general public, renewable energy proponents, municipalities and landowners wishing to host projects) expressed an equally passionate concern that the proposed setback was too large and would "impair the viability of proposed projects, deter landowners from participating in wind energy developments, discourage investment by the wind power industry and delay Ontario from meetings its goal for renewable power and job creation." Several commenters pointed out that the proposed setbacks significantly exceeded setbacks that had already been established by some local municipalities and that some consideration should be given to pre-existing ambient noise levels when siting wind turbines.

A large number of commenters expressed concern about the proposed 120-metre setback from significant natural heritage features such as important migratory bird areas, wetlands, provincial parks and conservation reserves. Conservation groups expressed concerns that the proposed regulation would permit projects to be sited within this setback if impacts are "mitigated". These groups argued that the "test should be that no harm to the significant natural feature will be allowed" and that decision-makers should be granted discretionary powers to require a further setback, or other more stringent conditions if necessary, on a site-specific basis. Many argued that developments should be prohibited completely within locally, regionally and provincially significant natural heritage features such as the Oak Ridges Moraine and the Niagara Escarpment. As well, strong concerns were expressed about locating projects within UNESCO designated areas such as the Niagara Escarpment, the east coast of Georgian Bay, the Frontenac Arch and Long Point.

Other comments, some recurring, about the proposed regulation included:

- both support for and opposition to the proposed property setbacks;
- opposition to locating wind and solar projects on productive agricultural land;
- suggestions to exempt rooftop and wall-mounted solar facilities from all REA requirements due to their minimal environmental impacts;
- concerns that the notification and consultation provisions require clarification to ensure local landowners and municipalities receive timely notice and are adequately consulted;
- a concern by municipalities over the removal of *Planning Act* powers and a resultant loss of control over local land use planning with respect to siting renewable energy projects. Many felt local municipalities were being relegated to play the role of consultants only;
- suggestions to shorten the timeline for the Environmental Review Tribunal to render a decision from nine months to six months due to the financial burden that would be imposed on proponents if a project was suspended for a lengthy period;
- concern that the grounds for appeal are overly stringent and are too narrow to "address many of the real land use compatibility and other environmental concerns…that might be raised by a renewable energy proposal". Recommendations were made to broaden the grounds for appeal to include aesthetic impacts, or the protection of cultural or heritage values;
- suggestions to streamline the process between ministries as well as to harmonize with the federal environmental assessment requirements where applicable;

- concerns about how ancillary infrastructure (such as access roads and transmission lines) will be evaluated (and potentially used) given its significant impact on the landscape and the role it plays in fragmenting habitat;
- suggestions that a complaints process be established within MOE;
- concerns around the Aboriginal consultation provisions and whether the Crown's duty to consult, as established by recent Supreme Court of Canada decisions, can be delegated to project proponents;
- suggestions that proponents be required to post financial assurances in order to ensure that future obligations will be undertaken;
- a requirement that proponents monitor impacts as part of the management and operation of the facility;
- suggestions that decommissioning plans should be included in site remediation plans and that clarity be provided as to what standard the land must be returned; and,
- a general concern that many key terms, such as "significant" or "mitigation" lack clarity or are inadequately defined. Several commenters recommended that the term should be defined broadly to include local, regional, as well as provincially significant features.

MOE appears to have reviewed the comments received and been willing to reconsider certain aspects of its proposal in light of those comments. Some of these revisions are discussed below.

The proposed noise setback of 550 metres, based on a noise level limit of 40 dBA, was established using models outlined in MOE's 2008 Noise Guidelines for Wind Farms. In determining the setbacks for the REA Regulation, MOE concluded that the models it used are "scientifically sound and supported by a transparent and peer-reviewed process" and therefore retained the proposed setback. MOE did acknowledge, however, that in some situations the ambient noise already exceeds the 40 dBA threshold and therefore introduced an exception to the 550-metre limit where higher ambient noise levels could be demonstrated. MOE also reduced the proposed setbacks for roads, railways and property lines, and allowed proponents to enter into agreements with landowners for reduced property setbacks.

MOE initially proposed that notice to engage in a project be given to all residents within a 1.5-kilometre radius, as well as published in a local newspaper, at a "preliminary stage of project planning." In response to concerns that the 1.5-kilometre radius would be too onerous in more populated areas, the final regulation reduced the notification distance to landowners within 120 metres of the project. Further clarity was provided as to other notice requirements.

While MOE originally proposed setbacks for "significant" natural features, the public expressed concern as to how "significance" would be defined and whether it would include locally or regionally significant features. While the REA Regulation defines "natural features" and outlines which public records (including those maintained by MNR, conservation authorities, and local authorities) must be examined to determine a project's proximity to a natural feature, it does not include a definition of significance. Accordingly, MOE deferred to MNR on the question of "significance" and requires that proponents submit reports to, and obtain confirmation from, MNR when determining "significance". Despite the concerns expressed by many, MOE retained the exemption, which allows projects to be sited within the established setbacks if impacts can be mitigated, and provided no discretion to establish a further setback if deemed necessary.

Finally, the hurdle for a third party to challenge the approval of a renewable energy project was reduced somewhat. In Bill 150, the grounds for a third party hearing before the ERT was that the project would "cause serious and irreversible harm to plant life, animal life, human health or safety or the natural environment." In the final Bill, the term "irreversible" was removed in relation to human health only and the grounds for a hearing under the *EPA* are that the "project will cause serious harm to human health; or serious and irreversible harm to plant life, animal life or the natural environment." The onus of proof lies with the person who requests the hearing.

SEV

In its SEV consideration document, MOE stated that the regulatory requirements reflect an ecosystem approach. MOE notes that it adopted a broad definition of the term "environment" which includes "the natural environment, living organisms including humans and the interrelationships with the built environment," rather than a narrower definition which is often used in planning or environmental approvals. MOE also asserted that the regulation addresses cumulative effects on the environment as proponents are required to assess and manage both the negative effects associated with a proposed project, as well as "develop plans for the life cycle of the facility, including construction, operation and decommissioning."

The REA regulation is a central component of the government's plan to reduce greenhouse gas emissions and other pollutants. MOE noted that the regulation is consistent with its SEV commitment to prevent pollution as it will help to "decreas[e] reliance on coal-fired power and other fossil fuel electricity generation projects [which] will have the potential to reduce the discharge of pollutants."

MOE also indicated that its SEV goals of increased transparency and public consultation are reflected in the regulation in that project proponents are required to provide local opportunities for public, Aboriginal and municipal consultation. As well, as part of its decision-making in developing the regulation, MOE attempted to adhere to its SEV principle of public consultation and held several public, stakeholder, multi-sector, and aboriginal workshops.

Other Information

At the same time that the REA Regulation came into effect, two regulations under the *Environmental Bill of Rights, 1993* (*EBR*) were also amended. The first, O. Reg. 73/94 – General, was amended such that the *EBR* leave to appeal provisions do not apply to REAs. Rather, as discussed above, a third party right to appeal now exists under the *Environmental Protection Act*. The second regulation that was amended, O. Reg. 681/94 – Classification of Proposals for Instruments, was also amended to classify REAs as a Class II instrument under the *EBR*. Such classification means that REA proposals must be posted by MOE on the Environmental Registry.

In January 2010, MOE released a plain-language guide that provides a good overview of the renewable energy approvals process. Included is a list of approvals that may be required from other ministries and approving bodies, depending on the type of project, as well as possible federal government requirements.

In February 2010, MOE posted an information notice on the Environmental Registry to inform the public that an electronic Certificate of Approval (C of A) library has been developed. The goal of the library, which became publicly accessible on March 15, 2010, is to provide online access to all Cs of A, including REAs, issued by the ministry.

In March 2010, MOE posted six draft technical bulletins on the Environmental Registry for a 90-day public review and comment period. The bulletins provide guidance and direction for project proponents in preparing the five reports that are mandatory for all projects – the Project Description Report, the Design and Operations Report, the Construction Plan Report, the Decommissioning Plan Report and the Consultation Report. The sixth bulletin is designed to provide clarity with regard to the required setbacks for wind turbines. According to the proposal notice, the bulletins are also designed to assist the public, along with other interested persons, in understanding the REA process.

ECO Comment

The REA Regulation represents a dramatic shift in how MOE processes and issues approvals for renewable energy projects. The regulation represents a possible model for approvals in other spheres and the ECO understands that a similar approach is being seriously considered as an option for modernizing most MOE approvals.

The ECO applauds the efforts of MOE and MNR to move the province away from fossil-fuel electricity generation and towards more environmentally benign sources of energy. This shift is a key step towards meeting the province's climate change targets, as well as improving overall air quality. These efforts must be balanced, however, with the equally valid goals of protecting Ontario's wildlife and natural environment. The success of this balancing act cannot yet be determined and depends in large part on how the REA Regulation is interpreted and applied. Some notes of caution are in order.

As indicated, the REA Regulation provides protections for provincially significant wetlands which exceed those afforded by the PPS and this is to be applauded. The ECO has a concern, however, regarding the level of protection afforded to non-evaluated wetlands and woodlands under the PPS and commented on this in our 2008/2009 Annual Report. These concerns are not fully addressed by the new MOE and MNR regulatory framework for approvals of new renewable energy projects.

Neither the REA Regulation nor the plain-language guide specifically mention that cumulative impacts must be assessed and the absence of particular direction in this regard is somewhat disappointing. REAs are prescribed instruments, however, and the Divisional Court of Ontario ruled in June 2008 that all ministries, including MOE, are required to consider their Statement of Environmental Values (SEV) when making instrument decisions. MOE's SEV states that the ministry considers cumulative effects on the environment, along with the interdependence of air, land, water and living organisms in its decision-making process. Accordingly, the ECO anticipates that MOE will give full and due consideration to cumulative effects when rendering decisions on renewable energy projects.

The ECO is cautiously optimistic with regard to the government's six-month service guarantee and feels that this is a laudable goal. In the past, however, MOE has experienced sometimes significant backlogs in its approvals processes. Similar backlogs may occur in the future. So, while supporting the notion of a service guarantee, the ECO hopes that the thoroughness afforded to application reviews does not get sacrificed on the altar of expediency.

The ECO agrees with the relatively narrow and stringent test that has been established for third party appeals. By limiting appeals to serious harm to human health, or serious and irreversible harm to the environment, it is apparent that the ERT will not be able to consider aesthetic considerations, such as the protection of viewscapes, and impacts on property values. Very few cases will likely meet the established threshold for appeal. In the ECO's opinion, a stringent test is needed to help facilitate the development of renewable energy in the province.

The ECO is somewhat concerned, however, with the short period of time that is afforded to third parties under the *EPA* to request a hearing before the ERT. The issue of a 15-day time period was raised in an application for review that was made to the MOE and is discussed in Section 5.2.15 in this Supplement. While that application focused on the leave to appeal provisions of the *EBR*, the principles that it raises, and the concerns that the ECO expressed, are equally valid with regard to the short time frame provided for REA third party appeals.

Finally, although the new applications process has been streamlined, in the ECO's opinion it places a sufficiently high burden on project proponents to be thorough, and transparent, throughout the application process. Proponents will be required to expend a significant amount of upfront effort in public, municipal and Aboriginal consultations, along with site-specific studies and the preparation of required documentation. A key component of such transparency will be granting the public and local municipalities adequate opportunities, both early on and throughout the process, to view and comment on all relevant reports as well as the final application. It is only in this manner that the local public is able to provide informed comments and gain a better understanding of what is being proposed. The ECO urges MOE to be vigilant in ensuring that project proponents provide sufficient opportunity, and transparency, to allow for meaningful engagement and input. If meaningful engagement of local communities is thwarted, it may result in the intensification, rather than the resolution, of social conflict.

Overall, the ECO feels that the approvals process outlined in the REA Regulation strikes a fair balance between the desirable goal of expediting the production of renewable energy in the province, and the

equally important objective of protecting our natural environment. Ultimately, however, the "proof is in the pudding" and time alone will reveal whether or not an appropriate balance has been struck. The ECO will monitor the implementation of the REA Regulation, along with the process by which approvals are granted, with a view to ensuring that each of these objectives are ultimately achieved.

Review of Posted Decision:

4.12 Sector-Based Air Standards – Amendments to O. Reg. 419/05 under the *EPA*

Decision Information:
Registry Number: 010-6587
Proposal Posted: June 10, 2009
Decision Posted: December 30, 2009
Comment Period: 90 days
Number of Comments: 45
Decision Implemented: December 22, 2009

Decision Information:
Registry Number: 010-6588
Proposal Posted: June 10, 2009
Decision Posted: December 22, 2009
Comment Period: 90 days
Number of Comments: 7
Decision Implemented: December 22, 2009

Decision Information:
Registry Number: 010-6589
Proposal Posted: June 10, 2009
Decision Posted: December 22, 2009
Comment Period: 90 days
Number of Comments: 4
Decision Implemented: December 22, 2009

Description

Background

Ontario is home to a wide range of heavy industries, which emit numerous air pollutants on a daily basis. These air emissions can negatively affect both human health and the natural environment. Air pollutants can contribute to health problems, such as asthma and other respiratory conditions, as well as to a range of environmental problems, such as smog, climate change, and the contamination of Ontario's lakes and soils.

O. Reg. 419/05

In 2005, as part of the province's commitment to clean up Ontario's air quality and better protect public health from the impacts of air contaminants, the Ministry of the Environment (MOE) introduced O. Reg. 419/05, Air Pollution – Local Air Quality, made under the *Environmental Protection Act* (*EPA*). This new regulation marked the first major improvement in regulating air pollutants in 25 years.

Ontario Regulation 419/05 provided a much-needed overhaul of the province's regulatory framework for industrial air emissions. The regulation included 40 new air standards, replacing earlier standards that, in many cases, were decades out-of-date and – by the ministry's own admission – were not protective of health and the environment. In 2007, MOE approved another 19 new or updated air standards for a total of 59 new air standards. In 2009, MOE revised one more standard (for acrolein), and posted a proposal for consultation on new air quality standards for an additional eight substances. (See Other Information below for more details on this proposal.)

As of May 2010, Ontario has air quality standards for 124 substances regulated under O. Reg. 419/05; of these, almost half have been developed since 2005. Each of these standards sets a limit on the maximum permitted concentration of a discharged contaminant when measured at the facility's property line – known as the "point of impingement" (or POI). Many of the new air quality standards developed

since 2005 are significantly stricter than the earlier standards. For example, the acceptable POI concentrations for lead and acetone were reduced by about 75 per cent from the earlier standards, and the acceptable concentration for xylenes, which have neurological effects, was reduced by about 65 per cent.

Environmental and Health-Based Approach:
Ontario's new air quality standards are set based on health and environmental effects. In other words, the POI concentration limits are set at a level that is believed, based on the best available science, to be safe for human health and the natural environment. The standard-setting process does not consider the technical or economic feasibility of facilities meeting these limits. Ontario's risk-based approach is somewhat unique. Many other jurisdictions, such as the United States, regulate air toxics using "best available control technology" standards, which require facilities to use a specific type of technology to reduce air emissions.

Compliance with Air Quality Standards:
When passed in 2005, O. Reg. 419/05 provided facilities with two options for complying with the regulation:

1) Meet the prescribed air quality standards for each contaminant discharged by the facility by the required date; or

2) If it is not technically or economically feasible for the facility to meet the standards, apply for a "site-specific alteration of the standard."

In order to establish compliance with the regulated air quality standards, facilities are required to develop an "Emission Summary and Dispersion Modelling" (ESDM) Report that demonstrates that the total emissions discharged from the facility, when translated to a POI concentration, are below the limits set out in O. Reg. 419/05.

To give industry sufficient time to meet the new or updated air standards (which may require investments and modifications to their facilities), these standards are phased-in over 5 years.

Site-Specific Alteration of Standards:
If a facility is unable to meet one or more of the new air quality standards by the applicable phase-in date, O. Reg. 419/05 allows the facility to apply for a site-specific alteration of a standard. This application process is rather onerous, requiring a facility to complete: an ESDM Report (that sets out the results from a modelling/monitoring study and an assessment of the magnitude and frequency of all exceedances of the standards); a technology benchmarking report; public consultation (with a minimum of one public meeting); and an action plan to implement and monitor progress. As an environmental safeguard, MOE can only approve an application for a site-specific alternative standard if the facility's emissions do not exceed a defined "upper risk threshold" at the POI.

The site-specific alternative standard is intended to be an interim solution only, and will typically be approved for up to a maximum of five years (10 years in extenuating circumstances). As of May 2010, only six companies had applied for alternative standards, while decisions had only been made on two of those.

Sector-Based Air Standards – Amendments to O. Reg. 419/05

On December 22, 2009, the province filed amendments to O. Reg. 419/05, establishing a third option for compliance with O. Reg. 419/05. The amendments provide MOE with the authority to develop new sector-based technical standards that can apply to multiple facilities that are unable to meet the air quality (POI) standards set out in O. Reg. 419/05.

Rather than require each facility that cannot meet the regulatory air quality standards to apply for an individual site-specific alternative standard, MOE amended O. Reg. 419/05 to provide a new approach

that addresses common sector-wide issues. Under this new approach, MOE can establish sector-based "industry standards" that set out technical and operational requirements for all sources of contaminants from a specific sector. The regulation also provides the ministry with the authority to establish "equipment standards" for a specific contaminant source (e.g., wood waste combustor), which can be applied across multiple sectors. Facilities can choose to apply to register under the industry and equipment standards in lieu of complying with the regulatory air quality standards in O. Reg. 419/05.

Criteria for Establishing a Sector-Based Technical Standard:
The following criteria must be met before the ministry may establish a sector-based industry standard:

- There must be at least two facilities in Ontario within the sector that cannot technically or economically feasibly comply with the regulatory air standards;
- There must be at least one facility within the sector that can technically and economically feasibly comply with the sector-based industry standard;
- Compliance with the industry standard must permit efforts, which would otherwise have been directed towards complying with the regulatory standard, to be put to better use protecting the natural environment; and
- The sector-based standard must be more efficient than having the ministry consider individual applications for site-specific alterations of standards.

The following criteria must be met in order for the ministry to establish an equipment standard:

- There must be at least two facilities in Ontario within the sector that have the same source of contaminant; and
- There must be at least one facility within the sector that can technically and economically feasibly comply with the equipment standard for the contaminant.

Technical Standards Publication:
The requirements for each industry and equipment standard are set out in MOE's Technical Standards Publication entitled: "Technical Standards to Manage Air Pollution." This publication is incorporated by reference into O. Reg. 419/05, making the requirements legally enforceable. There are currently two sector-based technical standards – one for the "forest products sector" and one for the "foundry sector" – included in this publication. Additional technical standards could be added to the publication in the future.

For each technical standard, the Technical Standards Publication specifies: the industry sectors to which the standard applies (using the "North American Industry Classification System" code); the contaminants and sources of contaminants included in the standard; the steps that must be taken to comply with the standard; and the timelines for taking those steps.

The publication includes requirements for each technical standard, which may relate to: the implementation of pollution control technologies and other technical solutions; the operation of the facility (such as process improvements, good engineering practices, material substitutions, maintenance practices, etc.); monitoring and reporting; or any other related matters. The publication may also include requirements for applicants to notify and consult with affected persons before making an application for registration under a technical standard.

MOE may review or update a technical standard from time to time as technology improves or new scientific information about a substance is identified; however, there are no mandatory requirements for periodic review.

Registration under the Technical Standards:
Facilities that wish to rely on a technical standard must apply to the ministry to register under that standard. The MOE Director may only approve an application for registration if: the applicant has complied with any requirements set out in the Technical Standards Publication to notify and consult with affected persons; and the Director is of the opinion that air emissions from the facility will not cause an adverse effect or, alternatively, that any adverse effect caused will be better prevented or ameliorated by the application of the technical standard.

Once a facility is registered, it must comply with all of the technical and operational requirements set out in the Technical Standards Publication within the specified time frame. Registered facilities that comply with all of the requirements in the technical standard are exempt from the regulatory air quality standards in O. Reg. 419/05 for any contaminants covered in the technical standard. As such, registered facilities are not required to report on any of the sources of contaminants covered by the technical standard or to include them in any future ESDM Reports. However, where an industry or equipment standard does not address all of the facility's sources of contaminants, the facility must still consider the remaining sources of contaminants in its ESDM report.

The ministry retains the authority to revoke (through an Order) a person's registration under a technical standard if the Director is of the opinion that air emissions from the facility may cause an adverse effect that can be better prevented if the technical standard were not used.

Public Consultation :
In response to stakeholder comments, MOE amended O. Reg. 681/94 – Classification of Proposals for Instruments, made under the *EBR,* to prescribe proposed facility registrations under a technical standard as a "Class II instrument". This means that all proposed facility registrations must be posted on the Environmental Registry for public comment for a minimum 30-day period. MOE will also maintain a list of all approved facilities registered under a technical standard on the ministry website.

Sector-Based Standards for Foundry and Forest Products Sectors

Facilities in the forest products and foundry industries now have the option of meeting the new technical standards as a substitute for compliance with the regulated air quality standards under O. Reg. 419/05.

Sector-Based Standard for Foundry Sector:
The foundry sector encompasses about 100 facilities in Ontario that process metals into moulded shapes by heating and casting molten metals. The ministry developed the technical standard for foundries after a number of facilities in this sector communicated to the ministry that they were facing technology and cost challenges in meeting the new air quality standard for lead. The new sector standard establishes technical and operational requirements for registered foundries to help reduce emissions of particulates (including metals, such as lead), as well as volatile organic compounds and sulphur dioxide.

The foundries technical standard adopts some of the technology requirements from the former Regulation 336, - Air Contaminants from Ferrous Foundries, made under the *EPA*. (Regulation 336 was revoked concurrently with the development of the new technical standard.) The standard also includes other more up-to-date requirements that were developed based on several recent ministry studies.

Sector-Based Standard for Forest Products Sector:
Ontario's forest products sector consists of about 200 facilities, including sawmills, pulp and paper mills, and wood products manufacturers. In response to concerns from multiple facilities in this sector about difficulties in meeting the new air quality standards for acrolein (a contaminant released when wood is heated), the ministry developed the new technical standard for the forest products sector. The new standard establishes technical and operational requirements to help facilities reduce discharges of acrolein.

Timeline for Compliance with New Technical Standards:
Facilities in both the foundry and forest products sectors will have one year from February 1, 2010 to decide whether or not to register under the new technical standards. During this period, the new standards for contaminants listed in the technical standard (such as lead for foundries and acrolein for the forest products sector) will not be applicable to facilities in these sectors.

Foundries that choose to register will have up to three years to make all the necessary technical upgrades and process changes. Registered facilities in the forest products sector will have five years to

comply with most requirements, with the exception of ten years to install new dryers with enhanced temperature controls.

Implications of the Decision

Ontario's approach to the regulation of air emissions takes a hybrid approach between a purely effects-based regime (which sets limits based only on environmental and health risks) and one that sets requirements based on costs and achievability. Ontario's approach starts by setting stringent, science-based regulatory air emission standards that are protective of the environment and human health (regardless of cost and achievability considerations), and then provides a process (i.e., site-specific alterations and sector-based technical standards) to deal with any technological and/or economic barriers to compliance.

Reduced Regulatory and Administrative Burden

The sector-based technical standards provide a new streamlined method for exempting facilities from the regulatory air quality standards. This new approach allows the ministry to develop a single sector-wide technical standard for multiple facilities that are facing common challenges in meeting the regulatory standard, rather than requiring each facility to seek an individual site-specific alternative standard.

This approach can greatly reduce the costs and regulatory burdens of facilities seeking relief from compliance with the air quality standards. Not only is the registration process for the sector-based standards significantly simpler than the site-specific alternative process, facilities need only apply for registration under the sector-based approach once, in comparison to the site-specific alternative standard, which typically requires re-application after five years. The sector-based approach will also provide ongoing relief from some of the more onerous requirements under O. Reg. 419/05 for registered facilities. Most notably, facilities registered under a technical standard will no longer be required to perform an ESDM, which requires considerable resources, for any contaminants included in the technical standard.

The sector-based standard is expected to reduce the administrative burden for MOE as well. While developing the actual technical standards does take significant time and resources, approving the individual applications for registration under the technical standard should be much simpler than approving individual applications for site-specific alterations. This streamlining of the application process is in line with the ministry's ongoing modernization of approvals initiative, which is working to ease the administrative burden of MOE's approvals staff, who are currently stretched far too thin.

Increased Consistency within Sectors

The sector-based technical standards should help create a more level playing field within an industry sector. Whereas the site-specific alteration process can create variability in requirements among facilities, the sector-based standards should ensure that technical and operating requirements are applied consistently across a sector. However, facilities that have already invested the time and effort to comply with the regulatory air quality standards may now have to compete against other facilities in their sector that are complying with the technical standards (where applicable).

Weaker Environmental Protection Compared to Regulatory Standards

MOE states that the sector-based standards "provide a new approach for improving air pollution." The sector-based technical standards could cause some environmental improvement by reducing the number of facilities that are currently not complying with the ministry's regulatory air framework. Bringing these otherwise non-compliant facilities into the sector-based system would ensure that these facilities are, at a minimum, using appropriate technology and operating practices as set out in the technical standards to reduce emissions.

However, the sector-based approach provides a reduced level of environmental protection compared to the regulatory air quality standards and site-specific alternative standards. Generally, the sector-based approach will allow registered facilities to emit higher levels of toxic emissions than would be permitted under the regulatory air quality standards. While the technical standards can notionally impose very stringent requirements, if the technical standards only include requirements and best practices that are already being applied, then the technical standards will not achieve significant reductions in emissions.

The sector-based approach also fails to encourage innovation or set a path for continuous improvement. Although MOE states that industries participating in the technical standards will be expected to make continual improvements to reduce air emissions, nothing in the technical standard will actually require facilities to make improvements beyond the initial requirements set out in the Technical Standards Publication. Given that there is no expiry date for the facilities' registration (unlike the site-specific alternative standards, which last only five years), nor any requirements for regular review of the technical standards, it is very unlikely that registered facilities will voluntarily make periodic improvements, even where new technologies become available or costs come down.

Moreover, in some cases, the sector-based approach could potentially discourage facilities from making greater environmental improvements. MOE has stated that any facility – even one that can feasibly comply with the regulatory air quality standards – can register under a technical standard. Accordingly, some facilities that might otherwise have taken steps to reduce their air emissions to meet the regulatory air quality standards, might now choose to rely on the simpler technical standard instead.

The technical standards also defer requirements for compliance with O. Reg. 419/05 for facilities within the foundry and forest products sectors for several more years. If not for the new technical standards, all facilities in these two sectors would have had to comply with the new regulatory standard for lead and acrolein by February 1, 2010.

Normalized Non-Compliance with Regulatory Air Quality Standards

The regulation provides the ministry with considerable latitude in determining whether and when to develop sector-based standards, and what to include in them. If the ministry applies the sector standards widely, the sector-based approach could normalize non-compliance of the regulatory air quality standards. Whereas the site-specific alternative standard process was intended as a one-off, short-term measure (i.e., to allow a few facilities a little more time to achieve compliance with the regulatory standards), the sector-based approach could create widespread exemptions and permanent non-compliance. It is hard to predict at this time how many technical standards the ministry will develop. However, if the technical standards are made more widely available, and registration is easy to obtain, these sector-based standards could become the primary, long-term means of complying with O. Reg. 419/05.

Removal of Monitoring and Modelling Requirements

Facilities registered under the sector-based technical standards are not required to monitor or submit ESDM reports for the contaminants listed in the technical standard. By removing the ESDM requirement, the ministry and the public will have no means of ascertaining the actual level of contaminants emitted from these facilities or the total level of toxic exposure by the public. By comparison, the site-specific standards process requires facilities to model community exposures and ensure that their emissions are below the "upper risk threshold".

The removal of the monitoring and reporting requirements in the sector-based standards also contributes to a loss of data that could be used to calculate total loadings of air pollutants to the environment. Assessing and controlling cumulating loadings of toxic emissions – especially for persistent contaminants that accumulate in the environment, such as lead or mercury – is important to ensure that the environment and the public are not exposed to harmful levels of pollutants. As with the ministry's existing framework for regulating local air quality through O. Reg. 419/05, the sector-based approach similarly

fails to explicitly address the cumulative effects of pollutant loadings, both over time and from multiple facilities emitting contaminants into a local "hot spot".

In addition, without emission limits or monitoring requirements, there will also be no way to track progress in reducing emissions or to assess how effectively the technical standards are working.

Inspections and Enforcement

With no requirements for ESDM reporting under the sector-based standards, the ministry will have to place greater reliance on the inspection process to ensure that facilities are in compliance with the standards. While this will likely increase the burden on MOE inspection staff, the ministry has stated that the clear rules in the technical standards can simplify MOE inspections and should be easier to enforce than the regulatory air quality POI standards.

Public Participation & *EBR* Process

MOE carried out a commendable public consultation process on these proposals. The ministry posted the proposal notice for the regulatory amendments on the Environmental Registry (#010-6587) on June 10, 2009, and provided a 90-day comment period. The ministry received 45 written comments on the proposal from industry groups, environmental non-governmental organizations (ENGOs), municipal public health units (PHUs) and environmental consultants. The ministry also held several consultation sessions with stakeholders to provide information and receive additional input.

MOE posted two separate proposal notices on the Registry on June 10, 2009 for the forest products industry standard (Environmental Registry #010-6589) and the foundries industry standard (Environmental Registry #010-6588), each with a 90-day comment period. In response to these two proposal notices, the ministry received a total of 11 comments. The ministry also engaged in extensive discussions with the affected sectors over two years prior to finalizing the standard.

On December 22, 2009, the ministry posted a decision notice on the Registry for each of the two sector-based standards. On December 30, 2009, about a week after the amendments to O. Reg. 419/05 were filed, the ministry posted a decision notice on the Registry for the regulatory amendments. All of the proposal and decision notices were clear and informative, and provided useful summaries of the comments received and the ministry's changes made in response.

Public Comments

In general, industry commenters supported the sector-based approach, while the PHUs and ENGOs opposed the proposal. This section highlights some of the key comments received and how MOE considered some of them in finalizing the amendments to O. Reg. 419/05.

Sector-Based Standards are Less Onerous than Site-Specific Process:
Most industry commenters stated that the sector-based approach is an improvement over the site-specific alteration of standards process. Many of these stakeholders commented that the site-specific process, with its requirements for extensive public consultation, expensive monitoring and modeling of air emissions, and preparation of complex technology benchmarking reports, was overly onerous. These stakeholders stated that the sector-based approach provides a reasonable solution, particularly for small to medium-sized businesses, to focus resources on preventative mitigation and process improvements as opposed to modelling potential emission outcomes. These stakeholders stated that this approach will improve the speed of process improvements and emission reductions. Many ENGOs and PHUs, conversely, were deeply concerned with the reduction in requirements in the sector-based approach as compared to the site-specific alternative process.

Greater Flexibility Required:
Several industry stakeholders expressed concerns that the sector-based approach does not readily apply to more diverse sectors. One industry association noted that the sector-based process puts sectors that

are heterogeneous (such as the chemical sector) at a disadvantage compared to homogeneous sectors, which can more easily take advantage of the sector-based approach. These stakeholders urged the ministry to make the technical standards more flexible, such as developing generic technical standards that can be applied broadly across industrial sectors. A few commenters stated that the technical standards should also be flexible enough to allow complex facilities to employ proprietary technology, so long as it meets the expectations of the technical standard.

In response to these comments, the final regulation was revised to allow MOE to establish equipment standards for specific sources of contaminants (such as a wood waste combustor) that can be applied to multiple sectors.

Lack of Regulatory Certainty and Clarity:
Several industry stakeholders expressed concern that the ministry's general approach to regulating air emissions – i.e., setting air quality standards at levels that industry cannot achieve, and then requiring industry and government to spend years developing alternative standards for some substances – creates regulatory uncertainty for both industry and the public regarding what the requirements will ultimately be for a given substance.

A few industry groups also stated that the general approach of O. Reg. 419/05 misleads the public. These stakeholders argued that, to the extent that an entire industry sector, or even multiple sectors, cannot meet a given air standard, the air standard is not providing real relevance for the citizens of Ontario. Furthermore, these commenters expressed concern that local communities are being told that the regulatory air quality standard is health-based, but then are being told that companies are allowed to operate at significantly higher levels through a site-specific or sector-based standard. They stated that, from the public's perspective, this can seem confusing and unreasonable. These stakeholders argued that it would make more sense, and would also provide greater certainty for industry and clarity for the public to simply set achievable air standards up front.

Sector-Based Standards Undermine Intent of O. Reg. 419/05:
Many PHUs and ENGOs commented that the amendments undermine the protections established in O. Reg. 419/05 in 2005, and will compromise local air quality and public health. Many stated that, while they appreciate the goal of reducing regulatory burden, this objective should not be pursued at the expense of public health or the environment.

Sector-Based Standards will Not Promote Environmental Protection:
Many ENGOs and PHUs strongly refuted MOE's assertions that the technical standards would maximize environmental improvements and promote emission reductions sooner than the status quo. Some stakeholders argued that, on the contrary, this approach defers steps to reduce emissions, citing the delay in requirements for the foundry sector to comply with the regulatory standards for lead as an example.

Many of these stakeholders expressed concern that registration will be too easy to obtain, and that the sector-based standards will merely include requirements that are already contained in most facilities' individual Certificates of Approval (Cs of A). These stakeholders pointed to comments made by the ministry that the sector-based approach will be used where technical solutions are "practical, easy to identify and easy to implement." One PHU commented that, if this is the case, the facilities should already be implementing these solutions and a sector-based technical standard should not be needed.

For the sector-based approach to be effective in reducing emissions, these stakeholders urged MOE to ensure that the new technical standards are challenging and reach well beyond the existing C of A requirements. These stakeholders also urged the ministry to require industry to meet a "best available control technology" standard, and not merely a "generally available control technology" standard.

Lack of Monitoring and Emission Reporting:
The ENGOs and PHUs were deeply concerned that facilities registered under the sector-based technical standard will not be required to monitor or submit ESDM reports for the contaminants listed in the

technical standard. These stakeholders were concerned that, by removing the ESDM requirement, the ministry and the public will have no means to ascertain the level of contaminants emitted from these facilities, no means to ensure that a facility's emissions are below the Upper Risk Threshold (URT), and no means to assess the residual level of toxic exposure to the public. In addition, without monitoring, there will also be no way to track progress in reducing emissions to ensure that the technical standards are in fact working as expected.

These stakeholders strongly urged the ministry to require facilities registered under a sector-based technical standard to conduct onsite monitoring and submit an ESDM report at least once every 4-6 years. Alternatively, a few PHUs recommended that, at a minimum, the regulation should provide the ministry with the authority to request a registered facility to complete a new ESDM report (e.g., if the ministry suspects that it is exceeding the URT). In addition, if ESDM requirements are not imposed, the stakeholders urged the ministry to undertake regular (at least annual) inspections to ensure that facilities are complying with the sector-based standards and not exceeding the URT.

In its final decision notice, MOE explained that it does not intend to require monitoring or ESDM reporting in the sector-based approach. The ministry stated that ongoing monitoring requirements can be costly for small to medium-sized businesses, and may be an inaccurate measure of whether progress is being made. MOE stated that it can better evaluate the success of a technical standard by periodically assessing representative facilities (through a short-term monitoring program) to confirm improvements.

However, in response to these comments, MOE did modify the regulation to include the authority for the ministry to require a facility to provide an ESDM report on request, and where the outcome of the ESDM report raises concerns, the authority to revoke the facility's registration.

Public Notification and Consultation:
Many PHUs and ENGOs expressed strong concerns about the lack of public notification and consultation in the sector-based technical standards regime. These stakeholders urged the ministry to require each registrant that wishes to rely on a sector-based standard to provide advanced public notification (e.g., send letters to neighbours, advertise in local newspapers and post a proposal notice on the Environmental Registry), and host a public meeting, as is required in the site-specific alteration process. They argued that, as facilities may be exposing neighbours to higher levels of air pollutants under the sector-based approach, the community has a right to at least be informed about and comment on the increased risk.

Several ENGOs also urged the ministry to provide the public with rights under the *EBR* to seek leave to appeal of a facility's application for registration under the sector-based approach, as well as applications for a site-specific alternative standard.

In response to these concerns, MOE stated that the ministry would require each application for registration under a technical standard to be posted on the Environmental Registry for public comment. MOE also stated that it would consider a requirement for some facilities to hold a public meeting, and would publish criteria for this requirement (such as size of the facility, public interest, nature of the contaminants, etc.) at a later date. The ministry also stated that it may require registrants to provide additional notice to neighbours through letters or advertisements in local newspapers.

No Expiry or Review Period for Sector-Based Standards:
Several PHUs expressed concern that, in contrast to the five-year expiry of the site-specific alternative standards, there was no expiry date for the sector-based standards. These stakeholders urged MOE to treat the sector-based approach as an interim measure only, to allow facilities a little more time to achieve compliance with the regulatory standards. At a minimum, the stakeholders stated that there should be a review of the technical standards every five years to ensure that standards are kept up to date and that new information is incorporated. Several PHUs argued that an open-ended technical standard with no emission limits will not encourage continuous improvement.

Failure to Consider Cumulative Effects:
A number of ENGOs and PHUs criticized O. Reg. 419/05 generally, and the sector-based standards specifically, for failing to address: the cumulative effects of multiple facilities emitting contaminants in a community; the impact of background concentrations of contaminants in an airshed; or the special concerns associated with persistent and bioaccumulative contaminants. These commenters stated that all of these factors need to be considered to ensure that the public is not exposed to harmful levels of pollutants. Several ENGOs noted that MOE's own statement of environmental values (SEV) requires the ministry to consider potential cumulative effects and to use a precautionary approach in its decision-making. They stated that allowing registrants of the technical standards to exceed the regulatory standards without MOE considering these site-specific factors is at odds with the ministry's SEV.

Streamlining the C of A Process:
Many industry commenters supported an approach whereby facilities registered under a sector-based technical standard should be exempt from the requirement to obtain a C of A for those contaminants addressed in the technical standard. Failing that, the stakeholders recommended that the ministry develop a streamlined approval process for these contaminants. Stakeholders noted that this approach could significantly reduce regulatory burden.

Conversely, many ENGOs and PHUs expressed concerns about the possibility that the sector-based technical standards process would replace the C of A process. These stakeholders noted that Cs of A typically contain a number of important requirements (such as monitoring and reporting requirements) that should be retained.

In the Registry decision notice, MOE stated that it intends to develop a streamlined approval process for the sector-based registration and C of A processes, and that it will continue discussions with stakeholders as it develops this process.

Timelines:
Several ENGOs and PHUs commented that the proposed timelines (i.e., a year to register for the technical standards, and up to five years to implement some of the technical standards) were much too long. These stakeholders stated that, as facilities have already had five years to plan for compliance, further delays in requiring compliance with O. Reg. 419/05 are unacceptable.

SEV

In the ministry's SEV consideration documents, MOE stated that the new sector-based standards were developed with the principle of using the best technical methods available to reduce air pollution for the protection of the environment. MOE also noted that, in addition to considering an ecosystem approach and environmental protection, the ministry also considered technical and economic feasibility "in order to achieve effective implementation of the technical standards."

Other Information

New or Updated Air Quality Standards

In July 2009, MOE posted a proposal for consultation (Environmental Registry #010-7190) on the development of the following nine new or updated standards:

1) Benzene
2) 1,3-Butadiene
3) Hexavalent Chromium, Chromium, and Chromium Compounds Divalent and Trivalent
4) Dioxins, Furans and Dioxin-like PCBs
5) Manganese and Manganese Compounds
6) Nickel and Nickel Compounds
7) Polycyclic Aromatic Hydrocarbons
8) Uranium and Uranium Compounds

9) Acrolein

In December 2009, MOE finalized a new air standard for acrolein. As of May 2010, the remaining proposals were still undergoing consultation.

In addition to these nine substances, MOE has stated that it hopes to move forward on new or updated standards for another seven high priority contaminants listed in the Ministry's Standards Plan, but the status of these is pending. MOE stated that priorities for choosing which substances to update are based on a number of considerations including toxicity, the potential for exposure, and the quantities released in Ontario.

Other Amendments to O. Reg. 419/05

As part of the proposal to amend to O. Reg. 419/05 to establish sector-based technical standards, the ministry also proposed a few other unrelated amendments to the regulation, including a proposal to require facilities to assess their emissions during start-up, shut-down and malfunctions. Industry and consultants strongly opposed the proposed change, and the ministry agreed to hold off on this amendment for now, stating that it would hold further discussions with stakeholders in the future.

ECO Comment

Ontario's general framework for regulating air emissions provides a reasonable and balanced approach. It allows the ministry to set a high bar through its regulatory POI concentration limits in O. Reg. 419/05, and then places the onus on facilities to either meet these limits or demonstrate that they cannot due to technological and/or economic barriers. This approach is preferable to setting POI concentration limits based on what is feasibly achievable for all facilities, which would result in standards that reflect the lowest common denominator. This approach also appropriately acknowledges the challenges for certain facilities or sectors to feasibly meet all of the regulatory air quality standards.

For this regime to succeed in maximizing reductions in air emissions, however, the ministry must ensure that its policies for exempting facilities from the regulatory air quality standards – through either the site-specific alterations or sector-based technical standards – remain rigorous. The new amendments to O. Reg. 419/05 impose minimal criteria for developing sector-based technical standards. There need only be two facilities in Ontario within a sector that cannot feasibly comply with a regulatory air quality standard. In sectors with dozens or even hundreds of facilities, the ECO hopes that, where a portion of the sector can comply with the regulatory standard, the ministry would not develop a technical standard to cater to the laggards. The ministry must ensure that the alternative approaches (both site-specific and sector-based) are used sparingly and only when compliance with the regulatory air standards is truly unachievable.

If the ministry applies its discretion to develop the new technical standards too widely, the sector-based approach could become the primary, long-term means of complying with O. Reg. 419/05. This would negate much of the benefit and meaning of the recently developed air quality standards, transforming them from legally binding standards into mere objectives or targets.

The ECO believes that MOE's claims regarding the potential of the new sector-based approach to improve environmental protection are overstated. While this approach should help bring some otherwise non-compliant facilities into the sector-based system, which would push these facilities to implement new technologies and operating practices to reduce emissions, on a whole, the new sector-based approach provides a reduced level of environmental protection as compared to the regulatory air quality standards and site-specific alternative standards.

The sector-based standards do not include emission or POI concentration limits and will allow registered facilities to emit higher levels of toxic emissions than under the regulatory air quality standards. The sector-based technical standards also do not include expiry dates or mandatory review periods, and therefore provide no impetus for facilities to make continuous improvements to reduce emissions. In

addition, the sector-based standards allow facilities in sectors with a technical standard to defer compliance with O. Reg. 419/05 for several more years.

Many public comments received by the ministry from ENGOs and PHUs focused on refuting various aspects of the ministry's claims that the sector-based approach promotes environmental improvement and encourages emission reductions "sooner than the status quo." In future proposals, the ECO encourages the ministry to be as open and transparent as possible about what exactly the proposal does – and does not – do, and to share as much information as is available to help the public better evaluate the environmental implications of new technical standards. For example, what are the sector's current emission levels? What technologies are facilities currently using? How much pollution reduction does MOE anticipate by implementing the technical standards? After implementation, will facilities exceed the regulatory limits? Will they exceed the upper risk threshold?

To ensure that the new technical standards maximize the potential to reduce emissions and improve air quality, the ECO urges the ministry to ensure that the technical standards reach well beyond existing requirements and embrace new technologies that really push reductions in emissions. If the technical standards simply adopt requirements that are already widely included in Cs of A and best management practices, the new sector-based technical standards will not result in significant emission reductions. Similarly, the ECO urges MOE to vigilantly use its powers to refuse or revoke a facility's registration under a technical standard where the ministry believes the facility may cause an adverse effect.

The ECO also urges the ministry to include reporting requirements in all sector-based technical standards. Removal of public reporting requirements contributes to a loss of public scrutiny and reduced pressure for the ministry to impose further emission reductions. Further, without full ESDM reporting, there will be no way to track progress in emission reductions and assess the effectiveness of the technical standards. The ECO urges the ministry to track and report publically on the progress of the technical standards in reducing emissions, starting by developing and publishing baseline information (such as current emission levels) for the sectors subject to technical standards.

The ministry should also set performance objectives for the technical standards. Where standards do not meet the performance objectives, and/or where new technologies become available or costs come down, the ECO strongly urges the ministry to review and revise the technical standards to ensure that industry makes continual improvements to reduce emissions.

The ECO also urges the ministry to ensure that this new reform is supported by adequate inspection and enforcement capacity. In our 2005/2006 Annual Report, the ECO recommended that "MOE support the roll-out of O. Reg. 419/05 by strengthening its inspection, compliance and enforcement capacity, and by monitoring and reporting on the effectiveness of these reforms over time" (see pages 93-96). Now, with the loss of ESDM reporting under the sector-based standards and the consequent loss of information on the level of contaminants being emitted, the ministry's site inspection program becomes even more critical to ensure that facilities are not causing adverse impacts on the environment or public health.

MOE has acknowledged for years that more work is required to address the cumulative impacts of air emissions; yet little improvement has been made in this area. As discussed in the ECO's 2005/2006 Annual Report, assessing and controlling cumulating loadings of toxic emissions is important to ensure that the environment and the public are not being exposed to harmful levels of pollutants (see page 94). Unfortunately, the removal of the reporting requirements in the sector-based standards further reduces the ability of the ministry to calculate total pollutant loadings and address the cumulative impacts of pollutants released to the environment. The ECO encourages the ministry to move forward on efforts to track and control cumulative loadings of air pollutants.

Finally, the ECO is pleased that the ministry acted quickly to prescribe the approvals for registration under a technical standard as an instrument under the *EBR*. This will provide the public with important rights to receive advanced notification and to comment on proposed registrations. The ECO encourages the ministry to also move forward on its promise to consider other notification and consultation requirements to enhance opportunities for public participation in the registration process.

Review of Posted Decision:

4.13 Revised Waste Electrical and Electronic Equipment (WEEE) Program

Decision Information:

Registry Number: 010-7162
Proposal Posted: July 10, 2009
Decision Posted: August 28, 2009
Comment Period: 30 days
Number of Comments: 19
Decision Implemented: April 1, 2010

Description

Every year, the number and type of new electronic gadgets available for purchase increases, and consumers race to buy the latest version of cell phone, mp3 player and television. With the processing power of high technology products doubling about every two years, the result is not only smaller, more sophisticated and cheaper electronics, but also rapid obsolescence and short-lived generations of equipment.

The handling, management and disposal of used electronics in Ontario is a growing concern not only because of limited landfill space, but because these products often contain dangerous materials (e.g., lead, cadmium, mercury, and chromium) that, when dumped or incinerated, threaten environmental and human health (see pages 180-186 of the ECO's 2003/2004 Annual Report). Jurisdictions without a formal waste electronics recovery program often export electronic waste to developing countries, where toxins in disassembled products can harm low-paid workers and contaminate waterways.

The Ontario government first took action on the growing mountain of Waste Electrical and Electronic Equipment (WEEE) in December 2004, when the Ministry of the Environment (MOE) defined and designated WEEE in O. Reg. 393/04 – Waste Electrical and Electronic Equipment, under the *Waste Diversion Act, 2002* (*WDA*) and requested that Waste Diversion Ontario (WDO) undertake a study of the state of WEEE management in Ontario. WDO is a non-crown corporation created by the *WDA* to develop, implement and operate waste diversion programs. A key guiding principle of these programs is that producers and users – not taxpayers – should pay to manage their waste.

After reviewing the study, in June 2007 the Minister of the Environment sent a letter requesting that WDO:

- Develop a WEEE program in phases, beginning with Phase 1 materials (see Table 1);
- Establish an Industry Funding Organization (IFO), including stewards affected by the WEEE Program, to coordinate, alongside WDO, the development and implementation of the WEEE Program; and
- Within one year of the approval of the Phase 1 Program Plan, develop and submit for approval a diversion program for Phase 2 WEEE (see Table 1).

In fall 2007, the Ontario Electronic Stewardship (OES) was established as the IFO for WEEE. In March 2008, OES and WDO submitted the Final Waste Electrical & Electronic Equipment Program Plan (the "Phase 1 Program Plan") to the Minister of the Environment. The Minister approved this plan in July 2008 and on April 1, 2009, Phase 1 of Ontario's WEEE diversion program was implemented.

Ontario's Existing WEEE Diversion Program

Since April 1, 2009, brand owners, first importers and/or assemblers of Phase 1 electrical and electronic equipment (EEE) for sale and use in Ontario have been designated as stewards and required to report and pay fees to OES for each unit introduced into the Ontario marketplace. These fees, which vary depending on the type of electronic device, cover the WEEE program's operational costs. Individual

stewards that wish to take direct responsibility for managing their obligations under the *WDA* can apply to the WDO for approval of an Industry Stewardship Plan (ISP).

Table 1: Phase 1 and Phase 2 WEEE Materials

Phase 1 – Implemented April 1, 2009	Phase 2 – Implemented April 1, 2010
• Personal computers (desktops, laptops, notebooks and notepads) • CD-ROM and computer disk drives • Computer terminals, keyboards and computer mice • Microcomputers and minicomputers • Monitors (Cathode Ray Tube, Liquid Crystal Display and plasma) • Printers • Fax machines • Televisions (Cathode Ray Tube, Liquid Crystal Display, plasma and rear projection)	• Copiers, typewriters and modems • Personal computers (handheld) • Personal digital assistants • Computer flatbed scanners • Telephones (cellular, cordless and wire line) and pagers • Telephone answering machines • Amplifiers, preamplifiers and equalizers • Radios, receivers, speakers, tuners and turntables • Video players, projectors and recorders (tape, disk and digital) • Audio players and recorders (tape, disk and digital) • Cameras (tape, disk and digital)

Under the program, residential and IC&I (industrial, commercial and institutional) generators of WEEE are able to dispose of their WEEE at OES-approved depots and through collection services provided by municipalities and reuse, recycling, waste management and charitable organizations.

To support these collection systems, OES provides weight-based financial incentives and transportation services for WEEE that is collected for recycling. For example, OES-approved collectors receive $165 per tonne of WEEE collected, sorted and prepared for transport. WEEE collected at OES-approved collection sites is then transported to consolidation centres for quality check, verification and recording of monitoring data before it is allocated through a Request for Proposal (RFP) process to primary processors. Primary processors may undertake any of the following: receiving, sorting, brokering, transporting, dismantling, disassembling, shredding or any other material processing activity, and disposal. Primary processors may then send WEEE components to downstream processors for the further manual or mechanical separation of materials. Under the program plan, participation in the program by all collectors (e.g., municipalities, retailers, and reuse organizations) and processors is voluntary.

To ensure that WEEE is handled according to applicable regulatory requirements and that the program meets recycling targets, processors are required to meet OES's Electronics Recycling Standard. Likewise, reuse and refurbishment organizations are required to meet OES's Reuse and Refurbishment Standard to participate in the program. Materials managed through incineration, energy recovery and landfill do not constitute diversion in Ontario's WEEE program.

For the ECO's review of the Phase 1 Program Plan, see section 4.6 of the Supplement to the ECO's 2008/2009 Annual Report.

The Final Revised (Phase 1 and 2) WEEE Program Plan

In July 2009, WDO submitted a revised WEEE program plan to MOE. After a 30-day Environmental Registry consultation period and review of public comments, the Minister approved the Revised Program Plan in August 2009. The following are some key changes in the Revised Program Plan from the Phase 1 Program Plan.

Revisions to Material Categories and Definitions:
As requested by the Minister, the Revised Program Plan adds Phase 2 materials to the diversion program (see Table 1). Moreover, the plan revises and combines some material categories to allow "greater precision in OES's cost models and fee-setting calculations." For example, computer monitors and televisions are combined into a single category ("display devices"), and desktop printers, copiers and multifunction printing devices are combined into a single category ("printing, copying and multi-function devices"). Categories were revised for a number of reasons, including to cover the costs of managing obsolete products and to reflect the increasing ability for some devices to perform multiple functions.

Steward Fees:
With the expansion of the program, as of April 1, 2010, stewards are now charged fees on sold or imported Phase 2 items. As with fees on Phase 1 materials, these fees can be forwarded to the consumer in the sticker price of an EEE purchase or as a separate charge on the receipt.

The fees for some Phase 1 materials have changed substantially from the earlier Plan, a result of revisions to material categories (see above) and their associated fees. For example, while the steward fee for all televisions under the Phase 1 Program Plan was $10.07/unit, the Revised Program Plan differentiates between sizes of display devices and charges $24.83 for devices with a screen larger than 29". Likewise, the Revised Program Plan now differentiates between desktop and floor-standing devices, increasing the fee substantially for the latter.

The Steward Self-Management Option:
As noted in the Phase 1 Program Plan, stewards of a designated WEEE material that wish to take direct responsibility for managing their obligations under the *WDA* can apply to the WDO for approval of an ISP. If approved, stewards that are part of an ISP are exempt from submitting fees to OES.

The Revised Program Plan introduces another option for stewards to manage their own WEEE: the steward self-management program. Stewards that already operate, or are interested in operating, a self-managed program for some or all of their EEE at the end of its life can apply to OES for program approval. While stewards approved by OES to operate self-managed programs are still required to pay fees to OES, these fees are modified to reflect the reduced volume of WEEE managed by OES and the reduced share of OES program costs incurred. Stewards who operate self-managed programs under the WEEE program, however, are ineligible to receive collection incentives.

Program Compliance Fee:
To accommodate the program's self-management option (see above), OES revised its fee-setting methodology to include the calculation of a Program Compliance Fee. Stewards who manage all of their WEEE under an OES-approved self-management program do not pay the per-unit fees to OES but instead pay the Program Compliance Fee to cover some of the common costs of running the program. Conversely, stewards whose WEEE is managed entirely under OES's WEEE program do not pay the Program Compliance Fee but instead pay the per-unit fee, which already incorporates a compliance cost. Stewards whose WEEE is managed partly by OES's WEEE program and partly by a self-management program pay the per-unit fee on quantities managed in the OES system as well as an additional compliance fee to make up any difference from the average Program Compliance Fee.

Modified Direct Ship Option:
In the Phase 1 Program Plan, IC&I generators of large volumes of WEEE (i.e., "WEEE generation sites") were given the option of shipping their WEEE (at the generator's expense) directly to OES-approved reuse locations or to OES-approved consolidation centres. Because some IC&I WEEE generation sites cannot, due to security reasons, send their WEEE through the program's consolidation system, the Revised Program Plan allows such generators to apply to OES to send their WEEE directly to a reuse centre for redistribution or to an OES-approved processor for recycling. To encourage participation in the program, under this option the generator will be reimbursed for transportation and processing expenses incurred.

Modified Requirements for OES-Approved Collectors:
The Revised Program Plan broadens the sorting and packaging requirements to permit the use of OES-approved containers and allow WEEE generation sites that use the direct ship option (see above) or do not qualify as collection sites (see below) to be excluded from these packing requirements.

Furthermore, in contrast to the Phase 1 Program Plan and OES statements made during plan development, the final version of the Revised Program Plan now indicates that OES-approved collectors cannot charge WEEE generators for their collection services.

Allowing WEEE Generation Sites That Do Not Qualify as Collection Sites to Still Participate in OES Program:
The Revised Program Plan sets out various performance and compliance requirements for OES-approved collectors, including requirements on: collecting, sorting, and packaging WEEE; environmental performance; security; privacy protection; and health and safety. Because some WEEE generation sites may wish to participate in the program but may be unable – or may not want – to meet the OES collection requirements, the Revised Program Plan allows these sites to still participate in the program by being serviced by an external OES-approved collector. Under this scenario, the OES-approved collector – not the generation site – receives the $165/tonne collection incentive.

Changes to the OES Reuse and Refurbishment Standard:
The OES Reuse and Refurbishment Standard defines the minimum requirements for reuse and refurbishment operations approved under the OES program. Under the Phase 1 Program Plan, language in the Reuse and Refurbishment Standard could have erroneously allowed "working" WEEE to be shipped to foreign markets for processing instead of reuse. The Revised Program Plan revises this standard to require that redistributed items are used in reuse applications at the downstream destination.

Changes to the OES Electronics Recycling Standard and Recycling Guidance Document:
OES-approved processors are required to adhere to OES's Electronics Recycling Standard, which defines minimum requirements to protect the environment and worker health and safety from the point of primary processing to final disposal. OES's Recycling Standard Guidance Document explains the environmental, legal, health and safety hazards associated with recycling WEEE. The Revised Program Plan amends these two documents to require that materials that may pose environmental, safety or mechanical risks (e.g., mercury containing components, batteries, toner and ink cartridges) be removed from WEEE prior to mechanical processing and managed separately.

Changes to the WEEE Allocation Methodology:
Under the Phase 1 Program Plan, OES allocated 100 per cent of collected WEEE to OES-approved processors through an RFP process on a regional and WEEE stream (display devices or computers/peripherals/printers) basis. The scoring criteria used to allocate WEEE were: recycling performance; ability to meet processing capacity requirements; distance between consolidation and processing sites; and cost.

Under the Revised Program Plan, OES no longer considers region or WEEE stream when allocating volumes of WEEE, and bases its allocation to processors on just three criteria: recycling rate; innovation and capacity; and cost. Moreover, the revised plan gives OES the right to direct up to 20 per cent of collected WEEE to processors for the purposes of "R&D (research and development), start-up testing of processing equipment and to achieve objectives of reducing transportation."

Amendments to O. Reg. 393/04

In addition to approving the Revised Program Plan, in August 2009 the Minister amended O. Reg. 393/04 under the *WDA* to add flexibility to the composition and appointment of OES's board of directors.

Implications of the Decision

Increased WEEE Diversion Opportunities for Consumer

With the addition of telephones, cameras and other Phase 2 WEEE to the program, the Revised Program Plan more than doubles the number of product types that WEEE generators can return to participating WEEE collectors. Moreover, the revision of material definitions means that consumers can return some obsolete items (e.g., rotary telephones, VCRs, and cassette-based players and answering machines) for recycling. This expansion in the types of products that can be returned for reuse, recycling and disposal will increase the volumes of WEEE that can be diverted and reduce consumer confusion as to what is included in the program. Likewise, the increase in the number of approved collection sites – and the new condition that OES-approved collectors cannot charge consumers for collecting WEEE – increases consumer convenience of WEEE disposal. Experience with Ontario's Blue Box system in the past 30 years shows that the more comprehensive and accessible the program, the more likely it will be used by the public and result in WEEE diversion. Additional electronic items that are listed in O. Reg. 393/04, like refrigerators, stoves and freezers, will be phased-in to the WEEE diversion program if requested by the Minister of the Environment.

Expanded and Increased Fees on EEE Products

The addition of Phase 2 WEEE to the Ontario's WEEE diversion program brings with it the charging of stewards for the introduction of Phase 2 EEE into the Ontario marketplace. If the cost of steward fees is passed on to consumers, differences in overall product price could theoretically influence consumer behaviour. For example, consumers might choose to purchase their EEE in neighbouring jurisdictions that do not charge WEEE fees or refrain from buying floor-standing printers or large (>29") televisions, which have substantially higher fees than their smaller counterparts. However, when the product price of an EEE product is in the hundreds to thousands of dollars, a nominal WEEE fee of less than $30 is unlikely to factor into consumer buying decisions.

Increased Flexibility for Stewards

The steward self-management program gives stewards the opportunity to manage the processing of some or all of WEEE generated by the use of their products while still under the umbrella of the OES WEEE program. This option gets around the need for a steward to obtain ISP approval from WDO, gives the steward some control over program implementation, and minimizes the fees paid by the steward to participate in the OES program.

Increased Flexibility for WEEE Generators and Collectors

The Revised Program Plan introduces several options that increase the flexibility for WEEE generators to participate in the program. First, WEEE generators that do not meet OES's performance and compliance requirements are still able to participate in the program and accumulate WEEE for diversion by directing collected WEEE to OES-approved collectors that do meet OES's requirements. Second, the Direct-Ship option, which reimburses IC&I generators for shipping WEEE directly to OES-approved redistribution or processing centres, encourages generators with security-related issues to participate in the program while maintaining any existing business relationships. Both of these options increase the potential for program participation and therefore WEEE diversion.

By broadening the program's sorting and packaging requirements to allow the use of OES-approved containers, the Revised Program Plan makes it easier for collectors to participate in the program.

Increased Environmental Protection

The revision of OES's Reuse and Refurbishment Standard explicitly prohibits OES-approved reuse and refurbishment organizations from shipping reusable WEEE to foreign markets for recycling. This revision provides a positive step towards prioritizing reuse over recycling. Moreover, the revision of OES's

Electronics Recycling Standard to require the removal of materials that may pose health and safety risks (e.g., batteries) before mechanical processing should ensure that these potentially hazardous substances are directed through the appropriate diversion channel (e.g., Ontario's Municipal Hazardous and Special Waste Program).

Public Participation & *EBR* Process

To support plan development, WDO and OES consulted with stewards and stakeholders through a series of stakeholder meetings and workshops (with simultaneous webcasts). Over 400 stakeholders attended two consultation workshops/webcasts held in February and April 2009 and OES met with representatives of several non-government organizations (NGOs) to discuss the Revised Program Plan. Attendees at the consultation workshops/webcasts included representatives from industry (collectors, processors and retailers), municipalities, the provincial government, law firms, and environmental organizations.

Between January and June 2009, OES posted several preliminary versions of the draft Revised Program Plan for public comment on its website. In June 2009, OES delivered the Draft Revised Program Plan to WDO, along with a consultation report describing how OES had considered comments received during consultations. Comments received and addressed in the consultation report cover a wide array of issues, including: steward obligations; the fee-setting methodology; the WEEE allocation process; and updates to the Electronics Recycling Standard. WDO posted the draft Revised Program Plan on its website for public comment and in July 2009 submitted the draft and consultation report to the Minister of the Environment.

In July 2009, MOE posted the draft of the Revised Program Plan (and a draft regulation proposing to amend O. Reg. 393/04) on the Environmental Registry. During the 30-day comment period, the ministry received 19 comments.

While municipalities were generally supportive of the Revised Program Plan, several argued that the collection incentive of $165/tonne is insufficient to cover both the operating costs and the capital costs of purchasing equipment and physical infrastructure to comply with OES requirements. One municipality sought clarification on the relationship between the WEEE program and the province's MHSW Program and how the WEEE program will achieve the plan's objective of doubling Ontario's WEEE recycling rate.

Comments from industry were varied and largely specific to the product manufacturers, distributors or related industry associations. Suggestions from industry commenters included the following proposals:

- Eliminating consolidation centres altogether (since this unnecessary step between collector and processor is cumbersome, expensive and carbon footprint heavy);
- Reducing the percentage of collected WEEE that OES can hold back from allocation to processors from 20 per cent to 10 per cent;
- Harmonizing Ontario's program as much as practicable with other provinces in order to improve program efficiencies;
- Modifying the fee remittance structure to include a fixed fee arrangement for stewards that import less than some threshold number of units; and
- Removing references to beryllium as a "substance of concern" from the Recycling Standard Guidance Document.

A First Nation's association that submitted a comment was generally supportive of the Revised Program Plan but expressed disappointment that First Nations were not involved in any of the consultation sessions. Given that many First Nations live in remote (fly-in or winter ice road only) communities, the association noted that the Revised Program Plan needs innovative methods to service rural, northern and remote communities in terms of WEEE collection and program promotion and education.

In August 2009, the Minister of the Environment approved the proposed Revised Program Plan without revisions.

SEV

In a brief statement, MOE explained that the Revised Program Plan promotes resource conservation because it promotes the diversion of WEEE and its potentially toxic components from landfill. MOE stated that to reduce pressure on the Earth's resources, the Revised Program Plan aims to: promote reuse by making consumers aware of reuse opportunities available; and promote recycling for WEEE that is not reusable. MOE explained that the Revised Program Plan protects the environment by diverting electronic products that contain potentially toxic components away from landfill and requiring program participants to meet strict operational standards that safeguard the environment and human health. In addition, MOE stated that the Revised Program Plan embraces the principle of Extended Producer Responsibility (EPR), which requires producers to take responsibility for their products once they reach the end of their useful life. Through EPR, the Revised Program Plan will help bring awareness to industry and consumers of the "interdependence between the environment, economy and society."

Although MOE's SEV consideration document for the Revised Program Plan was very similar to that previously provided to the ECO for the Phase 1 Program Plan, the newer one does not claim that the program "aims to encourage industry to reduce the amount of waste resulting from their product."

Other Information

Poor Rates of WEEE Collection during Phase 1

Eight months after implementing Phase 1 of the WEEE program, OES determined that some of the assumptions and estimates used to calculate steward fees were no longer accurate. First, sales of obligated EEE were lower and more variable than originally projected in the Phase 1 Program Plan, a result of the global economic downturn and the rapid shift in sales from desktop to portable computers. Second, actual volumes of WEEE collected through the OES system were tracking substantially (30 per cent) lower than projected, a consequence of OES competing for WEEE with non-participating collection organizations. In February 2010, after soliciting stakeholder feedback and receiving WDO approval, OES revised the steward fees to reflect these realities. As a result of these revisions, the fees charged to stewards for most EEE products changed by a few dollars.

In early 2010, WDO served OES with a notice of breach of agreement for failing to comply with the terms (i.e., failing to meet its diversion targets) contained in the Phase 1 Program Plan. In March 2010, OES announced that it would review the allocation process as outlined in the Revised Program Plan. Although OES stated that this review fulfils commitments made in the Phase 1 and Revised Program Plans, media reports suggest that it is largely in response to the program's poor WEEE diversion performance. In April 2010, OES posted a consultation document on its website proposing three alternatives to the current system, two of which would allow OES-approved processors to acquire volumes of WEEE independent of the OES-controlled consolidation and quota system. These options would let processors solicit new sources of WEEE and reduce OES's interference with the competitive market. As of July 2010, no change had been made to OES's WEEE allocation system.

Canada-wide Action Plan

In October 2009, the Canadian Council of Ministers of the Environment (CCME) approved a Canada-wide Action Plan for Extended Producer Responsibility (the "CCME Plan"). The purpose of the CCME Plan is to "extend the principle of producer responsibility across the country in a consistent and harmonized way with maximum impact across the national marketplace." The CCME Plan asserts that by shifting the responsibility for managing products at the end of their useful life to the manufacturer or importer of that product, stewards will be motivated to design products so as to reduce their overall environmental footprint. Under the first phase of the CCME Plan, each Canadian province and territory is committed, in principle, to developing an EPR program for electronics and electrical products within six years of the adoption of the plan. Besides Ontario, four other Canadian jurisdictions already have WEEE diversion programs: Nova Scotia, British Columbia, Saskatchewan and Alberta. Jurisdictions that have not yet

developed their WEEE diversion program will likely be looking at existing programs, such as Ontario's, for guidance on effective program structure, targets and implementation.

ECO Comment

The ECO applauds MOE for expanding the provincial WEEE program to include more materials. As with Ontario's Blue Box program, the more inclusive the diversion program, the less the public will be confused as to what items are included and the more the program will be used to divert reusable and recyclable materials from landfill. The ECO looks forward to the Minister requesting that additional WEEE, particularly household appliances (e.g., refrigerators, freezers, stoves, air conditioners, and clothes washers and dryers), be added to the program.

The ECO sees the merit of improved flexibility for stewards, generators and collectors in the Revised Program Plan while maintaining compliance requirements and standards to ensure environmental protection. Again, the more flexible and inclusive the program, the more likely that WEEE generators and collectors will participate, increasing the volumes of WEEE diverted through the OES program.

In the ECO's 2008/2009 Annual Report, the ECO expressed disappointment that the Phase 1 Program Plan failed to adhere to the 3Rs hierarchy and lacked measures to reduce the amount of waste produced in the first place. Unfortunately, the Revised Program Plan is also lacking in waste reduction initiatives. Although one section of the Revised Program Plan is encouragingly titled "Activities to Promote Reduction," this section largely just describes the concept of "Designing for the Environment"(DfE) – the term for initiatives undertaken by the electronics industry to improve the environmental performance of their products and activities – and gives some examples of reductions in size and weight of EEE via product design. The only commitment OES makes to promoting reduction is including "examples and analysis of reduction activities, and the anticipated future impact in Ontario of these initiatives" in OES's annual reporting to WDO. The ECO reiterates that simply reporting on steward DfE initiatives is not enough to "[encourage] stewards to initiate measures designed to reduce waste resulting from their products, increase recyclability of products and increase use of recycled content of products," as requested in the Minister of the Environment's June 2007 program request letter.

Despite the Minister's request, OES claims that "[DfE] is a reduction element that the WEEE Program cannot directly address." Likewise, OES asserts that it "does not have the authority to compel individual Stewards to undertake DfE activities…" The ECO disagrees. The Revised Program Plan states that OES's fee-setting methodology has the flexibility to modify fee rates to account for the following factors: variation in the collection and diversion performance of each material; the relative cost to manage related WEEE; or other 3Rs policy objectives established by the OES board. The ECO notes that just as the steward fees for floor-standing printers and large televisions have been raised substantially to reflect their higher handling and processing costs, fees could also be modified to reflect: the amount of plastics or toxic substances used in EEE; the ease of disassembly and recycling; the capacity for product or component reuse; and the durability and expected lifespan of the product. Higher fees for less environmentally friendly products might either compel stewards to undertake DfE activities or, if the fees were forwarded to the consumer, encourage the purchase of greener products. MOE itself acknowledges that uniform steward fees provide no direct financial incentive to improve product design and "can be an impediment to reducing waste and increasing reuse…" The ECO suggests that MOE ask OES to modify steward fee rates to reflect DfE and therefore align the program with ministry principles.

After WEEE reduction, reuse should be given priority over recycling. In the ECO's 2008/2009 review of the Phase 1 Program Plan, the ECO expressed surprise that the program does not include an assessment of WEEE reusability at consolidation centres and the diversion of reusable WEEE from recycling. The ECO acknowledges that, due to security and privacy protection, it would be inappropriate to refurbish discarded computers without the discarder's permission. Nevertheless, perhaps other types of WEEE (e.g., televisions, telephones, printers, stereos, cameras, etc.) could be intercepted at consolidation centres to determine their potential for reuse without violating the WEEE generator's privacy. Although WEEE generators can specify to OES-approved collectors whether they prefer their

discarded product to be reused rather than recycled, the percentage of WEEE sent for reuse might be improved if reuse was the default channel for WEEE that is devoid of privacy issues.

Many stakeholders have complained that the OES-controlled WEEE consolidation and allocation system monopolizes the marketplace, stifling innovation and fair competition between processors. The ECO agrees with OES's decision to review its allocation process and consider allowing OES-approved processors to independently solicit WEEE from approved sources. The ECO notes that another MOE diversion program, the Used Tires Program, operates without consolidation centres or the allocation of tires to processors. (See Section 4.6 of the Supplement to this Annual Report for the ECO's review of the Used Tires Program Plan.) Under the Used Tires Program, collectors, tire haulers and processors are free to solicit volumes of used tires but must meet safety and environmental requirements in order to participate in the program and receive financial incentives. The ECO encourages MOE to monitor the comparative success of these two diversion programs in order to determine the most successful allocation system for diverting waste from landfill.

Review of Posted Decision:

4.14 Greenhouse Gas Emissions Reporting Regulation and Guideline – O. Reg. 452/09

Decision Information

Registry Number: 010-7889
Proposal Posted: October 07, 2009
Decision Posted: December 1, 2009
Comment Period: 30 days
Number of Comments: 33
Decision Implemented: January 1, 2010

Description

Overview

In December 2009, the Ministry of the Environment (MOE) filed O. Reg. 452/09, the Greenhouse Gas Emissions Reporting Regulation, under the *Environmental Protection Act (EPA).* The regulation was accompanied by a technical guideline regarding mandatory greenhouse gas (GHG) reporting requirements and was posted as a proposal on the Environmental Registry for comment in October 2009 (Environmental Registry #010-7889). The regulation took effect on January 1, 2010.

Background

Ontario Regulation 452/09 requires companies in the petroleum, manufacturing and electricity sectors that emit over 25,000 tonnes of GHG emissions per year to begin reporting these emissions starting with 2010 emissions. Six types of greenhouse gases are covered, including carbon dioxide, methane, nitrous oxide and sulphur hexafluoride, plus two groups of gases generally referred to as HFCs (hydrofluorocarbons) and PFCs (perfluorocarbons). The regulation contains the following provisions and features:

- Reporting of specific GHG data by all companies exceeding the 25,000 tonne minimum threshold;
- Flexibility to use the best alternative quantification methods for 2010 GHG emissions;
- Mandatory use of identified standard quantification methods to quantify GHG emissions starting with 2011 emissions;
- Annual reporting of GHG emissions by June 1 of each year covering the previous calendar year, starting with a 2010 GHG Report due by June 1, 2011; and,
- Annual third-party verification of emissions by September 1 of each year covering the previous calendar year, starting with a 2011 GHG Verification Report due by September 1, 2012.

The technical guideline accompanying the regulation, entitled Guideline for Greenhouse Gas Emissions Reporting, outlines mandatory standard methods to be used to quantify emissions and includes the best alternative methods that may be used during the first year of reporting. The use of mandatory quantification methods will be required for the 2011 calendar year and are specific to each industry and type of emissions profile. All GHG values are to be reported in carbon dioxide equivalent (CO_2e) format, according to a formula presented in a table in the guideline document. The table lists the Global Warming Potential (GWP) for each GHG. For example, the GWP of methane is 21 times that of carbon dioxide. A company emitting 1,000 tonnes of methane per year would multiply this value by the GWP value of 21 and report 21,000 tonnes of CO_2e emissions.

While the regulation only covers companies with GHG emissions in excess of 25,000 tonnes per year, smaller companies with GHG emissions between 10,000 and 25,000 tonnes per year are being encouraged to voluntarily report in anticipation of emerging continental reporting requirements that may eventually cover these smaller companies. A 25,000 tonnes-per-year threshold represents about 90 per cent of emissions from industrial/commercial/institutional facilities in the province. A 10,000 tonnes-per-year threshold would capture an additional three per cent of the province's industrial emissions and an additional 200 companies. Linkage and harmonization with broader continental developments in emission reporting, emission registries and emission trading requirements is important to avoid a patchwork of reporting, verification and trading regimes.

To ensure the province is on the same page with developments elsewhere in North America, Ontario joined the Western Climate Initiative (WCI) in July 2008. The WCI is a collaboration of U.S. states and Canadian provinces working towards a common framework for the reporting of GHGs and the design and implementation of a cap-and-trade system.

In addition to reporting on the quantities of GHGs released each year, companies will be required to retain third parties to verify the accuracy of their GHG Reports in accordance with International Standards Organization (ISO) 14064 and 14065 requirements. ISO 14064 provides general guidance to those carrying out the validation and/or verification of GHG claims by emitting facilities and specifies the requirements the emitting facilities must follow for selecting GHG validators/verifiers. ISO 14065 specifies the qualification and accreditation principles and requirements for those bodies that undertake validation or verification of GHG assertions by those reporting.

While the first verification report is not due until September 1, 2012, covering 2011 emissions, MOE is encouraging all regulated sources to voluntarily undertake third-party verification in the first year (covering 2010 emissions) by September 1, 2011. As noted by the ministry, the intent is to allow time to build capacity for third-party verification – capacity that is only in the early stages of development in Ontario.

Implications of the Decision

The reporting of GHG emissions is not new to most large industrial companies in Ontario. Under Environment Canada's National Pollutant Release Inventory (NPRI), those industrial facilities with GHG emissions in excess of 50,000 tonnes per year are now required to submit GHG emissions data covering 2009 emissions by June 1, 2010. Companies with GHG emissions in excess of 100,000 tonnes per year have been required to report into NPRI since 2006. (Many large Ontario companies have also reported on a voluntary basis as part of the internationally recognized Carbon Disclosure Project for several years.) It is likely that NPRI will eventually reduce their reporting threshold to 25,000 tonnes per year in the interests of harmonization with both the WCI, MOE and U.S. EPA requirements.

As indicated in the decision notice, mandatory reporting of GHGs by large emitters is a necessary first step in the development of a cap-and-trade (or tradable permit) system and to facilitate the buying and selling of emission rights under a future tradable permit system. MOE expects that O. Reg. 452/09 will enable Ontario companies to link with other GHG trading systems under development elsewhere in North America thus creating a single, integrated North American carbon market. While it is expected that the requirements for both an annual GHG Report and a GHG Verification Report will result in additional costs

to industry, MOE's position is that the verification requirements are essential to support credible emissions data as a backstop to any future emission trading system.

To maintain a reasonable level of assurance that there has been no material misstatement or discrepancy in a GHG Verification Report, and to ensure impartiality, half of the regulation is devoted to ensuring that impartiality is not compromised. This appears to be in recognition that the skill sets required to audit and prepare a GHG Report on a facility's emissions are in essence the same skill sets that a qualified third-party verifier would use to prepare a GHG Verification Report.

Section 14 and related provisions stipulate that accredited verifiers cannot undertake the verification of a GHG emissions report of a company if: 1) the verifier is in a potential conflict of interest with respect to the company (for example, if it prepared the company's GHG Report); 2) the verifier has provided GHG consultancy services to the company within the past three years; and, 3) if the verifier has verified the company's GHG emissions reports for six consecutive reporting periods, unless at least three years have passed since the last verification.

In order to protect the confidentiality of proprietary information, MOE commented in its decision notice that Ontario's *Freedom of Information and Protection of Privacy Act (FIPPA)* was sufficient to protect propriety commercial information from disclosure and that information "that is exempted from public disclosure under *FIPPA*" would be protected as the regulation is implemented. Further, all information must be kept on site by the company for audit by MOE.

SEV

MOE noted the contribution that GHGs make to climate change, which the ministry describes as "one of the most significant environmental issues of our time." As a key principle of environmental management, MOE indicated that O. Reg. 452/09 would provide the government with the GHG emissions data necessary to "inform policy decisions, including the design of a GHG cap-and-trade program". Further, by moving forward on GHGs now, the government is taking leadership in encouraging other jurisdictions to take action while also ensuring that Ontario's industries are able to link to emerging trading systems elsewhere in North America.

Public Participation & *EBR* Process

This new regulation underwent extensive consultation with various stakeholders on key issues including roles, responsibilities, requirements and timelines. On October 07, 2009, the draft regulation was posted as a proposal notice on the Environmental Registry for a 30-day public review period that ended November 6, 2009. Throughout the remainder of November, MOE held public information and consultation sessions in Toronto, London and Sudbury and hosted several teleconferences as well. These sessions presented an opportunity for stakeholders to review the draft regulation and guideline, and seek clarification from MOE representatives. MOE posted its decision on the regulation on December 1, 2009 and it took effect on January 1, 2010.

MOE reported in its Registry decision notice that 33 comments were submitted on the proposal by industry, associations, municipalities, consultants and other interested parties. Comments were grouped around three main areas of concern: 1) verification issues; 2) overlap with federal (and other jurisdiction) requirements; and, 3) technical concerns.

Verification Issues

MOE noted a number of comments related to the perceived costs, complexity and administrative burden associated with the requirement for third-party verification of emissions data. Many requested that the verification requirements be removed or that the Ontario government perform these audits. There were also questions about the number, status and qualifications of verification service providers and the concern that the verification industry may not have the capacity to support the regulation.

To address the issue of building verification capacity, MOE agreed to phase-in mandatory verification as described above, making it voluntary in 2011 for 2010 emissions and mandatory in 2012 for 2011 emissions. The decision notice also indicated that the province would "monitor developments around third-party verification in the emerging U.S. cap-and-trade system, to ensure Ontario requirements are comparable to those in the U.S where feasible … and work to streamline it with other provinces and WCI Partners."

Harmonization with Canadian and U.S. Federal Requirements

There was considerable concern raised about the perceived duplication of reporting requirements with those of the Canadian federal government involving both reporting into a Statistics Canada database and NPRI requirements, and with the need for harmonization with developing U.S. requirements. At an MOE training session held in February, 2010, MOE staff presented material including a discussion about harmonization, noting the October 29, 2009 agreement by the Canadian Council of Ministers of the Environment "to minimize duplication and reduce the reporting burden for industry and governments through the development of a single-window GHG reporting system." MOE staff also indicated that Ontario would continue to work with its WCI partners to ensure harmonization with new U.S. EPA reporting requirements "where feasible" to facilitate single-window reporting, considered necessary to support the design of a North American-wide emissions trading system.

To address concerns about cost and administrative burden, and to ensure harmonization with GHG reporting requirements at the federal level, the definition of "facility" was modified to allow easier, one-window reporting of GHGs between MOE and Environment Canada. A "facility" for reporting purposes includes "all buildings, equipment, structures and stationary items … owned or operated by the same person". In addition, in order to harmonize with the U.S. EPA's Final Mandatory Reporting of Greenhouse Gases Rule, fuel sampling and flow analysis frequencies were revised to match the U.S. EPA requirements.

Technical Concerns

The foundation of any emissions reporting system is the measurement protocols and fuel sampling and analysis procedures that backstop and ensure accuracy of the data collected. The original proposal required that all facilities affected by O. Reg. 452/09 incorporate continuous emissions monitoring systems (CEMS), defined as the "equipment required to obtain a continuous measurement of a gas concentration or emission rate from combustion or industrial processes". Upon considering the feedback and concerns about emissions monitoring, the ministry modified the CEMS provision by stipulating that CEMS will only be necessary where there is already a requirement for CO_2 CEMS and related stack flow monitors as stipulated by federal or provincial regulations.

Concern was also expressed by respondents about the requirement that flow meters be calibrated by January 1, 2010. Such a requirement would have forced facility operators to prematurely shutdown plant operations to install and calibrate the equipment. MOE considered these issues and subsequently modified the regulation to allow a company to delay this calibration until the next scheduled shutdown, provided the company submits a plan for any postponement by December 31, 2010.

Clarification was requested by several companies regarding biomass issues. Several requested that biomass facilities be excluded from reporting because of insufficient research and analysis on biomass as a fuel to determine actual emissions from burning this material. MOE agreed to modify the solid biomass reporting requirements in the guideline to allow the use of emission factors (industry-accepted default values measuring grams or kilograms of CO_2 released per kilogram or tonne of biomass burned). The definition of biomass was also revised by MOE to make the provisions regarding peat and renewable biomass more consistent with the *Green Energy Act, 2009.*

Timelines for the submission of reports were also considered by many companies to be onerous and difficult to meet given the proposed implementation schedule. MOE responded by extending the deadline for confirming that a facility was below the 25,000 tonne threshold from 20 days to 60 days. Further, the

ministry agreed to extend the deadline to submit a re-verification of a revised GHG Report from 60 days to 90 days.

A number of respondents requested that small, portable and emergency equipment be exempt from the reporting requirements because they collectively emit only a small fraction of overall facility emissions. MOE denied this request, pointing out that section 4(3) of O. Reg. 452/09 already provided flexibility to companies by containing provisions for alternative reporting methods that could be applied to this equipment.

Other Information

This new regulation is closely tied to two other initiatives:

1) Bill 185, *Environmental Protection Amendment Act (Greenhouse Gas Emissions Trading), 2009* (Environmental Registry #010-6467), which received Royal Assent on December 15, 2009; and
2) "Moving Forward: A Greenhouse Gas Cap-and-Trade System for Ontario" (Environmental Registry #010-6740). As of June 2010, MOE had not posted a decision notice on this policy proposal.

Section 4.9 of this Supplement discusses the *Environmental Protection Amendment Act (Greenhouse Gas Emissions Trading), 2009* in more detail and the implications of O. Reg. 452/09 for the development and implementation of a cap-and-trade system in Ontario.

ECO Comment

Following the maxim that what gets measured gets managed, the ECO supports mandatory reporting of GHGs by industrial emitters and the release of this information to the public. The ECO commends MOE for a detailed and well-executed consultation process targeting industry and related stakeholders. MOE's commitment to continued industry training and education on O. Reg. 452/09 is also welcomed.

The ECO does have concerns, echoed by industry stakeholders, regarding the ability of the fledgling monitoring, reporting and verification (MRV) industry to develop the capacity to meet the anticipated rapid growth in demand for MRV services. MOE indicates that it will be monitoring developments around third-party verification in the emerging U.S. cap-and-trade system "to ensure Ontario requirements are comparable to those in the U.S. where feasible". While this is welcomed, MOE has yet to adequately address the capacity issue raised by industry or the potential for conflicts of interest between service providers as both validators and verifiers of the same company's emissions. Further, while the provisions in section 14 designed to minimize conflicts of interest in the production of GHG Verification Reports seem appropriate, the ECO notes that the powers of the MOE Director to approve or reject a verification report are significant and not subject to enough checks and balances.

The ministry has correctly positioned O. Reg. 452/09 as a necessary precursor to the introduction of a cap-and-trade system in Ontario. In anticipation that the federal governments of Canada and the U.S. will put in place a North American-wide tradable permit system sometime in the future, the decision notice has stressed repeatedly the need for linkage and harmonization with similar trading systems being contemplated in other provincial, state, national (and international) contexts. This desire to see the linking or merging of trading regimes was also expressed by a senior MOE official in a recent report on linking cap-and-trade systems in North America.

However, as of August 2010, it seems doubtful that the approval and implementation of a U.S. congressionally sanctioned cap-and-trade system will happen anytime soon. While the WCI is still intent on a January 2012 launch for its tradable permit system, it now appears that it will do so with fewer participating states. These developments reinforce the concerns that the ECO raised in its Annual Greenhouse Gas Progress Report 2008/2009 with regard to the Ontario government's heavy reliance on a future cap-and-trade regime to deliver on its 2020 GHG reduction targets "where key decisions about a future trading regime are largely in the hands of other jurisdictions."

While O. Reg. 452/09 is a necessary precursor to the establishment of a cap-and-trade system in Ontario, it could be argued that this goal is secondary to another equally important policy objective. The development of future carbon trading systems notwithstanding, the ECO sees considerable merit in having accurate and reliable GHG emissions data available to establish fair and transparent baseline emissions levels for various Ontario industries. With these in place, the province has the basis for making regulations to reduce greenhouse gas emissions "without being limited to emissions trading" to enhance its ability to protect the environment.

Review of Posted Decision:

4.15 Quetico Provincial Park Forest Fire Management Plan

Decision Information:

Registry Number: 010-3016
Proposal Posted: March 18, 2009
Decision Posted: July 15, 2009
Comment Period: 50 days
Number of Comments: 1
Decision Implemented: June 11, 2009

Description

Overview

Forest fires are a necessary ecological process across Ontario's landscapes. For example, the jack pine is a tree species that requires the heat of an intense forest fire to ensure that its seed cones release its seeds for the purposes of germinating, propagating and eventually establishing a new forest stand. Without the heat of an intense forest fire, stands of this species can be overtaken and replaced by other tree species such as balsam fir – its propagation is not fire-dependent. In addition, forest fires rejuvenate soils by making the mineral content in vegetation available as nutrient for future plant growth.

Fire is so vital to the forests of Ontario that the Ontario government has observed its need in legislation and policy over the past decade. The Ministry of Natural Resources (MNR) finalized a document in 2009 called the Quetico Provincial Park Forest Fire Management Plan (the Plan or QFFMP). The Plan, in MNR's words "supports the role of fire on the landscape and directs how fires will be used (prescribed fire and prescribed burn) to maintain and restore ecological integrity, including the maintenance of a shifting mosaic of different successional and structural forest types."

Background

Quetico Provincial Park ("Quetico" or the "park") is a wilderness class park located approximately 170 km west of the City of Thunder Bay and is situated on the Canadian Shield. The park, among Ontario's largest at 475,782 hectares (ha), is located in the Great Lakes - St. Lawrence Forest and is a transition zone between the Boreal Forest to the north and the Great Plains to the south and west. To the immediate south of the park is the border of Ontario-Minnesota and the Boundary Waters Canoe Area Wilderness; to the north, a section of the park boundary abuts Highway 11; two First Nation Reserves, the Namakan River and Lac La Croix are located to the west of the park. There is very limited road access to Quetico and many park users travel through the park by way of canoe.

The first Quetico Provincial Park Fire Management Plan was approved in 1997. That Plan required updating as a result of several provincial initiatives including the *Provincial Parks and Conservation Reserves Act, 2006* and the 2004 Forest Fire Management Strategy for Ontario (see the ECO's review in the Supplement to our 2004/2005 Annual Report, pages 198-208). Accordingly the 2009 Plan begins with a description of the legislation and policy that influenced the Plan's update as well as approvals required to execute the Plan. MNR noted that all of the projects contained in the document were

screened to category A and category B of the Class Environmental Assessment for Provincial Parks and Conservation Reserves.

In its Plan, MNR described the size and configuration of the park, its zoning, and land uses. As a wilderness park, uses include: canoeing, hiking, skiing, snowshoeing, fishing, some car camping, First Nation traditional activities, and commercial trapping. The ministry provided a solid discussion of the park's ecology and the importance of interaction of fire with the land base, for example:

> Studies conducted…indicate that older complex stands and the development of fire-sensitive, shade tolerant species (e.g. balsam fir) are becoming more dominant within the sub-canopy. This shift in forest age-classes (e.g. variable age class to older senescent age class) has had a considerable effect on diversity and overall forest health within this fire dependent ecosystem, while increasing susceptibility of stands to natural disturbances including wind events, insect infestation, disease, and even fire.

Historical Fire Record:
MNR and park researchers have a detailed history of fire on the landscape of Quetico Provincial Park and its resulting effects. Fire records date back to the late 1800s. Before this timeframe it is believed that lightning was the principal ignition source for forest fires within Quetico. Increased exploration and development in the late 1800s, including logging and mining, resulted in an increase in fire occurrence. In the 1920s, fire suppression was introduced into the park. Within a couple of decades suppression greatly reduced the number of fires in the park, and reduced the natural role of fire in Quetico's forest ecosystems.

At the landscape scale Quetico's natural fire regime has been one of large, periodic stand-replacing fires. For example, MNR reported that within a study area of 93,000 ha of the park, researchers had determined that in the pre-fire suppression era (1860-1919) the mean fire interval (i.e., the average number of years between two successive fires occurrences) was 78 years with an average area burned of 11,735 ha every ten years.

Since 1920, approximately 120,000 ha of Quetico's land base has burned in total (i.e., about 13,000 ha annually). Of this area, 90,000 ha were the result of large fires that occurred in 1936 and 1995. With the introduction and subsequent developments in fire suppression activities, the fire cycle (i.e., the time required to burn an area equivalent to the area of interest) had increased from 50-80 years in some major vegetation types, to greater than 300 years. For the period 1976 to 1998 the fire cycle was 379 years, according to MNR research. This number would be far greater had it not been for a large fire in 1995 that burned almost 25,000 ha in the southeast portion of the park.

Current Fire Response and Plan Goals:
The response to fire on the landscape, whether human or natural in origin, can directly affect the ecological outcome. MNR described in its Plan three types of response to fire in the park:

1) Full Response – includes an immediate, aggressive initial attack and/or sustained suppression action until the fire is declared out.
2) Monitored Response – involves the observation and assessment of a fire to ensure ecological or resource management objectives are achieved, but with minimal social disruption.
3) Modified Response – uses a combination of suppression techniques as well as monitoring, steering and containing the fire within a predetermined perimeter. MNR considers this approach to be a valid means to restore fire dependent ecosystems within Quetico.

The effective implementation of fire responses is critical to all MNR's goals for forest fire management – everything from protecting human health and safety through to maintaining the inherent ecological values of the park. MNR spelled out nine goals (with specific objectives under each goal) to be achieved through the Plan:

1) Prevent personal injury, value loss, economic and social disruption;

2) Explore opportunities to allow fire along the Quetico boundary;
3) Work with First Nations, stakeholders, visitors and partners to increase knowledge on the ecological role of fire and fire management in Quetico;
4) Undertake fire management activities (whenever feasible) in a manner to minimize negative impacts within Quetico and the surrounding area;
5) Monitor fire effects at different temporal and spatial scales to continually refine fire objectives in Quetico;
6) Maintain and restore fire dependent ecosystem structure, function and processes within Quetico to the maximum extent possible and conduct research where information gaps exist;
7) Promote Quetico as a centre for fire research;
8) Make fire research and management an important component of the Natural Heritage Education program; and
9) Identify and maintain sensitive biological, cultural and historic sites.

Of particular note, the sixth goal includes an objective that implies that 4,750 ha of burn would be required annually to attain the historical fire cycle of 78 years (as referred to above). It also specifies that a prescribed burn strategy will be developed by 2011 that will identify areas for renewal and hazard reduction. The latter term refers to, among other things, reducing fuel accumulation, e.g., the build up of brush and dead vegetation through the lack of fire, which can in turn lead to greater, more intense fires when fire occurs.

MNR's finalized Plan included a fairly lengthy section (almost one-third of the document) on the implementation of the Plan, to help achieve the goals listed above.

Implementation of the QFFMP

MNR specified two types of fire to plan for:

1) Prescribed Fire. Prescribed fire deliberately takes advantage of accidental forest fires in a predetermined area in accordance with a pre-specified and approved burning prescription to achieve the preset objective. This opportunity uses human (e.g., camp fire) and lightning-caused fire in areas where a very specific outcome is wanted. This fire use option may reduce or eliminate the need for prescribed burning.

2) Prescribed Burning. Prescribed burning is the deliberate, planned and knowledgeable application of fire by authorized personnel to accomplish pre-determined forest management or other land use objectives within a specific area. Prescribed burning is an option that will provide Quetico staff the opportunity to maintain and enhance ecological integrity and meet hazard reduction objectives within Quetico.

MNR's approach to fire management in Quetico will vary based on division of the park's area into four separate compartments (see table below). Two of these compartments fall into the category of "Managed Fire Compartment" and two fall into the category of "Prescribed Fire Compartment" – the former represents approximately 95 per cent of the park's land mass, and the latter, about five per cent. MNR's definition of a "managed fire" approach is "any fire managed using full, modified or monitored response or a combination of response options to meet fire or resource management objectives – such that costs and/or damage are minimized and/or benefits from the fire are maximized."

	Area of Park	Approach	Brief Description
Compartment 1 (Northern Border)	32.1% (152,809 ha)	Managed Fire	Numerous human values such as a campground, highway 11 and forest operations nearby.
Compartment 2 (Central Interior)	62.9% (299,799 ha)	Managed Fire	Back country use only; mixed wood forest including Jack Pine, mature red and white pine.
Compartment 3 (Central Parcel)	1.9% (9,223 ha)	Prescribed Fire	Small area within compartment 2; focus on jack pine renewal.
Compartment 4 (Southern Parcels)	2.9% (13,951 ha)	Prescribed Fire	Remote, with few physical assets; important stands of old growth red and white pine needed for renewal.

Compartment 1:
This compartment includes park landmass up to the park's northern border. Its forest vegetation is predominately jack pine, black spruce and trembling aspen. MNR determined that fire in this compartment would have a net beneficial effect for these fire-dependent species. However because of physical assets in the vicinity, MNR determined that a higher level of protection is required for this compartment. A modified response will most likely be employed involving direct and indirect suppression as well as steering fire. The response to fire in this compartment will be equal to the physical values at risk. If human health and safety are at risk, the fire would receive a full response until extinguished.

Compartment 2:
This compartment is the largest of all, and extends south to the international border. Its forest vegetation is also dominated by jack pine, black spruce and trembling aspen, but mature red and white pine are also prevalent along the southern border. Fire in this compartment would also have a net beneficial effect for fire dependent forest communities. Since there are few physical assets in this compartment, fires here will generally receive a monitored response. If fires threatened human health or safety, as this region of the park is used by visitors for backcountry canoeing and camping, then the response would be raised to a full / modified response. If the threat to lives or values had passed, MNR's response would return to monitoring.

Compartment 3:
Compartment 3 is a small forested parcel in the north-central region of the park. It is important because of the presence of jack pine and MNR's intent to use it to regenerate jack pine within the park. MNR wrote that in Compartment 3, where fire is needed to restore jack pine: "a moderate to high intensity surface fire is needed to open serotinous cones and eliminate the deeper organic layers associated with this fuel type." MNR did not state a prescribed target or plan for prescribed burn in this compartment.

Compartment 4:
This compartment comprises two small parcels in the southwest of the park. MNR's objective for these parcels is to maintain old growth red and white pine communities and to promote regeneration of these species. Low to moderate intensity fires will be beneficial in these parcels to reduce plant matter and litter that compete with or thwart the growth of these pine species and to expose soils to new pine growth. High intensity fires would lead to crown scorch, root damage, and tree mortality, and will not be considered for these parcels.

Plan Wrap-up:
MNR also included in its Plan sections on adaptive management, mitigation, fire effects monitoring, communications, cost and funding, and Plan amendment and review.

Implications of the Decision

The implications of this decision are difficult to discern. On one hand, MNR has quite detailed knowledge of the historical fire record, the importance of large fires for the ecology of the park and an understanding

of the hazards and downsides of suppressing large scale fires. On the other hand, the Plan heavily emphasizes the importance of fire-fighting to reduce hazards to human health and safety and threats to interests such as tourism, forestry and mining. Further, the second paragraph of the document states "due to the inherent dangers associated with fire, it is not possible to completely *'allow the forces of nature to function freely,"* [emphasis added by MNR]. This suggests that there is some reluctance on the part of MNR to deviate too much from its historical response of fire suppression when fire occurs.

Furthermore because of the unpredictable nature of fire, e.g., heat, speed of travel, wind direction, and because of the latitude MNR has given itself for dealing with fire in the park, almost any fire in the park could be met with a modified, full and later monitored response, depending on the level of threat it posed as it evolved. This range of possible responses produces a lot of uncertainty about the likelihood of fire in desired areas and intensity, and whether or not ecological goals can easily be met. As well, the Plan does not include any prescribed burn schedule or number of hectares to be burned. This will not be known until 2011, the timeframe by which the Plan commits MNR to produce a prescribed burn strategy.

The Plan's designation of prescribed fire for compartments three and four should be an attainable outcome. Both are small "islands" of landscape, in the interior of the park and very distant from any infrastructure, settlement, or industrial activity. It seems reasonable to expect that MNR could allow fire in these compartments, which comprise just under five per cent of the park.

Other statements in the Plan make it difficult to clearly predict outcomes. After describing where prescribed burning would be used, MNR noted that it may be needed in any part of the park (i.e., not solely within the defined compartments) to achieve fire management objectives. Secondly, there are at least five other sources of direction, e.g., regulations and guidance documents which could influence MNR's response to any given fire scenario. In other words, the QFFMP is not the final word in dealing with fire occurrences in Quetico Provincial Park.

Public Participation & *EBR* Process

The proposed Plan received one comment from an organization called the Quetico Foundation (Foundation). The commenter referred to the Plan as detailed, thorough, and well-reasoned. Further, the Foundation supported the Plan for the most part, providing only one major exception concerning prescribed burns.

The Foundation pointed out that MNR appeared to be using the entire area of the park in its planning, including lake area. This, the Foundation contended, overestimated the land mass that was forested and therefore capable of being involved in a forest fire and may also distort the interpretation of what is the "normal" fire occurrence.

It was also concerned about the use of prescribed fire potentially leading to excessive burn area over time. It contended that the pattern of fires in Quetico has been one of only a few very severe fire years (e.g., 1936, 1995) over many decades. The Foundation put forward that MNR's tabulation of large fires (1961 to 2006) in the Plan was inadequate to convey the total variation in fire occurrence over time. The Foundation went on to note that when really severe fire years do occur, the total long-term burned area could then exceed the benchmark target area because of all of the previous "top up" burning. It also suggested that when prescribed burn and prescribed fire are added to the extra fire area due to anthropogenic climate change, then the whole character and function of the park could be altered. The Foundation recommended that the fire benchmark be explicitly articulated in the Plan as a moving average over several to many decades and the benchmark should be calculated using land areas only.

MNR made revisions to the document based on the comment received and based on internal MNR input, before it was finalized. These included the addition: of a section on adaptive management; two graphs and a paragraph to better explain how fire occurrence and area burned changed during the fire suppression era (post 1920s); and an explanation of the tabulation of large fires.

Most significantly, MNR reworded Goal 6: (which includes the objective of area to let burn annually) to better explain the intent of the objective. MNR also recalculated the benchmark to use only land area and not land plus water area in the calculation of area burned. The previous 6,000 ha area burned changed to 4,750 ha, which more accurately reflects the historical fire cycle of 78 years. MNR noted that it also made minor technical changes and edits based on the Quetico Foundation's comments.

SEV

MNR considered its Statement of Environmental Values in making this decision. One of MNR's SEV principles is that the key to achieving sustainability is a sound understanding of natural and ecological systems and how our actions affect them. MNR states that the Plan complies with this principle as it is based on "promoting the understanding of the ecological role of fire..."

In response to one of its SEV principles, MNR stated that the Plan acknowledges the finite capacity of Quetico's ecosystem, including a benchmark area burned target. This statement is only partly credible from reading the Plan. MNR does not use the term "benchmark" in the Plan's discussion of annual burn, but used the language "an average area of 4,750 hectares would be required to burn annually" i.e., MNR did not commit to an annual planned burn 4,750 ha, but suggested that it was needed. Where this number (i.e., 4,750 ha) is specified in the Plan, the number is not explicitly referred to as a "benchmark target". MNR committed in the Plan to devising a prescribed fire strategy by 2011.

ECO Comment

The ECO welcomes the incorporation of the role of fire in maintaining healthy ecosystems. The ECO notes that MNR's own analysis in the Plan strongly affirms that fire occurrence enhances ecological integrity while fire suppression conflicts with ecological integrity. This analysis also showed that the positive impacts of fire match the number of negative impacts, when considering cultural and socioeconomic attributes or values (e.g., though fire has negative outcomes like visitor interruption or smoke affecting nearby communities, it also leads to improved opportunities for wildlife viewing and fire-based landscape renewal research).

Nevertheless, the ECO notes that several aspects of this Plan could be significantly strengthened. The Plan lacks clarity and precision and its language is often vague. The result is that there is little that can be predicted as a highly likely outcome flowing from this document. Put another way, any of a wide range of eventualities in the years ahead, from extinguishing the vast majority of park fires, all the way to an extensive burn incident occurring, could qualify as an outcome that meets the Plan's objectives. This range is too broad for a document referred to as a plan.

Another shortcoming is that MNR is still using a somewhat passive approach to the use of fire for ecological purposes. This is reflected in MNR's policy objective "to promote the understanding of the ecological role of fire". MNR indicated that the new Plan carries on from the old Plan in terms of the ecological use of fire. If this is so, MNR has had 10 years to promote this understanding, and should now be more active with the implementation of a prescribed fire strategy.

The ECO believes that the Plan does not articulate clearly and unequivocally enough its approach to ensuring that "ecological integrity is maintained." The goal of maintaining the ecological integrity of parks has been enshrined in Ontario's park legislation since 2006. In MNR's Plan, the goal of ecological integrity is sixth in a series of nine goals. The goal is stated in fairly clear language, i.e., "maintain and restore fire dependent ecosystem structure, function and process within Quetico…" But the objective for this goal more implies than states clearly that 4,750 hectares of annual burn (based on a 10-year rolling average) would burn in an effort to maintain a more natural fire cycle. MNR does not provide a perfectly clear indication that the goal will be achieved or exactly how – the Plan seems to suggest it could be achieved through prescribed fire or prescribed burn, perhaps emanating from fires arising anywhere in the park. The ministry does not have a prescribed burn strategy in the document but commits to producing one by 2011.

MNR updated the Plan partly because of the *Provincial Parks and Conservation Reserves Act, 2006* (*PPCRA*). The first objective of this Act is "To permanently protect representative ecosystems, biodiversity and provincially significant elements of Ontario's natural and cultural heritage and to manage these areas to ensure that ecological integrity is maintained." The ECO believes this *PPCRA* goal should figure more prominently in this, and any future MNR plans. By comparison, the federal government established a very strong commitment for a large northern park on the eastern shores of Lake Superior, Pukaskwa National Park. The park's Plan requires the park's management to implement fire-based ecosystem renewal and has a goal to restore fire to 50 per cent of the long-term average through a combination of prescribed fire and zoning. MNR's Plan for Quetico suggests that less than five per cent of the park's land mass is being targeted for prescribed fire and that about one per cent of the park's land mass could be allowed to burn annually.

This Plan would also benefit from a much more robust consideration of the likelihood of a very different climate regime in future as a result of global climate change. In its Plan MNR states that because of climate change, forest fires are occurring earlier in the season and future climate scenarios suggest increased fire activity and area burned across most parts of Ontario's west fire region. Beyond these statements, MNR's Plan did not clearly explain how it factored in a changing climate. Documents, maps and graphs on MNR's website forecast generally a warmer, drier climate, particularly in much of northern and western Ontario. Some projections by climatologists include the possibility that as a result of drier conditions, warmer temperatures and fuel build-up from fire suppression, that larger almost unmanageable fires could occur. The long-term result of drier conditions and large fires could be that vast tracts of the boreal forest from northwestern Ontario through to northern Alberta shift from a forest ecosystem to that of grassland.

Also, the ECO observes that the publishing of forest fire management plans is occurring at a slow rate. Quetico's Plan is the first to be produced since MNR adopted the Fire Management Strategy for Ontario in 2004 and the Fire Management Policy for Provincial Parks and Conservation Reserves in 2007. As of 2010, ten provincial parks still require plans to be brought forward as proposals.

The ECO urges MNR and Ontario Parks to make progress on the ten remaining forest fire management plans for provincial parks, located between Algonquin in the south to Polar Bear in the north. We also believe that MNR should clarify the language articulating the goals, objectives and implementation of these plans, place ecological integrity at the heart of these plans, and ensure that a changing climate is thoroughly factored into these plans.

Review of Posted Decision:

4.16 Development of MNR Policy to Guide Woodland Caribou Conservation and Recovery Efforts in Ontario

Decision Information:

Registry Number: 010-4421
Proposal Posted: August 21, 2008; April 27, 2009
Decision Posted: October 13, 2009
Comment Period: 36 and 30 days
Number of Comments: 2,209
Decision Implemented: October 13, 2009

Description

In October 2009, the Ministry of Natural Resources (MNR) released its finalized Ontario's Woodland Caribou Conservation Plan. The forest-dwelling boreal population of woodland caribou is listed as a threatened species under the province's *Endangered Species Act, 2007* (*ESA*). This conservation plan

outlines the measures the Ontario government intends to take to protect and recover this species at risk and its habitat.

It is estimated that 20,000 woodland caribou remain in Ontario, of which approximately one-quarter inhabit the boreal forest and are described as the "forest-dwelling" population. MNR speculates that about 3,000 forest-dwelling woodland caribou remain in the area set aside for commercial forestry, south of roughly 51°N. However, available estimates of the numbers of woodland caribou in Ontario are essentially guesses due to the lack of monitoring. The majority of Ontario's woodland caribou are part of the "forest-tundra" population; this population is currently under assessment by the Committee on the Status of Species at Risk in Ontario (COSSARO) to determine if it too should be identified as at-risk.

The forest-dwelling boreal population of woodland caribou has lost approximately half its range in the province since the end of the 19th century and is now found mainly north of Hearst and Dryden. This massive range contraction has resulted in the loss of approximately 35,000 square kilometres of habitat per decade in Ontario over the last century, equating to a northward range recession of roughly 34 kilometres (km) per decade. A driving cause of this range recession is the loss, fragmentation, and alteration of forested habitat caused by commercial forestry, land clearing, and linear disturbances such as road building. Other threats include the effects of climate change, the alteration of natural forest fire cycles, changes to predator-prey dynamics, and disease transmission from other ungulates.

The *ESA* came into force June 30, 2008, protecting threatened species, such as the forest-dwelling boreal population of woodland caribou, from being killed, harmed or harassed. The law's general protections for safeguarding their habitat from damage or destruction will apply beginning on June 30, 2013, unless a species-specific habitat regulation is passed.

In May 2007, the then Minister of Natural Resources committed to passing a species-specific habitat regulation for the forest-dwelling population of woodland caribou by June 2009. In our 2006/2007 Annual Report, the ECO stated that "the scope of genuine protection prescribed for their habitat will be a measure of the effectiveness of the new law, as well as a benchmark to assess the environmental sustainability of policy choices by the Ontario government for northern Ontario." As of June 2010, the habitat of the forest-dwelling population of woodland caribou had not been regulated.

The Recovery Planning Process

Ontario's Woodland Caribou Conservation Plan serves as the government response to the recovery strategy that was finalized for this species at risk in July 2008. The recovery strategy was initiated in 2001 and prepared by the Ontario Woodland Caribou Recovery Team, which was largely composed of MNR staff. The recovery strategy took seven years to complete, setting back the timing of this conservation plan, which was originally to be released in 2007.

The *ESA* intends that recovery strategies, drafted by impartial experts, serve as advice to government on how to best protect a species at risk. MNR is then required to prepare a government response within nine months. It is only at this step that social and economic factors may be considered. The *ESA* requires that recovery strategies include:

- the identification of the habitat needs of the species;
- a description of the threats to the survival and recovery of the species;
- recommendations to the Minister of Natural Resources on the objectives and approaches for the protection and recovery of the species; and
- recommendations to the Minister of Natural Resources on the area that should be considered in developing a habitat regulation, which protects the area from being damaged or destroyed.

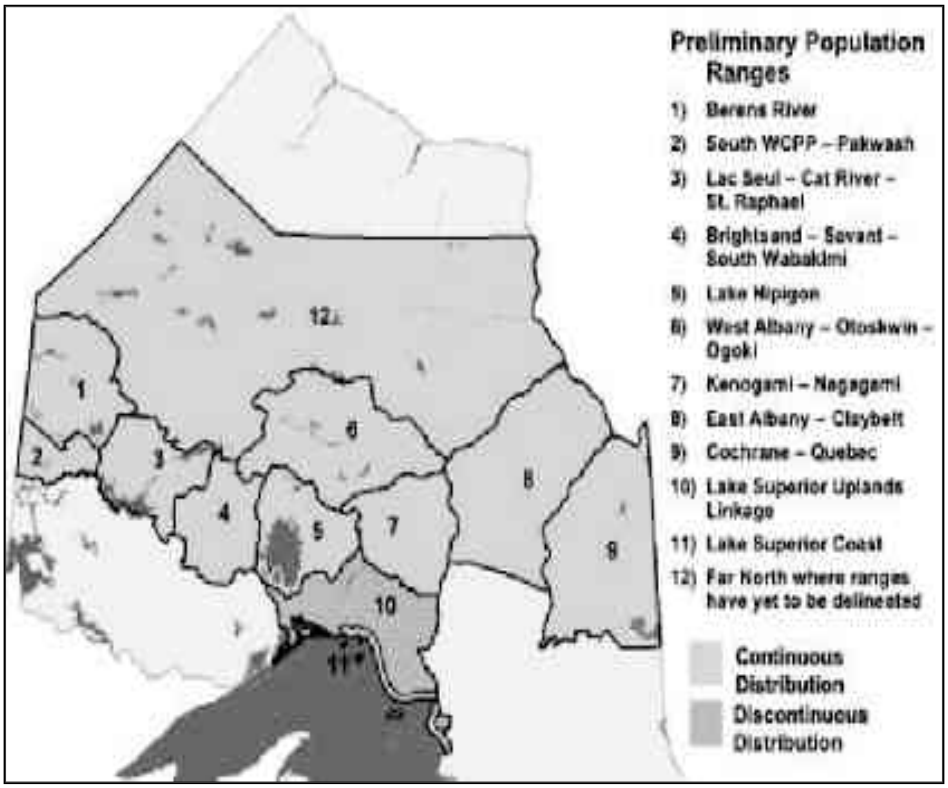

Figure 1: Preliminary population ranges of the forest-dwelling population of woodland caribou outlined in MNR's Caribou Conservation Plan. The conservation plan applies to the continuous (shaded area) and discontinuous (thatched area) range of the forest-dwelling population of woodland caribou. It does not include the range of the forest-tundra population of woodland caribou in the northernmost part of Ontario. (Source: MNR)

The ECO raised multiple concerns with the draft woodland caribou recovery strategy in our 2006/2007 Annual Report. A critical flaw was the recovery strategy's failure to identify habitat that needed to be protected. The ECO described the recovery strategy's approach as the maintenance of the *status quo* for this species at risk and a further delay in taking tangible recovery action. The ECO also was critical that MNR's primary measure to "protect" this species at risk was a set of forestry guidelines on how to progressively log its habitat. The ECO concluded,

> Woodland caribou epitomize why significant changes should be made to the way the Ontario government regulates and plans for northern Ontario, particularly for the intact boreal forest. While MNR is the lead ministry for managing wildlife, the policies of other ministries have a direct, and often negative, impact on conservation measures.

In early 2008, the then Minister of Natural Resources struck an arms-length Woodland Caribou Science Review Panel to review the scientific basis for the recovery strategy's recommendations. This panel released its report in May 2008, concluding that the recovery strategy is "reasonably sound" and "consistent with current scientific understanding of caribou biology." However, the panel also commented that the recovery strategy's "objectives and approaches are largely fitted into the existing policy and management framework. Thus, the overall approach is piecemeal and will ultimately fail." The panel noted that the recovery strategy "demonstrates over-confidence in the capacity of habitat management to effectively protect caribou, given that it relies on the untested hypothesis that caribou will eventually return to use industrially logged areas."

Implications of the Decision

The goal of the caribou conservation plan is to "maintain self-sustaining, genetically-connected local populations of Woodland Caribou (forest-dwelling boreal population) where they currently exist, improve security and connections among isolated mainland local populations, and facilitate the return of caribou to strategic areas near their current extent of occurrence." While laudable, the conservation plan does not contain the necessary measures to give confidence that this goal will be achieved.

The conservation plan is organized into eight main sections, as well as a section focusing on implementation. MNR has portrayed the plan as a "science-based" approach, guided by a suite of principles that few people could disagree with: ecosystem-based management, adaptive management, use of the precautionary principle, consideration of cumulative impacts and the long-term sustainability of caribou ranges.

The conservation plan states that an adaptive management approach will be applied in which science is used to continually inform and update management practices and policy. While sound in theory, few examples exist in which MNR has put adaptive management into practice over the long-term. Key aspects of adaptive management are: promoting action, accepting change, incorporating flexibility, emphasizing monitoring and feedback, and seeking resilient and practical outcomes.

Enhance Caribou Science

The conservation plan focuses its caribou research program not on how to protect caribou or safeguard their habitat, but, rather, on trying to validate the untested hypothesis that woodland caribou will re-occupy habitat that has been commercially logged. The research program will include:

- a broad assessment of caribou re-occupancy of formerly logged habitats;
- research on silvicultural efforts and the use of herbicides to renew future caribou habitat;
- case studies of known caribou re-occupancy of formerly logged habitat; and
- research on the establishment and use of thresholds of human disturbance and cumulative impact assessment.

MNR also will conduct a broader monitoring program to establish baseline data. This program will collect data on population sizes and health, range occupancy, and southern edge of continuous distribution. The conservation plan is vague as to who is responsible for the various monitoring programs, leaving it unclear as to what roles the ministry and the forest industry hold. In contrast to the proposed use of five recovery implementation groups as recommended in the recovery strategy, a single Provincial Woodland Caribou Technical Committee will be created to support implementation of the conservation plan.

Adopt a Range Management Approach

MNR will use a "range management approach" in which discrete areas will serve as the ecological context for planning and management decisions (see Figure 1). These areas will be used "for evaluating habitat conditions and identifying caribou habitat, assessing population trends, and assessing and addressing cumulative impacts." The conservation plan identifies 12 preliminary population ranges, although existing boundaries may later be refined. MNR will identify local population ranges for the Far North by 2012, as well as a management strategy for discontinuous range by an unspecified date. These discrete ranges will be used by MNR to establish range-specific population objectives. The conservation plan acknowledges that the success of range-specific management will require that management decisions "stay within known thresholds of range-level disturbance (human and natural)."

Improve Planning

The conservation plan does not provide any hard commitments or timelines to permanently set aside and protect the habitat of the forest-dwelling population of woodland caribou. Instead, the conservation plan

focuses on actively managing habitat by mitigating the impacts of development on a case-specific and range-specific basis.

A central purpose of the conservation plan, as envisaged by the *ESA*, should be to address the area of habitat that the Minister of Natural Resources intends to regulate, in order to protect it from damage or destruction. However, the conservation plan deflects this issue, noting that a regulation is being planned "to provide a sufficient amount and arrangement" of habitat. This lack of direction is extremely problematic.

The conservation plan makes many vague allusions about what MNR's actual actions might be for woodland caribou. For example, the conservation plan states that a "landscape approach to habitat conservation" will be used in a forthcoming habitat regulation. It also states that habitat will be provided for and renewed during the forest management planning process by requiring a new "dynamic caribou habitat schedule." It can only be guessed whether these statements are references to the Forest Management Guide for Boreal Landscapes, which MNR targeted for release in 2007, but now will not release until 2012.

The conservation plan refers to the Premier's commitment to protect at least 225,000 km^2 of the Far North. This commitment is dependent on the Ontario legislature passing and proclaiming Bill 191 (*Far North Act, 2010*) into law. If passed, this legislation should have an enormous impact on woodland caribou. It will likely have both benefits for this species at risk by creating some manner of new protected areas, but it will also set the stage for increased commercial forestry and other industrial operations in this part of Ontario. However, the conservation plan contains little discussion of how these new protected areas, as committed to by the Premier, would align with woodland caribou conservation given the large spatial requirements of the species.

The conservation plan assumes development will proceed in woodland caribou ranges, although special conditions may be applied on a case-by-case basis. First, this approach is reliant on MNR, and presumably other relevant ministries, developing a broad array of policies. Second, it also requires MNR to first obtain baseline data, such as population and habitat status, for each of the 12 preliminary ranges, and then assess acceptable levels of disturbance. Third, this approach would require effective interim actions that would address threats and safeguard habitat until baseline data is obtained and policies are finalized, which the conservation plan lacks. Therefore, given MNR's checkered history in developing policies for woodland caribou or monitoring their status, it is disconcerting that so many key details have been off-loaded to the future.

Crown land use planning is referred to in the conservation plan in extremely vague and non-committal terms. The conservation plan states that "caribou habitat values" in the areas of continuous distribution will be "considered" in all land use decisions. It also states that "caribou values" will be "considered" within the existing processes for the creation of new protected areas within the area currently licensed for commercial forestry. This weak language, coupled with a lack of definitions, leaves no choice except to guess about the possible land use planning implications for woodland caribou.

The concept of a "caribou insurance policy" is introduced in the conservation plan to guide forest management decisions. The conservation plan states that "deferrals" – areas not yet logged – will not be available for harvesting until these criteria are met:

- there must be sufficient amount and arrangement of currently suitable habitat and future habitat;
- based on silvicultural monitoring, logged areas must also be moving toward a suitable future habitat condition; and
- the local Woodland Caribou population must be viable, based on an assessment, at the local population range level, of caribou presence, population size and trends.

The conservation plan provides no explanation of key terms in this new policy direction, such as what constitutes a "sufficient amount" or what an "arrangement of currently suitable habitat" might be. While the conservation plan indicates that guidelines will be developed at a later date to clarify the

implementation of the "caribou insurance policy," this delay adds yet more confusion to the unanswered question of how commercial forestry under the *Crown Forest Sustainability Act* (*CFSA*) is compatible with the protection of woodland caribou habitat under the *ESA*.

Cumulative impact assessment, at both the population range level and the area of the proposed disturbance, will be the framework for "resource use and management planning decisions." In addition, integrated range analysis will be used for population monitoring, determining population objectives and status, assessing cumulative impacts and disturbance thresholds, and determining habitat status. Until "strategic policy direction is available," the conservation plan outlines one of three scenarios that would occur under this screening process for development and forestry approvals. These scenarios range from "green" (development proceeds) to "yellow" (development may require special approvals) to "red" (development may not be approved or it should geared towards improvements for caribou).

The conservation plan is ambiguous with regard to how cumulative impact assessment will be implemented and how planning decisions will be made. First, it does not provide any examples of the types of activities that this assessment would apply to. Logically, to be of any value, such assessment would apply to all activities that potentially generate disturbance(s) such as mineral staking and development, road and rail-line construction, hydro corridors and other infrastructure. Despite the fact that range recession has occurred in Ontario as a result of the northward push of industrial development, the conservation plan assumes that development can be made compatible through mechanisms such as "special conditions" in the approvals process. This process seemingly makes it very difficult to reach a "no" and deny a development proposal that would negatively affect woodland caribou and their habitat.

Second, it is unclear how this assessment will actually be applied by the various ministries of the Ontario government. Given that the conservation plan contains the actions that the Ontario government – not just MNR – will take, it must be assumed that amendments to the various approvals processes of other ministries will occur in order for this cumulative impact assessment to have any practical or legal effect. Moreover, the conservation plan is unclear how this decision-making framework will be applied when no approvals processes exist *per se*, such as mineral staking under the *Mining Act*.

Another element the conservation plan attempts to address is roads and other linear disturbances, which presumably includes features such as hydro power lines and rail-lines. Although the conservation plan does not specify by whom and when, it states that a policy will be developed to manage densities of linear disturbances. While the density of linear disturbances is an important consideration, it is important to note that their distribution or pattern is equally important. Even when taking this overall approach of mitigating development, rather than eliminating key threats, the conservation plan does not appear to acknowledge that the proximity to threats is a key variable. For example, the overall density of roads within a given caribou range is moot if a single linear corridor transects the middle of occupied habitat or an important ecological feature such as a calving ground. Research suggests that buffers from human disturbances should be more than an order of magnitude higher than what is directed by past MNR policy, as woodland caribou require at least 13 km of intact forest separating them from activities such as logging.

Enhance Caribou Habitat

This section of the conservation plan focuses on woodland caribou habitat in areas that already are licensed for commercial forestry. Similar to other sections of the conservation plan, it largely focuses on mitigating the impacts of forestry as the means to "enhance" habitat. The conservation plan states that silviculture, scheduling of harvesting and deferrals, and modelling will be used in forest management planning. Additionally, a requirement for caribou habitat provision objectives and a dynamic caribou habitat schedule will be included in forest management plans.

Forest management plans will include "minimum and maximum limits for the amount and distribution of habitat" to provide for "an adequate supply of habitat." The very concept of "maximum limits" for woodland caribou habitat is inconsistent with the stated goal of the conservation plan, as well as the basic intent of the *ESA*. Instead of treating it as a species at risk of extirpation whose habitat should be

protected, this approach treats woodland caribou as an ordinary forestry "value" that has to be planned around during the forest management planning process.

The conservation plan refers to the unreleased Forest Management Guide for Boreal Landscapes, but provides little information as to its exact application. While it may be reasonable to refer to policy that has yet to be developed, MNR has a long history of referring to documents that do not yet exist to allay public concerns of what actions it is taking to conserve woodland caribou. The conservation plan separately refers to the development of "new technical guidance for caribou habitat renewal in forest management guides." Again, it is unclear exactly what the conservation plan is referring to, be it the aforementioned forest management guide or something completely different.

This section also refers to developing a roads policy, at an unspecified time in the future, that will "include clear direction and standards for the decommissioning and removal of resource access roads in caribou range where necessary and feasible." This type of policy, if developed and implemented in a timely manner, would be a positive step forward.

The conservation plan states that it will "look for opportunities" through forest management planning and other land use planning to improve connectivity in discontinuous woodland caribou range. While this statement is laudable, there is no further information to explain how or when this action would be achieved.

Manage the Wildlife Community

The northward range expansion of moose and deer, caused in part by MNR's own forest management guidelines, has a variety of negative effects on woodland caribou. These effects include the transmission of a parasite that causes mortality in caribou, as well as the alteration of predator-prey dynamics. The conservation plan states that white-tailed deer hunting seasons are "being expanded across northern Ontario to help slow deer range expansion" within woodland caribou range. It also states that MNR will "assess the relationship between moose and caribou numbers" to develop objectives for maximum moose numbers in areas of continuous woodland caribou range. The conservation plan provides no additional detail on how or when these actions will be undertaken. In our 2006/2007 Annual Report, the ECO commented on this very issue, stating, "MNR should aim to achieve pre-anthropogenic disturbance population levels of moose when setting quotas within occupied woodland caribou range and where re-colonization of woodland caribou is feasible."

The conservation plan also opens the door to the culling of grey wolf populations and other predators. It states, "Ontario will assess the feasibility and effectiveness of directly and indirectly influencing predator densities in very specific situations, and develop criteria and guidelines for managing the prey-predator balance as required." Such an approach would be ecologically indefensible and the historical mismanagement of woodland caribou cannot be remedied in the future by killing off grey wolves.

Focus on Geographic Priority Areas

The conservation plan states that the immediate priority is to focus on population ranges along the southern edge of continuous woodland caribou distribution (which is also the northern edge of the area of undertaking for commercial forestry). It states that pilot projects will include range delineation, assessment of population health and landscape disturbance, and inventorying areas requiring road decommissioning. Potential recovery actions will include improving landscape connectivity, which presumably involves changes to existing forest management plans, as well as the possibility of transferring or relocating individual animals.

Improve Outreach and Stewardship

A series of best management practice guides will be published to increase awareness of woodland caribou ecology, as well as "to help mitigate some of the impacts of resource development." The conservation plan states that topics will include habitat management in forest management planning,

managing cumulative impacts among different resource sectors, mining, renewable energy, road and access planning, tourism, screening and decision support tools for resource users, and habitat considerations in the area of discontinuous distribution. The conservation plan does not specify whether they will be posted on the Environmental Registry for the purposes of public notification and comment.

The conservation plan states that the Ontario government "intends" to develop a state of the resource report on woodland caribou by 2014. It states that this report will include an assessment of population and habitat conditions, what has been learned about the re-occupancy (or lack thereof) of logged habitat, and a discussion of progress by that time.

The discussion of outreach and stewardship reflects the confused nature of the conservation plan. It states, "Ontario will ensure ongoing communication with other ministries to better consider and incorporate caribou conservation needs in other resource development initiatives within the geographic distribution of caribou." This language implies that only MNR has direct responsibilities to protect and recover this species at risk. In contrast, the *ESA* states that this conservation plan is required to summarize the actions that "the Government of Ontario intends to take in response to the recovery strategy and the Government's priorities with respect to taking those actions." Instead, the specific role of other relevant ministries – such as the Ministry of Northern Development, Mines and Forestry (MNDMF), the Ministry of the Environment (MOE), and the Ministry of Energy and Infrastructure (MEI) – is vague at the very best. The conservation plan should have clearly outlined the responsibilities of all applicable ministries of the Ontario government.

Integrate Aboriginal Traditional Knowledge

A very brief section is included in the conservation plan, stating the Ontario government will work with Aboriginal peoples. It states that Aboriginal traditional knowledge will be incorporated where available and that the Ontario government will work to identify partnership opportunities for research and recovery actions.

Public Participation & *EBR* Process

MNR posted a policy proposal notice on the Environmental Registry on August 21, 2008 for a 32-day comment period. It was then re-published September 22, 2008 to extend the comment period by four more days. The ministry provided a discussion paper, entitled Keeping Caribou in Ontario, including a questionnaire, at this stage. MNR did not explain in this notice that it was obligated to complete a government response and have it finalized by April 2009.

MNR later re-posted the policy proposal notice on April 27, 2009 for a 30-day comment period. At this stage, the ministry provided a draft of the caribou conservation plan for public comment. In this notice, MNR did explain in legal jargon that it was obligated to complete a government response, but it did not mention that the ministry was required to have already finalized it.

The ministry received 1,869 public comments during the first stage of its consultation and 340 at the second stage. Additionally, MNR considered 149 comments that it received during eight workshops that it conducted in the fall of 2008 and the spring of 2009. A wide range of opinions were expressed in the comments, reflected in the selected comments below.

AbitibiBowater, a forestry company, commented that it strongly supports the conservation and recovery of woodland caribou. However, it raised concerns over the lack of key details in the conservation plan, including the protracted nature of how many aspects will be implemented. For example, AbitibiBowater raised multiple concerns with the conservation plan's caribou insurance policy, such as the lack of accurate baseline data available for decision-making in the near-term as well as the failure to define key terms such as "sufficient" and "suitable" habitat. It stated that such omissions, coupled with the impact of factors affecting woodland caribou for which they are responsible, will make the development of forest management plans very challenging. As a result, AbitibiBowater commented that "if the caribou 'insurance plan' is implemented over a protracted period, forest management practices within a

management unit could be subjected to legal challenges under the Endangered Species Act, particularly if population range assessments and habitat assessment have not been completed."

Earthroots, a non-profit organization, commented that the conservation plan "does not constitute a plan at all" as it lacks adequate measures for protection and recovery of this species at risk. Its central concern was the conservation plan's focus on forest management planning. Earthroots stated that the conservation plan "provides misleading information and assumes the reoccupation of industrially disturbed landscapes by woodland caribou will occur despite the lack of peer-reviewed scientific evidence to support such an assumption." It commented that it was necessary for the conservation plan to articulate which areas are off-limits to industrial development.

Domtar, a forestry company, focused its comments on the caribou insurance policy, the delineation of woodland caribou ranges, and the decommissioning of roads within caribou range. It supported the intent of the caribou insurance policy, but stated that it should not exclusively focus on forestry, but, rather, include all forms of development that affect woodland caribou. Domtar also indicated that other activities that threaten woodland caribou should be included such as mining, hydroelectric development, and recreational developments.

Save Ontario's Species, a coalition of several non-profit organizations, provided many detailed comments in support of woodland caribou conservation. It stressed that the conservation plan must reflect the most up-to-date science, reflecting the work of the "Scientific Review for the identification of Critical Habitat for Woodland Caribou, Boreal Population in Canada" report that was commissioned by Environment Canada. The coalition also noted that logging and road building in intact woodland caribou habitat must be immediately halted as an interim measure to prevent further degradation, pending an assessment of whether woodland caribou can withstand additional disturbances. Additionally, Save Ontario's Species also stated that a habitat regulation for the species should encompass "all currently occupied woodland caribou range, plus historical range where restoration is biologically feasible." It was also concerned that the conservation plan was vague and contained *status quo* principles, thereby not meeting the basic intent of protection for this species under the *ESA*.

The Nishnawbe Aski Nation (NAN), which represents 49 First Nations communities, commented that the Ontario government had not conducted meaningful consultation with First Nations communities. It stated, "the NAN Chiefs-in-Assembly will not recognize the application of the Woodland Caribou Conservation Plan and Recovery Strategy in the NAN territory until a constitutionally correct consultation and accommodation has been finalized, and all concerns identified by First Nations had been addressed." NAN also stated, "It is also truly unfortunate that First Nation traditional ecological knowledge will not play an integral role in the management of this species and that consideration will only be given where available. Given that this knowledge will not play a pivotal role, the adaptive management framework for which decisions will be made on the conservation and management of caribou, will be viewed as flawed by First Nations."

The Ontario Federation of Anglers and Hunters provided an extensive comment on the conservation plan, calling on MNR "to move beyond vague strategic caribou planning." It stated, "years after Ontario began 'initiating' its caribou conservation strategy, it is disappointing that it can not yet identify individual herds/populations, including estimates of relative population sizes, trends, and identify the relative importance of mortality factors affecting each herd. Collecting this basic wildlife management data and making it available to the public, is a fundamental first step toward identifying Ontario's caribou protection and recovery priorities." The Ontario Federation of Anglers and Hunters voiced many other concerns, including that "predation and Aboriginal caribou harvests are significantly limiting caribou populations and these factors must be actively minimized."

The Wildlands League, a non-profit organization, submitted a detailed comment on the conservation plan that raised many concerns. It stated that the conservation plan failed to meet the requirements of the *ESA* such as by not addressing how habitat will actually be protected. The Wildlands League stated that the conservation plan does not represent sound planning and "more closely resembles an inconclusive brainstorming on the subject." It also commented that "stakeholders repeatedly hear of a science and

'our science' (MNR's) distinction from MNR staff suggests a dangerous pattern of ignoring the underlining tenants associated with science: that it is transparent, credible, replicable, and available for peer review. The fact that it is the 'MNR science' that has been consistently relied upon to date without meeting such criteria, and in the face of a substantive body of contrasting science that meets these tests is problematic." The Wildlands League recommended that logging and other development be immediately halted as an interim measure until it can credibly be defended that such pressures are unlikely to exceed understood thresholds of disturbance for woodland caribou.

The Ontario Forest Industries Association commented that it supported some elements of the conservation plan, but that it had many significant concerns including "the omission of any strong commitment to consider social and economic values." For example, it was concerned with "the priority status" that the government had given to this species at risk. The Ontario Forest Industries Association also was concerned with the continued delays in the release of a draft habitat regulation, thereby making it difficult to comment on the conservation plan. It also stated the conservation plan "needs to explicitly provide for compensation to forest companies" for any associated costs related to management decisions for woodland caribou.

Ontario Power Generation (OPG), a regulated Crown corporation, commented that it supports the intention of the *ESA*. It stated, "conservation plans, and the resulting habitat regulations, need to take into account demand for primary forest sector products and, increasingly, renewable forest-based fuels such as wood-pellets." OPG also stated that protected areas and other measures that "embed long-term deferral of development will have a significant negative impact" on their interests. Ontario Power Generation stated that existing and future hydroelectric generation facilities, as well as related access roads and transmission corridors, should "be treated as excluded areas from the prescribed habitat."

SEV

MNR states that it considered its Statement of Environmental Values (SEV) in finalizing the conservation plan. The ministry stated that "the government intends to consider and balance social, economic and environmental concerns in ensuring the long-term survival of Caribou populations in Ontario. In doing so, the government is aiming to ensure that human activities can continue and that they [are] conducted in ways that allow caribou to continue to exist on the landscape. The [Caribou Conservation Plan] recognizes that self-sustaining caribou populations in a healthy boreal forest will be a positive indicator of successful caribou conservation."

ECO Comment

The Ontario government has struggled for decades with how to deal with woodland caribou. It has avoided making the tough policy choices that would provide a basis for coherent actions and practical steps to protect and recover this threatened species and its habitat. Released in 2009, Ontario's Woodland Caribou Conservation Plan is meant to articulate what actions the Ontario government as a whole will take to at least safeguard this species at risk and, ideally, to strive to de-list the population once it is no longer in a state of jeopardy.

Ontario's Woodland Caribou Conservation Plan focuses almost exclusively on mitigating rather than eliminating threats to this species at risk. It provides little reassurance that woodland caribou will not be extirpated from Ontario by the end of the 21st century. It fails to take a precautionary approach, all but ignoring why the forest-dwelling population of woodland caribou became at-risk. Ignoring history is the antithesis of caution.

MNR touts this conservation plan as "science-based." The central pervading assumptions of the conservation plan are that development can be tweaked to mitigate disturbances and, at some point in the future, woodland caribou will re-occupy habitat that has been negatively affected by development. In effect, this approach is the very *status quo* that has caused the northward range recession of woodland caribou.

The conservation plan's emphasis on testing whether woodland caribou will re-occupy logged habitat is of great concern. While the science panel did generally support research that would test this hypothesis, it cautioned that "resource extraction should never be justified under the guise of research." Testing this hypothesis in the parts of the area of the undertaking (AOU) that have already been logged is starkly different from how MNR should approach the management of intact forest. If commercial forestry is to be approved north of the current cut-line, as envisioned by Bill 191 (*Far North Act, 2010*), MNR's approach contains an inordinate amount of risk and gambles with woodland caribou habitat. This risk is underscored by the approximate 20-year time lag between forest harvesting and range recession.

It is inexcusable that MNR has failed to develop and implement a monitoring program to-date for woodland caribou. Without such monitoring, it is impossible to detect failure and whether a program is achieving its objectives. In this case, failure is the continued loss of woodland caribou and their habitat. The ECO first called for a monitoring program in our 2001/2002 Annual Report, calling MNR's approach to forestry a "grand experiment" and that properly understanding the "impacts of forestry operations on the boreal population of woodland caribou is dependent on effective monitoring." In our 2006/2007 Annual Report, the ECO noted that MNR's provincial wildlife monitoring program failed to include woodland caribou as a species to be actively monitored despite the well-accepted fact that it is an indicator species of forest sustainability.

Little or no direction is provided in the conservation plan about if, when or how woodland caribou habitat will actually be set-aside and protected. The Ontario government had committed to passing a species-specific habitat regulation under the *ESA* for the forest-dwelling population of woodland caribou by June 2009. This commitment was not fulfilled. Indeed, the conservation plan appears to place little value or urgency on permanently protecting habitat for this threatened species. Given the conservation plan's overriding assumption that development can proceed under most conditions, the forthcoming habitat regulation will likely be of limited conservation value for protecting woodland caribou habitat.

The conservation plan also does not contain any interim measures to protect woodland caribou and their habitat until population assessments, range assessments and disturbance thresholds have been completed. Given the large areas that this species requires to survive, it is disappointing that the conservation plan contained little discussion about how the Premier's commitment to protect to at least 225,000 km^2 of the Far North would align with woodland caribou conservation.

The conservation plan causes arguably even greater uncertainty for all concerned stakeholders and, more importantly, for the survival of woodland caribou. It frequently uses ambiguous and vague language, without any supporting explanation of key terms. Moreover, the conservation plan off-loads many key policy decisions to the future, making it more like a faith-based approach rather than a "science-based" approach. As a result, stakeholders can only hope that key details will be worked out. It also reduces many important concepts to the level of jargon, such as the precautionary principle and ecosystem-based management.

The conservation plan fails to adequately describe who is responsible for what actions. It gives the strong impression that ministries outside of MNR have little or no concrete responsibilities. For example, the conservation plan's use of cumulative impact assessment as a decision-making tool does not specify who will do the assessment, how it would be conducted transparently, which ministries it applies to, or how existing approvals processes would be amended to reflect this new direction. It is also silent about how such a decision-making framework will be applied when no approvals processes exist *per se* such as with mineral staking under the *Mining Act.* Therefore, the assumption must be that it will not apply.

The conservation plan states that its success – the protection and recovery of woodland caribou – will require "a long-term commitment to an adaptive management approach." However, it also states that "not all recovery actions will be funded and implemented simultaneously." While it is reasonable to initially focus on high priority actions, such as addressing local population ranges along the southern edge of continuous distribution, it is critical that the Ontario government provide the necessary resources to support all aspects of protecting and recovering this species at risk in the long-term. The science panel cautioned that "monitoring is extremely vulnerable to cuts in funding and the exigencies of new

government priorities. Arbitrary changes in support can seriously impair, or ruin, the stream of management information."

Many aspects of the conservation plan lack timelines. This problem is compounded by the historical failure of MNR to meet many self-imposed timelines related to actions for woodland caribou. Although reference is made to the finalization of an "implementation plan" by April 2010, which might fill in some details that are lacking in the conservation plan, as of August 2010, no such plan had been posted on the Environmental Registry. The repeated pattern of putting off key decisions to future dates is not reassuring.

It is troubling that the Minister of Natural Resources failed to complete Ontario's Woodland Caribou Conservation Plan in the required time. Although the finalized caribou conservation plan was required by law to have been released by April 2009, it was not released until October 2009. Given that this was the first species to go through the recovery planning process since the *ESA* was proclaimed, it is a troubling precedent for the recovery planning of other species at risk that the law was breached in this manner.

Review of Posted Decision:

4.17 A Framework for Enhanced Black Bear Management in Ontario

Decision Information:

Registry Number: 010-4825
Proposal Posted: October 14, 2008
Decision Posted: June 26, 2009
Comment Period: 45 days
Number of Comments: 22
Decision Implemented: June 26, 2009

Description

Overview

In June 2009, the Ministry of Natural Resources (MNR) finalized its Framework for Enhanced Black Bear Management in Ontario ("Framework") with a goal to "ensure sustainable black bear populations across the landscape and the ecosystems on which they rely for the continuous provision of ecological, cultural, and optimal economic and social benefits for the people of Ontario." According to MNR, the new Framework will consolidate and refine current black bear management in the province, as well as provide guidance to future decision-making. The document includes a set of guiding principles, challenges and objectives for black bear management and research.

The Framework proposes the following specific objectives:

1) Maintain sustainable black bear populations on the landscape.
2) Provide the quality and quantity of black bear habitat necessary to sustain bear populations on the landscape.
3) Provide an effective policy and legislative framework that provides for ecologically-based sustainable management of Ontario's black bears.
4) Provide socio-economic benefits through the allocation of the black bear resource amongst user groups.
5) Enhance public awareness and understanding of black bear management and biology in Ontario.
6) Reduce human-bear conflicts through prevention, education and awareness, reporting and response.

Each objective is associated with key strategies and action items ("tactics") to implement the Framework.

Background

There are between 400,000 and 750,000 black bears (*Ursus americanus*) in North America, and MNR estimates 75,000 to 100,000 live in Ontario. Black bears are valuable to Ontarians, not only intrinsically, as an icon of our wilderness heritage, a symbol in aboriginal cultural traditions, and as a recreational and economic resource, but also as an important component of Ontario's ecosystems. Black bears can be considered a keystone and indicator species, predators of juvenile deer and moose, and potentially important competitors for other species.

Black bears have one of the lowest rates of reproduction of any land mammal in North America. Female bears have a very late age of reproductive maturity, having their first litter when they are five to seven years old. Black bears also have low fecundity, with only 2-3 cubs per litter, and reproduce once every two years at maximum. As a result, the consequences of mismanagement are high: once a bear population is overharvested, it may take a decade or more to recover. As noted previously by the Auditor General of Ontario, harvests of black bears in some areas of Ontario may be occurring at unsustainable levels.

Black bears have large home ranges. In Ontario, the range size of adult females average 15 to 25 km^2, while male ranges can be up to 10 times this size. Black bears also migrate long distances outside of their regular ranges for seasonal foods, such as to sucker spawning runs in the spring, and blueberry patches in the summer. Due to their wide ranging habitat needs, black bears are often limited by human development. In some regions, black bear habitats have been fragmented and degraded by roads and construction. Black bears are susceptible to being injured or killed by vehicles, as they often forage on sides of roads and train tracks, and may need to cross highways within their home ranges.

Climate change will have an effect on black bear populations. The northern limits of black bear distribution will likely move northward due to warmer climates. Because species with restricted habitat ranges will have the most problems dealing with climate change, black bear populations with fragmented habitats may be most affected. Another concern is that warmer temperatures could cause early emergence of producers or prey, or of bears from hibernation – potentially causing a "mismatch" in the availability of food for bears. As well, climate change will alter precipitation patterns, decreasing food availability due to berry crop failures.

History of Black Bear Management in Ontario:
Until 1961, Ontario maintained a year-round open season on black bear hunting. Any hunter with a permit could take bears, with no limitation on number of bears per hunter. From 1942 to 1961, on average 842 bears were killed each year by resident hunters. With the introduction of Ontario's *Game and Fish Act*, a hunting season was established for black bears from September 1 to June 30. This hunting season was divided into a spring and fall hunt in 1973. In 1980, the government separated hunting licences for black bears from those for deer, moose and wolves, and a year later based hunting seasons on Wildlife Management Units (WMUs), with extended hunting seasons in southern units. WMUs are geographic areas used by MNR in designing hunting regulations for most recreationally hunted species in the province.

During the 1980s, interest in black bear hunting in Ontario increased, as reflected in the growing number of licence sales by resident and non-resident hunters. A portion of this increase was due to the closure or limiting of hunting seasons in the United States. In 1987, MNR implemented the first black bear management policy in Ontario in order to provide "direction for a sound management program" in the face of increasing harvest, tourism and revenue, coupled with the knowledge of the low productivity of black bear populations. In 1989, MNR established a Bear Management Area (BMA) system in order to manage the harvest of bears by non-residents on Crown land. BMAs, which are assigned through annual licensing fees, are areas where bear hunting operators have exclusive use for their clients to hunt bears. In 1996, bear licences were limited to one tag per year.

In 1997, the *Fish and Wildlife Conservation Act, 1997* was passed, replacing the *Game and Fish Act* and establishing a central goal to "provide a better basis for protection and management of a broader range of

wildlife species in Ontario." MNR cancelled the spring bear hunt in 1999 due to concerns regarding the potential orphaning of cubs as they emerge from hibernation. This controversial decision led to the submission of over 35,000 public comments via the Environmental Registry, the highest number received on a decision in the Registry's history (see ECO's 1999/2000 Annual Report for a review). Although the fall season was expanded to provide additional hunting opportunities, the elimination of the spring bear hunt reduced the number of non-resident hunters, which in turn diminished the overall revenue from the black bear hunt.

An increasing number of complaints about nuisance bears after the cancellation of the spring hunt led MNR to establish an independent Nuisance Bear Review Committee in 2002 to examine the issue of human-bear conflicts, and to solicit and review public comments. In 2003, the Nuisance Bear Review Committee released a report, outlining major suggestions for MNR's black bear management regime in order to reduce nuisance bear activity. Suggestions included requiring additional parameters in mandatory reporting, further research on nuisance bear activity, and for MNR to take the lead in nuisance bear management. The committee found, contrary to popular belief, that "there was no evidence that prior to 1999, the spring harvest reduced nuisance activity by black bears." In response to the committee's report, MNR established its Bear Wise program in 2004. This program identifies four pillars – 'education, prevention, reporting and response,' as the most effective means of reducing human-bear conflict. The Bear Wise program comprises a variety of different tools, including a website, education programs and a 24-hour toll free phone line for reporting problem bears. The program is currently under review by MNR. Since 2004, in WMUs "with no sustainability concerns," hunters have been able to purchase a second tag to hunt black bears.

In October 2008, MNR posted a policy proposal on the Environmental Registry for "A Framework for Enhanced Black Bear Management in Ontario", with a 45-day comment period. The final Framework and decision notice were posted June 26, 2009.

Implications of the Decision

The objectives and key strategies of the updated Framework are based on three major ideas: increasing knowledge of population and habitat status; "enhancing" harvesting opportunities and socio-economic benefits; and reducing human-bear conflicts. Some key similarities and differences between the previous black bear management policy and the new Framework are outlined below.

Population Identification and Monitoring

The Framework provides guidelines for MNR's approach to improved population monitoring, including strategies related to data collection from harvest and non-harvest bear mortality as well as harvest-independent, landscape-based monitoring.

Harvest Mortality:
Reporting black bear kills has been mandatory for resident hunters in Ontario since 2004 and for non-resident hunters since 1987. The new framework does not introduce any new initiatives for collection of information from harvest mortality.

In the 2003 report, the Nuisance Bear Review Committee suggested several new parameters for hunter collection. This included mandatory reporting of sex and location of kill, for all hunted bears. Although sex and WMU location of the harvested bear are currently required within the mandatory resident hunter survey, MNR has noted that response rates are low. In 2008, only 64 per cent of resident hunters returned the mandatory survey. This information is also required in surveys for non-resident hunters, who had a 99 per cent response rate in 2008.

Another suggestion from the committee was the mandatory collection of premolars from all bears harvested, which would allow the determination of the age structure of the population. Currently, hunters only provide premolars on a voluntary basis. MNR had a 44 per cent return rate of molars from hunters in 2008. However, the return rates vary significantly between WMUs. Expanded collection of sex and age

data would provide information on both the harvest sensitivities and current pressures on populations. These recommendations have not been explicitly incorporated into the new Framework, although MNR will "evaluate the need for additional harvest data such as additional age (tooth) data from harvested bears."

Although the Framework suggests that new data management systems will be developed for hunter data, this objective had already been outlined in the previous policy. It is unclear in the Framework how the population information collected through harvest will be applied to adaptive management. MNR has noted that these parameters are currently used in computing regional population objectives.

Non-Harvest Mortality and Monitoring:
While harvest mortality data can be useful, it is often skewed to animals targeted for hunting, which are generally larger trophy bears, and does not account for all bear mortality in the province, such as natural mortality rates. It is therefore important for any harvest management plan to take into account harvest-independent data.

Requirements for non-hunting mortality data have not been changed in the new Framework. Although reporting is required for bear mortalities on private land (e.g., in defence of property), reporting rates are low and an unknown number of additional bear kills go unreported every year. The Framework tactics related to this issue are to "enhance reporting and documentation/assessment of non-hunting black bear mortality from a variety of sources," and "raise public awareness of the need to report bears killed in protection of property." However, the Framework fails to outline specific actions or further reporting requirements. Currently, as has been required since 1998, only the kill, date and location need to be reported for bears killed in defence of property. Age, sex and other data parameters need not be reported.

A Black Bear Population Index Network has collected data annually since the late 1980s, and made permanent by MNR across the province in 1997. This index calculates the incidence of black bears that "hit" baited stations, giving an approximation of how many bears may be present in a given region. However, this population estimate must be used with caution, as it does not account for multiple bears hitting the same station, or behavioural effects. An updated and more precise method of black bear population monitoring was initiated in 2004, after a recommendation for population monitoring improvements by the Nuisance Bear Review Committee. This method, of capture-recapture DNA fingerprinting of bear fur, provides a much clearer understanding of the true abundance level of the species within each WMU. Both programs are still in place, although dedicated annual funding for the DNA fingerprinting program has not been secured. It is unclear whether the Framework tactic to "establish and maintain a network of population monitoring stations across black bear range to monitor population trends" will be in addition to the existing monitoring efforts, or characterizes those in place.

Habitat Management

In the previous management policy, black bear habitat was not monitored or defined; rather, it was to be "maintained through deer/moose habitat management rather than specific black bear habitat guidelines." In contrast, the updated Framework dedicates one of its six objectives specifically for the management and assessment of black bear habitat.

The habitat management strategy contains an explicit requirement to "ensure an adequate supply of black bear habitat" and outlines tactics that will continue research already being conducted, provide input to forest management, and determine impacts of climate change on black bear habitat. The habitat assessment strategy, to "develop habitat assessment approaches to aid in assessing ecological capability for black bears," has associated tactics to "assess the need to expand" research, including black bear food surveys and habitat suitability modelling.

A recent study has shown Ontario's current provincial land classification and forestry resource inventory maps do not provide enough detail to guide habitat management for black bears. Additional on-the-

ground field research will be necessary to ensure that the specific food and habitat needs of black bears will be met.

Harvest and Socio-Economics

Black bear hunting is central to the management approach presented in this Framework. MNR states, "a commitment has been made to develop an enhanced bear harvest management program. The goal is to ensure the sustainability of black bear populations and the continuation and/or enhancement of bear hunting opportunities and associated economic benefits."

While the previous policy explicitly stated the target harvest guidelines as five to eight per cent of the total population, the new framework does not identify any guidelines or maximum yield. Furthermore, there is no explicit mention of a re-evaluation of the current "sustainable" harvest density guideline of 10 per cent for the province, as noted in MNR's accompanying backgrounder document on black bears.

In the past, population estimates for Ontario's black bears have been extrapolated from a single long-term study (1969-1983) from the North Bay region of the Great Lakes-St. Lawrence ecozone, and harvest guidelines (i.e., 5 – 8 per cent of the estimated 75,000 to 100,000 bears) have been based on this approximation. However, this extrapolation was unlikely to be representative for all of Ontario, and was especially unlikely for the Boreal ecozone. Studies conducted throughout the 1990s by MNR scientists provide long-term population information for black bears in the Boreal forest. The Framework's strategy to "develop and implement provincial guidance on appropriate black bear harvest strategies in relation to landscape productivity" may be an avenue for incorporating new and existing population and landscape information into harvest guidelines. However, it is unclear what form this "provincial guidance" will take.

The modelling of population impacts of hunting, as outlined in the Framework, could be a useful tool for MNR to determine the impacts of different hunting regimes. However, it will be important that these modelling exercises take into account all known population data and parameters, not only those based on harvest data, as well as ecological knowledge on a population scale.

While the Nuisance Bear Review Committee Report (2003) suggested keeping black bear management guidelines at the WMU level, there are several alternative levels discussed in this Framework. These include BMAs, and "landscape-level" or "ecological zones," yet boundaries for these areas were not described nor were maps included. As a result, the framework is unclear on how "appropriate scales" for management will be determined.

Addressing Human/Bear Conflict

The Framework indicates that MNR intends to "reduce human-bear conflicts through prevention, education and awareness, reporting and response," through the existing Bear Wise program as well as outfitter-led public awareness programs.

Climate Change Adaptation

The Framework notes climate change as a potential challenge for black bear management in Ontario. Within the strategies, tactics aim to "determine the effects of climate change" on black bear populations and habitat and, to mitigate and adapt to effects of climate change on black bear habitat. However, the methods for achieving these results are not stated.

Climate change is also mentioned within the Education section, to "raise awareness and understanding regarding the impacts of climate change on bear populations and habitat."

Public Participation & *EBR* Process

On October 14, 2008, MNR posted a proposal notice for the Framework on the Environmental Registry. During a 45-day comment period, MNR received 22 comments on the proposed Framework.

Many individual commenters felt the Framework inadequately addresses their concerns regarding human-bear conflicts and suggested a variety of solutions. Some felt the best way to provide better management of nuisance bears was to reinstate the spring bear hunt. In response, MNR noted that "specific program changes (e.g., season changes) [were outside] the scope of this policy proposal." Some commenters from northern Ontario felt that the Bear Wise program should be improved, an issue being addressed through the Bear Wise program review and also outside the scope of the Framework. In sum, many of the individual commenters expressed some confusion as to what the new Framework was meant to accomplish, and disappointment due to the lack of "teeth" it provided for management.

The Ontario Federation of Agriculture (OFA) supported much of MNR's proposal. However, it voiced concern that the link between natural food shortages and increased crop and livestock predation by bears was not made clear in either the Framework or the accompanying background information. The OFA also pointed out limitations in the programs providing compensation to farmers experiencing crop, livestock or beehive damage due to black bears. OFA also acknowledged the underreporting of bear mortality due to protection of private property, attributing this to a lack of concern by MNR District offices: "If calls related to bear damage to crops and/or livestock were treated with the importance they deserve, then farmers would be more likely to report non-hunting bear mortality related to the protection of one's property."

The Ontario Federation of Anglers and Hunters (OFAH) generally supported the Framework, but had several suggested changes based on its belief that "human-bear conflicts can be largely prevented, especially in low wild-food years, by managing bear populations, through hunting, to levels below natural 'average year' carrying capacity." OFAH called for "optimized" economic return through increased hunting opportunities, and a future consideration for MNR to reopen the spring bear hunt. OFAH advocated for the continued use of WMUs and BMAs as the scale for landscape-level population objectives rather than deriving new ecological zones. OFAH also wanted to ensure its organization and members would be considered in stakeholder consultation.

OFAH made specific suggestions regarding the content and wording of the Framework's guiding principles and challenges, many of which were incorporated verbatim into MNR's final Framework. For example, in MNR's draft Framework, the first guiding principle read: "black bears have an intrinsic value within the natural ecosystem, and for the people of Ontario." The final version, however, with wording changes exactly as suggested by OFAH reads: "black bears have an intrinsic value within the natural ecosystem and*, through sustainable use, positive socio-economic values* for the people of Ontario." Moreover, one of the Framework's guiding principles was changed from "black bear populations will be affected by climate change" to OFAH's suggestion, "black bear populations *may* be affected by climate change."

SEV

MNR stated that it had considered its Statement of Environmental Values (SEV) and its "commitment to biodiversity and sustainable use of natural resources to generate environmental, health and economic benefits" in making this decision.

MNR also asserted that "the precautionary principle is considered in determining appropriate bear harvest levels in the consideration of the uncertain and incomplete knowledge of natural systems." The ECO notes, however, that it is unclear how the precautionary principle is being taken into account in the Framework as it is not explicitly referred to in any discussion of harvest guidelines.

Other Information

In MNR's draft Forest Management Guide for Conserving Biodiversity at the Stand and Site Scales (2008), "one or more of caribou, white-tailed deer, moose, marten, and pileated woodpecker" are considered as ecological indicators of forest health. Black bears are not included in this list. However, as black bears might be considered an "umbrella" species, their habitat requirements could be valuable in capturing those of other species. As noted in MNR's backgrounder on black bears, "A landscape that can

support the habitat of one of the largest terrestrial carnivores can support a variety of other plant and animal species." In the draft Stand and Site guide, forestry activities are prohibited within a 100-metre radius buffer around the dens of hibernating black bears.

ECO Comment

The ECO is pleased that MNR undertook a review of black bear management in the province. Ecologically-based population monitoring, independent of harvest data, should be central to any wildlife management framework. As the ECO noted in our 2007/2008 Annual Report, regarding MNR's approach to mammalian predator management, "concerted attempts should be made to acquire the best possible ecological knowledge to inform decision-making." Data collection and research are critical components of understanding black bear populations and their long-term ecological sustainability in Ontario.

The ECO is concerned, however, that rather than reflecting a "more enlightened ecological approach" to black bear management, this Framework explicitly outlines that MNR has made the commitment to continue and enhance recreational bear hunting opportunities. The ECO notes that in this document, "sustainability" is a term only used in relation to the continued harvest of the species.

While the previous black bear policy explicitly established harvest guidelines of five to eight per cent of the total population, the new Framework is vague on harvesting goals. Harvesting guidelines have not been re-evaluated within the Framework, and only "ongoing monitoring" and "evaluating" are action items to determine whether harvest needs to be changed. MNR states in the black bear backgrounder that "the provincial sustainable harvest rate is 10% of the population." It is unclear, however, how this rate was determined and what the scientific basis is for this statement. If "ecologically-based" harvesting targets will be used, as outlined in the Framework, ecological zones must first be defined or determined. MNR has indicated that "ecological zones" have been identified that group WMUs together based on ecological similarities, and assist in determining population objectives for the region. However, as of June 2010, these ecological zones have not been made publically available.

The ECO commends MNR for explicitly including habitat monitoring and maintenance as a guideline, as was suggested in the ECO's 2007/2008 Annual Report. This guideline puts maintaining habitat in its proper place as a critical part of managing a species for its long-term survival, as habitat loss is the leading cause of endangerment of Ontario species. However, the ECO is concerned that the strategies and tactics associated within this guideline do not improve upon the *status quo*, and are too vague to be action-oriented, as are others in this Framework. Strategies and tactics that "assess the need for further long-term research," "evaluate the need for additional harvest data," and "consider need for research and monitoring initiatives" do not amount to a clear action agenda for the ministry. Research needs and gaps have been long identified, by the ECO, MNR's own Nuisance Bear Review Committee, the Auditor General of Ontario and other reports. The ECO believes that MNR's strategies and tactics should be action-oriented – to develop and implement research or monitoring programs – rather than worded in the vague language that does not require any action to be taken at all.

No timelines for completion or review processes are in place to outline the timing and effectiveness of this framework. As suggested by the Nuisance Bear Review Committee, a five-year review of the Framework could provide a guidepost for implementation, as well as an opportunity for public comment and adaptive management to improve the program's efficacy.

The ECO is troubled by the fact that MNR altered the Framework's guiding principles to those defined by Ontario's hunting lobby. A critical conceptual change between draft and final versions of the Framework was to remove the proposed reference to the intrinsic value of black bears to the people of Ontario. The first guiding principle now suggests that black bears do not have an intrinsic value to Ontarians, but only "socio-economic" value resulting from their "use" as a resource. This does not reflect the spirit of the *Environmental Bill of Rights, 1993,* which states "the people of Ontario recognize the inherent value of the natural environment."

More than two decades after the first black bear policy was introduced, MNR's management goals are largely unchanged. Although the ECO notes some technological improvements by MNR in population monitoring and modelling for black bears, the ECO is unsure how the Framework itself will improve on-the-ground management from previous methods. Without understanding how the Framework's vague strategies and tactics will be implemented, it is unclear how effective or "enhanced" management will be. As noted in the final section of the Framework, implementation will require discussions and consultation. The ECO suggests these discussions should be balanced, focused on the ecological sustainability of the species, and open to public comment and review.

Review of Posted Decision:

4.18 Forest Management Guide for Conserving Biodiversity at the Stand and Site Scales

Decision Information:

Registry Number: 010-5218
Proposal Posted: November 27, 2008
Decision Posted: March 18, 2010
Comment Period: 60 days
Number of Comments: 25
Decision Implemented: April 1, 2011

Description

Background

Ontario's forests play an important role in the world's forest ecosystems. At more than 700,000 km^2, Ontario's forested land is approximately the size of Germany, Italy, Switzerland and the Netherlands combined. Ontario is also home to about 17 per cent of Canada's boreal forest, and 2.5 per cent of the global boreal forest. Many of the province's 30,000 known species live within forested areas and every year millions of the world's migratory birds use Ontario's forests.

Approximately 80 per cent of the province's forests are Crown lands managed by the provincial government. Over 35 per cent of this area is known as the area of the undertaking (AOU), the region of Ontario where commercial timber harvesting actively occurs. The Ministry of Natural Resources (MNR) and the Ministry of Northern Development, Mines and Forestry (MNDMF) share responsibility for forest management in the province. MNR is responsible for sustainable forest management and biodiversity-related issues, while MNDMF's responsibilities are limited to the business and economic aspects of forestry. Forestry in Ontario is regulated through the *Crown Forest Sustainability Act, 1994* (*CFSA*) and MNR's Class Environmental Assessment Approval for Forest Management in Crown Lands in Ontario (Declaration Order MNR-71) under the *Environmental Assessment Act.*

Forestry operations occur in 45 designated management units across the AOU. Before a management unit is harvested in Ontario, a forest management plan (FMP) must be developed and approved by MNR. FMPs are required to include descriptions of the management unit, long-term management direction, planned operations and monitoring programs, as well as a determination of forest sustainability. Plan development is guided by four regulated MNR manuals: the Forest Management Planning Manual; the Forest Information Manual; the Forest Operations and Silivultural Manual; and the Scaling Manual.

By the late 1990s, MNR had developed a collection of over 30 forestry management guides, which provided additional direction on dealing with finer scale, specific issues – ranging from provision of habitat to particular species, to codes of practice for operations in riparian zones. Many of these issues needed to be addressed at the stand or site scale, rather than the management unit or landscape scale. MNR defines forest stands as "an aggregation of trees occupying a specific area and uniform enough in composition (species), age and arrangement to be distinguishable from an adjacent aggregation of trees," while sites are smaller, specific locales – for example, osprey nesting sites.

In 1999, the ministry initiated a review of the province's forestry guides. MNR decided to consolidate all 36 forestry management guides down to five guides:

1) Silviculture Guide (five primary and two supporting documents; 1997 to 2005)
2) Resource-Based Tourism Guide (2001)
3) Cultural Heritage Values Guide (2006)
4) Landscape Guide (Great Lakes-St. Lawrence Forest [2010] and the Boreal Forest [2012])
5) Forest Management Guide for Conserving Biodiversity at the Stand and Site Scales

The ministry began developing the guides for the landscape, stand and site scales in 2002.

On March 18, 2010, MNR approved its final Forest Management Guide for Conserving Biodiversity at the Stand and Site Scales (the "Stand and Site Guide" or "guide"). MNR designed this guide for use in concert with regulated manuals and other forestry guides, to "collectively direct sustainable forest management practices."

The Forest Management Guide for Conserving Biodiversity at the Stand and Site Scales

The purpose of the Stand and Site Guide is to provide direction on planning and conducting forest operations at the stand and site level (i.e., tens of square metres to hundreds of square kilometres) so that "forest biodiversity will be conserved and Ontario's forests will remain healthy and sustainable." The guide replaces 22 of the 36 previous forestry guides, with the intention of providing more efficient forestry guidance. MNR notes that the guide "reflects the most recent scientific understanding of managing forest ecosystems, thereby ensuring the conservation of forest biodiversity in the province."

Major issues addressed through direction in the guide include:

- stand composition, pattern and structure to allow for a variety of wildlife habitats;
- ecological function of aquatic systems and shoreline riparian zones;
- forestry activities in the ranges of particular forest species, such as moose, deer, and birds; and
- forestry activities in habitats of species at risk.

The Stand and Site Guide also includes direction for soil and water conservation, salvage and biofibre harvest, and road and water crossing construction.

The Stand and Site Guide provides three levels of operational direction to forest managers and forest management planning teams: standards, guidelines and best management practices. Standards and guidelines provide mandatory direction but the latter require professional expertise or local interpretation to implement. Best management practices are not mandatory, but are provided as an illustration of a particular action a manager may wish to take.

Forest management planning teams are required to follow the policies set out in the Stand and Site Guide when preparing 10-year FMPs or contingency plans that come into effect on or after April 1, 2011, and in planning operations for second five-year terms. For plans that come into effect before April 1, 2011, MNR staff can choose to follow direction in the guide at their discretion.

Coarse and Fine Filters:
The 2010 Stand and Site Guide considers forestry operations at conceptual "coarse filter" and "fine filter" scales. In applying the coarse filter, direction in the guide attempts to emulate natural disturbances, such as forest fires, and natural landscape patterns. The fine filter provides guidance for particular species or values that may not be captured by the coarse filter, due to particular e

MNR asserts this approach will create a "

At the fine filter level, the Stand and Site Guide provides direction for "features" and "values." MNR defines features as "geographic locations and descriptions of topographic, cultural, and cadastral entities of Ontario's landbase" and can include natural or human-made structures or boundaries. The ministry identifies features and provides maps annually to forest management planning teams. A value includes "features, benefits, or conditions of the forest that are linked to a geographic area, that are of interest from various points of view, and that must be considered in forest management planning." Although forest workers or even members of the public can identify values, MNR must verify them in accordance with the ministry's Forest Information Manual before they are subject to direction under the Stand and Site Guide.

Taking into account coarse and fine filters, MNR further categorizes "conditions on regular operations," which are larger-scale restrictions such as annual timing conditions or site-specific prescriptions for an Area of Concern (AOC). If AOCs overlap, the most restrictive direction applies to the site unless otherwise directed by MNR.

Direction at the Coarse Scale:
MNR intends the coarse-scale direction in the Stand and Site Guide to guide commercial timber harvesting to emulate forests after natural disturbances, in terms of forest composition, pattern, and structure.

Residual Forest:
Residual forest is retained during forestry operations to provide wildlife habitat. MNR's conceptual definition for residual forest is "a forested patch that generally functions more as habitat for wildlife that inhabit older forest than as habitat for wildlife that inhabit younger forest." In the Stand and Site Guide, residual forest must be a "free-to-grow," productive Crown forest stand, with a minimum size of 0.1 hectare that is either over 35 years old or over 10 metres high, and comprises a 50 per cent canopy closure. The sub-stand pattern is ideally uniformly spaced, and normally has a species composition similar to that in the stand before harvest.

Wildlife Trees:
MNR defines wildlife trees as "trees retained during forest operations with the intent to provide structure and features beneficial to wildlife in general, and for specific species, groups or communities." These trees can include standing healthy, dead or dying trees, and generally can only include those that are windfirm, over three metres (m) in height and 10 centimetres diameter at breast height. Stubs are "live trees that have been cut (and killed) well above the normal stump height" and are retained to emulate properties of trees killed in wildfires.

Specific wildlife trees or stubs may be set aside for a particular purpose. For example, cavity trees provide habitat for bird and other animal species; mast trees produce crops of acorns or other edible fruits providing food for wildlife and diversity trees are those that are rare within a particular forest type. MNR notes, "a single wildlife tree with more than one special attribute can be counted and used to achieve multiple standards and guidelines."

The Stand and Site Guide provides direction for wildlife tree retention through conditions on regular operations. For example: in a clearcut system and in shelterwood removal cuts, an average of 25 wildlife trees per hectare are required by the standard, while in preparatory and regeneration cuts for a selection system, an average of 10 living cavity trees are required per hectare.

Direction at the Fine Scale – Management of Site-Specific Habitats

Aquatic Areas and Shoreline Harvest:
MNR previously provided direction for cutting in shoreline areas in two documents that were replaced by the 2010 Stand and Site Guide. The Code of Practice for Timber Management Operations in Riparian Areas (1991, 1998) required a three-metre undisturbed vegetative buffer around shorelines. Timber Management Guidelines for the Protection of Fish Habitat (1988) contained several restrictions to

shoreline cuts affecting different aspects of fish habitat, including prohibition of clearcuts in areas around cold lakes containing sensitive species (Table 1).

Table 1: A Comparison of some Aspects of Shoreline Direction in the 2010 Stand and Site Guide and Similar Provisions in Previous Guides

Feature	Allowable Shoreline Cutting	
	Old Direction	**New Direction**
Lakes	Yes, for lakes ≥ 10 hectares	Yes, for lakes ≥ 8 hectares
Ponds	Maybe	Yes, for ponds ≥0.5 and <8 hectares)
Permanent streams	Yes	Yes
Intermittent streams	Maybe	Yes
Rivers	Yes, but no explicit direction	Yes, explicit direction
Provincially significant wetlands (PSW)	No	Yes
Riparian buffer zone	3 m	15 m
Clearcutting: lakes	• Up to 50% on cool/warm water lakes • Prohibited on cold water lakes • Patches/strips	• Up to 50% small lakes • Low slopes only • Continuous
Clearcutting: permanent streams	• Up to 50% on cool/warm water streams • Prohibited on cold water streams • Patches/strips	• Not within first 15 metres (if dense forest occurs) • Low slopes only • Only on one side

As required by the Stand and Site Guide, AOCs for shorelines are measured "from the edge of vegetation communities capable of providing an effective barrier to the movement of sediment" and range from 30 to 90 metres in radius, depending on the steepness of the slope (i.e., larger AOCs in areas with steep slopes, to prevent erosion and deposition of sediment into the water). The guide permits harvest in shoreline AOCs, with restrictions outlined in standards. For example, harvest must retain residual forest: ≥50 per cent for small lakes and high- or medium-sensitivity ponds; ≥75 per cent for medium lakes, ≥90 per cent for large lakes; and on at least one side of rivers to provide a travel corridor. Around streams, harvesting must retain dense forest occurring 15 metres of the inner AOC; however, if wetlands or brush line the stream and no dense forest occurs, no forest need be retained. The guide prohibits clearcutting in shoreline AOCs with steep slopes; it is allowable only in those with slopes less than 30 per cent.

Guidelines encourage perpetuation of the "distinctive character" of the shoreline forest, preferentially retaining shoreline forest associated with recharge areas on brook trout lakes and streams, and maintaining forest connectivity. Best management practices note "prescribed burns should be considered as an option for renewing shoreline forest."

The Stand and Site Guide defines AOCs for Provincially Significant Wetlands (PSWs). Harvesting is allowable in a PSW when an Environmental Impact Study is undertaken and demonstrates that operations will not result in the loss of features or ecological functions that make the wetland significant. Harvest, renewal and tending operations are permitted in the 120-metre radius AOC around a PSW if

they retain residual forest and "will not result in direct damage to vegetation within the PSW or deposition of sediment within the PSW." For other non-designated wetlands, forestry activities continue under "conditions on regular operations."

Species At Risk:
Although harming threatened and endangered species is prohibited in Ontario, the level of habitat protection currently provided for species on the Species at Risk in Ontario (SARO) list under the *Endangered Species Act, 2007* (*ESA*) is variable. The Stand and Site Guide provides direction on specific considerations for many of the 59 species at risk within the AOU, although protection given again varies from species to species. For the habitats of some species, standards outline restrictions for forestry operations, generally with a buffer zone around a site. Habitats are defined as areas currently occupied or used by a species or those historically occupied or used. In some cases, there are timing restrictions throughout the year when forestry activities would be limited.

The guide does not provide direction for protecting the habitat of species that already have regulated habitat under the *ESA,* such as the peregrine falcon and wood turtle. Instead, the guide simply references the *ESA* habitat regulation and encourages planning teams to consult with MNR for up-to-date information. The ministry also notes, "direction in this guide should be considered as preliminary and will be superseded by any future direction provided by the MNR with respect to measures or actions that may be required in order to comply with the *ESA*."

Other Species:
The Stand and Site Guide provides specific guidance for protecting the habitat of 27 bird species. Although nests and eggs of most birds are protected from disturbance and/or destruction by either the federal *Migratory Birds Convention Act, 1994* or the provincial *Fish and Wildlife Conservation Act, 1997* the Stand and Site Guide provides additional protections for some species. Compared to previous direction, the buffers are larger for some species and smaller for others, while others are unchanged (Table 2).

Conditions on operations and prescriptions for AOCs do not apply to individual "habituated birds" that have built nests in highly developed or disturbed situations. For these birds, planning teams may develop unique nest-specific AOC prescriptions.

Table 2: Areas of concern for some bird species in the Stand and Site Guide

Species	Old Direction	New Direction (Standards/Guidelines)
Great blue heron (*Ardea herodias)*	1000 m	300 m
Osprey (*Pandion haliaetus)*	800 m	300 m
Bald eagle (*Haliaeetus leucocephalus)*	800 m	400 m
Cooper's hawk (*Accipiter cooperii)*	300 m	100 m
Red-shouldered hawk (*Buteo lineatus)*	300 m	400 m
Great gray owl (*Strix nebulosa)*	300 m	400 m
American kestrel (*Falco sparverius)*	0 m	25 m
Songbirds (various species)	0 m	0 m

Note: Direction listed is for active or primary nests/colonies.

The Stand and Site Guide provides AOC prescriptions and conditions on regular operations around dens of some terrestrial "furbearing" mammals. These include black bears (*Ursus americanus*), grey foxes (*Urocyon cinereoargenteus*), cougars (*Puma concolor*), grey wolves (*Canis lupus*) and wolverines (*Gulo gulo*).

Provisions are also included for other species and habitats, such as:

- Moose (*Alces alces*) aquatic feeding areas and mineral licks;
- Groundwater recharge areas associated with brook trout (*Salvelinus fontinalis*) spawning sites;
- Beaver (*Castor canadensis*) habitat; and
- Hibernacula of the eight bat species present in the AOU.

Biofibre Harvest

The Stand and Site Guide includes limits on non-harvest biomass removal, noting that organic matter that is not part of a harvested tree must be left on site, and that "stumps and all below ground portions of a tree are not available for utilization as a forest product."

Effectiveness Monitoring

MNR's Class Environmental Assessment Approval for Forest Management in Crown Lands in Ontario (Declaration Order MNR-71) requires the ministry to maintain a research program to assess the effectiveness of all forestry guides. Additionally, each guide is required to contain a description of "an approach that shall be undertaken to monitor the effectiveness of the guide."

The final Stand and Site Guide contains only a brief overview of the types of effectiveness monitoring and methods that may be undertaken and defers detailed discussion to another draft MNR document, Effectiveness Monitoring of Forest Management Guidelines: Strategic Direction. In this draft document, the ministry states that its effectiveness monitoring program is based on "the principle of hypothesis-based monitoring," with the underlying hypothesis that direction in the new guides is more effective than old direction, or no direction at all, when compared to biodiversity conservation in reference forests.

In the Stand and Site guide, MNR identifies ten key uncertainties, such as the sufficiency of residual forest in providing wildlife habitat, as priorities for the effectiveness monitoring program. Three uncertainties, all of which relate to harvest in shorelines or aquatic areas, are given low priority for monitoring because of current and ongoing research on this topic. The guide does not provide timelines for research and monitoring.

Implications of the Decision

Sufficiency of Residual Forest for Habitat is Unclear

The definition of residual forest is one of the most important components of the Stand and Site Guide, as it provides direction for wildlife habitat throughout the guide. Requirements for residual forest are similar to those in the previous policy – the 2001 Forest Management Guide for Natural Disturbance Pattern Emulation (NDPEG). MNR stated that direction in the NDPEG was based on amounts of residual forest observed after wildfires in Ontario.

2006 was 82 years old. MNR's background and rationale document for the Stand and Site Guide suggests that residual forest will approximate older forests in its ecological function. However, the ministry admitted, "the response of wildlife communities to this direction has not been rigorously tested" and has indicated this will be a research priority. Therefore, the implication of this direction is currently unclear.

Similar Quantity of Wildlife Trees

Wildlife trees retained after forestry operations are intended to provide "structure and features beneficial to wildlife in general." While previous policy focused on the value of stubs to emulate a natural disturbance, the new guide is more explicit in recognizing the value of different types of wildlife trees,

allowing protection of specific habitat and food sources. Nevertheless, the overall numbers of wildlife trees required for retention remain similar.

Increased Shoreline Cutting

Lakes, ponds and their adjacent forested shorelines provide important habitat to aquatic, semi-aquatic, and terrestrial species. The Stand and Site Guide outlines a conceptual shift in terms of shoreline cutting. In contrast to previous policy, direction in this guide not only permits, but also explicitly encourages, management in shoreline areas. The ministry's overarching rationale for the change in attitude to shoreline harvest – from restriction to encouragement – relates to perceived ecological benefits. MNR states that "the habitat requirements of the greatest number of shoreline-inhabiting species will be met when shoreline forest occurs in a variety of ages and patterns." The ministry also notes where scientific evidence was not available, that some components of shoreline AOC direction were "based largely on expert advice or inductive inference."

MNR provides examples of species that may benefit from this direction, including beavers and eastern kingbirds (*Tyrannus tyrannus*), but also notes that there may be negative consequences for other species, such as wood ducks (*Aix sponsa*) and moose. The ministry states that two-thirds of the species at risk within the AOU use aquatic and wetland habitats.

Previous research has shown that shoreline cutting can be detrimental to aquatic and riparian systems. Much of this is related to increased runoff: increased concentrations of nutrients and sediments flowing into the water body can decrease water quality and affect fish habitat and other aquatic biota. MNR has identified these issues as key uncertainties in Stand and Site Guide direction, but does not consider them of high importance for its effectiveness monitoring program. MNR states that research currently underway will address many of the uncertainties associated with shoreline cutting.

MNR will investigate how new direction emulates natural disturbances for some catchment-scale hydrological functions, such as increased release of methylmercury into water bodies.

Additional Habitat Protection for Some Species at Risk

Some endangered and threatened species that do not currently receive habitat protection under the *ESA* will receive some limited interim habitat protection from forestry activities through direction in the Stand and Site Guide. These include newly listed species and those that will not receive general habitat protection under the *ESA* until 2013. Stand and Site Guide prescriptions may be especially important to species such as plants, reptiles and invertebrates, which do not receive habitat protection under any other legislation. For some species, however, habitat protections afforded through the Stand and Site Guide may not be implemented by the time the *ESA*'s habitat protections come into effect.

For other species at risk in the AOU, the Stand and Site Guide provides little or no species-specific direction. For instance, for all 11 fish species at risk in the AOU, the guide does not provide species-specific direction – only general direction at a coarse scale, within considerations for aquatic and wetland areas.

Species listed as Special Concern on the SARO list do not receive any habitat protection under the *ESA*. For many of these species, direction in the Stand and Site guide will increase their overall habitat protection. For example, although the den sites of eastern wolves (*Canis lycaon*) are protected under the *FWCA,* the Stand and Site Guide provides additional protection for their rendezvous sites. It remains to be seen, however, whether future species of Special Concern will be included in updated versions of the guide.

Restrictions on Biofibre Harvest

The maintenance of a critical amount of non-harvest biomass on the forest floor after forestry operations is vital in preventing the depletion of soil nutrients. Although biofibre may be becoming a more desirable commodity as a renewable resource – for bioenergy, wood pellets and biochemicals – the excessive removal of woody material after timber harvest may have negative impacts on soil quality over the long term. The inclusion of scientifically determined limits on non-timber biomass removal in the Stand and Site Guide may be increasingly important as Ontario moves forward with encouraging the use of biofibre for fuel.

Lack of Detailed Effectiveness Monitoring

MNR will not be conducting full effectiveness monitoring for all aspects of direction in the guide. Instead, only key uncertainties will be subject to further research. Monitoring will compare Stand and Site Guide direction to controls in five areas – four in the boreal forest, and one in the Great Lakes-St. Lawrence forest. Although comparisons with controlled experimental regions is a science-based, logical approach, this method may not reveal the diversity or breadth of issues within Stand and Site Guide direction, especially as guidelines require professional interpretation.

Public Participation & *EBR* Process

MNR posted the draft Stand and Site Guide as a proposal notice for a 60-day public comment period on the Environmental Registry from November 27, 2008 to January 26, 2009. During this time, 25 comments were received. Some commenters felt that MNR did not provide sufficient time to allow a thorough review of the 150-page document (and its accompanying 30 pages of appendices and 429-page backgrounder), especially as this detailed policy proposal was posted over the holiday season.

Many commenters had concerns about the classification of specific directions as mandatory standards, discretionary guidelines or optional best management practices. Some commenters pointed out that the vague wording of some guidelines, combined with the leeway for professional discretion, resulted in weak directions that may have been better designated as standards.

The most controversial component of the draft 2008 Stand and Site Guide was the new guidance for cutting around shorelines. Many commenters disagreed with MNR's rationale for increasing shoreline cuts, a measure the ministry asserted would increase habitat availability for species such as beavers and those associated with beaver wetlands. Commenters felt the scientific basis for this direction was lacking. As one individual commented, "don't use the beaver as an excuse to log shorelines. There are no shortages of beaver." Some also felt the new shoreline direction was in conflict with the precautionary principle. The Wildlands League cited a variety of reasons that shoreline cutting, as proposed, would be problematic. They noted that scientific literature, other jurisdictions and MNR's own forestry guides identify significant risks associated with this practice, including the creation of unnatural forest composition around shorelines and the visibility of sloppy operations to the public. They also noted that increased shoreline cuts might exacerbate the problem of calcium depletion from lakes, a factor not taken into account by the ministry. Finally, they noted that to ensure shoreline cuts were carried out in a responsible manner, MNR would have to increase monitoring efforts, but did not have the capacity.

In contrast to these concerns, the Ontario Forest Industry Association (OFIA) made it clear that it would not support the guide without the swift adoption of the new shoreline harvesting guidance, stating: "In the past MNR has not been able to reflect new science in its management standards (e.g., opportunities around shoreline harvest) due to social and political concerns/opposition. However, the OFIA wishes to be clear that additional delays in incorporating new science into management practices … will not be supported. The formal adoption of these practices is fundamental to our overall support of this guide."

In response to public comments, the ministry maintained that "science and advice received from the guide's science advisors indicates that management in shoreline areas, if thoughtfully planned and carefully implemented, can be used to produce a more natural landscape pattern that provides habitat for a wider range of riparian wildlife (including beavers, a keystone species) with very little risk to aquatic ecosystems." MNR stated that some aspects of shoreline cutting direction were changed from draft to

final documents "to make the direction more precautionary and address concerns raised," noting that additional restrictions were included to limit the amount of shoreline harvested and preserve the nature of the retained forest.

Some commenters voiced concern about harvesting in wetlands. In the 2008 draft guide, harvest was allowable in a PSW if "assessment by MNR suggests that the proposed operations are necessary to avoid severe socio-economic hardship," a concept to which many commenters were opposed. In the decision notice, MNR noted that direction for wetlands "was revised [from draft to final versions of the Stand and Site Guide] to more appropriately address the intended role of socio-economic considerations in decisions about these wetlands." Although harvesting within PSWs is still allowable under some circumstances in the final guide, the reference to the avoidance of socio-economic hardship was removed.

The Ontario Federation of Anglers and Hunters (OFAH) voiced concern regarding how the draft 2008 Stand and Site Guide advises forest managers to control access by hunters, for example, through closing areas to moose hunting for 10 to 15 years after a clearcut. They noted, "it is inappropriate for forest management to dictate access restrictions or manipulations to attempt to manage wildlife populations through the forest management manuals" as MNR already does so through wildlife management programs; doing so would be "redundant and unnecessary." The OFAH also found that despite protections for species at risk, the habitats of species of recreational value were not protected: "for those species such as turkey, grouse or waterfowl, which are of great importance to Ontarians, the AOCs are virtually nonexistent."

SEV

MNR considered its Statement of Environmental Values (SEV) in developing the final Stand and Site Guide. The ministry noted that it based the guide on sound science from a comprehensive scientific review, and that extensive stakeholder consultation was undertaken. The ministry noted that during guide development, "when the science was limited or ambiguous, the precautionary principle was invoked and the prescribed direction was purposefully conservative." Moreover, MNR stated that "direction in the guide is considered an appropriate balance between exercising caution and wise use." MNR noted it will take an adaptive management approach with the goal to "speed the process of learning by treating policies as hypotheses and developing monitoring and research programs that directly test the effectiveness of the policies and guidelines." Finally, the ministry noted that since the Stand and Site Guide will be implemented through the forest management planning process, additional consideration and public consultation will be undertaken to address specific concerns as they arise.

Other Information

In December 2009, the Expert Panel on Climate Change Adaptation (the "Panel") released its recommendations to the Ontario government on how best to plan for climate change adaptation. The Panel noted that planning for climate change in forestry will be a challenge, and "the complexity and uncertainty of projecting the impacts of climate change are probably greater for forests in Ontario than for any other sector of the economy or ecosystem."

Beyond the immediate impacts on the forest industry and the Ontarians who depend on it, climate change will affect many nonhuman species within the area of the undertaking. Although future versions of the Landscape Guide may include measures for adaptation to climate, the Stand and Site Guide does not mention climate change at all. This is worrisome because the ranges of some species may be pushed northward due to climatic shifts. Forestry modelling, planning and practices, at all scales, will have to be re-examined for their utility through the lens of climate change to take Ontario's changing ecological communities into account.

The Panel made several specific recommendations to Ontario's forest industry. One of the Panel's recommendations was that MNR and MNDMF, in collaboration with stakeholders, review current forest policies to ensure they take climate change projections, trends and impacts into account. The Panel further

recommended that MNR and MNDMF develop models examining the cumulative impacts of multiple climate change stressors on forest ecosystems. The Panel also suggested MNR and MNDMF, in collaboration with forest industry and local communities, undertake comprehensive vulnerability assessments for Great Lakes - St. Lawrence, Carolinian, and boreal forest regions.

ECO Comment

The ECO is pleased that MNR has completed the Stand and Site Guide. MNR's goal of streamlining and increasing public accessibility of the document is commendable and the ECO acknowledges the difficult work of consolidating over twenty documents into one guide. There are many positive aspects of the guide. For example, the ECO is pleased that MNR has taken biofibre harvest into account in the final 2010 Stand and Site Guide, as was recommended in our 2008/2009 Annual Report. However, the process of developing and finalizing the Stand and Site Guide has been lengthy and exceeded target completion dates. The ECO urges MNR to adhere to timelines in the future, particularly its required review of approved forestry guides every five years.

The ECO is pleased that the Stand and Site Guide will provide more protection for some species of Special Concern and their habitats. However, it is unclear whether newly listed species of Special Concern will be included in updated versions of the Stand and Site Guides. There is no explicit requirement for the Stand and Site Guide to include any future species at risk, although direction for one newly listed species was added to the guide between draft and final versions. The ECO suggests that an explicit requirement in the guide to include future species at risk, especially those of Special Concern, may be a prudent and precautionary approach for MNR to take.

The new direction encouraging shoreline cutting was likely the most controversial aspect of the Stand and Site Guide, and some components were based on expert opinion. The ECO is therefore troubled that some key research questions related to shoreline cutting were given low priority for effectiveness monitoring by the ministry. Although the ministry's current research may address some of these issues, ongoing monitoring is essential in determining how these changes in shoreline cuts will influence aquatic and riparian communities over the long term.

In the guide, MNR admits no "rigorous" tests have shown that residual forest is sufficient for wildlife habitat – although much of the guide is predicated on the fact that residual forest will "conserve" biodiversity. even years spent preparing the Stand and Site Guide. Without research to show that residual forest provides for ecological integrity of biological communities, MNR's approach to forestry continues to be a "grand experiment" as the ECO noted in our 2001/2002 Annual Report.

MNR's approach to treat "policies as hypotheses" may be a rapid and economical way to proceed. However, if monitoring programs are not thorough, well-funded and completed in a timely manner, these "hypotheses" are not truly being tested, and are simply ill-informed policy directions. This is especially troubling for controversial directions, such as increased shoreline cutting and harvest around provincially significant wetlands. The ECO is concerned that there are no timelines for effectiveness monitoring, and is disappointed in the lack of information about monitoring provided in the Stand and Site Guide.

It is currently impossible to determine how effective this guide will be in conserving biodiversity during forestry practices. Before the implications of the Stand and Site Guide can be measured, it will need to be incorporated into future FMPs, which in turn will be used to guide forest management on the ground. As a result, large-scale, practical results and compliance with this policy will not be available for evaluation for several years, through monitoring FMPs and independent forest audits. In ecological time frames, real benefits afforded to biodiversity conservation as a result of this guide will take much longer to observe.

Review of Posted Decision:

4.19 Ontario's Protected Areas Planning Manual

Decision Information:

Registry Number: 010-5767
Proposal Posted: February 13, 2009
Decision Posted: August 27, 2009
Comment Period: 45 days
Number of Comments: 5
Decision Implemented: August 27, 2009

Description

In August 2009, the Ministry of Natural Resources (MNR) finalized its Protected Areas Planning Manual (the "manual"). The purpose of the manual, which is a requirement under the *Provincial Parks and Conservation Reserves Act, 2006* (*PPCRA*), is to outline how management direction for provincial parks and conservation reserves is to be developed. MNR states that the manual "establishes a provincially consistent, transparent and predictable approach to protected areas planning." This document replaces the Ontario Provincial Park Management Planning Manual (1994) and processes that were previously used for planning conservation reserves.

Background

Ontario's protected area system is comprised of 329 provincial parks and 294 conservation reserves. These protected areas range in size, characteristics, diversity and accessibility, and together they contribute to Ontario's economy, biodiversity, outdoor recreation and natural heritage appreciation opportunities. For example, this system includes protected areas ranging from the rugged wilderness of Lady Evelyn-Smoothwater Provincial Park to the recreational playground of Wasaga Beach Provincial Park. Ontario's parks host approximately 10 million visits each year and generate an economic impact of hundreds of millions of dollars each year. At the same time, protected areas are the cornerstone of habitat protection and biodiversity conservation.

The framework within which MNR plans and manages protected areas has several levels, which result in increasingly detailed and site-specific decisions. These levels include legislation (e.g., the *PPCRA*), strategic directions (e.g., Our Sustainable Future), MNR planning policies, protected area systems planning (e.g., Ontario's Living Legacy Land Use Strategy), land use planning (e.g., Crown Land Use Policy Atlas) and site-specific management directions.

At the level of the protected area, management directions can take two forms: 1) a brief management statement (formerly referred to as a statement of conservation interest) that addresses a limited number of non-complex issues; or 2) a detailed management plan that addresses substantial and complex issues. While 613 of Ontario's 623 protected areas are currently covered either by a management plan or statement, this does not necessarily mean that these management directions reflect up-to-date legislation and policies or involved adequate public involvement when they were developed; at the time that the ECO wrote our 2003/2004 Annual Report, only seven per cent of Ontario's protected areas had up-to-date plans that had been approved following public consultation. Of Ontario's 294 conservation reserves, fewer than 20 are covered by a management direction that involved public consultation through a posting on the Environmental Registry.

With the passage of the *PPCRA*, MNR is required to "prepare a management direction that applies to each provincial park and conservation reserve" by September 2012. The *PPCRA* notes, however, that a management direction may apply to one or more provincial parks, one or more conservation reserves or to a combination of provincial parks and conservation reserves. The Temagami Area Park Management Plan, for example, provides management direction for five provincial parks and eight conservation reserves in the Temagami area.

The *PPCRA* also requires MNR to annually examine management directions that have been in place for 10 years or more to determine whether they need to be amended or reviewed. To guide the preparation and amendment of management statements and plans, the *PPCRA* requires MNR to prepare a planning manual. MNR finalized the Protected Areas Planning Manual in August 2009.

The Protected Areas Planning Manual

The Protected Areas Planning Manual outlines each step to be followed by MNR staff in developing management statements and plans for protected areas, including:

- Scoping the project, developing the terms of reference and determining the type of management direction needed;
- Compiling and organizing background information;
- Developing and consulting the public, stakeholders and Aboriginal communities on management proposals and preliminary management direction;
- Reviewing input received from consultations, revising the preliminary management direction and obtaining approval for the revised direction;
- Implementing the management direction, applying the adaptive management approach, and applying the Class Environmental Assessment for Provincial Parks and Conservation Reserves (Class EA-PPCR) when considering projects in protected areas;
- Monitoring and evaluating both the implementation of the management direction and the effectiveness of its actions; and
- Examining, updating and amending the management direction.

MNR notes that in a limited number of cases, a secondary management plan may be prepared for complex topics where management direction policy is required or needs elaboration. A secondary plan, for example, could address the management of fire, wildlife, vegetation, fisheries, ecosystems, or other resources in a protected area. Secondary plans are to be treated as amendments to existing management directions.

The manual includes many figures and tables that direct MNR staff through the steps of this planning sequence and refer them to supplementary tools and guidelines, such as the Management Direction Template, the Aboriginal Involvement Guideline, the Five-year Protected Area Planning Schedule Guideline, the Protected Areas Zoning Guideline and the Monitoring Guideline, that may assist in planning. These tools and guidelines, which do not form part of the manual, are to provide technical details, checklists and templates that focus on how to implement the manual's requirements and minimum standards. Although the manual refers to an MNR website for the "most current list of planning tools and guidelines," as of July 2010, this website listed no such documents and, according to MNR, they were still being developed.

In the manual, MNR emphasizes the importance of early planning and scoping. This involves identifying planning requirements and products, filling information gaps, involving Aboriginal communities, and consulting with stakeholders and interested public. The manual stresses the importance of compiling background information as a key component of planning and identifies the types of background information to be considered in a planning process. These include natural heritage values, cultural heritage values, recreational and land use values, social and economic benefits, protected area pressures and protected area policies. Acknowledging the need to process and store large quantities of diverse information, the manual indicates that information will be stored and managed systematically within MNR's Protected Areas Planning Information Repository (PAPIR), which is a continually updated "living" archive for information on a protected area. The manual states that PAPIR will assist MNR planning teams in determining information gaps and identifying priorities.

The manual notes that despite identifying discrete steps, planning processes are often iterative and multiple steps may occur simultaneously. Moreover, certain aspects (e.g., the consideration of ecological

integrity, Aboriginal consultation, public and stakeholder involvement, internal reviews and approvals) may occur throughout the planning process.

The manual provides minimum requirements for involving stakeholders, Aboriginal communities and the public in the planning process. Such requirements include: reviewing ministry records of claims and consultations; inviting communities to participate; determining the interests, uses and overall values each community or stakeholder has in the planning area; giving Aboriginal communities, stakeholders and the public the opportunity to review planning documents; uploading documents to MNR's website; and posting proposal and decision notices on the Environmental Registry.

Echoing the requirements of the *PPCRA*, the manual indicates that each protected area planning process must provide the public at least one opportunity to consult during the development of a management statement and at least two opportunities to consult during the development of a management plan. For very complex management plans, the manual encourages a minimum of three involvement opportunities, a standard above and beyond that found in the *PPCRA*. The manual indicates that Environmental Registry comment periods will last for a minimum of 45 days. As the ECO noted in our 2003/2004 Annual Report, MNR does a commendable job of using the Environmental Registry to notify and consult the public on management plans for provincial parks, posting multiple notices with lengthy comment periods for each new plan. The manual indicates that additional details on appropriate involvement opportunities are to be found in MNR's unreleased Public and Stakeholder Involvement Guideline and Aboriginal Involvement Guideline.

The manual provides guidance not only for the development of management directions but also for implementing management direction once it is approved. This includes: communicating its status to affected parties and the public; using adaptive management (i.e., continually improving management policies and practices by learning from the outcomes of their application); and implementing projects through the Class EA-PPCR. (Project managers are required under the *Environmental Assessment Act* to confirm the completion of the Class EA-PPCR requirements before the implementation of a project in a provincial park or conservation reserve.) The manual also encourages monitoring both the implementation of the management direction and the effectiveness of its management actions. Information gained through monitoring, internal examinations or public input can be used to adjust the management direction to keep it current and relevant.

MNR states that to fulfil *PPCRA* requirements, beginning September 4, 2012, the ministry shall annually examine management direction documents that are over 10 years old and determine the need to amend or rewrite them. The manual provides guidance on updating, examining and amending management directions, and offers minimum requirements for public notification and consultation via the Environmental Registry. The manual states that existing management statements, particularly older statements of conservation interest or interim management statements for which prior consultation did not occur, should not be amended but instead replaced with a new management plan to address substantial or complex proposals.

Lastly, the manual includes direction on monitoring the implementation, maintenance and revision of the planning manual itself. To ensure a smooth transition between previous planning requirements and the new manual requirements, MNR directs that if a planning team had already issued a public notice for a planning project before the date this manual took effect (August 27, 2009), the planning team should apply the manual's requirements wherever practicable, but their application will not be required.

The Incorporation of Ecological Integrity in the Protected Areas Planning Manual:
The *PPCRA* directs that the "maintenance of ecological integrity shall be the first priority" in all aspects of the planning and management of Ontario's provincial parks and conservation reserves. The Act defines ecological integrity as "a condition in which biotic and abiotic components of ecosystems and the composition and abundance of native species and biological communities are characteristic of their natural regions and rates of change and ecosystem processes are unimpeded."

The manual also acknowledges ecological integrity as the first priority in the planning and management of protected areas and instructs that this principle be considered throughout the planning process. The manual encourages planning staff to consider ecological integrity when assessing the appropriateness of uses in protected areas and when preparing preliminary management directions. Moreover, the manual instructs MNR managers to monitor changes in condition to assess potential threats to ecological integrity, referring to an unpublished guideline for additional details. Finally, the manual indicates that the ministry's examination of 10-year old management directions will include the consideration of whether the management direction and policies continue to support the maintenance of ecological integrity.

Implications of the Decision

The planning manual will provide clear, step-by-step guidance to MNR staff as they go through the process of: preparing new management directions; examining, updating and amending existing directions; and implementing and monitoring approved directions. The manual will also be useful for Aboriginal communities, stakeholders and members of the public who have an interest in following and participating in protected areas planning. Straightforward instructions and supplementary tools, such as templates, checklists and forms, mean that protected areas planning will likely become more consistent and predictable. Moreover, minimum consultation requirements will likely ensure that management plans and statements are developed with the input of Aboriginal communities and the public at large.

Although the *PPCRA* directs that each protected area be covered by either a management statement or plan, there is no legislative requirement that ministry staff adhere to approved management directions. Likewise, because the planning manual is a policy with no real regulatory authority, there is no legal obligation that MNR staff follow its instructions when preparing management directions. Furthermore, because many of the technical details regarding the planning of management directions have been relegated to separate guidelines, the public may have no opportunity to exercise their right under the *Environmental Bill of Rights, 1993* (*EBR*) to comment on their content. The manual states that MNR will manage the supplementary tools and guidelines independently of the manual and they "may be changed, created or deleted at MNR's discretion without external involvement."

According to the manual, the evaluation and consultation processes of certain Class EA projects in protected areas may be coordinated with the development or amendment of management directions. While coordinating processes could reduce staff workload, lower process costs, and maximize consultation sessions, it could also increase the complexity of the consultation process for the public. The manual encourages using processes that will be clear and easy for the public to understand.

Public Participation & *EBR* Process

MNR posted the draft manual on the Environmental Registry in February 2009 for a 45-day comment period, during which the ministry received five comments. After reviewing the comments and revising the manual, MNR posted the approved manual in August 2009.

Commenters were generally supportive of the manual, noting that it makes commendable changes that build on past planning processes. Nevertheless, the few commenters that submitted concerns had several suggestions to improve the manual and the planning process it directs, including:

- Reversing the order of two sections of the manual to give ecological integrity more emphasis;
- Requiring that an independent evaluator be used to conduct the examinations of management directions;
- Adding a reference to MNR's intention to phase inappropriate activities out of protected areas (see Other Information);
- Requiring that all management directions outline the number of people, the required expertise and the required budget needed for effective implementation;
- Making all supplementary tools and guidelines available to the public;
- Adding a reference in the manual to the Aquatic Class of provincial parks; and

- Giving the public the opportunity to comment on the geographic area open for protection.

Other comments received were related to issues outside the scope of the planning manual. These included requests to amend the Class EA-PPCR to place more emphasis on the consideration of ecological integrity and a request to amend the *PPCRA* to require MNR staff and the public to follow management directions.

Ministry Consideration of Public Comments

MNR appears to have thoughtfully reviewed comments made by the public and reconsidered aspects of the proposed manual. Most notably, MNR revised the manual to remove references to "implementation plans," which in the draft manual involved grouping related projects together and subjecting them to the requirements of the Class EA-PPCR rather than the consultation requirements of the *EBR*. In its place, the approved manual now references "secondary plans," which, as described above, may be prepared to address complex topics. MNR insists that these secondary plans will be treated as amendments to management direction and subject to posting on the Environmental Registry. As the ECO noted in our 2008/2009 Annual Report, detailed protected area policies, whether they be called implementation plans, secondary plans, resource management plans or stewardship plans, are policies for the purposes of the *EBR* and must therefore be posted on the Environmental Registry for public comment. When the ministry seeks to implement a project described in these policies, the Class EA-PPCR applies such that both the policy and the project are respectively subject to the *EBR* and the *EAA* at different steps of the process.

MNR made several other changes to the manual based on received comments, including:

- Rewording of some paragraphs to make the intended guidance clearer;
- Clarifying that the Protected Areas Planning Information Repository is intended as a resource for MNR staff; and
- Correcting the history of Ontario's protected areas system to indicate that Niagara Falls Park (not Algonquin Park) was the first publically owned park in the province.

SEV

MNR considered its Statement of Environmental Values (SEV) in developing and approving the manual, stating that the manual "focuses on protected areas planning towards balancing the sustainable use of the natural resources with the protection and enhancement of natural ecosystems." In its SEV consideration document, MNR clearly and thoroughly responded to how the manual applies the SEV's principles, including: the exercise of caution in the face of uncertainty; the valuation of natural resources; environmental protection; the fostering of applied research; the use of adaptive management; and the prevention of negative environmental impacts before undertaking new activities.

Other Information

In 1989, MNR established a policy to phase out private tenure (e.g., recreation camps and agriculture) and commercial harvesting (trapping, bait harvesting and commercial fishing) activities in some provincial parks by December 31, 2009. In November 2009, MNR posted a policy proposal on the Environmental Registry (#010-8203) seeking input on proposed changes to this phase out policy. The policy proposed to grant non-transferrable lifetime extensions for those private tenure and commercial harvesting permits/licences that "would have expired at the end of 2009 under the current policy." The proposal notice stated that "until this policy review is complete and decisions are made, the affected activities will not be phased out as originally scheduled by December 31, 2009." The language in this proposal notice indicates that MNR unilaterally cancelled the December 2009 phase-out date without public consultation. As of July 2010, no decision notice had yet been posted on the Environmental Registry.

The Class EA-PPCR, which was approved on September 23, 2004, requires MNR to review the document every five years and place the review in the public record within 180 days of the 5-year

anniversary of the Class EA's approval. MNR was therefore required to have reviewed the Class EA-PPCR and released the review to the public by March 22, 2010. As of July 2010, no notices had been posted on the Environmental Registry indicating that this review is underway.

ECO Comment

The ECO is pleased with the clear and detailed guidance that MNR's Protected Areas Planning Manual provides. The figures, tables and references to supplementary tools should provide an easy-to-follow path for MNR staff when preparing management directions. Moreover, the detailed steps allow the public to follow the planning process and be aware of opportunities to participate. The ECO applauds MNR for unambiguously recognizing the priority of ecological integrity in protected areas planning and incorporating this consideration throughout the manual's planning steps. In particular, the ECO appreciates the manual's instructions to identify monitoring methods and indicators to measure the effectiveness of management directions in maintaining ecological integrity. Effective monitoring should be able to guide the future management of each protected area and provide the information needed to inform MNR's State of the Protected Areas Report.

Nevertheless, the ECO strongly disagrees with MNR's decision to put important details regarding protected areas planning in separate guidelines that seemingly will be unavailable for public comment. Several of these guidelines will likely be environmentally significant, including guidelines that direct: how to determine planning and management priorities in the context of ecological integrity; how to consult with public and Aboriginal communities; and how to monitor the effectiveness of management directions. Given their likely environmental significance, MNR is required under the *EBR* to post the proposed guidelines on the Environmental Registry for public comment. Once completed, the ECO urges MNR to comply with the *EBR* and post the draft guidelines on the Registry.

The previous Ontario Provincial Parks Management Planning Manual contained detailed policy directions for provincial parks. This manual is now replaced, however, with the new Protected Areas Planning Manual, which provides only general planning guidance and relegates detailed direction to undrafted guidelines. As a result, until the supplementary guidelines are developed, MNR's protected areas planning seemingly lacks specific guidance on important details, such as how to consider the appropriateness of activities in protected areas. As the ECO wrote in our 2006/2007 Annual Report, while camping, fishing and other "non-industrial uses" have long been associated with protected areas, the type, intensity and/or timing of certain activities may be incompatible with ecological integrity. What may be an appropriate activity in one protected area may not be suitable in another.

To ensure that activities in protected areas do not jeopardize ecological integrity, planning staff need a policy that clearly articulates the ministry's position on the appropriateness of specific activities (e.g., dog sledding, cottages, camping, and fishing) in protected areas. In addition, MNR needs a guideline that serves as a screening process to assess the compatibility of unforeseen activities (e.g., geocaching, the filming of movies and television shows) with the maintenance of a protected area's ecological integrity. MNR's unpublished Protected Areas Zoning Guideline and Protected Areas Compatibility Test may address these planning concerns. The ECO encourages MNR to prepare such policies as promptly as possible to fill the current gap in planning direction.

The ECO reiterates the observation made in our 2006/2007 Annual Report that protected areas must be managed on a greater ecosystem basis to fulfil their mandate of protecting Ontario's biodiversity. With this in mind, management directions for protected areas should consider ways to identify and address threats that originate from outside their borders. Likewise the planning manual should instruct that this consideration be included in management plans and statements. Moreover, the province needs to take a landscape-level approach to Crown land management that gives priority to protected areas and defuses any competing interests between ministries with the common goal of protecting biodiversity.

Given that MNR's SEV includes a commitment to encourage energy and resource conservation in the ministry's operations, the ECO is disappointed that the planning manual does not instruct MNR staff to consider ways to incorporate greening opportunities into protected area management statements and

plans. The ECO believes such considerations should have been included in the planning manual itself to ensure their incorporation into effective and comprehensive management directions.

In summary, now that ecological integrity is the first priority for protected areas planning, the ECO believes this concept should be explicitly identified in the management directions of provincial parks and conservation reserves. Accordingly, the planning manual that guides the development of these directions should instruct how this priority is to be incorporated into and implemented through management statements and plans. Indicators of ecological integrity should be expressly identified in management directions and used with measurable objectives to form the basis of each protected area's ecological monitoring program. Furthermore, management directions should include a consideration of how visitor use and external threats stress the protected area's ecological integrity and how such stresses are to be mitigated or eliminated.

The ECO has expressed frustration before that there is no requirement in the *PPCRA* that MNR adhere to policies and plans created under the Act. Because policies under the *PPCRA* have no regulatory weight, no matter how sound the guidance in the planning manual or how protective a management plan, there is nothing requiring MNR staff to follow them. As a result, the value of this planning manual and the management directions that develop from it are undermined by their lack of authoritative power. Site-specific land use controversies can put great pressure on MNR staff to compromise ecological integrity. To give management directions the authority they need to ensure environmental protection, the ECO recommends that MNR amend the *PPCRA* to make management direction for protected areas binding on the Crown.

While the *PPCRA* and the planning manual clearly prioritize the consideration of ecological integrity, the Class EA process for projects in protected areas, which predates the *PPCRA*, does not. Rather, the Class EA-PPCR contains only a single reference to ecological integrity as it applies to one specific protected area. As the ECO has noted before, this inconsistency between the parks class EA and the *PPCRA* poses serious problems, which, unless fixed, will be exacerbated in the years to come. The ECO is disappointed that MNR is late in completing its required review of the Class EA-PPCR and hopes that the ministry's tardiness reflects a substantial overhaul of this document to prioritize the consideration of ecological integrity.

Review of Posted Decision:

4.20 Habitat Regulation for Nine Species at Risk in Ontario

Decision Information:

Registry Number: 010-6490
Proposal Posted: May 15, 2009
Decision Posted: November 24, 2009
Comment Period: 31 days
Number of Comments: 1,231
Decision Implemented: February 18, 2010

Description

Overview

Habitat loss and alteration is the leading threat to species at risk in Ontario. On February 18, 2010, nine of Ontario's species at risk became the first to receive new regulated protection of their habitat. This move was in partial fulfilment of the government's commitment to regulate the habitat of 10 identified species at risk by June 30, 2009.

Ontario Regulation 242/08, the general regulation made under Ontario's *Endangered Species Act, 2007* (*ESA* or the "Act") was amended to specifically define the habitat of the following endangered and threatened species:

- American badger (*Taxidea taxus*) – endangered
- barn owl (*Tyto alba*) – endangered
- eastern prairie fringed-orchid (*Platanthera leucophaea*) – endangered
- Engelmann's quillwort (*Isoetes engelmannii*) – endangered
- few-flowered club-rush (*Trichophorum planifolium*) – endangered
- Jefferson salamander (*Ambystoma jeffersonianum*) – threatened
- peregrine falcon (*Falco peregrinus*) – threatened
- western silvery aster (*Symphyotrichum sericeum*) – endangered
- wood turtle (*Glyptemys insculpta*) – endangered

The Ministry of Natural Resources (MNR) indicated that the regulation of habitat for the tenth species, the threatened forest-dwelling boreal population of woodland caribou (*Rangifer tarandus caribou*), would be addressed through a separate Environmental Registry notice.

By defining the habitats of these nine species within the regulation, the habitat protections provided under the *ESA* were triggered to take effect immediately, providing stronger protections for at least some of those species. MNR asserted that "the environmental consequences of the proposed regulation are anticipated to be positive as it increases the likelihood of survival of the species, maintains the biological diversity of the habitat in which they are found and promotes a healthy environment for a healthy economy."

Background

The new *ESA* came into force on June 30, 2008, replacing the outdated *Endangered Species Act* of 1971. Like the old law, the legislation includes a specific prohibition on the damage or destruction of habitat of endangered or threatened species. Unlike the old law, the *ESA* clearly defines what constitutes "habitat;" however, the Act does not define what may constitute its "damage" or "destruction." The *ESA* also includes a more flexible approach to habitat protection that allows for a mix of uses within protected habitat. As stated by MNR, "activities that are compatible with habitat protection (i.e., they do not damage or destroy the habitat) will not be affected." As well, the government has discretion to issue "flexibility tools" – permits and agreements that allow activities in protected habitat that would otherwise be prohibited.

Habitat Regulations and Recovery Strategies:
The *ESA* states that before making a habitat regulation, the Minister of Natural Resources "shall consider any recovery strategy that has been prepared for the species" and any government response that has been published regarding the recovery strategy. Further, MNR habitat policy has stated that when identifying and describing habitat, the government will consider:

- the area protected under the general definition of habitat,
- the best available scientific information on the species, and
- the social and economic implications of habitat regulation.

Recovery strategies must be prepared within five years for all endangered and threatened species that were listed when the Act came into force. Recovery strategies must identify the habitat needs of the species and threats to its survival and recovery. Strategies must also make recommendations to the Minister on the area that should be considered in developing a habitat regulation, and objectives for the protection and recovery of the species.

Once a recovery strategy is developed, the Minister of Natural Resources must, within nine months, issue a government response statement that describes the government's intended course of action for a

species. The Minister must ensure that all feasible measures contained within the government response statement are implemented.

Despite the above policy direction, at the time habitat regulation was made for the first nine species, recovery strategies for the species were in draft form only and no government response statements existed. In the proposal notice for this habitat regulation, MNR did not make any reference to or provide a direct link to either the draft recovery strategies for the species in question or to MNR's habitat protection policy (Species at Risk Policy 4.1). MNR posted final recovery strategies for these species on February 18, 2010, but as of June 2010 no government response statements had been prepared.

Habitat Protection under the ESA:
"Habitat" is defined in the Act as either:

- an area prescribed by regulation as the habitat of a particular species ("Regulated Habitat"); or
- "an area on which the species depends, directly or indirectly, to carry on its life processes, including life processes such as reproduction, rearing, hibernation, migration or feeding" ("General Habitat").

The Act clarifies that General Habitat applies only to areas that are currently occupied by a species (i.e., it does not include areas that were formerly occupied by a species or where the species has the potential to be reintroduced). Unlike General Habitat, Regulated Habitat can apply to areas that were historically occupied by the species or areas where the species is believed to be capable of living. Regulated Habitat can include an area that is larger than, smaller than or equivalent to the area that would apply as General Habitat. The only limitation on the Minister's authority to establish Regulated Habitat is that the Minister may not make a regulation that would result in the species becoming extirpated or extinct.

If no habitat regulation has been made for a particular species, then the General Habitat will apply. If a habitat regulation is made for a particular species, the Regulated Habitat protections will replace those for General Habitat.

Currently, the protection of General Habitat is only in force for the 42 species that were listed under the old law, and for any endangered or threatened species listed after the *ESA* came into force. For the 86 endangered and threatened species that were newly listed at the time the *ESA* came into force, General Habitat protection will not take effect until June 30, 2013. By contrast, protection of a Regulated habitat for a particular species (regardless of when it was listed) applies as soon as the regulation takes effect.

MNR has discretionary power to create habitat regulations for the 42 species that were listed under the old law and for the 86 endangered or threatened species listed when the *ESA* came into force. However, habitat regulations must be made within two years of new listings for endangered species, and within three years of new listings for threatened species.

Nevertheless, when the *ESA* came into force the Ontario government committed to regulating the habitats of 10 species by June 30, 2009, and to "make every reasonable effort to propose regulations for highest priority species" by June 30, 2013. The "top ten" species include the nine that are newly regulated, as well as the forest-dwelling population of woodland caribou. As of June 2010, MNR had not proposed a regulation for caribou habitat.

Regulated Habitat for Nine Species:
Protected habitat for the nine species listed above is now specifically defined in O. Reg. 242/08. Some of the key aspects of these Regulated Habitats that differ from General Habitat include:

- *Geographic restriction* – The Regulated Habitats of six of the nine species are described using specific geographic boundaries within Ontario, either by naming municipalities in which habitat occurs or by referencing maps filed in MNR's Species at Risk Branch.

- *Historical habitat* – The Regulated Habitats of five species include habitat that has been occupied by the species in the past but is not necessarily currently occupied. Time limits range from as short as within the last 12 months to "any time in the past."

- *"Suitable" habitat* – For three species, the Regulated Habitat includes some areas described as "suitable" conditions for the species, but that may not be known to be currently inhabited by the species. For example, for Jefferson salamander, areas within specified geographic limits comprising "suitable foraging, dispersal, migration or hibernation conditions" and that "would provide suitable breeding conditions" are included.

- *Buffer zones* – Most of the Regulated Habitats include buffer zone(s) or corridors, in varying forms, around specific areas or habitat features. Examples include areas within five metres of an American badger den and the area within 25 metres (m) of the base of a tree or other natural feature that is or was used as a nesting or roosting site by a barn owl.

Other aspects of some of these Regulated Habitats include:

- defining specific types of environments in which a species exists as habitat, such as fens, tallgrass prairies or moist old fields (i.e., Eastern prairie fringed-orchid);
- excluding certain types of unsuitable environments from habitat, such as quickly flowing turbulent water or water more than five metres deep (i.e., Engelmann's quillwort); and
- including areas that are or were occupied by the species' prey as habitat (e.g., American Badger).

Implications of the Decision

Of the nine species now protected by Regulated Habitat, only two were previously protected under the General Habitat provisions; the habitats of the remaining seven species were not protected at all and would not have received General Habitat protection until 2013. MNR did not meet its own commitment to regulate the habitat of these species by June 30, 2009.

Habitat regulation for a species at risk does not equate to the complete protection of the area described. Activities defined by MNR as not being damaging or destructive to a species' Regulated Habitat will be allowed to continue. MNR has recently released a proposal that includes some forestry and aggregate mining activities in this group of "non-destructive" activities (see Other Information below).

There can be advantages and disadvantages to having a species' habitat prescribed by regulation. On one hand, a habitat regulation can result in the protection of a significantly larger area than the General Habitat. A habitat regulation may define historic and/or potential habitat as habitat for protection (for example, historic nesting sites of barn owls.) On the other hand, a habitat regulation may prescribe a smaller area than what would be protected by a species' General Habitat. For instance, if individuals of a species occur outside of the described Regulated Habitat, their habitat will not be protected (e.g., if Engelmann's quillwort is discovered outside of the boundaries designated in the habitat regulation, there is no mechanism to provide immediate protection for that habitat), while it would have received automatic protection under the General Habitat provision.

Regulating habitat can also be problematic given that, for many species, there are knowledge gaps regarding the species' distribution, habitat requirements and ecological requirements. These knowledge gaps pose a challenge to identifying areas in which a species does or can occur. If Regulated Habitat is limited geographically or otherwise without sufficient information, actual habitat of a species at risk may be left unprotected, while it would receive protection under the General Habitat provisions. For this reason, including a catch-all provision in habitat regulations to protect any newly discovered occurrences of a species is critical. While MNR's habitat protection policy provides that "habitat regulations will be amended as needed to accommodate newly discovered habitat, habitat protected by a habitat protection order, or other relevant considerations," amending a regulation can be a long process and in the meantime habitat could be lost.

Adding to this challenge is the reluctance of landowners in some cases to identify (or to permit MNR to identify) the presence of species at risk on their property, out of concern that the presence of a species at risk would infringe on the owner's rights to use the property.

In the case of the nine species that are now protected under Regulated Habitat, the areas or environments defined for protection are generally consistent with those recommended in the draft Recovery Strategies, with some notable exceptions (e.g., "catch-all" provisions to ensure that newly discovered habitat outside any geographic or other boundaries receives immediate protection.) For some species, MNR appears to have been somewhat selective or restrained in following recovery strategy recommendations for defining habitat. For example, buffer zones defined for peregrine falcon habitat are smaller than proposed in the draft recovery strategy for that species. While the draft recovery strategy recommends a three-kilometre buffer for any current or newly discovered nests on cliff faces, only a one-kilometre buffer is provided.

Public Participation & *EBR* Process

MNR posted this proposal on the Environmental Registry for a 31-day public comment period. In addition, MNR sent letters to all identified landowners or land managers for areas that were considered to be proposed habitat for the species in question, with the exception of wood turtle habitat for which no notice was provided "due to the sensitivity of the species to poaching." MNR also held a stakeholder consultation session in Toronto.

The proposal notice on the Registry included links to background information on habitat protection under the *ESA* on MNR's website. However, MNR did not explain the relationship between recovery strategies, government response statements and habitat regulations, nor did it identify the existence of or provide links to the draft recovery strategies for the species in question. This is of concern, because if the public cannot comprehend the *ESA* process, it does not serve MNR's responsibilities under the *EBR* nor provide benefit to the species.

MNR reported in a decision notice (Environmental Registry #010-6490) that it received 425 comments on this proposal. However, MNR indicated in the decision notice that it also received an additional 165 form letters and 641 post cards commenting on the proposal, amounting to a total of 1,231 comments received from the public (see Every Comment Counts below).

In the decision notice, MNR described generally the comments that it received from the public and explained MNR's responses to those comments, as well as several changes that MNR made in the final decision in response to the public's comments. As a result of the public comments, MNR strengthened the regulation on a number of fronts, including, for example the extension of the protection of American badger dens from maternal dens only to all dens, and protection of suitable foraging areas for barn owls within one kilometre of nesting or roosting sites.

Outside of these species-specific recommendations, commenters also had general concerns about the Regulated Habitats. Stakeholders were concerned about the lack of clarity and potential for subjectivity in some habitat descriptions, making it difficult for non-experts to judge whether or not an area would constitute habitat or not. One consulting firm noted in regards to Jefferson salamander that "the habitat is being defined in an overly generous manner that is vague and all-inclusive. It will likely trigger significant conflict between developers and regulators over its interpretation." Earthroots also cited vagueness as a "significant flaw" in the Jefferson salamander habitat regulation, as it is not clear if newly discovered populations would be provided habitat protection.

Industry stakeholders voiced concern that the habitat regulations would overly restrict their operations and requested that MNR provide additional guidance as to what activities constituted damage and destruction of species' habitat. The Ontario Stone, Sand and Gravel Association (OSSGA) noted, "given that the provincial government has yet to define what activities would constitute damage or destruction of habitat…OSSGA remains concerned that the *ESA* and associated habitat regulations will be interpreted

'on the ground' as a broad prohibition against any activities occurring within regulated habitat areas." The Ontario Waterpower Association remarked on MNR's "lack of concern about actually implementing these regulations in a way that not only protects the species but the facility/landowners that will ultimately be held responsible."

Many commenters questioned why MNR's habitat regulations differed from the habitat requirements outlined by species at risk recovery teams. Save Ontario's Species (SOS), a collaborative group of environmental organizations, noted that "unless recovery team recommendations are taken seriously and implemented to the fullest extent possible, these regulations will not be based on sound science or best available knowledge." Some commenters also questioned the science itself. The Ontario Federation of Anglers and Hunters noted the "disappointing" MNR estimate for the American badger population in Ontario, at 0 to 200 individuals. The questionable adequacy of data was echoed elsewhere, and the Ontario Federation of Agriculture noted, "it is unacceptable for the Ministry to impose potentially draconian regulatory burden on farmers with less than adequate data due to financial constraints."

Commenters also questioned how the precautionary principle was being taken into account and criticized MNR for not exercising its ability under the *ESA* to regulate newly discovered occurrences and habitats for these species. Earthroots commented, "habitat regulations must be open to the inclusion of future habitat areas if recovery is to become a realized goal." The issue of precedent-setting was also of concern: as noted by SOS, "if the habitat regulations for the first ten species are not strong, it sets a terrible precedent for those to follow."

In addition to external stakeholders, two government ministries provided comment on the habitat regulations: the Ontario Realty Corporation (ORC), on behalf of Ministry of Energy and Infrastructure, and the Ontario Ministry of Agriculture, Food and Rural Affairs (OMAFRA). Both noted that MNR had not provided their ministries enough guidance on requirements under the regulations, or their interpretation of terms within the regulations. The ORC owns several properties within regulated habitat and questioned how activities, such as general maintenance, should be limited or restricted at these sites. OMAFRA stated that "it is unclear what actions would be expected of farmers and rural landowners in trying to interpret the regulations." OMAFRA also outlined that it believes farming practices are compatible with species at risk habitat protection and should not constitute its damage or destruction.

Following the filing of the regulation, MNR committed to hold open houses across the province "for interested parties to learn more about the regulation, to receive advice on how to avoid harming the species or damaging its habitat, and receive information on the flexibility tools available under the *ESA*."

Every Comment Counts

This year, nine species at risk became the first to receive regulated habitat protection in Ontario. Habitat loss is the primary threat to species in the province, and protecting habitat is essential – but often controversial.

The ECO is troubled by the manner in which MNR reported the number of comments received from the public about its proposal to regulate habitat for nine species at risk. MNR reported in the Comments section of its decision notice that it received 425 comments on the proposal (321 online and 104 in writing). However, MNR acknowledged later in the notice that it also received 165 form letters and 641 postcards from the public – bringing the total number of comments to 1,231. Further, MNR stated that, "excluding form letters, approximately an equal mix of supportive and non-supportive comments was received."

The ECO questions why every comment received from the public (whether in the form of original letter, electronic comment, postcard, etc.) was not included in MNR's tally of the comments submitted, and why MNR would exclude comments received in particular formats from its evaluation of the public's response to the proposal. Every Ontarian has a right under the *EBR* to comment on a proposal notice, and every comment received represents an expression of an Ontarian's views about the proposal. In this case, each member of the public who sent in a form letter or postcard expected that their right to

participate in this decision would be acknowledged and respected.

This approach is not consistent with MNR's past practice of providing the true total number of comments received, and noting the number of those comments that were received as form letters, petitions, postcards, etc. MNR's usual approach is more appropriate and transparent. A significant number of form letters or petitions normally indicate a heightened degree of public interest, which should be acknowledged.

It is not clear from the decision notice whether MNR considered the form letters and postcards that it received when making its final decision on this regulation, as it is required to do under the *EBR*. The ECO notes that while MNR should count every comment received as a separate comment, a comment does not represent a "vote" that determines the outcome of the proposal. It is reasonable that the substantive content of identical form letters or postcards be considered together as one; however, the fact that a substantial number of comments expressing the same position or concerns was received should also be given weight in the ministry's decision-making process.

The ECO urges MNR to acknowledge and consider every comment received in response to a notice on the Environmental Registry, as each comment represents the exercise by a separate Ontarian of his or her right to participate in government environmental decision-making under the *EBR*.

SEV

MNR considered its Statement of Environmental Values (SEV) in reaching its decision, noting its ongoing commitment to biodiversity conservation and sustainable use of natural resources. In its SEV consideration, MNR outlines its use of the precautionary approach in creation of regulations. It also notes the importance of a balanced approach to developing regulated habitat, integrating scientific information on species' needs with the socio-economic goals of local communities. The SEV describes landowner, stakeholder and Aboriginal consultation processes that were undertaken. MNR also states it "intends to monitor and evaluate whether provisions in the habitat regulation are meeting their intent over time and take an adaptive management approach to revising these provisions as needed."

Other Information

Technical Guidance for Forestry Activities in Regulated Habitat

On February 18, 2010, the same day the habitat regulations came into force, MNR posted two policy proposals on the Environmental Registry to provide technical guidance for forestry and aggregate extraction within regulated habitat for the wood turtle (Environmental Registry #010-9183) and peregrine falcon (Environmental Registry #010-9184) ("technical guidance documents"). These technical guidance documents describe the forestry and aggregate extraction activities "that do not damage or destroy the habitats of these species," and will therefore be allowed to continue.

In these proposals, MNR has included its new interpretation for the phrase "damage or destroy" under the *ESA*: "Only those activities that have the effect of *impairing* or *eliminating* the *functionality or usefulness* of the habitat for enabling the species to carry out its life processes will constitute damage or destruction." By this definition, structural elements (e.g., trees) within Regulated Habitat can be removed without being deemed damage or destruction.

Both documents note that "harvesting that retains residual forest, existing aggregate extraction, and road maintenance and repair" are activities that may not damage or destroy habitat. If an activity is determined to be likely to damage or destroy protected habitat, an "overall benefit" authorization by MNR would be required before proceeding, which would require the proponent to provide some benefit to the species, whether that be through habitat "enhancement or creation," "long-term habitat protection" or other actions that would reduce identified threats to the species.

Much Ado about Wood Turtles

No other aspect of the proposed habitat regulation received more attention than the provisions related to the wood turtle (*Glyptemys insculpta*). Wood turtles are brownish-grey, medium-sized turtles, designated as endangered in Ontario. They use both aquatic and terrestrial habitat, including rivers, streams, bogs, swamps, wet meadows, woods, upland fields and farmland. The primary threats to wood turtles are habitat loss, road mortality and the pet trade industry.

The proposed Regulated Habitat for the wood turtle consisted of both aquatic and terrestrial areas used by wood turtles or adjacent to areas used by wood turtles. Larger areas of habitat were defined for wood turtles in northern municipalities than in southern locations.

The defined habitat included in the final regulation for both northern and southern municipalities differs significantly from what was proposed. Specifically, the buffer zones in aquatic areas (i.e., below the high water mark) increased tenfold for southern populations (from 200 m to 2,000 m), and even more for northern populations (from 500 m to 6,000 m). Buffers around nesting sites increased from 30 m to 300 m for both northern and southern populations.

The protection for this species drew ire from foresters, industry associations and private landowners in some affected northern rural municipalities, who warned in the media that this "overbearing protection of wood turtle habitat" is "penalizing an already hard-pressed forest industry," abrogates private landowner rights and "could create massive restrictions for planning development" in affected communities. While acknowledging that certain activities may be approved to continue within wood turtle habitat, opponents argued that a permitting system for operating in wood turtle habitat is an "additional layer of red tape the [forestry] industry just can't afford right now." Further, many opponents argued that poaching for the illegal pet trade – not habitat loss – is the greater threat to wood turtles.

Northern opponents stated that MNR should have consulted "with the people whose livelihoods and way of life would be most affected" and were critical of MNR for holding only one consultation session in Toronto. They stated the Ontario government is "falling victim more and more to pressure groups from urban areas" and that "we cannot let a southern Ontario politically motivated decision endanger our livelihood."

In November 2009, Renfrew County passed a resolution that outlined its position that "the wood turtle habitat regulation should be immediately withdrawn prior to filing and returned to Cabinet for revision, accompanied by a comprehensive socio-economic impact assessment." Other local municipalities soon followed suit and backed this resolution.

Groups in support of the habitat regulations pointed out the use of the wood turtle as a scapegoat for the "real" problems facing the forestry industry, such as "the strong Canadian dollar, the falling demand for products like pulp, newsprint and lumber, and highly efficient, low-cost global competitors." The director of Ontario Nature noted in a recent newspaper editorial: "Given the growing consumer demand for green wood products, why is the [forestry industry] doggedly pitting economy against protection, north against south, rural folk against city dwellers? … It is time … to stop blaming endangered species for an economic crisis."

However, with MNR's new proposal, *Technical Guidance for Forestry Activities in Wood Turtle Regulated Habitat under the Endangered Species Act, 2007* much of this heated debate appears to be moot. Forestry activities will still proceed in regulated wood turtle habitat, with some restrictions. The ECO questions MNR's rationale in releasing this draft technical guidance document for the wood turtle only after the habitat regulation passed. The polarized debate would have been eased if the guidelines had been available for comment concurrent to the habitat regulations.

Recovery Strategies for Newly Listed Species

In December 2009 MNR posted an information notice on the Environmental Registry (#010-8465) with draft recovery strategies for five additional species:

- eastern flowering dogwood (*Cornus florida*);
- Ogden's pondweed (*Potamogeton ogdenii*);
- redside dace (*Clinostomus elongatus*);
- deerberry (*Vaccinium stamineum*); and
- spotted wintergreen (*Chimaphila maculata*).

MNR also posted a second information notice (Environmental Registry #010-8464) to notify the public that it would require additional time to prepare recovery strategies for the Eastern pondmussel and red knot *rufa* subspecies (both endangered), for which recovery strategies were also required by February 19, 2010. MNR stated that it requires additional time to coordinate with Fisheries and Oceans Canada on the recovery strategy for the Eastern pondmussel, and with the Canadian Wildlife Service on the recovery strategy for the red knot *rufa* subspecies.

On February 18, 2010, the five finalized recovery strategies were posted on MNR's website, meeting MNR's obligation under the *ESA.* As these species were either first listed as endangered or had their Species at Risk in Ontario list status changed to endangered on February 18, 2009, recovery strategies were required to be prepared within one year.

A new policy proposal was also posted on February 18, 2010, to inform the public that MNR was initiating government response statements to recovery strategies for 13 species: the five listed here, as well as eight of the nine species that have regulated habitat (excluding western silvery aster) (Environmental Regisgtry #010-9192). Feedback from both public comments and consultation sessions will be incorporated into draft government response statements. MNR stated these drafts will be posted on the Registry in summer 2010 and undergo a further round of public comment before finalization. The response statements will be due November 18, 2010, as the government has nine months to prepare a response after finalizing a recovery strategy under the *ESA*.

ECO Comment

Habitat protection is vitally important to the protection and recovery of Ontario's species at risk. Given the delay in the application of General Habitat protection for most species until 2013, the ECO noted in our March 2009 Special Report on the *ESA* (The Last Line of Defence: A Review of Ontario's New Protections for Species at Risk) that "it is critical that MNR swiftly prioritize and develop the habitat regulations for these species to ensure that their status is not further jeopardized in the intervening period."

The ECO is generally pleased with the implementation of habitat regulations for the first nine species. In particular, the ECO appreciates that seven species that would not be covered by General Habitat protection until 2013 are now protected. The ECO questions MNR's decision to "fast-track" two species that already had General Habitat protection (the few-flowered club-rush and western silvery aster) when there are other species that will receive no habitat protection until 2013. MNR should prioritize those species that are the most imperilled if their habitats are not protected.

It is not ideal that habitat regulations are being finalized without recovery strategies or government response statements in place for the regulated species. While the ECO recognizes the workload challenges that MNR faces, the ECO urges MNR to make every effort to ensure that recovery strategies are finalized and government response statements developed promptly so that future habitat regulations may be based on the best available information, as contemplated by both the *PPCRA* and MNR's own habitat protection policy. It is unfortunate that the Ontario government did not meet its own commitment to regulate the habitat of the first ten species by June 30, 2009.

A key to successful implementation of the *ESA*, as outlined in the ECO's 2009 Special Report, will be for MNR to "ensure that habitats are prescribed on an ecological basis, rather than being driven by economic or social constraints." The ECO has previously expressed grave concern that MNR has the authority to effectively decrease the amount of a species' habitat that is to be protected. Fortunately, MNR does not appear to have done this in the case of these nine species. Regulated Habitats closely mirror the recommendations found in the science-based recovery strategies for most of the nine species. Even those habitats that are limited geographically appear to have been based on the available scientific information about the species' distribution in Ontario. The ECO was disappointed, however, that MNR chose to disregard draft recovery strategy recommendations to include provisions with sufficient flexibility to protect any occurrences of these species that may be found outside the defined habitat boundaries in the regulation. This would have been a sensible and prudent approach.

MNR should also have explained the *ESA* habitat protection framework better to the public in the proposal notice, including the role of recovery strategies and government response statements, and importantly, the upcoming proposals for the technical guidance documents. It would have been extremely helpful for the public if MNR had explained the existence of and provided direct links to the draft recovery strategies for the species in question, as well as copies of MNR's species at risk habitat protection policy and bulletin. These background documents could have greatly assisted members of the public who commented on the proposal.

The ECO is pleased that MNR responded to the public's comments on the regulation proposal by strengthening some provisions in the regulation to afford better habitat protection. However, MNR should have consulted more widely with the public prior to the regulation being made. While it is commendable that MNR held province-wide open houses *after* the regulation was filed to explain the regulation and to provide advice to affected landowners, it would have been more helpful and more transparent to have held similar open houses beforehand. This might also have alleviated some of the concerns of local landowners who may not have fully understood the implications (or likelihood) of having habitat on their properties, or the availability of the flexibility tools to permit certain activities on prescribed habitat. MNR will need to ensure that landowners are kept well-informed on an ongoing basis about potential habitat on their properties, and what activities may or may not be acceptable as a result. Landowners will play a crucial role in whether the habitat protection provisions in the *ESA* are effective. The ECO reiterates our recommendation from our 2009 Special Report that MNR expand the Conservation Land Tax Incentive Program to provide greater financial incentives to private landowners to protect the habitat of species at risk. As of June 2010, the Ontario government had taken no action to address this formal ECO recommendation.

Given that MNR considers some forestry and aggregate activities as non-destructive, habitat regulations may not be as restrictive, or protective, as the public had previously believed. Had it been clear to parties commenting on the habitat regulation that technical guidance documents for forestry in regulated habitat were being prepared, public comments would likely have been very different. To the ministry, regulated habitat is much like a "value" to be considered in forest management planning; however, many members of the public were operating under the understanding that there would be a blanket prohibition on any industrial activities within regulated habitat. As a result, the ECO is concerned with MNR's handling of the public process involving what habitat should be protected and what activities are allowable within it.

The ECO is troubled by MNR's proposed interpretation of what constitutes "damage or destruction" of species-at-risk habitat. Although ecologically functional habitat is essential to species' survival, it may be difficult for managers or for scientists to demonstrate or quantify habitat functionality, or lack thereof. This could lead to potential problems and possible legal conflicts in determining what activities may be allowable in regulated habitat. Another concern is the uncertainty associated with losing structural elements of habitat – many unintended functional changes can result from structural changes. Changes in the structural integrity of a habitat could have unknown and possibly negative consequences to habitat. The ECO will comment further on the technical guidance documents once decisions are posted on the Registry.

Review of Posted Decision:

4.21 Approval and Permitting Requirements Document for Renewable Energy Projects

Decision Information:

Registry Number: 010-6708
Proposal Posted: June 9, 2009
Decision Posted: September 24, 2009
Comment Period: 45 days
Number of Comments: 266
Decision Implemented: September 24, 2009

Description

On September 24, 2009, the Ministry of Natural Resources (MNR) published its requirements for approving renewable energy projects. The Approval and Permitting Requirements Document for Renewable Energy Projects (the "Requirements Document") was released the same day that O. Reg. 359/09, the Ministry of the Environment's Renewable Energy Approvals Regulation (REA Regulation) under the *Environmental Protection Act*, came into force. (For a review of the REA Regulation, please see Section 4.11 in this Supplement.) These two initiatives constitute two of the major components involved in implementing the green energy vision embodied by the *Green Energy and Green Economy Act, 2009* (*GEGEA*).

Background

MNR is responsible for managing Ontario's fisheries, wildlife, aggregate resources, provincial parks and Crown lands. The ministry also shares responsibility for forest management with the Ministry of Northern Development, Mines and Forestry. Pursuant to its statutory obligations, MNR issues various permits, licences, authorizations and approvals for activities on Crown lands and on private lands. Renewable energy projects may require MNR-issued permits pursuant to various statutes, including the *Public Lands Act*, the *Endangered Species Act, 2007* (*ESA*), the *Fish and Wildlife Conservation Act, 1997* (*FWCA*), the *Provincial Parks and Conservation Reserves Act, 2006*, and the *Conservation Authorities Act*. Under the *GEGEA*, MNR was granted the authority to request information and studies in connection with renewable energy projects in order to issue the appropriate permissions.

Overview

The goal of the Requirements Document is to provide clarity and guidance as to which activities must be undertaken, and what information is required by MNR, in order for it to grant permission for a renewable energy testing or generating facility on Crown or private land. Appendix D of the Requirements Document lists the various provincial and federal laws, regulations, policies and guidelines upon which the requirements are based, and which provide further information and direction for project developers.

The document also highlights the fact that other regulatory bodies, such as conservation authorities, municipalities or federal agencies may have specific requirements that must be considered. Federal approvals from Fisheries and Oceans Canada, Transport Canada or Environment Canada may be required prior to obtaining one from MNR.

Similar to the REA Regulation, the Requirements Document does not apply to water power facilities as these are subject to the Class Environmental Assessment for Waterpower Projects. The Requirements Document also does not apply to projects proposed on federal lands.

Once an applicant has met all the requirements outlined in the REA Regulation and the Requirements Document, they may submit a complete application to the government for review.

Renewable Energy Testing Projects proposed on Crown Land

In order to determine the viability of a particular location, project developers may need to undertake testing activities (such as measuring wind speed, for example). While a Renewable Energy Approval (REA) from Ministry of the Environment (MOE) is not required to conducts tests, several MNR requirements exist. Where construction is required to gain access to the proposed testing site, the requirements are similar to those that would be imposed by MOE for a renewable energy project. There may also be additional location or project-specific approvals required depending, for example, if the testing is to be done in a provincial park, a conservation reserve, or in the Far North. For testing projects that do not require construction to gain access, the obligations are less onerous due to the reduced potential impact on the environment.

Renewable Energy Projects

For renewable energy projects, most of the requirements are contained within the REA Regulation and therefore are not specifically outlined in the Requirements Document. Key requirements that are additional to those contained in the REA Regulation and relate to the natural environment include:

Site Investigation Report:
Under the REA Regulation, proponents are required to conduct both a records review and site investigation assessing the natural heritage features (air, land and water) within 120 metres of a proposed project. While the REA Regulation requires the proponent to provide general information about nearby natural features, MNR supplements this by requiring information regarding: fish and fish habitat; rare vegetation; protected species and habitat; wildlife and their habitat; mineral aggregate resources; petroleum resources; Crown forest resources and hazard lands. Various MNR permits and approvals may be required based on the information submitted.

Endangered Species Act, 2007 Requirements:
Where a species or habitat that is protected under the *ESA* is present in the proposed project area, a proponent must assess the potential impacts of all aspects (construction, operation, decommissioning) of the project on the species or habitat. If the proponent determines that the project will not have a negative impact, they must provide sufficient documentation to support that conclusion. Where, however, there are potential negative impacts that are prohibited by the *ESA*, the proponent must determine whether the project can be modified, and "all reasonable alternatives to the proposed activity must be considered, including alternatives that would not negatively affect the species." If no modifications can be made to avoid the negative impacts, an authorization from MNR under the *ESA* will be required.

Fish and Wildlife:
Under the *FWCA* authorization must be obtained from MNR if the construction or operation of a project will destroy bird nests or eggs, beaver dams, black bear dens or interfere with black bears in their dens.

Additional Location- or Project-specific Requirements:
Similar to the requirements for a testing project, there may be additional location-specific approvals required. For example, if a proponent is proposing to construct a project in a natural hazard land, permission from the local conservation authority may be required. For areas under a Forest Resource or Sustainable Forest Licence, an amendment to the applicable licence will be necessary. Projects located in the Far North will likely be required to take into consideration any requirements imposed by Bill 191, the proposed *Far North Act, 2010* if it is enacted by the legislature. For off-shore wind facilities, the requirements contained in the REA Regulation are supplemented by further MNR requirements relating to issues such as fisheries, shipping channels, and coastline erosion. Finally, facilities proposed for provincial parks or conservation areas may be constructed under certain circumstances, and the document outlines three conditions that must be satisfied:

- no reasonable alternative exists;

- the lowest cost is not the sole or overriding justification for constructing in that particular location; and
- all reasonable measures are taken to mitigate environmental harm.

Additional project-specific requirements are outlined, for example, in cases where proposed projects will: use aggregate materials; result in the harvesting of Crown-owned forest reserves; or will use more than 1000 cubic metres of forest fibre per year.

Projects that Do Not Require an REA:
For a small-scale solar facility (Class 1 or 2) or a small-scale wind facility (Class 1) no REA is required. If such a project also does not require the disposition of Crown land, very few requirements apply. The only applicable requirement is where the project has the potential to negatively affect protected species or habitat. In this case, an assessment must be conducted to determine whether the *ESA* requirements outlined above apply. Where a disposition of Crown land is required, a project proponent must file a project description, a site plan, a decommissioning plan and documentation of any relevant aboriginal consultation. As well, an assessment must be conducted under the *ESA*.

Implications of the Decision

Renewable Energy Testing Activities and Projects Will Not Be Posted on the Environmental Registry

The MNR Guideline Document outlines the ministry's requirements for renewable energy testing activities proposed on Crown land. These testing projects do not require an REA and applications for approval are submitted to MNR directly. Testing the viability of a particular location may require the construction of new access roads, which can have significant environmental impacts. Accordingly, various natural heritage and water body, as well as protected species and habitat, assessments must be conducted. As there is no requirement for an REA, however, applications for testing activities and projects will not be posted on the Environmental Registry for public review and comment.

Species at Risk are Still at Risk

The REA Regulation, and by reference the Requirements Document, expressly prohibits locating renewable energy projects in certain areas such as provincially significant wetlands in southern Ontario (as identified in the Provincial Policy Statement) and coastal wetlands. This express prohibition is not, however, extended to habitat that is protected under the *ESA*. Rather, although proponents are required to explore alternatives to prevent negative impacts, where these cannot be avoided MNR may grant an authorization under the *ESA* to proceed.

Public Participation & *EBR* Process

MNR published the proposed Requirements Document on June 9, 2009. The proposal notice explained MNR's role in issuing renewable energy approvals and indicated that the purpose of the document was to clarify MNR's requirements when reviewing applications for approvals. The proposal notice also drew the reader's attention to MOE's proposal for a new renewable energy approvals regulation that was posted on the Environmental Registry the same day, and provided links to more information on the *GEGEA*.

MNR provided a 45-day comment period, between June 9, 2009 and July 24, 2009. Along with the Environmental Registry posting, several public and Aboriginal meetings were held in June 2009. A high level of public interest was shown in this proposal notice, with MNR receiving 266 comments.

Comments on the proposed Requirements Document were received from: residents associations; municipalities; members of the general public; environmental non-governmental organizations (ENGOs); ratepayer associations; the renewable energy industry; conservation authorities; Natural Resources Canada; and others. While some of the commenters focused on MNR's proposed document, a significant number submitted comments addressing issues that more properly related to provisions in MOE's proposed regulation (such as the setback distances for wind turbine noise). The key issues raised

by commenters that focus exclusively on issues covered by MNR's proposed document are outlined below.

Similar to comments received in response to MOE's REA proposal, there was significant support for a streamlined approvals process. Some renewable energy developers felt, however, that the process could be further improved through the development of a single REA Regulation document, rather than having MNR develop a separate document. Citing a need for certainty to proceed with a project, industry commenters also expressed concern about the lack of clear timelines for decision-making and appeal processes.

Some commenters requested that some of the studies required by MNR be expanded to more fully capture all species that might be affected by a project. In particular, a suggestion was made by the Canadian Environmental Law Association to not only require bird and bat habitat but also butterfly studies, along with more information regarding migration patterns and impacts on the sustainability of the species' population due to wind facilities.

With regard to projects proposed within the boundaries of provincial parks and conservation reserves, some commenters felt that the three conditions were not stringent enough and that any development must be required to show a "net benefit to the ecological integrity of the site", rather than merely efforts to mitigate. The Ontario Bar Association suggested that these protected areas should "not be sacrificed to energy generation except in cases of extreme need and where there are no other practical alternatives."

Conservation Ontario expressed concern that the important role served by local conservation authorities, and the knowledge that they possess regarding local natural features, was not properly reflected within the MNR document. As such, it was suggested that the document should clarify the need for project proponents to engage with local conservation authorities during the preliminary planning stages given their responsibility for issuing various permits and approvals.

Some commenters focused on the rules and processes relating to protected species and habitats. One project developer expressed a concern that, despite the absence of a comprehensive data source indicating all occurrences and locations of species at risk and their habitats, proponents may be required to carry out site assessments where a "reasonable expectation" exists that a protected species is present. Other commenters indicated their desire that any information or analysis regarding potential negative impacts on protected species be made available for public scrutiny.

Finally, concerns were expressed about the post-construction monitoring provisions and whether they were stringent enough to ensure protection for the natural environment. As well, scepticism was expressed regarding MNR's capacity to oversee compliance with monitoring commitments made by project developers.

Given that MNR's approval and permitting requirements are generally derived from pre-existing legislation for which it is responsible, the requirements themselves were not substantially changed in response to public input. The primary changes were to provide clarity with regard to MNR's requirements and how the Requirements Document relates to MOE's REA Regulation.

One change that was made, however, was the elimination of a provision that allowed proponents to request a reduction in the scope of requirements. The draft document proposed that these requests could be allowed where proponents felt that a specific requirement is unnecessary and that there would be no negative effect on the natural environment or public health and safety. Several commenters expressed concern about this provision and felt that if such reductions were to be allowed, any decision to do so should be kept open and transparent, and that clear criteria would need to be established to guide such decisions.

A second key change was to remove all requirements relating to water power facilities from the document. This amendment was in response to the decision by MOE and MNR to exempt water power

projects from the REA requirements and to continue to regulate their development through a class environmental assessment process.

Other Information

In September 2009, MNR posted a proposal notice on the Environmental Registry indicating that it is undertaking a multi-phased review of its Crown land site release policies and procedures for wind (including turbines projects proposed for development in the Great Lakes) and water projects. (The proposal notice was then republished in December 2009 to seek input on Phase One, and again in January 2010 due to an administrative error.) The original land site release policies were introduced in 2004 to provide clarity for those interested in developing projects on Crown land administered under the *Public Lands Act* (*PLA*). MNR is undertaking this review to ensure that these policies are consistent with the new REA process. At the same time that MNR posted the proposal notice in September, the ministry suspended its process for issuing Crown land grants for wind and water projects. The process will remain closed until the review is complete.

In January 2010, MOE posted a proposal notice on the Environmental Registry to amend O. Reg. 681/94 – Classification of Proposals for Instruments, under the *Environmental Bill of Rights, 1993* (*EBR*). Ontario Regulation 681/94 is the regulation that specifies which instruments are subject to *EBR* provisions, including the requirement to post proposal notices on the Environmental Registry. The January 2010 proposal is to classify certain approvals issued under the *ESA* as instruments for the purposes of the *EBR*. The proposal specifically states, however, that it does not apply to those *ESA* instruments that are exempted under section 32 of the *EBR*. Such instruments are exempted on the grounds that they are subject to the public consultation provisions of a Class Environmental Assessment and therefore fall under the *Environmental Assessment Act* (*EAA*) exception pursuant to section 32 of the *EBR*. The proposal notice states, however, that MNR will continue to voluntarily post information notices for comment where notice is required under an *EAA* process.

In April 2010, MNR posted a proposal notice on the Environmental Registry indicating it is updating its bat guidelines for wind power projects. The proposed document, Bats and Bat Habitats: Guidelines for Wind Power Projects, is being updated to provide "guidance on identifying and addressing potential negative effects on bats and bat habitats during the planning, construction and operation of wind power projects in Ontario." The Registry posting indicates that MNR's previous document, Guideline to Assist in the Review of Wind Power Proposals: Potential Impacts to Bats and Bat Habitats (Developmental Working Draft, August 2007), no longer applies to wind power projects being reviewed under the REA process. Rather, the criteria and procedures identified in the draft 2010 guidelines have been deemed acceptable by MNR until the final document is approved.

SEV

In its Statement of Environmental Values consideration document MNR outlines its principles of resource stewardship as contained within its SEV. In a checkmark fashion, MNR identified those principles that it viewed as relevant to the proposed document. Rather than describing how these principles were applied while developing the Requirements Document, the consideration document outlines the perceived environmental benefits of renewable energy projects in general and then provides a description of several provisions within the Requirements Document that contain MNR-specific requirements which are supplemental to those required by MOE as outlined in the REA Regulation. Accordingly, at no point does the consideration document explain how MNR's SEV was considered or applied during the development of the Requirements Document. However, in light of the fact that the Requirements Document does not establish a significantly new direction for the ministry (but rather is a consolidation and synthesis of pre-existing provisions), the failure to explain how its SEV was considered is disappointing, but not a critical deficiency.

ECO Comment

In general, the ECO supports the increased development of renewable energy projects and anticipates that these will play an important role in both moving the province's energy mix away from fossil fuels and helping to build a more resilient energy infrastructure. Accordingly, the ECO supports MNR's efforts to consolidate its REA requirements into one guidance document as this will help to clarify MNR's requirements for project developers and, it is hoped, help to streamline the overall approvals process.

A specific concern, however, relates to *EBR* rights and transparency regarding some approvals that may be granted by MNR for renewable energy projects. A proposal for a renewable energy approval is a classified instrument for the purposes of the *EBR*. Accordingly, all applications for renewable energy approvals will be posted by MOE as proposal notices on the Environmental Registry for public notice and comment. Unfortunately, certain other required permits and approvals issued by MNR, that may or may not form a mandatory part of a complete submission for an REA, are not required to be posted on the Environmental Registry. In order to ensure the success and future viability of renewable energy projects, all efforts must be made to keep the public fully informed of proposed developments.

Review of Posted Decision:

4.22 Amendments to the *Mining Act*

Decision Information:
Registry Number: 010-1018
Proposal Posted: July 18, 2007
Decision Posted: August 28, 2008
Comment Period: 60 days
Number of Comments: 122

Decision Information:
Registry Number: 010-4327
Proposal Posted: August 11, 2008
Decision Posted: April 30, 2009
Comment Period: 65 days
Number of Comments: 209
Decision Implemented: October 15, 2008

Decision Information:
Registry Number: 010-6559
Proposal Posted: May 5, 2009
Decision Posted: December 21, 2009
Comment Period: 60 days
Number of Comments: 750
Received Royal Assent: October 28, 2009

Description

Background

In the 1800s, miners used picks and shovels to find and extract minerals, like nickel, silver and gold. Embarking out into the untouched wilderness of Ontario, prospectors had "free entry" to access any land that contained Crown-owned minerals, stake their claim with wooden posts, and acquire a mineral lease, never stopping to consider the interests of the property owners or the public. This right of free entry was a fundamental feature of Ontario's first mining laws (and mining legislation in other provinces) to promote mining activity, create wealth in the province and encourage the settlement of northern lands.

Much has changed in Ontario since the *Mining Act* (the "Act") was first enacted in 1869. First, there are many more recognized uses for Ontario's land than just mining, and previously inaccessible forests are now enjoyed by cottagers, campers, canoeists and hunters. Second, while early mines were generally small in scale with a relatively small ecological footprint, modern day mining often involves large-scale and mechanized digging, drilling and blasting, with the potential to have significant environmental

impacts. The drafters of the initial *Mining Act* could never have dreamed of the scope and scale of mining that exists today. Finally, the public has grown more concerned about our natural environment and the impacts of human activities, expecting environmental risks to be mitigated and mining lands restored.

While Ontario and the mining industry have changed dramatically since the 19th century, Ontario's *Mining Act* has not kept pace. Periodic revisions to the Act passed by various governments during the past century have introduced some important features including:

- processes to secure interests in mining claims;
- a dispute resolution mechanism;
- a domestic processing requirement;
- exclusions and withdrawals of certain land types from staking; and
- requirements for mine closure and reclamation.

Nevertheless, the underlying principle of free entry (and its accompanying process of staking mineral claims and acquiring leases) has remained untouched, often creating conflicts between mining companies, the public, environmental interests and Aboriginal communities.

Although the *Mining Act* and the concept of free entry may have worked in the 19th century, it is clearly at odds with 21st century land uses and values. Free entry assumes that mineral development is appropriate almost everywhere and that it is the "best" use of Crown land in almost all circumstances, giving mining priority over forestry, commercial development, recreation, and the conservation of ecologically significant landscapes.

For those properties in Ontario where the property owner holds the surface rights but the Crown owns the mineral rights, i.e., surface rights only (SRO) properties, free entry has allowed staking and exploration on private property without the surface owner's consent or consultation. Likewise, the Ontario government has provided few tools to ensure that Aboriginal land claims and treaty rights are safeguarded, allowing staking and exploration on traditional Aboriginal and treaty lands without consultation. As expected, the free entry system has resulted in conflicts between mining companies, private property owners and Aboriginal communities. In some cases, this tension has led to Aboriginal communities issuing "land cautions" to prevent or inhibit economic development, such as mining, in traditional land use areas (e.g., Temagami). In other high-profile controversies, members of Aboriginal communities have been jailed for blocking mining exploration on unresolved land claims.

The public and the ECO have repeatedly called on the government to brush the dust off this outdated piece of legislation and make it work with today's values and land uses. In December 2006, the ECO received an application under the *Environmental Bill of Rights, 1993* (*EBR*) requesting regulatory reform related to the assessment of the environmental impacts of proposed mining projects. In our 2006/2007 Annual Report, the ECO noted that Ontario's existing regulatory structure treats public land as freely open to mineral exploration and that "the consideration of other interests, such as the protection of ecological values, is reactionary, and the question of whether mineral development may be inappropriate is not answered upfront." Likewise, the ECO has asserted that this century-old system fails to adequately assess the cumulative impacts of development or safeguard environmental values. Because free entry permits staking on all Crown lands unless expressly withdrawn, the ECO has also argued that the Act impedes comprehensive land use planning. In our 2006/2007 Annual Report, the ECO recommended that the Ministry of Northern Development, Mines and Forestry (MNDMF) "reform the *Mining Act* to reflect land use priorities of Ontarians today, including ecological values."

Bill 173, the Mining Amendment Act, 2009

In response to calls from stakeholders, the ECO and the public, the government agreed to review and revise the *Mining Act* and on October 28, 2009, Bill 173 (the *Mining Amendment Act, 2009*) received Royal Assent, concluding a multi-year process to bring Ontario's *Mining Act* into the 21st century. Bill 173 makes numerous amendments to Ontario's *Mining Act* relating to prospecting land, staking mining claims, disputing claims, assessment work, surface rights owners, exploration work, diamond mine royalties and

consultation with Aboriginal communities. It is important to note, however, that many amendments to the *Mining Act* will not come into force until "a day to be named by proclamation of the Lieutenant Governor."

The Purpose of the Act:
Previously, the purpose of the *Mining Act* was "to encourage prospecting, staking and exploration for the development of mineral resources and to minimize the impact of these activities on public health and safety and the environment through rehabilitation of mining lands in Ontario." The amended purpose provisions now encourage mining activities "in a manner consistent with the recognition and affirmation of existing Aboriginal and treaty rights in section 35 of the *Constitution Act, 1982*, including the duty to consult." Bill 173 also removes the purpose's final clause ("through rehabilitation of mining lands in Ontario"), indicating that land rehabilitation should not be the only means by which the impacts of mining activities are minimized.

Prospecting and Claim Staking in Ontario:
Previously, mining claims in Ontario could only be physically staked on the ground; the *Mining Act* required prospectors to identify the boundaries of a claim usually by erecting wooden posts, blazing trees, cutting underbrush, and erecting pickets or monuments of earth or rock. The amended Act allows the government to pass regulations establishing a "map staking" system by which claims can be staked on a map rather than on the ground. The Minister of Northern Development, Mines and Forestry (the "Minister") has stated that the phased implementation of map staking will take place over a period of three to five years, starting with a paper-based system in southern Ontario before moving to an online, electronic system across the province.

If a mining claim relates to a property for which there is a surface rights owner, the amended Act requires the prospector to notify the surface rights holder of the claim within 60 days of applying to record the mining claim. (Previously, prospectors were not required to inform surface rights owners that they had staked a claim on their property.) Prospectors are also now required to successfully complete a prospector's awareness program before obtaining or renewing a prospector's licence. Although the details of the program are yet to be described in regulations, according to the Minister, "the intent of the program is to ensure that prospectors are aware of the new provisions of the *Mining Act*," including the rules for staking claims and exploring for minerals on private lands and requirements for Aboriginal engagement and consultation.

Lands Removed From Staking:
Under the version of the *Mining Act* in place prior to Bill 173, staking has been prohibited for decades on a number of land types (e.g., railway land, lots with a registered plan of subdivision) unless the Minister's consent is given. Amendments contained in Bill 173 expand this list to include: residential or cottage lots smaller than one hectare; natural gas, oil or water pipeline corridors; airport lands, lands associated with artificial reservoirs or dams; and municipal lands used for public purposes (e.g., public buildings, sports fields, skating rinks, libraries, and parks). Furthermore, the Minister may withdraw from staking lands that are: of Aboriginal cultural significance; inconsistent with any Far North land use designation; or needed for highways, renewable energy projects or power transmission lines. Bill 173, however, repealed the provision in the Act that prohibited prospecting and staking on lots with crops, such as gardens, orchards, vineyards, nurseries and plantations.

The *Mining Amendment Act, 2009* also expands the list of lands that are completely prohibited from staking; once the relevant section is proclaimed, even the Minister cannot give consent to stake lands in the Far North if a community based land use plan designates the lands for a use inconsistent with mineral exploration and development. Likewise, prospecting and staking is prohibited on lands in southern Ontario where the mining rights are not held by the surface rights owner. In northern Ontario, SRO property owners will be able apply to have the Minister withdraw the mining rights from prospecting, staking, sale or lease once Cabinet proclaims this section of the Act. This decision, however, will be contingent on an assessment of the land's mineral potential.

In both northern and southern Ontario, any existing mining claims, leases or licences of occupation on privately-owned land remain valid. Nevertheless, the Minister can still impose restrictions on the use of the surface rights of a mining claim if portions of the land are of Aboriginal cultural significance.

Exemption from the Mining Land Tax:
Under the *Mining Act*, certain lands are subject to the payment of the mining land tax. These include: lands that were originally granted as mining lands; lands for which the mining rights were severed from the surface rights; and lands that are now being used for mining purposes. Provisions yet to be proclaimed in the amended Act will allow certain registered owners of lands or mining rights subject to the mining land tax to apply to the Minister for an exemption from the tax so long as the property is not being used for mining purposes and there are no existing mining claims, leases or licenses of occupation for the lands. In deciding whether to grant an exemption, the Minister may consider whether the lands have provincially significant mineral potential and whether there are mine hazards or other rehabilitation concerns relating to the lands.

Aboriginal Rights:
Several amendments to the *Mining Act* enshrine the rights of Aboriginal communities. For example:

- Lease holders are required to conduct themselves on the leased property in a manner consistent with the protection provided by existing Aboriginal or treaty rights;
- The Minister can designate individuals or a body to hear, consider and make recommendations regarding disputes arising under the *Mining Act* related to Aboriginal consultation and existing or asserted Aboriginal or treaty rights;
- The Minister may impose restrictions on a claim if portions of the lands are of Aboriginal cultural significance;
- Before advanced exploration or mine production may commence, a proponent must consult with potentially affected Aboriginal communities about closure plans.

Exploration Plans and Permits:
Bill 173 amends the *Mining Act* to create a "Director of Exploration" position within MNDMF. No person is to carry out any prescribed activity on a mining claim, lease or licence of occupation without first submitting an exploration plan to the Director.

While lower impact mining activities will require only the submission of an exploration plan, higher impact activities will require the acquisition of, and adherence to, an exploration permit. In deciding whether to issue a permit, the Director of Exploration shall consider a number of factors, including "whether Aboriginal consultation has occurred," and any "arrangements" that have been made with potentially affected Aboriginal communities and surface rights holders. The types of activities that will require a permit and/or plan, and the requirements for those activities, will be prescribed in regulations.

Land Use Planning:
A still-to-be proclaimed amendment prohibits the establishment of a new mine in the "Far North" if there is no community based land use plan for the area of the project, or if the land use designation in an existing plan is inconsistent with the opening of a new mine. Nevertheless, despite this provision, the government will be able to permit a new mine opening if a project is in "the social and economic interests of Ontario." To date, only one community based land use plan has been approved (see pages 124-128 of the ECO's 2006/2007 Annual Report).

Assessment Work:
The holder of a mining claim is required to conduct a certain amount of annual assessment work, such as bedrock trenching, exploration drilling and geotechnical surveys, to keep a claim in good standing. Once details are prescribed in regulations, however, the amended Act will allow claim holders to make payments in place of assessment work.

Penalties, Fines and Liability:
Bill 173 raises the maximum fine that a judge can impose for offences under the Act from $10,000 to $100,000 and also allows a judge to imprison a convicted contravenor for up to one year. Moreover, the liability of an offence is now extended to any officer, director, employee or agent of an offending corporation. Furthermore, in addition to any other penalty imposed, a court that convicts a person of an offence may also issue orders to recover any monetary benefit related to an offence, and to prevent, eliminate or ameliorate damage that results from the offence.

Implications of the Decision

Certainty for the Mining Industry

To provide certainty of investment to shareholders and prospective financers, mining companies must be reasonably confident that staked claims will be able to proceed to lease, exploration, title and mineral extraction. The amended *Mining Act* maintains this certainty in a number of ways.

First, the amended Act allows prospectors to continue staking claims without first notifying SRO property owners, Aboriginal communities or other stakeholders. This should reassure most exploration companies that private knowledge about lands of mineral interest will not be shared with competitors. Second, mining companies are assured that mineral rights and tenure that existed on private property in southern Ontario prior to October 28, 2009 (the date Bill 173 was passed into law) will be unaffected by the withdrawal provisions in the Act. (In northern Ontario, mineral rights and tenure on private property will be unaffected by the Act's withdrawal provisions if they existed before the day the amendment in section 35.1(8) is proclaimed.) Third, the Act attempts to pre-empt conflicts between mining companies and Aboriginal communities by requiring that exploration plans undergo appropriate Aboriginal consultation and by introducing a formal dispute resolution process for Aboriginal-related issues.

While Bill 173 increases certainty in some areas, mineral companies considering doing business in Ontario remain concerned that several important details about the Act's implementation are yet to be prescribed in regulations. This includes the requirements for exploration plans and permits, requirements that proponents undertake Aboriginal consultation, the definition of "Far North", and the specific components of community based land use plans. Until these regulations are passed, much uncertainty remains for industry with regard to the impacts of this legislation.

Security for Surface Rights Owners

The amended Act improves the rights of land owners who hold only the surface rights to their properties. Most notably, the amended Act withdraws SRO properties in southern Ontario from prospecting, staking, sale and lease (although claims that existed prior to October 28, 2009 remain valid and property owners that wish to allow mineral exploration on their properties can apply to the Minister to reopen their lands for staking). Moreover, the amendments require proponents to notify SRO property owners of claims staked on their property and MNDMF to consider arrangements made with these land owners when issuing an exploration permit.

The Act, however, also creates a double standard in that property owners in northern Ontario who do not hold the mineral rights on their property must apply to the Minister to have their lands withdrawn. For these property owners, the security that their land will not be staked and possibly developed is at the discretion of the Minister. Moreover, as of July 2010, the section of the Act allowing a property owner in northern Ontario to request a withdrawal had not yet been proclaimed. Because pre-existing claims are unaffected by a withdrawal order, until this provision is proclaimed SRO property owners in northern Ontario are unable to request a withdrawal and mining companies can stake on these properties without worry that their claims will be annulled. Finally, because the Act does not reunite surface and mineral rights but simply withdraws SRO properties in southern Ontario from staking, the government could potentially reverse this withdrawal in the future and reopen these lands to staking, sale and lease.

Rights of Aboriginal Communities

The amended purpose of the Act explicitly recognizes Aboriginal and treaty rights and the Crown's duty to consult Aboriginal peoples. The Supreme Court of Canada has ruled that the Crown owes a duty to Aboriginal communities to consult them on projects that might affect established or credibly asserted Aboriginal rights, and to accommodate appropriately. Although the Crown can delegate procedural aspects of consultation to third party proponents, the duty to consult applies to the Crown (e.g., the provincial government) and not to private sector proponents.

With the passage of Bill 173, Ontario becomes the first jurisdiction in Canada to expressly recognize Aboriginal and treaty rights in its mining legislation. As a result of provisions in support of the new purpose, Aboriginal communities should have a greater impact on and some control over where mining activities can occur and any restrictions on exploration activities needed to minimize the impacts on Aboriginal communities.

There is nothing in the amended Act, however, that requires consultations with Aboriginal communities prior to staking claims on Aboriginal or treaty lands or even notification after a claim has been staked. Furthermore, Bill 173 does not require proponents to develop Impact Benefit Agreements or revenue sharing between mining companies and affected Aboriginal communities. And despite the provision requiring consistency with land use plans, the government may permit a new mine opening in the Far North if a project is in "the social and economic interests of Ontario." As mentioned above, MNDMF has indicated that future regulations will spell out important details, including the requirements of Aboriginal consultation, details of the dispute resolution process, and how sites of "Aboriginal cultural significance" will be determined.

Environmental Protection

Provisions in the amended Act might help reduce the environmental impacts of mining activities in several ways: community based land use plans, once developed, could prevent the opening of new mines in certain ecologically or culturally significant areas of the Far North; increased penalties for offences against the Act may improve compliance with the Act's provisions; the phased introduction of map staking will help reduce the minimal impact of ground staking; and broadening the list of lands protected from staking will limit the lands on which mining activities can occur. Moreover, the graduated regulatory scheme for exploration activities may potentially lessen the environmental impacts of mineral exploration, although the Act fails to explicitly require the consideration of possible environmental impacts for the granting of an exploration permit. As with so many components of the Act, however, the effectiveness of community based land use plans, exploration plans and exploration permits in protecting the environment will depend on details spelled out by future regulations developed under the amended Act.

Increased Ministerial Discretion

The amended Act gives increased powers to the Minister of Northern Development, Mines and Forestry to manage mineral exploration and development. For example, the Minister has the power to: allow staking on land that is otherwise withdrawn; accept/reject requests from SRO property owners in northern Ontario to have their land withdrawn from staking; impose restrictions on mining claims if portions of the lands are of Aboriginal cultural significance; and revoke a licence of occupation if lands are being used for purposes other than mining purposes. Broad discretionary powers allow the opportunity for political considerations and personal values to play a role in important decisions, creating uncertainty for the mineral industry, Aboriginal communities and SRO property owners.

Map Staking

Allowing prospectors to stake claims via map staking will: enable prospectors to stake land that was previously inaccessible because of remoteness or difficult terrain; allow the more efficient and accurate staking of lands; level the playing field where it is too expensive for prospectors with limited finances to operate; and eliminate the impact of ground staking on the environment, including on Aboriginal lands

and SRO properties. Allowing map staking, however, may also reduce the local economic activity associated with conventional prospecting, including supply services, food services, transportation, hospitality and equipment supply. Moreover, depending on the system developed, map staking will potentially allow highly capitalized companies to stake large tracts of land.

Prospector Training

Once the prospector awareness program is developed and prescribed by regulations, prospectors will be unable to obtain or renew a prospector's license without providing evidence of successful completion of the program. Existing license holders will be given two years to undertake the requisite awareness training.

Public Participation & *EBR* Process

MNDMF undertook consultation on amendments to the *Mining Act* in three stages, using three separate Environmental Registry proposal notices: consultation on proposed amendments to the Act regarding claim staking and mineral exploration on property where mineral rights and surface rights are held separately; consultation on a discussion paper on modernizing the Act; and consultation on a variety of proposed amendments to the Act.

July 2007 Notice Requesting Input on Potential Changes to the Mining Act

In July 2007, the ministry – then called the Ministry of Northern Development and Mines – posted a proposal notice on the Environmental Registry (#010-1018) seeking public input on developing a framework for revising the requirements for mineral exploration on private surface rights. The proposal notice, which provided a 60-day comment period, requested feedback on a number of policy options, including: the use of map staking in southern Ontario; requirements for claim holders to restore surface conditions on private lands; broadening the list of lands not open for staking; enhanced notification requirements for claim staking and exploration on privately owned lands; and revisions to the consent requirements for prospecting or staking on private lands. The ministry received 122 comments from the public in response to the proposal notice.

In August 2008, MNDMF posted a decision notice, stating that it would consider surface rights/mineral rights issues as part of its broader process to modernize the *Mining Act*. The ministry stated that it would consider comments made on the July 2007 proposal notice in the context of this modernization process, and that it was seeking comments on the modernization of the Act through a new policy proposal notice (see below).

August 2008 Discussion Paper on Modernizing the Mining Act

In August 2008, MNDMF posted a policy proposal on the Environmental Registry (#010-4327) seeking public comment on a discussion paper entitled Modernizing Ontario's Mining Act – Finding a Balance. The notice, which provided a 65-day comment period, indicated that consultation would focus on: the mineral tenure system; Aboriginal rights and interests; regulatory processes for exploration on Crown land; land use planning in the Far North; and private rights and interests relating to mineral development. The proposal notice, however, failed to name the discussion paper, provide a direct hyperlink to it, or even clearly indicate that the purpose of the notice was to get feedback on the discussion paper. MNDMF received 209 comments on its August 2008 proposal.

In addition to seeking comments via the Environmental Registry, MNDMF conducted extensive consultations from August 2008 to February 2009. MNDMF stated that during this period, it consulted over 1,000 individuals and groups in several public and stakeholder meetings and 20 prospectors/industry sessions, and consulted approximately 100 First Nations in 40 workshops and sessions. Furthermore, the ministry stated it would consider input received through: the previous Act proposal notice on surface/mineral rights issues (Environmental Registry #010-1018); consultations on Ontario's Mineral Development Strategy; preliminary discussions on the development of a Growth Plan for Northern

Ontario; and discussions regarding a paper on an Aboriginal consultation approach for mineral sector activities.

The ministry states it decided on October 15, 2008 – the day the Registry consultation ended – to proceed with drafting amendments to the *Mining Act*. MNDMF did not post a decision notice, however, until April 30, 2009, when the Minister tabled Bill 173 in the Legislature.

May 2009 Proposal Notice for Bill 173

On May 5, 2009, MNDMF posted an Act proposal on the Environmental Registry (#010-6559) proposing a Bill (Bill 173), entitled *The Mining Amendment Act.* The proposal notice stated that the purpose of the proposed Bill was to "modernize the Act to ensure the legislation promotes fair and balanced development that benefits all Ontarians in a sustainable, socially appropriate way, while supporting a vibrant, safe, environmentally sound mining industry." The May 2009 proposal notice provided a 60-day public review and comment period.

In addition to the opportunity to comment via the Environmental Registry, stakeholders were also able to comment on proposed amendments at five days of public hearings of the Standing Committee on General Government. On October 28, 2009, the *Mining Amendment Act, 2009* received Royal Assent. MNDMF, however, did not post its decision notice on the Registry until December 21, 2009.

Public Comments on the Three Registry Proposals

Commenters on the three proposals included: members of the general public; SRO property owners; municipalities; environmental non-governmental organizations (ENGOs); conservation authorities; the prospecting industry; the mining industry; lawyer's associations; agriculture associations; and others. Supporters and opponents of the proposed amendments were equally passionate in their convictions. Some felt that the proposed framework for regulating exploration activities and protecting the rights of Aboriginal communities and private property owners jeopardized the future success of the mining industry. Others expressed the opinion that the amendments do not go far enough to ensure environmental protection and effective municipal land use planning.

Many commenters asserted that the following amendments must be included in the final Act:

- Requiring mining companies to obtain the consent of property owners and Aboriginal peoples before staking, prospecting or exploring for minerals on private property or treaty lands;
- Implementing regional land use planning prior to allowing exploration or mining operations to proceed. Commenters requested that community land use plans in the Far North be used to designate lands inconsistent with mineral exploration and that municipalities be given the power to determine where mining can and cannot occur through official planning;
- Requiring comprehensive environmental assessments for all mining activities, including prospecting, exploration, mining and mine closure activities;
- Prohibiting uranium mining until appropriate rules are established to protect human health, safety and the environment (see Section 5.5.1 of this Supplement for details of an application for review related to uranium mining).

Comments from ENGOs, municipalities, conservation authorities and other organizations and individuals also requested that the government:

- require prospectors to undergo training, examination and certification to obtain a license;
- withdraw world heritage sites, managed forests, areas identified by municipal Official Plans as environmentally sensitive, significant wetlands, conservation areas, and other ecologically important areas from staking;
- permanently reunite surface and mineral rights on all privately owned properties across Ontario;

- require the notification of conservation authorities and municipalities in advance of ground exploration activities to ensure that this work is not carried out in vulnerable areas as defined under the *Clean Water Act, 2006* and is not a significant threat to drinking water sources;
- require a minimum separation distance of 500 metres between mining activities and all residential lots;
- put important details in the primary legislation rather than leave them to undrafted regulations or ministerial discretion;
- change the purpose of the Act from "encouraging prospecting, staking and exploration for the development of mineral resources" to "achieving an economically and environmentally sustainable system of mineral governance;"
- replace the minimum annual assessment work requirement with a system that charges annual fees for prospecting, exploration and mining permits. Commenters argued that Ontario's assessment work provision is a "make work" requirement that encourages claim holders to disrupt the land for no purpose other than to maintain their claim;
- retain the provision in the Act that prohibited prospecting and claim staking on croplands, such as gardens, orchards, vineyards, nurseries and plantations; and
- require the sharing of mining project revenues with Aboriginal communities.

Prospectors saw little need to change the Act, asserting that many of the proposed amendments would negatively affect their industry. In particular, prospector associations argued that additional red tape (created by the requirement to conduct Aboriginal consultation, obtain an exploration permit and ensure consistency with as-of-yet unwritten community land use plans) would likely reduce investor confidence that a staked claim can proceed to development, a necessary feature of an effective mining regime. Furthermore, one association noted that the time and resources taken to conduct consultations, obtain permits, and make "arrangements" with potentially affected Aboriginal communities, could prevent claim holders from fulfilling annual assessment work requirements, resulting in the automatic forfeiture of the claim. Prospectors were also deeply concerned that developing a map staking system would eliminate prospecting jobs, reduce local investment and make it difficult for individual prospectors with minimal funds to compete with large, wealthy corporations.

Like the prospecting industry, the mining industry disapproved of any changes to the Act that would hinder free entry, competitive staking, and the certainty that a staked claim could proceed to mining development. With this in mind, industry asserted that consultations must be confined to examining how an activity should proceed not whether or not it should occur. Like prospectors, mining companies also expressed frustration over the lack of clarity and the apparent transfer of the Crown's duty to consult with Aboriginal communities to proponents.

To reduce potential conflicts and improve certainty of investment, the mining industry recommended that the government:

- resolve all outstanding Aboriginal land claims;
- develop a comprehensive database of Aboriginal and treaty rights for consultation purposes;
- catalogue all sites of "Aboriginal cultural significance;"
- require Mining Recorders to advise prospectors of likely affected parties when claims recorded;
- develop guidelines that describe the responsibilities of the proponent, Aboriginal communities and government in the consultation process;
- impose strict timelines on Aboriginal consultation and arbitration; and
- clarify the status of mineral tenure acquired before and since the Premier's July 2008 announcement to protect 225,000 square kilometres of the Far North (see Other Information below).

Unlike the prospecting industry, however, the mining industry supported the concept of map staking, arguing that it is more efficient, avoids unnecessary costs and safety risks, and uses less fossil fuels than ground staking. Moreover, the mining industry argued that eliminating the need for physical entry onto properties will prevent potential conflicts between property owners and exploration proponents.

One thing all stakeholders agreed on was that Bill 173 leaves too many important details to undrafted regulations. Many commenters expressed frustration that the implications of the legislation are unclear without the accompanying regulations. Many also expressed concern that certainty in investment and environmental protection was undermined by the increased level of ministerial discretion.

Ministry Consideration of Public Comments

MNDMF appears to have reviewed the comments received on the three proposal notices and was willing to reconsider certain aspects of the proposed amendments in light of those comments. For example, following the consultation period on its August 2008 discussion paper, MNDMF's proposed amendments to the Act reflected repeated requests to withdraw staking on SRO properties in southern Ontario. Likewise, in response to comments received on the proposed amendments, MNDMF appears to have revised Bill 173 to allow SRO property owners to request the reopening of their property's mineral rights for staking. MNDMF also revised the *Mining Amendment Act, 2009* to specify that the Minister would consider and act upon any report and recommendations that come out of a dispute resolution process.

Notwithstanding these revisions, however, few substantial changes were made to Bill 173 between its tabling in May 2009 and its final passage in late October 2009. In particular, despite repeated calls for environmental assessments at each stage of the mining cycle, rules for uranium mining, requirements to notify and consult Aboriginal communities prior to staking, and for increased municipal input in land use planning on Crown land, provisions to address these concerns do not appear in the finalized Bill 173. Moreover, in its decision notice for the *Mining Act* amendments, MNDMF fails to specify how it revised Bill 173 to reflect public concerns.

As part of the process to modernize the *Mining Act*, MNDMF posted three proposal notices on the Environmental Registry, soliciting comments on each one. Although the decision notice for the first Registry posting (#010-1018) indicated that all submitted comments would "be considered under the Mining Act modernization posting (Environmental Registry #010-4327)," neither the proposal notice nor the decision notice for #010-4327 mentions this fact.

The ECO is troubled by MNDMF's approach to reporting on the number of comments received from the public about proposed amendments to the *Mining Act* (Environmental Registry #010-6559). While the decision notice stated in the Comments section that 86 comments on the proposal had been received (86 online and 0 in writing), the notice confusingly stated later that 750 responses had been received through the Environmental Registry process (86 comments through the Registry site and 664 comments as e-mails, written letters and postcards). The ECO notes that although the Environmental Registry is in the format of an online site, every comment received on a proposal during the comment period – not just those received online – must be included in a ministry's tally of comments. Moreover, for all *EBR* decision notices, ministries must provide explanations of how public comments were considered.

SEV

In its Statement of Environmental Values (SEV) consideration note, MNDMF stated that modernizing the *Mining Act* will bring the legislation "into harmony with the values of today's society while maintaining a framework that supports the mineral industry's contribution to Ontario's economy." The ministry stated that the modernized Act will ensure Ontario has up-to-date mining practices that support the mining sector and will ensure appropriate consultation and accommodation of First Nation and Métis communities. Although MNDMF listed several provisions that may help to reduce environmental impacts (e.g., community-based land use plans, map staking, and increased fines and penalties for non-compliance with rehabilitation requirements), the ministry did not explicitly outline how the Act's amendments will "minimize environmental disturbances during all phases of mining."

Other Information

In December 2006, Sierra Legal Defence Fund (now Ecojustice) submitted an *EBR* application for review on behalf of the Wildlands League and Mining Watch Canada requesting a review of the need for

regulatory reform related to the assessment of the environmental impacts of mining projects. The Ministry of the Environment (MOE), the Ministry of Natural Resources (MNR) and MNDMF all denied this application. For more information on this application and the ECO's review of the ministries' decisions, please see Section 5 of the Supplement to the ECO's 2006/2007 Annual Report and Section 5.2.6 of the Supplement to the ECO's 2008/2009 Annual Report.

In July 2008, the Premier announced government plans to protect at least 225,000 square kilometres of the Far North Boreal region under the Far North Land Use Planning Initiative. He announced that scientists, First Nation and Métis communities would collaborate to map and permanently protect an interconnected network of conservation lands across the Far North. Moreover, he stated that the government would work with all northern communities and resource industries to create a broad plan for sustainable development and that local plans would be developed in agreement with First Nations.

In June 2009, MNR posted a proposal notice on the Environmental Registry (#010-6624) soliciting comments on Bill 191, the *Far North Act, 2010*. On the same day, the Minister of Natural Resources tabled Bill 191 in the Legislature for First Reading. Bill 191 proposes to deliver on commitments made in the Premier's July 2008 announcement, and "would enable a formal land use planning process with the First Nations in the Far North that will result in community-based land use plans that will designate protected areas and identify areas where sustainable economic development may occur." Bill 191 received Second Reading on June 3, 2010.

In April 2009, two applicants requested a review of the need for a new act to legislate activities, such as mining and mineral exploration, in areas with elevated naturally occurring uranium. The applicants asserted that Ontario's existing legal framework provides no avenues for addressing community concerns about uranium exploration and provides few tools for monitoring and mitigating impacts of uranium exploration on water resources and the environment. The Ministry of Municipal Affairs and Housing, MOE, MNR and MNDMF all denied this application for review. For more information on this application and the ECO's review of the ministries' decisions, see Section 5.5.1 of this Supplement.

In December 2009, MNDMF posted a policy proposal notice on the Environmental Registry (#010-8656) soliciting input on eight key areas that need to be addressed in order to develop appropriate regulations under the amended *Mining Act*. The notice, which provided a very generous and lengthy comment period of 127 days, noted that different sections of the *Mining Act* will be proclaimed "once the relevant details are developed." The ECO will review these regulations in future reports.

ECO Comment

Considering the wildly divergent views of stakeholders, the amended *Mining Act* strikes a reasonable balance between meeting the interests of the mining industry and private property owners. What is missing from this mix, however, is an equivalent reflection of the concerns raised by ENGOs and the public for better measures to minimize the impacts of mining activities on the environment.

While the Act includes some environmental protections in the way of powers to regulate mine rehabilitation and prevent immediate and dangerous adverse effects related to existing or historical mining properties, these types of powers are largely reactionary and may fail to address an issue until after the damage is done. To ensure that potential environmental impacts and the measures needed to mitigate them are fully considered *before* they occur, the ECO encourages MNDMF to require that a Director of Exploration's decision to approve an exploration permit include the review of a comprehensive environmental impact assessment. Furthermore, to ensure that public concerns are fully considered, the ECO strongly encourages the government to classify exploration plans and permits as instruments under the *EBR*. This would allow the public to comment on exploration plans and permits via the Environmental Registry and file applications for review and investigation.

The ECO agrees with MNDMF's decision to expand the list of land types withdrawn from staking. However, the ministry should have included world heritage sites, conservation areas, and natural heritage features, such as significant wetlands, woodlands and habitat, in Bill 173's list of withdrawn lands.

Moreover, the ECO believes the government missed an excellent opportunity during the review of the *Mining Act* to give itself the authority to cancel mining leases. Currently, MNDMF cannot withdraw a claim that proceeds to lease unless it is repealed by a judge of the Ontario Superior Court. In our 2008/2009 Annual Report, the ECO expressed frustration with MNDMF's inability to cancel mining leases that overlapped with an ecologically important old growth forest. The ECO argued that the government should have the ability to protect environmentally significant sites that conflict with mining claims.

Because many important details about exploration plans and permits are yet to be developed in future regulations, it is difficult to know what effect these measures will have on protecting the environment. Likewise, uncertainty for industry, property owners and environmental protection is created by government delays in: drafting the *Far North Act*; *2010* developing community based land use plans; and proclaiming the *Mining Act* provision that allows SRO property owners in northern Ontario to apply to have their lands withdrawn.

Moreover, because pre-existing claims are unaffected by community based land use plans, the government's failure to roll out the amended *Mining Act*, its regulations, and the *Far North Act, 2010* as a single, comprehensive regulatory package creates loopholes that undermine the very land use planning the government hopes to achieve. These delays could result in cases where the government realizes only after the fact that mining claims have been staked on ecologically sensitive lands, at which point it is too late to withdraw the lands. Such a situation would be similar to the mining disentanglement headache that has plagued the government for years (see pages 85-89 of the Supplement to the ECO's 2006/2007 Annual Report). This troubling scenario could have been pre-empted by heeding the ECO's past suggestions to proactively identify lands with significant ecological values, withdraw such lands from staking, and give the government the authority to cancel leases. To prevent the creation of more disentanglement-like situations, the ECO encourages the government to develop *Mining Act* regulations and the *Far North Act, 2010* as promptly as possible, without sacrificing or constraining the public's right to full and meaningful consultation.

Map staking has the potential to bring with it a whole host of problems, including the troubling prospect that foreign corporations with deep pockets will be able to stake large tracts of Ontario with the "click of a mouse." Given the seemingly inappropriate use of claim staking to secure hundreds of kilometres of land for a rail corridor (see box entitled The Ring of Fire: Using Mining Claims to Plan the Far North in Part 5.1.3 of this year's Annual Report), such a system has the potential to seriously undermine land use planning in the province. The ECO therefore expects MNDMF, as has been indicated by the Minister, to use extensive consultation and input from other jurisdictions with map staking to develop a fair and effective map staking system that does not jeopardize land use planning.

MNDMF should be praised for undertaking extensive consultations during the development of Bill 173. The ECO looks forward to continued consultation and use of the Environmental Registry as the ministry develops regulations under the amended Act. The ECO is disappointed, however, that MNDMF's proposal notice for its discussion paper on modernizing the Act failed to provide an electronic copy – or even the name – of the document the ministry was seeking comment on. Insufficient information in Registry postings seriously hinders the public's ability to comment. Furthermore, the ECO is frustrated that it took MNDMF four months to send the ECO the written comments the ministry had received on Bill 173. Such delays hamper the ECO's ability to effectively review the ministry's consideration of public input.

SECTION 5

ECO REVIEWS OF APPLICATIONS FOR REVIEW

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5.1 Ministry of Energy and Infrastructure

Review of Application R2009013:

5.1.1 Review of the Need for a Comprehensive, Inclusive, Mandatory Energy Efficiency and Consumption Audit Provision in the *Green Energy Act, 2009*

(Review Denied by MEI)

Background/Summary of Issues

In December 2009, two applicants filed an application requesting a review of section 3 of the *Green Energy Act, 2009* (*GEA*) which prescribes mandatory home efficiency disclosure. The ECO referred the application to the Ministry of Energy and Infrastructure (MEI), and also provided it to the Ministry of Municipal Affairs and Housing for information purposes.

The purpose of section 3 of the *GEA* is to provide disclosure of information, at the time-of-sale of a property, about a home's energy use and efficiency performance. The intent is to inform and educate home buyers, prior to the purchase, about the on-going energy operating costs and environmental impacts related to home ownership. Beyond providing information, disclosure can also motivate home sellers and buyers to retrofit and improve their home's energy efficiency which results in a higher home value, on-going cost savings and environmental benefits.

The terms "rating" and "audit" are often used interchangeably but they are different – an audit consists of the protocols and procedures used to determine the rating. In jurisdictions like the EU, Canada, the U.S. or Australia that rate buildings, the rating is typically comprised of two parts: (1) a label or certificate displaying an alpha, numeric or other symbol that encapsulates the building's energy efficiency (e.g., A to F with A-rated houses being top performers; a range of numbers like 0 to 100 with either the high or low end of the scale representing the most efficient performer; or, 1,2 and 3-star ratings showing an ascending rank of efficiency); and, (2) a detailed technical report explaining the building's use of energy and ways to improve it.

Information needed to assign a rating can be provided by several means, such as: simple analysis of bills, thermal imaging to detect areas of heat loss or by modelling the home's energy performance. Modelling involves an "energy audit" of the home. A certified energy auditor visits the home and measures its dimensions and the amount of glazing (windows and skylights), and records the efficiency of mechanical equipment and the insulating value of building envelope materials. This data is used in a computer model to calculate a standardized efficiency rating. In Ontario, for example, the federal government's EnerGuide rating system requires an audit and computer modelling to assign a rating from 0 to 100 – 100 being a perfectly efficient house, a typical new home built in 2010 would achieve a rating of about 75-80 whereas older homes would have lower ratings.

Section 3 of the Act prescribes that a person offering to buy a property has the right to receive information, reports or ratings about a home's energy consumption and efficiency from the person selling the home. The section uses broad and general wording because the details of the information to be provided had not been determined by the government at the time of passage of the *GEA*, but are to be provided later in regulation (as noted in section 31(b) of the Act).

Section 3 further requires that the seller must provide the information to the buyer prior to accepting the buyer's offer to purchase. And finally, as a result of an amendment made to section 3 prior to passage of

the Act, a buyer may waive, in writing, their right to receive such information, in which case the disclosure provision does not apply and the seller is exempted from providing information.

The application stated that a review was warranted because the approach to audits contained in the Act is not, in fact, mandatory given that buyers may waive their right to the information. As well, the applicants argued that section 3 of the Act merely reflects the situation governing real property transactions prior to passage of the *GEA*, that is, the seller of a property is required to produce an energy audit upon request of the buyer.

The applicant's claimed that a review was justified for the following additional reasons: the environmental and economic benefits outweigh costs associated with a change to a true mandatory requirement; section 3 is limited in scope (applying only to single-family detached and attached dwellings); and, current rebates and audit standards are unco-ordinated and not comprehensive.

The applicant's offered their view of how the *GEA* could be improved by the implementation of a truly mandatory and inclusive energy audit. Among its elements were the proposals that audits be mandatory for leased properties, include multi-unit residential buildings – such as condominiums and rental apartments – and apply to non-residential properties. A social equity argument was made for including tenancies in an inclusive audit.

GEA Home Efficiency Disclosure Provision is not Mandatory but Voluntary

Bill 150, the *Green Energy and Green Economy Act 2009*, Schedule A (which enacted the *GEA*) was amended on a government motion at Second Reading to: exclude leased properties and change details of the property buyer's right to receive energy information at the time-of-sale of the property. The essential change introduced was the addition of the buyer's ability to waive, in writing, their right to receive energy information. Prior to the amendment, the waiver did not exist in the legislation.

The applicants argued that the mandatory nature of the audit was abolished by the amendment since it granted the home buyer the ability to waive the requirement for the seller to provide an energy audit. In their view, the *GEA* enacted a requirement that is no different from the situation governing real property sales prior to passage of the Act: a voluntary approach where a property vendor was required to produce energy consumption information upon the request of prospective buyers.

According to the applicants, the distinction between voluntary and mandatory-with-a-waiver is subtle but in practice there is no difference. To illustrate the distinction, they compared home transactions that occurred before and after passage of the *GEA*. Prior to the *GEA*, if a buyer requested energy consumption information and the seller did not produce it, the purchaser's recourse was to discontinue the transaction and the seller lost a prospective buyer. Under the *GEA*, where the buyer requests energy information and the seller does not comply, the buyer has no recourse against the seller. The buyer can discontinue the transaction and the seller loses a buyer. In practice, it is the same situation that existed pre-*GEA*.

The Need for Mandatory Audits

The applicants maintained that a voluntary approach to home efficiency disclosure is ineffective in promoting energy audits at time-of-sale. They argued that under a voluntary approach, a small number of audits are completed relative to the number of houses sold. Sales and audit data were provided to support this contention.

According to the applicants, agents are unlikely to voluntarily recommend an audit because it creates a potential barrier to completing a transaction. Also the applicants argued, under a voluntary approach if a purchaser does not receive information from an energy audit, their alternative is to rely on information in reports provided by home inspectors. Such information is based on energy bills of the previous homeowner and is dependent on occupancy factors and does not give standardized information like that provided by an audit.

A potential buyer is prejudiced – even if the buyer offers to pay the seller's cost for the audit – when compared with other buyers who are willing to waive their rights and forego the audit.

Effect on Property Vendors

The applicants proposed that the effect on vendors is twofold: the audit cost and the potential reduction in property values. In regard to the cost of the audit, the applicants stated that it is partially offset by government rebates that cover approximately one-half of the audit cost, and could be further reduced by placing the onus for the audit cost on the purchaser. Regarding the latter effect on property values, the applicants believed efficiency will mainly depend on the vintage of the home (year of construction) and argued that any loss of equity will result from owners who do not take responsibility for upkeep and retrofit of their properties. Sellers who diligently maintain or retrofit and improve their homes could benefit from an increased property value associated with an energy efficient home. The applicants were also not convinced by the argument that mandatory audits deprive older homeowners of equity built up for use as retirement income because the appreciation of the market value of properties in Ontario far surpasses the effect of an audit that reveals an inefficient home.

Benefits of Mandatory Audits

The applicants maintain that economic and employment growth from "green" jobs to perform audits and home retrofits will result. Mandatory audits will enable the government to reduce spending on energy supply infrastructure and will increase energy security.

Ministry Response

MEI denied the application stating that it did not contain sufficient new evidence to warrant a review. The ministry indicated that Bill 150 was amended to include the waiver in response to public input received when the proposed legislation was posted on the Environmental Registry, as well as comments received by the Standing Committee reviewing the Bill. The intent of the amendment was to relieve a seller of the obligation to obtain an energy audit where the buyer does not want the information and would never have requested it. According to MEI, this provides flexibility for purchasers and different sales situations, for example, where a buyer will renovate or tear down and rebuild the house. In instances where the waiver is not invoked, the energy rating is mandatory and upholds the buyer's right to information.

The ministry stated that buyers can presumably make conditional offers dependent on a satisfactory energy rating, as is currently done when buyers request a home inspection.

The ministry responded to the applicants' argument that the *GEA* approach was limited in scope and not comprehensive by stating that the government is initially focusing on making audits applicable to single-family homes and that this approach is consistent with consultations with stakeholders, including comments received through the Environmental Registry and at the Standing Committee.

ECO Comment

The ECO believes that MEI should have provided a more detailed rationale for its decision to deny the application for review. The ministry should have elaborated on: the number and source of comments received that were critical of section 3 of Bill 150; whether the comments provided compelling data to support the view expressed; and, how MEI used these comments to determine that flexibility was needed and could be provided by way of adding a waiver provision since few specifically mentioned the need for flexibility. To assist the applicants' understanding of the ministry's decision, MEI should also have described any alternative options that were considered in drafting the amendment to section 3.

While the application did not explicitly raise the issue of the lack of proclamation of section 3 of the *GEA* at the time all other sections of the Act were proclaimed into force, the ministry could have provided its

reasons for not immediately proclaiming section 3 of the *GEA* and any future plans for proclamation (as of June 2010, section 3 was still not proclaimed).

Also of interest to the applicants – given their concern that potential buyers who do not execute their waiver have little redress if they do not receive audit information – would be MEI's explanation of the reason that enforcement provisions originally contained in Bill 150 were removed when the Bill was amended, and the potential impact of this amendment on the amended section 3. The Minister of Energy and Infrastructure's remarks to the Standing Committee reviewing Bill 150 stated that these were not essential to the success of the bill.

In its decision to deny the review, MEI indicated that it expects to post a draft regulation on home energy ratings on the Environmental Registry in the "coming months". The ECO will monitor and follow-up on the ministry's commitment.

5.2 Ministry of the Environment

Review of Application R0334:

5.2.1 Classification of Chromium-containing Waste as Hazardous (Review Undertaken by MOE)

Summary of Issues

Almost 15 years ago, applicants from the tanning industry requested that the government regulate the different forms of chromium according to their toxicity. The Ministry of the Environment (MOE) agreed to undertake the review and advised the applicants that its review would be "coordinated and harmonized with the federal review of the national hazardous waste definition." However, it was not until March 2009, that MOE advised the ECO that the updated federal hazardous waste regulations did not contain an exemption for tanning waste containing chromium. MOE did not advise the applicants of the federal decision made in 2005/2006 nor did it make a decision on their application for review.

Last year, the ECO criticized MOE for not having taken independent action when it became apparent that the federal review would take so long and urged MOE to make a decision and close the application. In the Supplement to last year's Annual Report, the ECO stated that "the delay in making a final decision on this application under the *EBR* is unprecedented" and that MOE's handling of the application was "totally unacceptable."

Background

Chromium is a metal that is used to produce stainless steel, chrome plating and catalytic converters; and as a catalyst in the dyeing and tanning of leather. Two forms of chromium are common in the natural environment, trivalent, which is essential to the metabolism of glucose in humans and other animals, and hexavalent, which is known to cause health effects. Hexavalent chromium was declared toxic to the environment and a danger to human life or health under the *Canadian Environmental Protection Act* (*CEPA*).

Under Reg. 347 – General Waste Management, made under the *Environmental Protection Act* (*EPA*), a waste is considered hazardous if the total chromium level in a leachate test exceeds five milligrams per litre (mg/L) even if the waste contains only the non-toxic form of chromium, trivalent chromium. The applicants explained that other jurisdictions, including the United States, differentiate between toxic and

non-toxic forms and that continuing to classify the non-toxic form as hazardous "places an unnecessary economic burden on industry."

ECO Comment

In response to a query in April 2010 from the ECO, MOE advised that it is working on the application and hoped to close it by the summer. Although the ECO appreciates that MOE is finally taking action, the ECO notes that the 15-year timeline on this file sets an abysmal example for how to handle an *EBR* application. The ECO will continue to monitor the status of this application closely.

Review of Application R2005004:

5.2.2 Review of the 1994 MOE Guideline C-4: The Management of Biomedical Waste in Ontario (Review Undertaken by MOE)

Background/Summary of Issues

On August 15, 2005, the ECO received an application requesting that the Ministry of the Environment (MOE) review Guideline C-4: The Management of Biomedical Waste in Ontario, 1994 ("1994 Guideline"). The applicants, owners of a biomedical waste collection company, argued that because generators of biomedical waste are not legally obliged to follow the 1994 Guideline and do not always comply with its provisions voluntarily, the 1994 Guideline needed to be converted into a regulation. Regulations are enforceable under the law and often include penalties for violations.

The applicants argued that, as a result of the low level of generator compliance with the 1994 Guideline's provisions:

- large quantities of biomedical waste end up being handled in the non-hazardous waste stream;
- their economic interests were hurt since they were competing with unlicensed biomedical waste collection companies primarily providing services to private healthcare generators who do not comply with the 1994 Guideline;
- the public, commercial waste haulers and landfill operators were exposed to increasing volumes of hazardous biomedical waste, and
- biomedical waste companies' staff were exposed to hazardous biomedical waste due to generators' non-compliance with the 1994 Guideline's provisions.

The ECO forwarded the application to MOE on August 19, 2005.

Ministry Response

MOE acknowledged receipt of the application on August 22, 2005 and promised the applicants a notice of the decision as to whether a review would be conducted by October 21, 2005 – within the 60-day period established under section 70 of the *Environmental Bill of Rights, 1993* (*EBR*). On December 22, 2005, two months later than the *EBR* prescribed deadline, MOE notified the applicants that it expected staff to complete a review of the 1994 Guideline by September 1, 2006 and the applicants would be provided with a summary of the outcome of the review by October 1, 2006. The ministry committed to letting the applicants know if there was any change in the expected completion date. However, MOE did not follow up on this commitment although the review took more than a year longer than was expected.

On December 6, 2007, 14 months later than the promised date, MOE notified the applicants that the review was completed and that the 1994 Guideline required revisions. In February and March 2008, MOE held focused group consultations with selected stakeholders. Following this, a proposal was posted

on the Environmental Registry for a 60-day public review and comment period starting October 23, 2008 and ending December 22, 2008. MOE posted a policy decision with a revised Guideline C-4: The Management of Biomedical Waste in Ontario, 2009 ("2009 Guideline") on January 12, 2010. For a review of this decision, please refer to Section 4.4 of this Supplement.

The regulatory framework that governs the management of biomedical waste in the province includes:

- Part V of the *Environmental Protection Act* (*EPA*);
- Regulation 347 – General-Waste Management; and
- the revised Guideline C-4: The Management of Biomedical Waste in Ontario, 2009

MOE revised the 1994 Guideline, rather than converting it into an *EPA* regulation, as the applicants had requested. The introduction to the 2009 Guideline noted that waste generators should follow the 2009 Guideline as "best management practices", but that waste carriers and receivers will be bound by Certificates of Approval (Cs of A) under the *EPA*. The new Guideline "will in part inform" the case by case conditions that the ministry will impose when it approves Cs of A for carriers and receivers of biomedical waste. It must be noted, however, that under section 18 of Reg. 347 the generators of biomedical waste are obliged to be registered with the MOE Hazardous Waste Information Network and report on the quantities and types of waste they generate.

ECO Comment

While the provisions of the revised 2009 Guideline will be incorporated into the Certificate of Approval process for biomedical waste management companies, it is not clear how the 2009 Guideline will ensure biomedical waste generators comply. In other words, MOE's decision to simply revise the guideline instead of converting it into a regulation does not address the applicants' main concern, which is generators' non-compliance with the Guideline's provisions and the risks to public health and the environment this poses.

The ECO has some procedural concerns. MOE did not meet the 60-day deadline established under section 70 of the *EBR* for informing applicants of a decision to review. In addition, MOE's initial review took 14 months longer than it promised without informing the applicants of the delay.

Review of Applications R2006006, R2006010, and R2007010:

5.2.3 Review of the Need to Create Legislation to Protect the Waterloo and Paris/Galt Moraines (Review Undertaken by MOE)

Background/Summary of Issues

In 2006 and 2007, the ECO received several applications for review that draw attention to tensions between development pressures in communities in the Grand River and adjacent watersheds and protection of the ecosystems that several urban centres depend on for water.

Growth Plan

In 2006, the Ontario government prepared the Growth Plan for the Greater Golden Horseshoe ("Growth Plan") under the *Places to Grow Act, 2005*, which is a decision-guidance framework that establishes specific density targets and planning priorities for managing growth in the region. According to the Growth Plan, Ontario's population is supposed to increase by four million people by 2031. The Growth Plan establishes five urban growth centres within the Grand River watershed: downtown Guelph, uptown Waterloo, downtown Kitchener, downtown Cambridge and downtown Brantford. These communities

largely depend on groundwater and/or limited surface water supplies for drinking water. Nutrients and other pollutants from treated and untreated wastewater are also discharged into the Grand River.

There is a tension between the Growth Plan population targets and protecting the water resources of the watershed. Population growth may be appropriate where there is adequate access to water supplies. However, the long-term supply of potable water will be adversely affected by increased development and demand for water. If demand for water outstrips supply, municipalities will need to invest in bringing water into the area to deal with water shortages, as well as ensure its water infrastructure can handle the discharged water.

The situation is further compounded by the effects of climate change, where Ministry of Natural Resources (MNR) 2010 models predict that by mid-century Southern Ontario will experience at least an average 2.6 degrees Celsius warming in the summer with consequent increased evapotranspiration.

The Moraines

Moraines are a geological feature formed at the edge of glaciers traversing across the landscape. Moraines vary in composition, size, height and thickness depending on the underlying geological material the glacier travelled across.

The glacial sand and gravel deposits of moraines act like a sponge, absorbing rain and snowmelt. The water stored in the moraine's aquifers is filtered and slowly released into lakes, rivers and streams. As such, moraines are often an important source of drinking water and act a recharge/discharge area for watersheds and their communities. Furthermore, the forested areas of the moraine typically support diverse ecological habitats.

Numerous advancing and retreating glaciers in the glacial era resulted in the formation of a series of moraines in Ontario. In total, there are 14 moraine complexes in the Grand River Watershed, including the Waterloo Moraine, the Paris Moraine and the Galt Moraine. These three moraines are the subject of the three separate *EBR* applications for review received by the ECO that express concern that development pressures in the region are impeding the moraine's hydrologic cycle and threatening water resources of the watershed.

The Waterloo Moraine:
The Waterloo Moraine spans approximately 400 square kilometres of the Grand River watershed in the Region of Waterloo. The municipalities of Waterloo and Kitchener developed on the central portion of the moraine, and as urban growth centres in the Growth Plan, are required to meet specified resident and job density targets by 2031.

Much of the moraine's major recharge area is located to the west of the urban area in a rural agricultural area. The multi-aquifer provides water to the majority of Kitchener/Waterloo inhabitants and those in rural areas west of the municipalities. The Region of Waterloo Water Supply Master Plan indicates that there is sufficient groundwater supply to meet the 2031 Growth Plan targets, but only if water conservation and efficiency programs are implemented, and a pipe to Lake Erie would be required after 2031. Furthermore, wastewater is already an issue in Waterloo (pop. 478,000), where 13 treatment plants discharge wastewater into the Grand River or its watershed. The region expects to spend $826 million in the next 10 years in treatment upgrades and expansions to water and wastewater treatment.

The Paris and Galt Moraines:
The Paris and Galt Moraines extend 560 square kilometres from Caledon to Norfolk County. These moraines are significantly lower in relief than the Waterloo Moraine and have a relatively permeable surface geology. These features contribute to high levels of recharge into the moraines, which support numerous coldwater streams and wetlands. Studies indicate the potential presence of locally important aquifers along and beneath the moraines. Moreover, there are significant natural heritage features that warrant recognition unto themselves.

While the moraines are not subject to imminent development pressures, Guelph (pop. 115,000) and Cambridge (pop. 131,000), as Growth Plan urban centres, are on course to reach resident and job gross density targets by 2031. This growth will be primarily outside the moraines. Furthermore, significant aggregate operations are occurring in Puslinch Township, between the Paris and Galt Moraines. The City of Guelph Water Supply Master Plan indicates the need for additional ground and/or surface water supplies by 2017-2025. Cambridge is examining the option of bedrock wells to meet its water demands.

The Applications for Review

Waterloo Applications:
In June and July 2006, two applications for review (the "Waterloo applications") were submitted to the ECO outlining the need for a new policy or act to protect the Waterloo Moraine. They asserted that increased population growth would have a detrimental affect on the quality and quantity of groundwater and result in pollutants contaminating regional wells. They also expressed concern over an increase in the risk of floods and water shortages if the recharge areas are not allowed to function naturally.

The applicants further contended that current policies and laws are insufficient to protect the moraine. They asserted that the region's new Environmentally Sensitive Landscapes policy, which aims to identify and protect areas of high quality environmental features, does not contain adequate source water protection measures and only protects a portion of the groundwater recharge lands of the moraine. Furthermore, they argued that current laws and policies, i.e., the *Ontario Water Resources Act* (*OWRA*), *Safe Drinking Water Act*, and Provincial Policy Statement, 2005 (PPS), do not safeguard the ecological integrity of the moraine. Instead, the applicants proposed that a new act or policy be created to protect the groundwater and recharge areas of the moraines.

Paris/Galt Application:
In May 2007, applicants filed an application for review (the "Paris/Galt application") requesting a review of the need for a new policy or law to protect the Paris and Galt Moraines and their groundwater recharge area in the Grand River watershed. The applicants stated that municipalities within the watershed, such as Guelph, Cambridge, Kitchener and Waterloo, are all designated as growth areas in the province's Growth Plan and largely dependent on groundwater resources to supply their municipal drinking water. The applicants contended it is critical to protect the moraines before the surrounding growth areas encroach into the moraines. The applicants also urged the province to analyze the cumulative effects of aggregate extraction on groundwater recharge in the moraine areas.

The applicants argued the "inter-jurisdictional complexity of protecting the Paris and Galt Moraines warrant provincial leadership in protection policy." Due to the geographic size of this system of moraines, the applicants stated that the area requiring protection is more extensive than the municipal source water protection areas outlined in the *Clean Water Act, 2006*.

The ECO sent the three applications to the Ministry of the Environment (MOE), the Ministry of Natural Resources (MNR) and the Ministry of Municipal Affairs and Housing (MMAH).

Ministry Response

MNR and MMAH denied all three applications. The ECO's review of their responses can be found in the Supplement to our 2007/2008 Annual Report (pages 259-262).

After an extended delay, in April and July 2007 respectively, MOE responded to the applicants of the Waterloo and Paris/Galt applications and agreed to conduct a review into the necessity of a law or policy to protect the moraines. However, the ministry stated that items not under MOE's mandate, such as the PPS 2005, the Greenbelt Plan and the Growth Plan, would not be part of the review. Likewise, MOE stated that, in keeping with provisions in the *EBR*, the ministry's review would not examine decisions made within the last five years (e.g., *Clean Water Act, 2006* (*CWA*); the *OWRA*; *Nutrient Management Act, 2002*; *Environmental Assessment Act*). Finally, the ministry outlined that its review would not affect current planning decisions.

In May 2009, MOE informed the applicants that it had completed its review on the Waterloo and Paris/Galt applications. It produced a single report responding to the three sets of *EBR* applications on May 4, 2009. The ministry's report concluded that no new provincial policy or legislation was required to protect the moraines.

MOE's report surveyed the current policy and legislative framework to determine if it was sufficient to protect groundwater recharge in the Grand River watershed (and other watersheds along the moraines) from the effects of urban development and aggregate extraction on the moraines. The review also examined the framework for potential gaps in knowledge of the hydrogeology of the moraines and the ability of laws and policies to protect the hydrologic function of the moraines.

The review was completed with the assistance of a consultant, a ministry review team, and an inter-ministry committee made up of staff from MNR, MMAH, the Ministry of Agriculture, Food and Rural Affairs, the Ministry of Northern Development, Mines and Forestry, the Ministry of Energy and Infrastructure and the Ministry of Transportation. The MOE review team examined provincial, regional and municipal policies and consulted with municipalities, conservation authorities and provincial staff.

MOE asserted that its review broadens the understanding of the functions of the moraines, which benefits other government agencies, municipalities, conservation authorities and stakeholders. MOE's report describes the hydrology of the moraines including the: boundaries, geology, hydrogeology, recharge and storage, water supply, ecological features, water quantity and budget and water quality. The report also outlines key scientific considerations such as the scope of hydrogeology evaluations and ecological reserves. The report supported the use of monitoring data to guide future planning and land use policy decisions and the development of technical guidance documents.

MOE's report found that the Waterloo Moraine has been extensively studied for decades. Although the Waterloo Moraine is experiencing local contamination issues at several well fields, particularly from road salts and fertilizers, the report noted that the area is not facing issues related to decreased water quantity. The report found that the Region of Waterloo has been pro-active in water resource protection and has developed an extensive monitoring program and sub-watershed development plans. Nevertheless, no specific land-use controls have been proposed. The report confirmed that much of the major recharge area is located to the west of the urban area in an agricultural area of the moraine.

With respect to the Paris and Galt Moraines, MOE's report found that there was detailed hydrogeology data for the developed areas of the moraines but insufficient detailed data for the majority of the moraines. The report found that water level trends are stable and there are high levels of recharge into the moraines, which supports coldwater streams and wetlands. The presence of large scale aquifers, however, has not yet been confirmed within the moraines. While MOE's report noted that groundwater quality is affected by agriculture, septic systems and de-icing material, gravel extraction in the area does not appear to have significant impacts on the groundwater flow systems or surface water and wetlands.

Upon reviewing existing laws and policies (except those excluded from the review), the report concluded that a new provincial law or policy for the moraines was unwarranted at this time. Although not officially part of the review, the report found that the *CWA,* the PPS, the Greenbelt Plan and the *OWRA* provide adequate protection for groundwater recharge in the Upper Grand River watershed and other neighbouring watersheds. MOE expected that the *CWA* would address most of the applicants' concerns over drinking water once source protection plans are prepared and implemented. The report also affirmed that regions, municipalities and conservation authorities play a key role in implementing Ontario's planning system at a local level.

MOE revealed that additional studies examining water supplies were being conducted and were expected to be completed in 2010. The report also stressed the continued need to analyze data and monitor and assess future growth implications. Further, in collaboration or consultation with partner ministries, First Nations and stakeholders, MOE committed to developing guidance materials to assist with the implementation of policies protecting hydrologic functions of the moraines.

ECO Comment

MOE's research outlining the hydrogeology of the moraines – and the laws and policies applicable to them – is important and is to be commended. The ECO believes, however, that it is by no means the conclusive step in determining how best to manage and control development pressures on the moraines to ensure that water resources are protected for future generations. If the principles of watershed-based planning are applied, and the environmental and socio-economic context of the moraines are examined to assess the cumulative effects of development, the ECO believes that current provincial policies do not adequately protect the ecological and hydrogeological integrity of the moraines.

On the tenth anniversary of the Walkerton water tragedy, we are reminded of the critical role water plays in the environmental, social and economic well-being of our communities. These hard lessons must never be forgotten. The ECO outlined our concerns over the provincial planning system's ability to protect water resources and natural features such as moraines in previous Annual Reports. In our 2006/2007 Annual Report, which examined the challenges to creating sustainable communities in southern Ontario, the ECO found that "serious conflicts are inherent in the province's plans for balancing growth and ecosystem sustainability." These conflicts can be avoided if they are anticipated and proactively addressed in a more thoughtful way. The mandated use of a systems-based approach – in contrast to the voluntary nature of the PPS – should ideally require the explicit prioritization of ecological and hydrological integrity in land use planning. For example, watersheds should be a key unit within land use planning in which to frame decision-making. Sustainability, a central premise in watershed planning, ensures regular assessments of where it is feasible to develop and how much growth the natural environment can support. Ecologically sustainable water management requires the protection of the integrity and resilience of the affected ecosystems while meeting the human needs for water.

Although MOE's report provided excellent benchmarking information on the moraines, it did not assess whether the ecological capacity of the moraines can realistically accommodate the projected growth in the region. This would include considering natural flows variability, source water protection, pollution risks, groundwater supplies and climate change. Interestingly, several models cited by the report indicate that the water capacity of the moraine's recharge areas decreased as the population increased. Our 2006/2007 Annual Report reiterated these concerns, noting that the Growth Plan imposes growth on watersheds where communities are already struggling with water supply and wastewater treatment issues. Unfortunately, the population projections for Growth Plan communities were established before the future water and wastewater infrastructure needs were identified, and their associated costs and environment impacts, were assessed. This clearly indicates that provincial policies, such as the Growth Plan, favour economic development over sustainable planning processes.

Not only does the Growth Plan fail to require that population allocations be adjusted for communities with watersheds close to or already at carrying capacity, it favours large-scale infrastructure projects to overcome natural limits to growth. Waterloo is proposing to address any future water shortages by constructing a pipe to Lake Erie to pump water in and out of the city. Not only do infrastructure projects like these override natural ecological carrying capacity, they are also extremely costly and energy intensive, and as sewage and water systems ("infrastructure") they are exempt from natural heritage protections in the PPS and Greenbelt Plan despite their potential for significant environmental effects.

While there are municipal, regional, provincial and federal laws and policies that can be used to protect the moraines, the moraines traverse several cities, counties, and regions each with their own official plans and zoning individually applied to these complex ecosystems. It is unlikely that every jurisdiction or level of government will have the same priorities. The resulting piecemeal approach to planning and protection can leave ecologically and hydrogeologically significant areas vulnerable or under protected, thereby compromising the entire landscape and the communities that rely on it.

A comprehensive systems-based plan for natural heritage protection, as well as land use planning, is clearly required to address such problems. Although the province's land use planning laws and policies are commendable in some respects, our past reviews reveal that they were ineffective in preventing,

curtailing or modifying environmentally destructive developments. Natural features such as large moraines should be the very basis, at the outset, on which local land use planning decisions are weighed. Yet the province does not specifically identify moraines as a landform or natural heritage feature to be considered for protection. On numerous occasions MOE has asserted that its planning system is adequate to protect significant environmental features. The ECO finds this assertion unconvincing given that the government has had to create several individual laws and policies to protect specific vulnerable ecosystems, including the Oak Ridges Moraine, the Protected Countryside and Lake Simcoe. The province should acknowledge, as it did for the Oak Ridges Moraine, that these laws and policies on their own are inadequate to protect complex ecological features spanning several jurisdictions. The ECO commented on this issue in our 2008/2009 Annual Report. The province has the opportunity to make a strong commitment to ecosystems-based planning in Ontario. The PPS is currently under review. MMAH should revise the PPS to *require* that diversity and connectivity of natural features, as well as their long-term ecological function and biodiversity, be maintained and restored. This would improve planning in Ontario and help to ensure significant natural features are protected.

Review of Applications R2007007, R2007008, and R2007009:

5.2.4 The Need for Municipal Climate Change Adaptation Strategies (Review Undertaken by MOE, Denied by MNR, MMAH)

Background/Summary of Issues

In Ontario, the *Environmental Protection Act (EPA)* and *Ontario Water Resources Act (OWRA)* provide broad authority for the Ministry of the Environment (MOE) for environmental protection. However, the province does not have a regulation specific to stormwater management and current ministry guidance related to stormwater does not consider climate change.

The applicants submitted this application to the ECO on April 12, 2007. They contended that there is a need for legislation that requires municipalities to put in place climate change adaptation strategies, particularly with regard to stormwater infrastructure. They felt that this is particularly urgent given that Ontario's stormwater infrastructure is aging.

In addition to providing background on climate change and adaptation research, the applicants provided four principal reasons why the ministries identified MOE, MNR, and MMAH should undertake the review:

1) Global climate change is influencing weather patterns in North America. This climatic variability is causing more frequent extreme weather events to occur. As a result there is increased pressure on municipal stormwater infrastructure and an increased risk of economic losses from flooding to the province as well as the private sector.

2) Management of stormwater infrastructure in Ontario currently is based on "best management practices," which only large municipalities have the economic means to undertake. The applicants noted that MOE's Stormwater Management Planning and Design Manual 2003 ("SWMP Manual" or "Manual") is a guidance document for municipalities and urban developers to consult and that there is no legal requirement to follow the guidelines. They felt that those municipalities with larger budgets will follow the manual's guidance, but those with smaller budgets will not. This means some municipalities will have inadequate stormwater infrastructure to deal with the heavier precipitation events expected as a result of climate change. The applicants pointed to the role of the *Planning Act* in municipal stormwater management and drainage planning. They also note the *Conservation Authorities Act* "does not directly affect urban storm water management as it exists right now, [but] the potential for it to exist in a refined stormwater management plan is there."

3) The applicants claimed that there is no standardization of stormwater infrastructure for municipalities; and also that existing stormwater infrastructure may be inadequate to accommodate the changing climate.

4) Damage already caused to local infrastructure has shown the weakness in existing stormwater management systems in Ontario and the resulting economic costs. The applicants cited the July 2004 rainfall event in Peterborough, which led to extensive flooding, and also the August 2005 rainfall event in the northern half of the City of Toronto. The latter cost the City of Toronto and residents approximately $500 million in repairs.

Concurrent to this review, in December 2009, the Expert Panel on Climate Change Adaptation (the "Panel") recommended that MOE should "complete a comprehensive review of stormwater management throughout the province by the end of 2011 to ensure that provision has or is being made to take climate change risks into account."

Ministry Response

Ministry of Natural Resources

MNR denied this application in a letter dated June 25, 2007, stating that the requested review was beyond MNR's mandate and that:

- Municipal stormwater infrastructure is a municipal responsibility and stormwater design and planning direction is led by MOE;
- The *Planning Act* provides the legislative tools to allow municipalities to implement stormwater management for new development and the Provincial Policy Statement (PPS) provides general policy guidance on matters of provincial interest, both of which are the responsibility of MMAH;
- The *Conservation Authorities Act* provides for regulations for the control of development in areas such as river valleys and wetlands; and
- The potential effects of climate change still require assessment.

Ministry of Municipal Affairs and Housing

In a letter dated July 5, 2007, MMAH also denied the application. The ministry reported that the improved *Planning Act,* which had been updated within the last five years, will assist municipalities in the management of climate change. For example, the *Planning Act* provides municipalities with new powers to include sustainable design elements through the site plan control process, to better control the effect of the possible consequences of climate change.

The *Planning Act* also contains provisions that: require municipalities to have regard to flood control when considering plans of subdivision and consent applications; empower municipalities to apply site plan control conditions pertaining to stormwater; and require municipalities to make decisions consistent with the PPS provisions dealing with stormwater management practices to minimize stormwater volumes.

MMAH also stated that the technical guidance and direction suggested by the applicants was beyond the scope of the *Planning Act* and that MOE and MNR, along with conservation authorities, provide technical guidance and direction to assist municipalities to regulate stormwater.

Ministry of the Environment

On February 26, 2008, (approximately eight months after the date required under the *EBR)*, MOE informed the applicants and the ECO that it was undertaking the review and that it would require up to 24 months to complete.

Because of MOE's lengthy estimated timeline to complete the review, ECO staff wrote to MOE in October 2008 to request an update on MOE's progress. On March 26, 2009, MOE staff made a presentation to ECO staff about the status of its review and stated it would be complete in February or March 2010. MOE sent a final summary report of its review to the applicants on March 25, 2010.

Stormwater Management in Light of Climate Change: MOE's Review:
To contribute to the review, the ministry had assembled a Stormwater Management Working Group. This group consisted of representatives from provincial ministries, federal agencies, municipalities and conservation authorities, and consulted external climate science experts. A literature review on stormwater and climate change indicated that science could not yet anticipate changes in storm frequency, duration, time and location at a suitable level of detail to allow for changes to stormwater management practices. However, the group also found that due to considerable economic, health and environmental risks, Ontario needs to be proactive in adapting to climate change.

In the summary report, MOE recognizes "that municipal stormwater management adaptation to climate change based on best available science is a priority for Ontario" and long-term planning must take water quantity, quality, and cumulative impacts into account. The ministry recommends that a "MOE policy framework is needed to support resilient municipal stormwater management systems and adaptation to climate change and other identified stressors for new and existing developments."

The ministry's review did not find that new legislation was necessary to assist municipalities in adapting stormwater management and infrastructure to climate change. The summary report states that the *OWRA* and *EPA* "provide a sufficient legislative framework for implementing adaptation to climate change for municipal stormwater management, through approvals, general prohibitions, orders, penalties and regulation making authority for environmental protection." MOE notes some specific policy and guidance areas related to stormwater:

- *OWRA* Section 53 Certificates of Approval (Cs of A) for stormwater sewage works;
- MOE's 2003 SWMP Manual;
- MOE's 2008 Design Guidance for Sewage Works; and
- Guideline B-1 Water Management.

The ministry states that the SWMP Manual requires updating to include additional best practices for climate change adaptation, as the current version focuses on conveyance and end-of-pipe facilities, rather than on source control. MOE also notes the approvals process for municipal stormwater management requires review, to encourage source control best practices. Additionally, MOE will consider exemptions from the approval process for certain "predictable and low risk stormwater management situations." The ministry explicitly states that in terms of initiatives for source control that "…policies, guidance, public education and incentives are preferred over prescriptive mandatory regulations and legislation."

Research and Monitoring:
The summary report states, "no province-wide inventory is available for municipal stormwater systems to gauge the size of the problem or to compare any achieved progress on system condition or vulnerability to climate change." The ministry further notes that current approvals for stormwater sewage works often have no requirements for reporting on stormwater inventory, condition or performance. MOE states that data collection and management systems are necessary to track stormwater systems in the province for their vulnerability to climate change.

The ministry lists initiatives it has undertaken to support improved stormwater management. This list included projects such as:

- updating phosphorus and sediment controls;
- assisting municipalities' long-term stormwater management planning (Bay of Quinte and City of Toronto);

- funding conservation authorities in low impact development research projects; and
- developing public information on proper disposal of swimming pool water.

Education and Coordination:
The summary report recognizes that stormwater management is a collective responsibility of several ministries (i.e., MOE, MMAH, MNR, the Ministry of Energy and Infrastructure (MEI) and the Ministry of Transportation (MTO)), along with municipalities and conservation authorities. MOE recommends that these groups work collaboratively in determining solutions and tools for source control for stormwater management, in light of climate change.

The review notes the importance of public education in gaining support for new source control initiatives, particularly through demonstration projects and incentives; all levels of government will need to engage in public outreach and address the issue of financing.

Links with Recommendations from the Expert Panel on Climate Change Adaptation Report:
MOE states in the summary report that its findings are consistent with the recommendations made by the Panel, and that the Minister of the Environment is considering all recommendations. However, the ministry did not detail what its response would be to these recommendations, nor did MOE commit itself to any actions or timelines. The ministry's review directly referenced only one of the recommendations by the Panel directly related to stormwater management. However, several other recommendations are closely linked with the issue of stormwater and climate change resilience. For example, one recommendation of the Panel was to support the development of tools to help homeowners identify where retrofits could be made to increase resiliency to increased extreme weather events, because of climate change.

ECO Comment

Ministry of Natural Resources

MNR's approach and justification for denying this review appear reasonable. As the application was directly related to municipal infrastructure, MNR appropriately noted this issue was outside its jurisdiction and that the role of conservation authorities with regards to planning was limited. However, the ECO notes MNR does have an important role in assessing the role of climate change on aquatic biodiversity and incorporating climate projections into flood forecasting.

Innovative stormwater management should address watersheds and ecosystems – a much wider scope than simply municipal infrastructure. New research indicates that the most effective stormwater systems are those planned at the watershed level, in conjunction with planning at neighbourhood and lot levels (e.g., see Table 1). With this shift in focus, MNR and conservation authorities will need to play an expanded role in future watershed-level planning for stormwater. The ECO urges MNR to work closely with other ministries in planning for climate change adaptation, including issues related to stormwater management.

Ministry of Municipal Affairs and Housing

Technically speaking, MMAH's decision to deny this application is acceptable because of its recent review of the *Planning Act* and associated PPS. However, the ECO points out that with a five-year review cycle for the PPS, denying an application via an invocation under section 68 of the *Environmental Bill of Rights. 1993* (*EBR*) will always be possible. This does not mean that issues brought up by applications do not require consideration and influence in the next PPS review, nor does it preclude MMAH from addressing them. The ECO notes that MMAH has denied every *EBR* application it has ever received on any subject matter (for further information on this issue, please see page 18 of the ECO's 2008/2009 Annual Report).

The ECO hopes that the PPS review expected this year will reflect an inter-ministerial co-ordinated effort. Many opportunities exist for MMAH to include stormwater management and innovative source control

approaches in the PPS. The ECO urges MMAH to introduce green infrastructure practices into the PPS. The ECO also expects that the ministry will integrate the MMAH-related recommendations of the Expert Panel on Climate Change Adaptation concerning stormwater management into the PPS review.

Bill 72, the *Water Opportunities and Water Conservation Act, 2010*

On May 18, 2010, the Minister of the Environment introduced Bill 72, the *Water Opportunities and Water Conservation Act, 2010*. If passed, the act would require municipalities to submit a Water Sustainability Plan, including an assessment of risks to stormwater management services posed by climate change and a plan to deal with those risks.

Ministry of the Environment

The ECO is pleased that MOE undertook this review, and with the ministry's vision for resilient municipal stormwater management systems. MOE's review signals a move forward from its previous goal for stormwater management – "to minimize the risks of loss of life and property damage due to urban floods" – to a more holistic goal that considers ecosystems and climate change. However, the ECO warns that MOE must act swiftly, with the right tools, in order to bring this vision to fruition.

The ECO is disheartened at the absence of timelines for this needed policy reform. MOE has committed to reviewing the SWMP Manual, revamping the approvals process, and creating a policy framework for municipal stormwater management – but the review does not say how, or when. The ECO expects that these policy reviews and developments will be timely and include public participation. The ECO also questions the ministry's reluctance to consider new legislation or regulation as part of the toolkit.

To redefine Ontario's stormwater management, a suite of innovative approaches will be necessary. No single low impact development approach or best management practice will be sufficient. Incentives for innovative source control options are desirable in a transitional capacity. However, over the longer term, mandating green infrastructure would create a more level playing field for developers and municipalities, spark innovation, and ensure Ontario is on track to deal with climate change adaptation.

MOE has no overview of how many municipalities are following best management practices outlined in the SWMP Manual, and to what extent. The lack of monitoring hinders the ability of MOE to identify shortcomings in the Manual or assist those municipalities unable to meet best management practices. The ECO agrees with the ministry that data collection efforts on uptake are necessary to track and assess vulnerability to climate change, and urges MOE to ensure collected data is publicly available and accessible.

The ECO has observed an even more important information gap, which needs urgent attention. Ontario municipalities are continuing to rely on outdated regional data on the intensity, duration and frequency (IDF) of storms, as they plan and build new infrastructure. With changing weather patterns and climatic conditions, old data can no longer be relied upon to predict future conditions. The province needs to take responsibility to ensure that municipalities have the tools they need – scientifically based on local, reliable and long-term monitoring data – to adapt stormwater systems to climate change. While some municipalities, such as the City of London, have moved forward in developing updated IDF projections and their own by-laws for innovative stormwater solutions, others have not. With recent closures of Environment Canada monitoring stations in the province it is increasingly important that collaborative work between ministries and with conservation authorities, municipalities and the federal government ensure that the right data are being collected and fed into municipal planning. The ECO believes MOE should be a lead agency in this initiative.

Review of Application R2007018:

5.2.5 Review of MOE Policies or Regulations under the *Safe Drinking Water Act, 2002* as they Relate to Inorganic Fluorides in Drinking Water

(Review Undertaken by MOE)

Background/Summary of Issues

In November 2007, two applicants requested that MOE review existing policies, regulations and standards (as well as the need for new regulations and policies) under the *Safe Drinking Water Act*, *2002* (*SDWA*) as they relate to the addition of inorganic fluorides (and any other accompanying contaminants) to drinking water.

Although Japan, China, 98 per cent of Europe, and some Ontario cities (e.g., Welland, Thorold and Dryden) have banned or stopped adding fluoride to drinking water, several municipalities in Ontario continue this practice. Most fluoridated communities in Ontario add hydrofluorosilicic acid (an inorganic fluoride) to their drinking water. The applicants assert that the "additions of toxic inorganic [vs. organic] fluorides…with its accompanying contaminants such as inorganic arsenic and lead into our drinking water" have:

- resulted in increased contamination of groundwater, surface water and sewage effluent to water bodies and natural environments;
- caused significant harm to water bodies, groundwater sources and the life therein; and
- caused harm to the health of certain subsets of the population, including babies, pregnant women, fetuses and the elderly.

Ministry Response

MOE agreed to undertake this review in February 2008. The ministry indicated that Health Canada, as secretariat to the Federal-Provincial-Territorial Committee on Drinking Water (CDW), was revising the technical support document for the Canadian Drinking Water Quality Guideline for fluoride and was expected to conduct a national consultation within two years. MOE stated that the Government of Ontario participates on the CDW and will consider the applicants' comments before undertaking a provincial consultation via the Environmental Registry. MOE noted that this provincial consultation "will be carried out at the same time as Health Canada conducts the national consultation." The ministry stated that comments received through the provincial public consultation, as well as materials provided in the application, will be considered by the province in setting new policies regarding fluoride in drinking water.

In September 2009, MOE posted an information notice on the Environmental Registry (#010-7777) informing the public and stakeholders that Health Canada was consulting the public on its technical support document "Fluoride in Drinking Water." Health Canada's national consultation period was held for 71 days, ending November 27, 2009. In the information notice, MOE indicated that it would carry out its own consultation under an Environmental Registry policy proposal notice once the Health Canada document had been finalized. The ministry stated that it will use information provided by Health Canada's consultation to review and amend, if necessary, its position on fluoridation as outlined in the ministry's "Technical Support Document for Ontario Drinking Water Standards, Objectives and Guidelines."

In January 2010, MOE sent a letter to the applicants to update them on the status of their application for review. MOE explained that Health Canada was in the process of compiling and reviewing the many comments it had received. Moreover, the ministry noted that Health Canada was responding to a federal petition regarding fluoride, which could delay the review and finalization of Health Canada's rationale document for at least a year. The ministry noted that this delay would in turn delay MOE's review of fluoride. MOE assured the applicants that it is still committed to reviewing any new information cited in the

final version of Health Canada's rationale document that may have an impact on provincial policies regarding the fluoridation of Ontario's drinking water. Moreover, the ministry stated that if this review results in any changes to policies related to inorganic fluorides in drinking water, it will conduct a stakeholder consultation on the Environmental Registry.

ECO Comment

The ECO will review the handling of this application once the ministry has completed its review.

Review of Application R2008008:

5.2.6 Moscow Landfill Site Provisional Certificate of Approval No. A370601 (Review Denied by MOE)

Background

Purpose of the EBR Application

On October 3, 2008, the ECO received an application to review a Provisional Certificate of Approval (C of A) issued in 1980 under the *Environmental Protection Act* (*EPA*) and held by the Township of Stone Mills ("the Township"). The permit was for the operation of the Moscow Landfill Site, located in the County of Lennox and Addington. The applicants submitted that the C of A should be revoked because it was outdated and inadequate to protect public health and the environment. The applicants also submitted that, in the alternative, the C of A should be substantially amended to provide a greater degree of environmental and health protection and to address issues such as acceptable waste types, site capacity, waste diversion, landfill gas management, etc.

At the time of this application, the Township had already applied to the Ministry of the Environment (MOE) for an amendment to the C of A to allow a relocation of the landfill "footprint" (i.e., defined area of the site). If approved, the landfill lifespan would be extended from a few years to approximately 39 years, without increasing its size.

Site History

Although the exact date when the Moscow landfill first opened is unavailable, the general consensus is that the former municipality of Camden East established it in the 1960s. The Township (since amalgamated into the Township of Stone Mills) was issued a temporary C of A for the site in 1979. A new C of A, with the same provisions but no expiry date, was issued by MOE in 1980. The provisions defined the site's footprint and included two requirements – one regarding the size of the "working face" (the area where new waste is added) and the other the need to cover the waste with soil on a weekly basis. In 1990, the C of A was amended only to prohibit burning of wastes on site. At the time of this application for review, no other amendments had ever been made to the original C of A.

The landfill site is bordered on one side by Route 6 and surrounded on the other three sides by property that until recent expropriation by the Township (see below) belonged to one of the applicants. In 1989, the latter applied to the Township for the right to sever some of his land. He was informed that the Township would not allow any development on most of this adjacent land because it fell within a 500-metre landfill "zone of influence" and that the groundwater under the land was possibly contaminated. (Note: This type of landfill has no liner or leachate-treatment system and thus depends on "natural attenuation", or the degradation of leachate by microorganisms in the surrounding soil. The "zone of influence" is the area that MOE policy designates as necessary for the natural attenuation to occur. MOE discourages municipalities from allowing any development within a landfill's zone of influence.)

In 2003, an MOE inspection found that waste had been deposited in a wetland area on the site, as well as on land not approved as a landfill by MOE. Furthermore, MOE discovered that a portion of the original approved site had in fact included wetland areas and that local ground and surface waters were not being monitored. Subsequently, MOE advised the Township: not to deposit waste in the wet areas, nor within 30 metres of the site boundaries; to develop plans for water monitoring, recycling, and household hazardous waste management; and, to apply for an amendment to the existing C of A, ensuring compliance with section 11 of Regulation 347 – Waste Management – General, made under the *EPA* (referred to hereafter as Reg. 347).

In 2005, the Township admitted to non-compliance with Reasonable Use Guideline B-7, which states that contaminants in water tested at the boundaries of a landfill site must not exceed standards set by the ministry. The options available to the Township at that point included: the installation of an active leachate collection system; or, the acquisition of either the rights to the groundwater under the adjacent land or the land itself. In response, the Township in 2006 submitted an application to MOE for an amendment to its C of A. The proposed amendments included obtaining additional land for natural attenuation of leachate; recognizing the Township's new Development & Operation Plan; and, re-locating the site's footprint by some 60 metres in an up-gradient direction (to avoid dumping waste into the wet areas). At that time, MOE told the Township that it had to actually acquire the land needed for natural attenuation before it could apply for an amendment of its C of A. The Township began negotiating with the landowner to purchase the necessary land. After these talks proved unsuccessful, it started expropriation proceedings.

In July 2007, MOE inspected the site and found that improvements had been made. In January 2008, the Township informed MOE that it had expropriated the necessary land. Subsequently, MOE invited the Township to submit an application for amendment of the C of A. On October 3, 2008, the Applicants submitted the application for review of the C of A.

Summary of Issues

The application cited section 39 of the *EPA*, which empowers the Director to revoke or revise an approval where: a waste disposal site does not comply with the *EPA* or its regulations; may create a nuisance; is not in the public interest; or, may result in a hazard to the health or safety of any person. The applicants outlined three fundamental reasons for a review, based on the above legislation: first, there is no demonstrable need for the facility; second, there is good reason to believe that in the past and up to the present the site has not been operated in compliance with applicable legislation, regulatory standards, the Provisional C of A, and MOE's policy framework; and third, that the site might pose a number of serious environmental and health risks.

With regard to the perceived lack of need, they argued that the Township of Stone Mills owns and operates two other landfill sites that are sufficient to handle the waste of the 7,600 residents of the Township. They further noted that eastern Ontario has a number of other waste transfer stations and waste disposal facilities that could accept the waste. This argument is supported by the fact that the Moscow site receives a fairly small amount of waste on an annual basis (3,200 cubic metres in 2007).

With respect to the lack of compliance with relevant laws and policies, the applicants described five distinct areas of non-compliance:

1) *EPA* – Subsection 14(1) of the *EPA* states that no person can cause or permit the discharge of a contaminant into the environment if the discharge causes an "adverse effect." The applicants contest that the dumping of waste on the affected land was an offense under this provision, as was the contamination of the groundwater under the same property.

2) *Ontario Water Resources Act* (*OWRA*) – Subsection 30(1) of the *OWRA* prohibits the discharge of any material into any waters or onto any bank or shore that may result in the impairment of water quality. The applicants suggest that the depositing of waste into surface water in marshy

areas on the site and the leachate-related contamination of the groundwater under the adjacent lands constituted an offence under the Act.

3) *Applicable waste regulations* – The Moscow landfill pre-dates the current landfill standards in O. Reg. 232/98 under the *EPA*. However, the older landfill standards contained within Regulation 347 still apply. The applicants argued that the site does not meet many of these older standards.

4) *Approval requirements* – Although the 1980 C of A did not contain many provisions, the applicants argued that these bare-minimum requirements were often not met at the site. The working face often exceeded the maximum size specified and the waste went uncovered for long periods of time.

5) *MOE's policy framework* – The applicants argued that the site did not meet some of MOE's policy guidelines. For instance, the "Reasonable Use" Guideline (B-7) states that a disposal facility cannot be supported in a location where natural attenuation is weak or where there is fractured bedrock under the site, as is the case for this site. The guideline also states that a disposal facility cannot be located where the consequences of failure are unacceptable, as in the case, for instance, where drinking water could be contaminated. The same guideline requires that levels of contamination at site boundaries meet specified standards. The applicants pointed out that the 2003 ministry inspection report flagged this last point as a potential area of non-compliance, because of the proximity of the site boundaries to the actual waste disposal area. They also noted that the 2007 ministry inspection report, which also assessed sampling results from the Township's monitoring program, confirmed the site did not comply with Guideline B-7.

With regard to the concern that the site might pose environmental and health risks, the applicants made the following points: first, odour has been a major problem for residents in the area, particularly during clear, still weather conditions or periods of rain; and second, that there is potential for contamination of the groundwater used by local residents, as well as potential impacts on the Napanee River. They noted that monitoring data showed that the groundwater under land south (and therefore up-gradient) of the landfill was contaminated. They expressed concern that this contamination could move farther south and impact drinking water, if it had not already done so.

The applicants also cited the MOE's Statement of Environmental Values (SEV), which includes adopting an "ecosystem" approach" and the "precautionary principle", and concluded that a review would be "entirely consistent (if not expressly mandated) by MOE's SEV."

Ministry Response

On December 10, 2008, MOE responded to the applicants. The response indicated that the ministry has been inspecting the site and had responded to residents' complaints regarding odour. The response included a summary of the results of the MOE site inspections in 2003 and 2007, including acknowledgement of the following points (not a full list):

- a portion of the site's approved footprint lay within a wetland area;
- reports from the Township from 2005 onwards had confirmed that the site was not in compliance with the ministry's Guideline B-7;
- the Township's options for addressing its non-compliance were to install an active leachate collection system, acquire the subsurface rights to the groundwater surrounding the site, or acquire the land itself;
- the land had been acquired by the Township and the ministry had therefore invited it to submit an application for an amended C of A, which would address the issues noted above (and raised by the applicants).

In conclusion, MOE response stated that although the Assistant Deputy Minister of Operations Division had determined that a review was warranted, the ministry was denying the application, based on the fact that MOE was already reviewing the Township's application for an amended C of A and that the *EBR*

review would in effect be a duplication of effort. MOE promised to review material from the applicants as part of its review and to keep the applicants informed during and after the review process, which would be completed by April 11, 2009.

Other Information

On May 14, 2009, the ministry sent the applicants a copy of the Review Report of the Township of Stone Mills' Certificate of Approval for the Moscow Waste Disposal Site. The findings of the review included confirmation of several of the applicants' environmental concerns, including:

- Non-conformance with minimum buffer requirements;
- Non-conformance with Guidelines B-7 and B-7-1 (see description in Summary of Issues, above); and,
- Exceedances in the ponded water in the wetland of Provincial Water Quality Objectives, and in particular, exceedances for iron "in a range where literature indicates toxicity to aquatic life could occur."

The report indicated that, in response to the above issues MOE was recommending, new conditions be added to the C of A. These conditions included:

- Regular inspection, record keeping, a complaint-response procedure, and annual reporting;
- Acceptance of only municipal waste generated within the Township;
- Regular application of cover material;
- Installation of a clay liner under the relocated footprint; and,
- Submission of the following:
  - An environmental monitoring program for groundwater, surface water, leachate, landfill gas, and aquatic toxicity;
  - A contingency plan and criteria for triggering abatement actions;
  - A calculation of site capacity.

On July 22, 2009, the applicants wrote to MOE requesting a public hearing and decision by the Environmental Review Tribunal (ERT), pursuant to section 32 of the *EPA*. They cited the following as grounds for such a hearing:

- Because it had been started and "approved" before the *EPA* was enacted, there had never been in the history of the site a public hearing to determine whether it is suitable for a landfill;
- The site is located on thin soils and fractured bedrock, making it vulnerable to aquifer contamination;
- The site is close to a major watercourse, sensitive natural features (i.e., provincially significant wetlands), and several farms and residences;
- The site does not meet current landfill standards and there has been a history of non-compliance with existing legislation and policy; and
- There is good reason to believe that the continued operation of the site would not be in the public interest and might result in a hazard to public health and safety.

On July 27, 2009, MOE sent the applicants a copy of the draft amended C of A, which it stated was consistent with the above recommendations. The applicants were given approximately two weeks to submit their comments.

On August 14, 2009, MOE responded to the ERT hearing submission. The ministry denied the request and stated that a hearing was not needed for these reasons:

- C of A amendments do not require a mandatory hearing; moreover, the task of determining whether or not a site is suitable for a landfill is regularly performed by professionals within the ministry.

- With regard to the applicants' other concerns, the ministry responded by stating that the new C of A conditions for monitoring and providing a contingency plan with abatement trigger mechanisms would provide all the protection required and adequately address all issues.

ECO Comment

The ECO feels that MOE acted reasonably in its treatment of this Application for Review. Its denial of the review in favour of the on-going review of the Township's C of A application was reasonable, as a second review would have been redundant. MOE also acted reasonably in considering the applicants' concerns and in keeping them informed of the results of its own review and the subsequent issuing of an amended C of A to the Township.

The decision to continue the operating life of the Moscow Landfill, however, raises two serious issues for the ECO. First, the site on which the landfill is located would not be acceptable if it were proposed today. Its proximity to sensitive and significant natural features, the fractured bedrock underneath the site, and the associated risk to the local water supply are significant considerations that would eliminate the site as a potential landfill. Even with the implementation of monitoring programs, contingency plans, and trigger mechanisms, the site would not be suitable. These facts beg the question: why not close it and haul the waste to a modern facility? The ECO does not agree with the implicit MOE policy of relying on amended Cs of A to justify keeping old landfill sites open in bad locations. In failing to make the decision to close the site, MOE could have at least added to the provisions of the amended C of A the requirement for the Township to implement a mandatory backyard or community-scale composting program. Removal of the organics from the waste stream would reduce new leachate generation, minimize the odour problems and mitigate many of the environmental risk factors.

The second serious issue has to do with fairness. The adjacent landowner has borne the brunt of the detrimental and adverse impacts associated with the continuation and expansion of this landfill. Most of his land was expropriated to establish a buffer zone and provide leachate attenuation capacity, leaving his small remaining parcel of land and his house on the edge of a working landfill, thus greatly reducing his property's value and impacting his family's quality of life.

The issue of what to do with the legacy of these old dumps, whether they are closed or still operating under inadequate Cs of A, needs to be addressed head-on by the ministry (see Part 6.1 of this year's Annual Report for an update on aging landfills and a more detailed discussion of options). Furthermore, in addressing this matter, the ministry should also consider the development of mechanisms for equitably resolving economic disputes and property-related issues that arise when neighbouring property owners are negatively impacted by the application of new rules to old, outdated, and often improperly sited facilities.

Review of Application R2008010:

5.2.7 Request for Review of the Air Approval for Kiley Paving Ltd. (Review Undertaken by MOE and then Cancelled)

Geographic Area: Kingston

Background/Summary of Issues

Two applicants were concerned that air emissions from a hot mix asphalt plant have been exposing about 500 people to harmful contaminants and unacceptable odours and noises where they live, work, farm, play, worship and shop. In November 2008, the applicants used the *Environmental Bill of Rights, 1993* (*EBR*) to request that the Certificate of Approval (C of A) for Air and Noise granted to Kiley Paving Ltd

("Kiley") for a hot mix asphalt plant ("asphalt plant") be revoked or "substantially amended." They provided evidence that:

- the asphalt plant was not needed;
- the Ministry of the Environment (MOE) should never have approved Kiley's application for a C of A;
- Kiley had been operating out-of-compliance with its C of A, the *Environmental Protection Act* (*EPA*) and O. Reg. 419/05 Air Pollution – Local Air Quality, made under the *EPA*; and
- the asphalt plant may pose a "number of serious risks to the local environment and public health."

Background

Located in the Hendricks Aggregate Quarry, the asphalt plant was approximately 2.5 kilometres south of the hamlet of Wilton near Kingston, Ontario. According to the applicants, Kiley began operations soon after the equipment was installed in August 2004, despite not having a C of A as required under section 9 of the *EPA*. Between August 2004 and December 2008, Kiley has operated every year, sometimes intermittently, from spring until December.

In April 2005, Kiley formally applied for a C of A, which was approved by MOE in June 2005. By then Kiley had already attempted to address complaints from its neighbours about odours by moving the asphalt plant to another area within the quarry and increasing the height of the stack.

Issue – The Asphalt Plant Was Not Needed

Because Kiley did not operate the asphalt plant for prolonged periods during 2008, the applicants reasoned that there was no "demonstrable public need" for the asphalt plant. Kiley had fulfilled its contractual obligations using asphalt from other sources without an apparent loss of jobs or profits. The applicants expressed concern that starting and stopping the plant's equipment could reduce the effectiveness of its pollution controls and Kiley's ability to retain an experienced technician who could ensure that the asphalt plant operated efficiently and safely. Furthermore, they noted that the equipment used by Kiley was designed to be set-up easily and quickly, and moved from one job site to another rather than be operated from one permanent location.

Issue – MOE Should Not Have Approved the C of A

The applicants provided the following evidence that MOE had approved the C of A based on incomplete, out-of-date and/or erroneous information, and had made errors during its review of Kiley's C of A application in 2005.

- Kiley had submitted air study maps that did not identify the locations of the village of Wilton or the numerous residences constructed near the quarry.
- Emissions were modelled for a mobile asphalt plant; whereas, MOE approved the C of A for a permanent asphalt plant.
- An error in the air study potentially underestimated odorous emissions by a factor of 20 to 50. MOE did not discover the error until 2008.
- The noise study categorized the area as Class 2 (Urban); whereas, the applicants believed that it should have been Class 3 (Rural), which has more stringent noise criteria.
- MOE specified an hourly maximum production capacity for the asphalt plant in the C of A that was much lower than what was specified on Kiley's website and in the manufacturer's documentation provided to MOE. Moreover, although the C of A limited the plant's hourly production rate, Kiley was required to keep records of only daily production rates.
- The C of A application did not include a cumulative effects analysis, nor a human or ecological health risk assessment.

Issue – Lack of Compliance with Legislation and Approvals

The applicants noted that Kiley began operations prior to obtaining a C of A, a contravention of section 9 of the *EPA*. In their opinion, Kiley had also contravened section 14 of the *EPA*, which prohibits discharges that cause an "adverse effect," and section 33 of O. Reg. 419/05, which prohibits discharges that cause loss of enjoyment of normal use of property or interference with the normal conduct of business operations. The applicants explained that they and their neighbours have been subjected to "obnoxious and objectionable odours" and have submitted formal complaints to both Kiley and MOE. In response, MOE conducted an air survey in 2008, which confirmed that odours from the asphalt plant were sufficient to cause an off-site adverse effect, and fined Kiley for failing to report environmental complaints as required by its C of A. An MOE Air Scientist involved in the study stated, "I do not believe that the facility can be operated in its current configuration and capacity within MOE standards or guidelines."

Although the original C of A included a condition that limited operations to daylight hours only, MOE amended it in April 2008 to allow Kiley to begin operations at 6 a.m. Despite it being dark at that time in the fall, MOE kept the daylight hours condition in the C of A. According to the applicants, Kiley has used a floodlight to begin operations and neighbours cannot check the colour of the plume from the asphalt plant. A colour other than white may indicate that the asphalt plant is discharging contaminants into the air.

Issue – Risks to Environmental and Public Health

The applicants indicated that residents have complained about odour since October 2004, describing it as "oily, tarry, nauseous, headache-making, putrid, noxious and obnoxious," and reported breathing difficulties. The applicants provided information from Environment Canada and the New Jersey Department of Health about the potential environmental and public health effects of the contaminants that are present in asphalt fumes, such as polycyclic aromatic hydrocarbons, combustion products, particulates and various chemical compounds.

The applicants explained that an acoustic assessment report prepared in April 2005 indicated that projected noise discharges from the asphalt plant would be within the criteria established for Class 2 (Urban) for noise discharges between 7 a.m. and 7 p.m. However, when Kiley received approval to begin operations at 6 a.m., it became subject to the criteria for noise discharges between 11 p.m. and 7 a.m., which are more stringent. The applicants realized that if the projected noise discharges were as loud as those described in the report, Kiley would be exceeding the noise criteria at some reception points. The applicants also disputed the classification of the area as Class 2 (Urban) – an area dominated by urban hum. The applicants contended that the area should be classified as Class 3 (Rural) – agricultural land and small communities. Class 3 (Rural) noise criteria are more stringent. The applicants also explained that the acoustic assessment incorrectly assumed that the terrain was flat and that there was a noise barrier, even though the quarry is in a valley and the noise barrier does not exist. The applicants noted that no actual field measurements were taken to confirm the validity of the calculations. The applicants reported that residents living two kilometres from the asphalt plant have been awakened when the plant starts up in the morning.

The applicants objected to MOE continuing to allow unacceptable odour and noise discharges from the asphalt plant in spite of the findings in the 2008 air study. The applicants requested that MOE revoke Kiley's C of A, or rewrite the C of A so that it has a "comprehensive set of effective and enforceable conditions, which actually protect the local environment and public health." The applicants provided a comprehensive list of items that they would like addressed in the C of A. The applicants explained that MOE should undertake this request for a review because it is consistent with MOE's Statement of Environmental Values; and because the approval of the C of A is not subject to periodic approval and new evidence of off-site impacts was found in 2008. The ECO forwarded the application to MOE.

Ministry Response

On January 15th, 2009 MOE agreed to undertake the review of Kiley's C of A and provided the applicants with information on current abatement activities. MOE explained that it was discussing potential changes in equipment and procedures with Kiley with the objective of reducing and/or eliminating odour emissions. In addition, MOE noted that Kiley has volunteered to build a 10-foot high berm on one side of the quarry and to plant trees on the berm to make the site more aesthetically pleasing. MOE explained that the public would be consulted on any proposed amendments to Kiley's C of A that may be required as a result of equipment and/or procedural changes. If off-site odour impacts continue, MOE committed to taking additional abatement measures, such as issuing orders/notices that may require Kiley to conduct a new air study. MOE indicated that it would complete its review by April 30, 2009.

In March 2009, Kiley advised MOE that it would be moving its asphalt plant to a new location and on April 6, 2009 asked MOE to revoke its C of A for the Hendricks Aggregate Quarry location. As a result, MOE decided that the review was no longer required and committed to ensuring that Kiley's new operation meets current environmental standards.

Other Information

Kiley applied to MOE for two new Cs of A (Air) to operate (a) a permanent hot mix asphalt plant near Millhaven, which is near Kingston, Ontario, and (b) a portable hot mix asphalt plant. MOE posted proposal notices for both applications on the Environmental Registry (#010-7436 and #010-8516) in August and December 2009, respectively, for public comment. In February 2010, MOE granted both Cs of A with a condition that both plants comply with MOE's noise criteria.

In the last few years, odour and noise issues have received more attention from MOE and the courts, and have resulted in serious consequences for offenders.

- On November 4, 2009, a court fined BP Canada Energy Company $800,000 plus a 25 per cent victim fine surcharge for emitting a ten-minute odorous plume that travelled off-site. The plume caused temporary physical symptoms in some residents and disrupted schools and businesses.
- In January 2009, MOE issued a Control Order to Collingwood Ethanol (CE), a manufacturer of fuel-grade ethanol, requiring it to immediately cease odour and noise discharges after abatement measures failed to reduce discharges to acceptable levels. Neighbours had made hundreds of complaints since CE began operations in 2007. CE temporarily ceased operations in 2009 to address the issue. (CE is now operating under the name "Amaizeingly Green.")
- In 2006, the Town of Newmarket was successful at having Halton Recycling, a compost manufacturer, declared a public nuisance after receiving over 1,100 odour complaints during a two-year period. Halton Recycling had already spent $8,000,000 on upgrades. Since then,
    - neighbours have filed hundreds of odour complaints;
    - MOE has issued Provincial Officer's Orders and a Control Order; and
    - Halton Recycling has taken various abatement measures and limited production to about 10 per cent of capacity.

For additional information on CE's Control Order, refer to our 2008/2009 Annual Report, pages 33-35.

ECO Comment

The ECO is pleased that MOE agreed to review Kiley's C of A and commends MOE for outlining the various abatement measures that were being discussed to the applicants prior to completing its review. The applicants have, as have others in recent years, aptly described the effects of unwanted odour and noise on their lives and their community, and their frustrations at the lack of progress. Too often abatement measures, including in this case, have failed to reduce odour and noise discharges to acceptable levels. The ECO continues to urge MOE to take strong, proactive measures to managing this issue. The ECO is also concerned that too many land use decisions are being made without sufficient attention to potential odour and noise impacts.

In our 2007/2008 Annual Report, the ECO recognized that MOE had taken a significant step forward on managing odour when it released two position papers on developing an Odour Policy Framework. MOE also amended O. Reg. 419/05 to include 10-minute odour-based standards for three highly odorous substances. However, these standards will not be fully in force until 2013. In the meantime, MOE has published a technical bulletin clarifying how the new odour-based standards should be modeled and which human receptors should be included in the modeling. During the discussions on the position papers, MOE acknowledged that much more work will be required and that current land use policy guidelines will require updating. The ECO will continue to monitor progress on this issue. For further information, refer to the ECO's 2007/2008 Annual Report, pages 115-118, and the ministry's website.

Review of Application R2008014:

5.2.8 Request for a Review of the Need for Air Pollution Hot Spots Regulatory Reform (Review Undertaken by MOE)

Background/Summary of Issues

In January 2009, two applicants requested a review of the need for a new regulatory framework to fill gaps in Ontario's air pollution laws related to cumulative impacts of pollution, particularly air pollution "hot spots." Hot spots are described by the applicants as "multi-pollutant, multi-facility areas with significant background levels of pollutants or pollutant levels from local sources that exceed toxic air pollutant standards and areas impacted by persistent, bioaccumulative, toxic air pollutants from industrial sources."

The applicants are concerned that air pollution hot spots in Ontario threaten the physical and psychological health of people living in those areas, and compromise their right to live in a healthful environment. As evidence of significant deficiencies in Ontario's air pollution regulatory regime, the applicants cited the environmental health crisis in the community of Aamjiwnaang First Nation near Sarnia, Ontario, an air pollution hot spot area known as "Chemical Valley." The applicants assert that the current regulatory framework is "unable to adequately protect the environment or human health from the dangers associated with air pollution."

The applicants asked the Ministry of the Environment (MOE) to:

- Identify Pollution Hot Spots areas in Ontario requiring pollution reduction plans;
- Regulate air pollution in hot spot areas using a cumulative effects approach;
- Require that any assessment, report or estimate of emissions and/or pollutant concentrations include background levels of pollution;
- Require MOE standards to be ratcheted down over regulated enforceable timelines;
- Make the reduction of emissions of persistent and bioaccumulative pollutants a priority;
- Require that "maximum achievable control technologies" and "lowest achievable emission rates" be used to achieve a reduction of overall emissions;
- Require ongoing monitoring of emission sources at industrial facilities;
- Engage community members and industry in the development of pollution reduction plans;
- Prohibit the issuance of new or amended Certificates of Approval (C of A) while pollution reduction plans are being developed, unless the approvals would result in a reduction of emissions; and
- Ensure that pollution reduction plans set out maximum limits on pollution that can be approved by MOE under the C of A process.

The ECO forwarded the application to MOE.

Ministry Response

By letter dated May 11, 2009, MOE notified the applicants that it would undertake the requested review. MOE stated that it is:

> committed to developing the long-term tools, including science, policies and guidelines to support the application of an ecosystem approach, including consideration of cumulative effects. As such the ministry is currently reviewing how it applies the principles of its Statement of Environmental Values (SEV), including cumulative effects assessment and the ecosystem approach, in its environmentally significant decision making.

The ministry advised the applicants that, as part of its review of the environmental decision-making process, it would review the matters raised in the application. The ministry noted that if the review concludes that the current framework warrants revision, the ministry "will actively engage the regulated community, local residents, and other stakeholders."

In May 2010, the ECO requested an update from MOE on the status of its review. MOE informed the ECO that the ministry has been working on its SEV Guiding Principles Review, which is considering "how to best operationalize the SEV principles, including consideration of cumulative effects." MOE stated that as part of the SEV project, the ministry is looking at new approaches, examining experiences in other jurisdictions, and actively considering the proposal presented in the application for review. While the ministry could not give a precise date for the completion of the work, MOE suggested the ECO contact the ministry in six months for an update on progress.

ECO Comment

The ECO is pleased that MOE has agreed to undertake this review. As MOE's review is ongoing, the ECO will report on the ministry's handling of this application and the outcome of the review in a future reporting year.

Review of Application R2008015:

5.2.9 Review of a Certificate of Approval (Air) for a Pesticide Manufacturing and Packaging Facility in Dundas, Ontario

(Review Undertaken by MOE)

Background/Summary of Issues

In February 2009, two applicants representing a group of community members requested that the Ministry of the Environment (MOE) undertake a review of Certificate of Approval (Air) #8-2115-80-987 ("C of A"), issued to Wilson Laboratories Inc., operating as Biedermann Packaging Limited ("Biedermann Packaging").

Biedermann Packaging is in the business of manufacturing, formulating and packaging pesticides at its industrial facility in Dundas, Ontario. The C of A sought to be reviewed governs a dust collector designed to control particulate emissions and an associated circular silencer used at the facility.

The application stems from a major fire at the Biedermann Packaging facility in July 2007, during which approximately 900,000 – 1,200,000 litres of contaminated douse water entered nearby Spencer Creek, killing hundreds of fish in the creek and resulting in serious environmental damage. The fire caused significant concern in the local community about the environmental and health effects of the fire, and led to closer scrutiny of the facility's operations in general by a local group of concerned citizens. In our 2008/2009 reporting year the ECO received a number of applications related to the Biedermann

Packaging fire, including an earlier application made by these applicants requesting a review of the facility's C of A for sewage works, all of which are discussed in the Supplement to our 2008/2009 Annual Report.

In this application, the applicants raised similar concerns to those raised regarding the facility's C of A for sewage works. The applicants noted that the C of A was issued in 1998 to Wilson Laboratories Inc., and was not updated to reflect that the instrument holder is now Biedermann Packaging. The applicants were concerned that the C of A for air does not include a description of the activities currently taking place at the facility or the types of pesticides/fertilizers manufactured at the facility. In particular, the applicants noted that the C of A does not describe the facility's activities in formulating chemicals for use in the agricultural industry. Consequently, the C of A "may not contain conditions suitable for protecting human health and the environment from the types of chemicals that are actually manufactured at the facility." The applicants believed that MOE should require Biedermann Packaging to evaluate whether the current dust collector provides a level of emissions control suitable for the current activities and substances used at the facility. The applicants also noted specific concerns about the manner in which used filters from the baghouse system are handled and disposed, and about the height of the dust collector exhaust stack.

The applicants specifically requested that MOE:

- amend the C of A to reflect the name of the current operator;
- amend the C of A to include an accurate and thorough description of current site activities;
- demonstrate that the facility's emission control equipment is protective of health and the environment, given current activities at the facility;
- consider the need to update the facility's Operations and Maintenance Manual; and
- evaluate whether the circular silencer fan provides adequate noise control.

Ministry Response

On April 3, 2009, MOE notified the applicants that it had determined that a review of the C of A would be appropriate. MOE stated that it would:

a) conduct a technical review of the C of A;
b) make administrative amendments as appropriate (e.g., changing the name of the instrument holder and reviewing the description of the facility); and
c) review the Operations and Maintenance Manual for the facility.

MOE estimated that it would take approximately two months to complete its review.

On July 14, 2009, MOE notified the applicants of the outcome of its review. MOE explained that, as part of its review, the ministry conducted an inspection of the facility in April 2009 to ensure compliance with terms of the C of A, and to investigate noise complaint(s) in the area. MOE reported that its inspection of the facility did not reveal any instances of non-compliance with the C of A or the facility's Operations Manual. However, Biedermann Packaging was unable to confirm that the facility met the requirements of the ministry's noise guideline (NPC-205).

MOE also advised the applicants that it reviewed the C of A and associated documents (e.g., the original C of A application, information provided by the company during the ministry inspection), and concluded that the conditions of the C of A "are protective of human health and the environment and therefore do not require any amendments." However, MOE noted the need for standard records retention and complaint notification requirements in the C of A.

As a result of its review, MOE amended the C of A as follows:

- to reflect the name of the current facility operator;
- to include standard conditions for records retention and complaint notification; and

- to require Biedermann Packaging to undertake an acoustic assessment of the facility.

MOE advised that the C of A may be amended further if any concerns are identified as a result of the facility's acoustic assessment.

Other Information

On July 17, 2009 – just three days after MOE provided its decision to the applicants – MOE's Hamilton District Office released its report entitled "Biedermann Packaging Inc. Fire – MOE Response and Prevention of Future Incidents."

The report details the company's background, compliance activities prior to and following the 2007 fire, MOE's response on the night of the fire and the ensuing MOE investigation and findings. In brief, MOE concluded that the douse water from the fire, which contained a number of pesticides, including diazinon, entered and caused impairment to Spencer Creek. However, upon examining the standard of care taken by the company prior to the fire, the ministry concluded that there was sufficient evidence that Biedermann Packaging "took all reasonable care to avoid any foreseeable discharge of the douse water," and therefore charges were not warranted.

ECO Comment

The ECO is pleased that MOE agreed to undertake this review. In the wake of the Biedermann Packaging fire, which resulted in significant anxiety within the local community about the health and environmental effects of the fire, it was prudent for MOE to ensure that the conditions of the facility's approvals are sufficiently protective.

The ECO commends MOE for not only reviewing the C of A on paper, but conducting an inspection of the facility itself to assist in the ministry's assessment of the C of A conditions.

The outcome of MOE's review - the amendments it made to the C of A - appears reasonable. However, MOE should have included more details or examples to explain how it concluded that the C of A conditions and the Operations Manual are appropriate for the current activities at the facility and sufficiently protective of health and the environment. MOE should also have specifically addressed the specific concerns that the applicants raised in regards to the baghouse filters and the height of the dust collector exhaust stack.

The ECO is troubled that the review's conclusions did not address the fundamental concerns of the applicants regarding the adequacy of the outdated C of A to protect the environment and human health. Although noteworthy, MOE's statement that it did not identify any non-compliance with the C of A or Operations Manual was generally unhelpful to the applicants because it did not address this specific issue. The applicants' very concern was that the existing C of A conditions and Operations Manual were not protective enough, irrespective of whether or not the facility was abiding by them or not.

This application highlights the ECO's concerns over outdated Cs of A, which are discussed in detail in our April 2007 Special Report "Doing Less With Less" (see MOE Case Study #4). The ECO urges MOE to devise a systematic process to ensure that older Cs of A are reviewed and updated in accordance with the facility's current activities, new environmental standards and technological advances.

Notwithstanding the outcome, it is fortunate that MOE agreed to undertake this review, as the C of A was found to be lacking standard terms for records retention and complaints notification – both key aspects of public accountability and transparency. The ECO is pleased that MOE updated the name of the facility operator, but questions MOE's apparent reluctance to include a description of the facility's operations in the C of A, which would have only increased transparency.

Finally, it would have been helpful for MOE to have told the applicants that its report on the Biedermann Packaging fire was to be released shortly. The report may have addressed and even alleviated some of

the applicants' concerns, particularly since the report discusses what MOE "[has] done since [the fire] to reduce the risk of future incidents at the Biedermann facility that can affect the community and the environment."

Review of Application R2008016:

5.2.10 Application for Review for a Permit to Take Water Issued to Nestlé Waters Canada (Review Denied by MOE)

Background/Summary of Issues

In 2007, Nestlé Waters Canada applied to the Ministry of the Environment (MOE) for a five-year renewal of an existing Permit to Take Water (PTTW), which would allow Nestlé to take up to 3.6 million litres per day from its well in Aberfoyle, just south of Guelph. MOE posted the permit proposal on the Environmental Registry that year (Environmental Registry #010-0224) and received 8,178 submissions, including comments from the current applicants. MOE issued the permit (#7043-74BL3K) on April 17, 2008, but for a period of two years only (to April 30, 2010), and with a number of significant environmental conditions included (see Ministry Response, below). On March 16, 2009, the applicants submitted an application for review, requesting that MOE review the renewed permit.

The same applicants had submitted two previous applications for review, one in January 2007 requesting a general review of the ministry's PTTW policy (with a view to banning water-taking permits for bottled water), and another just prior to the company's 2007 PTTW-renewal request, requesting a review of Nestlé's existing permit. Both applications were denied by MOE.

The applicants based their case specifically on the precedent of the 2008 Lafarge decision (for a summary of the Lafarge case and its legal implications, see Part 9 and page 31 of our 2008/2009 Annual Report), in which the Environmental Review Tribunal (ERT) awarded an applicant leave to appeal two Certificates of Approval (Cs of A) issued to a cement company (Lafarge Canada Inc.) for burning waste as a fuel in their production facility. In that case, a number of leave-to-appeal applicants based their argument, in part, on the fact that the MOE had not considered its Statement of Environmental Values (SEV) as part of the process of assessing whether or not to issue the instruments. (The *Environmental Bill of Rights, 1993,* requires that each prescribed ministry develop a SEV to guide it when it makes decisions that might affect the environment.) Lafarge then sought to apply for a judicial review, in order to overturn the ERT decision, but was unsuccessful in Divisional Court. Finally, after Lafarge also failed in its appeal to the Ontario Court of Appeal, the company requested the cancellation of its two Cs of A and dropped the project. The main implication of this decision was that MOE must consider its SEV before issuing an instrument (it had previously argued that this was not necessary, as these principles were built into its policies and regulations*).* (Note: Subsequently, in July 2008, MOE expressed its intention to develop a set of procedures for SEV consideration of instrument decisions and informed the ECO that this development process is underway.)

The applicants stated that MOE's decision to issue this permit was inconsistent with the ministry's 1994 SEV (which was the version that applied when the permit was issued in April 2008) and that this inconsistency provided strong evidence that MOE had not considered its SEV in issuing the permit. They further argued that given the Divisional Court's decision on the Lafarge case, in June 2008, MOE should review its decision to grant the permit. The applicants also expressed the opinion that a review would lead to MOE reversing its decision and revoking the permit.

The MOE SEV principles, to which the applicants referred specifically, were:

- adopting an ecosystem approach to environmental protection;
- considering the cumulative effects on the environment;

- considering the effects of decisions on future generations; and
- using a precautionary, science-based approach in decision-making.

The reasons given by the applicants for stating that MOE's decision to grant the permit was inconsistent with these SEV principles can be summarized as follows:

- Nestlé draws its water from the same aquifer as the City of Guelph, whose Water Supply Master Plan warned in 2006 of increasing pressure on its water supply. The applicants stated that this fact shows that the PTTW contradicts the "consideration of future generations" principle.
- Nestlé's own data show occasional water-flow reversals from Mill Creek (a local watercourse) to the underground aquifer, presumably due to the reduction in aquifer levels caused by the water taking. The applicants expressed a concern that this could result in the contamination of the aquifer with bacteria and other microorganisms, putting peoples' health at risk. Given this concern, they argued, the permit would seem to contradict the "precautionary principle."
- A hydrogeological consultant hired by the Township of Puslinch determined that Nestlé's taking of water could potentially cause damage to the local ecosystem by reducing the flow of groundwater to Mill Creek, lowering the creek's levels and inhibiting its natural cooling cycle. The applicants felt that the existence of this risk showed that the decision to award the permit contradicts the "cumulative impacts", "ecosystem approach", and "precautionary" principles.
- Nestlé's activities (selling bottled water) result in large quantities of water being removed from the watershed. The applicants state that this undisputed fact violates the "ecosystem approach" principle.

Ministry Response

In May 2009, MOE denied the application for review, arguing that it had in fact considered its SEV principles when issuing the PTTW. The ministry further stated that the conditions that it had attached to the permit, including reducing its length to two years from the requested five, clearly demonstrated this fact. In responding to the specific arguments raised by the applicants, MOE began by stating that its SEV principles, along with existing water-management principles and the ministry's water-management policies, guidelines and Provincial Water Quality Objectives, are built into the principles of the PTTW program and manual, which were revised in 2005. MOE's response then described in more detail how it had considered the individual principles of the PTTW manual, at the same time indicating how these actions also addressed the principles of the SEV and the concerns of the applicants.

The first principle of the PTTW manual requires that the ministry take an ecosystem approach, one of the SEV principles highlighted in the applicants' submission. MOE argues that it considered the ecosystem approach and that the evidence is provided by the set of conditions applied to the permit as well as the activities voluntarily undertaken by Nestlé. These include: surveys of the fish species in the Mill/Aberfoyle Creek; mapping of the vegetation communities in the area surrounding the creek; monitoring and reporting of vegetation changes possibly associated with changes in water-discharge levels; wildlife monitoring and reporting for amphibians, birds, reptiles, and mammals; stream habitat mapping; and monitoring and reporting of water flow, water level, and vertical hydraulic gradient data.

The second principle of the PTTW manual deals with the issue of conflicting uses for the water resource and the methods of resolving these problems should they occur. Under this principle, MOE discussed the applicants' concerns regarding the impact of the taking on Guelph's water supply and the potential for contaminating the aquifer through back-flow of water from Mill Creek. The ministry pointed out that the City of Guelph had confirmed that the water-taking would not interfere with its water supply at present, but might in the future, at which point, MOE stated, the permit might not be renewed. With respect to the contamination issue, the ministry stated that there is currently no evidence of contamination, that the permit requires Nestlé to conduct an extensive monitoring program for both surface and well water in the area, and that the permit requires "mitigation or cessation of pumping" if any impact on local water is indicated.

The third principle in the PTTW manual concerns the use of adaptive management. The ministry argued that its use of the conditions, including on-going monitoring and reporting, is evidence that MOE's decision to renew the PTTW is in keeping with this principle, which incorporates a precautionary, science-based methodology.

The fourth principle requires the consideration of cumulative effects in issuing permits. MOE listed further details of its assessment prior to issuing the PTTW that support its contention that cumulative effects were considered. These included assessments of temperature data from Mill/Aberfoyle Creek, the capture zones of the City of Guelph municipal wells, and other localized groundwater takings.

The fifth PTTW manual principle requires the incorporation of risk management principles into the permitting process. The MOE argued that none of the concerns outlined by the applicants had manifested during the previous permit period, and that it therefore makes sense to allow a renewal that requires extensive monitoring. In this way, data can be obtained that will determine whether or not the applicants' concerns are justified. MOE also stated that since any adverse effects from this permit would be reversible, a reasonable margin of safety exists.

Other Information

Several relevant events have occurred since the application was submitted. First, on August 5, 2009, MOE posted on the Environmental Registry (#010-6350) a policy proposal entitled "Stewardship – Leadership – Accountability. Managing Ontario's Water Resources for Future Generations." This paper provides detailed proposals on issues such as water conservation, transfer of water between Great Lakes watersheds, and the implementation of a second phase of water charges in Ontario. It also details how the government will implement the *Safeguarding and Sustaining Ontario's Water Act*, *2007* (*SSOWA*). The *SSOWA* amended the *Ontario Water Resources Act* to enable Ontario to meet key agreements of the *Great Lakes – St. Lawrence River Basin Sustainable Water Resources Agreement*, signed by the premiers of Ontario and Quebec and the governors of the eight U.S. Great Lakes states in 2005.

On August 24, 2009, MNR posted on the Environmental Registry (#010-7477) a policy proposal entitled "Amendments to Ontario Low Water Response Policy." This document is intended to refine and enhance the province's current low-water response program by providing clear definitions of drought and low water and describing the means for measuring and quantifying these conditions. In addition, the process for making decisions on the three condition levels (Conservation, Restriction, and Regulation) and the indicators and thresholds for the levels are proposed.

Lastly, on November 3, 2009, MOE posted an information notice (Environmental Registry #010-8173) indicating that the ministry had extended Nestlé Waters's PTTW for one year, making the permit duration three years in total. MOE's rationale for the extension was that there had not been any low-flow conditions over the two seasons since the permit had been issued and thus the ministry had not been able to assess the impact of the water taking on the ecosystem, as per the conditions set out in the PTTW. Since the extension did not change any of the conditions in the permit, MOE did not consider a regular Registry posting (with comments solicited) necessary.

ECO Comment

Technically, the applicants are correct in their criticism of the ministry's process. MOE did not produce a SEV-consideration document, as it does for all other prescribed decisions that are posted for public comment (e.g., proposals for Acts, regulations, and policies). The position of the ECO is clear on this matter: SEV consideration on prescribed instruments is required. Nevertheless, the circumstances of this application are such that the ECO finds the MOE decision not to review the PTTW to be reasonable. The reasons for this finding are as follows:

1) As mentioned in the Background section above, MOE has acknowledged the need to do formal SEV considerations on instruments, but has stated that it requires some time to develop the

appropriate procedures and carry out the necessary training. This application was submitted within the period of time identified by the ministry as necessary for this transition.

2) The outcome of this particular PTTW decision-making process seems reasonable, largely because the PTTW manual had been reworked (in 2005) to incorporate MOE's SEV principles. Despite the absence of a SEV-consideration document, the nature and extent of the terms and conditions required in the renewed PTTW provide solid evidence that the ministry considered its SEV principles when it applied the PTTW manual in the development of the permit.

In supporting the ministry's decision on the current application, however, the ECO also commits to monitoring the progress of the ministry as it develops the policies and procedures necessary to provide SEV considerations of instruments in the future.

With regard to MOE's recent extension of the permit to three years (see Other Information), the ECO also finds this action reasonable. Although the ministry used the reduced length of the permit as evidence that it had considered its SEV principles, increasing its length by one year in order to be able to better assess low-flow impacts (given that water levels had been high since the permit was issued) is consistent with the ministry's evidence-based, adaptive-management approach.

Finally, the ECO found the ministry's response to the applicants to be lacking in one specific area. A major concern raised by the applicants was not addressed – the fact that much of the water bottled under this permit will be exported and therefore lost to this watershed. The ECO is aware that MOE has consulted extensively in recent years on the issue of transferring water out of Ontario's watersheds and has received many comments recommending a ban on such activities. In spite of the many reservations expressed by the public, however, the provincial government has to date not moved to prohibit or even limit out-of-basin transfers in the form of bottled water.

Given the uncertainties of climate change and the increasing incidence of low-water conditions in Ontario in recent years (see "Drought in Ontario? Groundwater and Surface Water Impacts and Response", page 49 in our 2007/2008 Annual Report), the applicants' concern would seem to have sufficient weight to warrant, at the very least, a direct response. Given that MOE is currently engaged in a consultation process regarding Ontario's water resources (see Other Information above), including the issues of water transfers between watersheds and charges for water takings, the ECO feels that a mention of these upcoming activities and an invitation by MOE to participate in the associated consultations would have been appropriate.

Review of Applications R2009001, R2009002, R2009003, R2009004:

5.2.11 Need to Legislate Development and Mineral Exploration in Uranium Zones (Review Denied by MNDMF, MMAH, MNR, and MOE)

This application was reviewed in conjunction with R2009001 (MNDMF), R2009002 (MMAH) and R2009003 (MNR). Please see the Ministry of Northern Development, Mines and Forestry portion of this Section for the full review.

Review of Application R2009006:

5.2.12 Review of O. Reg. 116/01 and the Guide to Environmental Assessment Requirements for Electricity Projects

(Review Denied by MOE)

Background/Summary of Issues

In May 2009, two applicants requested that the Ministry of the Environment (MOE) review O. Reg. 116/01 – Electricity Projects, made under the *Environmental Assessment Act* (*EAA*). They also requested a review of MOE's March 2001 Guide to Environmental Assessment Requirements for Electricity Projects (Guide) as it relates to natural gas electricity projects equal to or larger than five megawatts (MW). The applicants argued that a review was necessary because O. Reg. 116/01 and the companion Guide misclassify natural gas facilities as Category B. They argued that the environmental impacts of natural gas facilities are greater than other similarly classed facilities (such as wind, hydroelectric or biomass), and therefore natural gas facilities should properly be classified as Category C and be required to undergo a more thorough environmental assessment process.

Background

The environmental assessment requirements for electricity projects in Ontario are established by O. Reg. 116/01 (or the "Electricity Projects Regulation") and described in the Guide. Based on the regulatory requirements, the Guide classifies electricity projects into three categories. These categories were established based on the type of fuel used, the size of a project, and, in some instances, the efficiency of the proposed facility. The categorization of a project determines the depth of environmental review or assessment, and the level of public and agency consultation, to be undertaken. The categories and corresponding environmental assessment requirements are laid out below.

Category A: Projects that are expected to have minimal environmental impacts. These projects do not require approval under the *EAA* and are not regulated by the Electricity Projects Regulation. If there are significant environment impacts associated with a proposed project, however, the Minister of the Environment may require an individual environmental assessment (EA) under the *EAA*. The Environmental Registry is used for public consultation on prescribed instruments needed for Category A projects.

Category B: Projects with "potential environmental effects that can likely be mitigated." Although these projects are subject to the *EAA*, proponents are not required to prepare a full individual EA on the condition that they follow the proponent-driven Environmental Screening Process (ESP) as outlined within the Guide. Depending on the outcome of the screening process, proponents with projects in Category B may be required to undergo an Environmental Review to conduct further studies and/or consultation. Alternatively, the project may be bumped-up (or elevated) to Category C and subjected to an individual EA.

Category C: Major projects that, because of their known significant environmental impacts, warrant the preparation of an individual EA under the *EAA*.

The thresholds and categories for some electricity generation projects (prior to amendments made in September 2009) are as follows:

Electricity Project Type	Category A: No *EAA* Requirements	Category B: Environmental Screening/Review Process	Category C: Individual EA
Solar photovoltaic	All	-	-
Wind turbines	< 2 MW	≥ 2 MW	-
Hydroelectric facilities	-	< 200 MW	≥ 200 MW
Natural gas	< 5 MW	≥ 5 MW	-
Biomass (not including waste material)	< 5 MW	≥ 5 MW	-
Landfill Gas / Biogas	< 25 MW	≥ 25 MW	-
Waste biomass (includes woodwaste)	< 10 MW	≥ 10 MW	-
Oil	< 1 MW	1 to < 5 MW	≥ 5 MW
Coal	-	-	All

Summary of Issues

Misclassification of Natural Gas Projects:
The applicants requested that MOE review both O. Reg. 116/01 and the Guide with regard to the classification of all natural gas projects over five MW as Category B. The applicants argued that, despite MOE's stated intentions, the screening and review process fails to protect the environment as it does not ensure that proposed electricity projects are assessed in a manner that is commensurate with their potential harmful effects.

The applicants argued that other Category B projects, such as small hydroelectric, wind and biomass are considered sustainable and "green" with little environmental impact. Natural gas projects, other the other hand, are fossil-fuel based (similar to oil and coal) and produce toxic emissions and greenhouse gases. On this basis, the applicants argued that larger natural gas projects should not be included in Category B, but rather placed within Category C and subjected to an individual EA. While the applicants agreed that it might be appropriate to exempt small, natural gas power generation facilities, they felt that larger ones should undergo a review "that is commensurate with their size" and potential impact. In their opinion, it is inappropriate to "permit large plants to proceed without [a] full EA in the absence of a strong demonstration of no impact." They requested, therefore, that MOE amend O. Reg. 116/01 and the Guide so that larger natural gas facilities require an individual EA and be subjected to a more rigorous assessment and approvals process.

Flaws in the Environmental Screening Process (ESP):
The applicants expressed several concerns regarding the ESP as it applies to larger natural gas facilities. Some concerns were that the process:

- is a proponent-driven self assessment which therefore has an inherent bias; and,
- does not require a rigorous assessment of site-specific potential environmental impacts, but rather allows a 'literature' review to suffice.

As well, the applicants argued that while the Guide provides a general umbrella of environmental impacts that need to be considered, it is "left to the proponent to determine the scope of evaluation for any particular element." The applicants felt this is improper, and asserted that this would lead to the unfortunate situation where there would be no government review unless an objection was made against a project.

The applicants also argued that the ESP is flawed as it does not require proponents to address questions regarding need or to explore alternative projects. As well, they pointed out that because the screening process does not include a review of cumulative impacts or consideration of local ambient air quality, natural gas projects may play a significant role in contributing to deteriorating air quality and increased health impacts in areas where local air quality is already compromised. To support this argument, the applicants pointed to studies by the Ontario Medical Association (OMA) that link the effects of air pollutants to premature deaths in Ontario.

The York Energy Centre:
To illustrate their concerns with the environmental screening process as it applies to larger natural gas facilities, the applicants highlighted the proposed development of the York Energy Centre (YEC) in King Township, in North York Region.

In 2003 the need for increased electricity supply in the North York Region was identified. In 2005, a proposal to rebuild a transmission line through the Towns of Markham and Aurora to meet the supply requirements was abandoned by Hydro One following opposition from both the public and the affected municipalities. In order to find another solution, the Ontario Power Authority (OPA) began a consultation process that resulted in the release of the North York Region Electricity Supply Study in September 2005. This study contained an integrated proposal to: reduce peak demand through energy conservation and demand management; improve and expand transformer capacity; and build a 200 to 350 MW natural gas-fired generating facility in the North York Region.

The generation proposal was confirmed through a January 2008 Minister of Energy Directive which directed OPA to enter into a contract with a power company for the construction and operation of a simple-cycle natural gas-fired electric power plant with a rated generation capacity of 350 to no more than 400 MW and an in-service date no later than December 31, 2011.

The OPA issued a Request for Proposals (RFP) in July 2008, with a three-month deadline. As part of their bids, applicants were required to provide evidence that they had begun an Environmental Screening Process. The RFP explained that bids would be evaluated against a set of 'rated criteria', each of which had an assigned maximum score. Several bids were ultimately submitted and, in December 2008, Pristine Power was awarded the contract for the proposed YEC.

The YEC is a single-cycle natural gas-fired electricity generation facility which is proposed for construction in a mainly rural area and is in close proximity (600 metres) to the Holland Marsh – a flat, extensive farming region with rich and unique soils. The Holland Marsh is designated as a Specialty Crop Area within the Agricultural Systems classification of the Greenbelt Plan and is the source of much produce grown in southern Ontario.

The YEC facility has a nameplate capacity of 435 MW (depending on ambient conditions) and an OPA contracted capacity of 393 MW. It is being designed as a 'peaker' plant to accommodate periods of peak electricity demand and it is projected that the facility will operate only infrequently and for short periods. According to the OPA, the facility will likely operate between 260 to 1,300 hours annually to meet peak demand. The YEC will require a transmission connection to the provincial electricity grid and a pipeline connection to provide the required natural gas for the project.

According to the applicants, this proposed natural gas-fired generating facility (which is 78 times larger than the five MW threshold for Category B projects) will have significant environmental impacts that were not adequately addressed by the proponents and which fell through the cracks of the ESP.

In particular, the applicants argued that the YEC proponents did not address the additional cumulative impacts that the YEC would have on the local air, which, they contended, is already degraded. The applicants indicated their belief that no such studies had been conducted "as such analysis is not required as part of the screening or environmental review process." As well, they expressed concerns about the cumulative impact of the generation facility on prime agricultural land due to the proposed facility's proximity to the Holland Marsh, and on nearby water, such as the Lake Simcoe Watershed.

In the applicants' opinion, an individual EA would have been more appropriate for the YEC as questions pertaining to "need" and "alternatives" would have been raised. In particular, the applicants argued that declining power demands in York Region (due to local conservation and demand management efforts) might have led to the conclusion that there was no need for further generation capacity in the region, had the question of "need" been posed. As well, they felt that if alternatives had been considered as part of the process, a decision to construct on less sensitive lands might have been reached. In this regard, they pointed to the fact that other proposals submitted in response to the same OPA RFP process were able to "find industrial zoned lands off of the Greenbelt and away from the vicinity of the Holland Marsh". Due to the confidentiality of OPA's RFP process, it was not clear to the applicants why YEC was selected, or what environmental considerations were factored into the decision-making process. The applicants argued that this process would be more transparent if an individual EA was followed.

Finally, the applicants argued that an individual EA of the project would have addressed other critical issues such as the improper "piece-mealing" of the project into separate components (such that the gas pipeline was not assessed as part of the project), and the potential archeological significance of the land.

Ministry Response

On July 13, 2009, MOE denied this application for review.

MOE explained its decision by stating that when it developed the regulatory size thresholds in 2001, it attempted to ensure that a "level playing field was achieved by placing projects of similar scale and environmental effect within the same categories." In doing so, MOE concluded that projects with known and mitigable environmental effects would be grouped together and subjected to an ESP. Only projects with "known significant environmental effects," such as coal-fired facilities, were placed in Category C and subjected to the higher scrutiny of an individual EA. In denying this application, MOE stated that it continues to view the environmental effects of both small and large natural gas-fired facilities as mitigable and therefore properly classified as Category B.

MOE stated its opinion that little potential harm will be done to the environment if a review of the regulation is not conducted. It based this opinion on the fact that members of the public can request that a proposed Category B project be elevated to an individual EA and subject to a higher level of scrutiny. MOE also indicated that many issues raised by the applicants would not be addressed, even if individual EAs were required for larger natural gas facilities. According to the ministry, this is because "individual EAs are carried out by the proponent and not by the ministry" and, similar to what occurs under an ESP, the ministry merely provides feedback on issues related to its mandate.

In responding to the applicant's concern that questions of "need" and "alternatives" are not properly addressed through the ESP, MOE indicated that such questions are more appropriately assessed by the OPA and the Ministry of Energy and Infrastructure (MEI) as part of electricity planning for the province. MOE concluded that because these questions are considered during OPA and MEI planning processes, it would be "inappropriate to require project proponents to duplicate an existing assessment."

To address the concern about "piecemealing", MOE assured the applicants that while transmission lines and transformer stations associated with a Category B generation facility are considered as part of a project, those that are part of the Independent Electricity System Operator controlled grid are not included as they are constructed by a different proponent and subject to a separate EA process. MOE indicated that gas pipelines are planned under the Ontario Energy Boards' "Leave to Construct" process, and therefore indicated that it would be duplicative to have natural gas proponents include pipelines within their assessment.

Regarding concerns that the ESP does not require an assessment of cumulative effects, MOE pointed out that this is not currently required by the more stringent individual EA process. MOE indicated, however, that it is in the process of reviewing both individual EAs and streamlined EA processes (such as the ESP) to "determine how to consider cumulative effects in stressed airsheds and watersheds." In the

interim, however, MOE indicated that the ministry still has the ability to require a proponent to assess and mitigate any negative impacts on air quality that may be identified through an ESP, as well as to impose conditions within a Certificate of Approval.

Finally, the ministry acknowledged that there is a link between poor air quality and health, but stated that the OMA studies focus on air pollution more broadly, rather than on emissions from natural gas electricity generation facilities. The ministry outlined the results of a study conducted for MEI, which concluded that the replacement of coal-based electricity generation with natural gas will benefit air quality and lead to "substantial health benefits."

Other Information

In September 2009, O. Reg. 359/09 – Renewable Energy Approvals, was brought into force under Part V.0.1 of the *Environmental Protection Act (EPA)*. This regulation created a new class of approvals for most renewable energy facilities as well as a new, streamlined permitting and approvals process designed to expedite the development of renewable energy projects. In conjunction with this change, O. Reg. 360/09 amended O. Reg. 116/01 such that most renewable energy generation projects (several of which were classified as Category B) are now exempt from having to comply with the screening process prescribed by O. Reg. 116/01.

In January 2010, King Township passed an Interim Control By-law that will provide the Township with a one-year window (with an option to extend the window to two years) to study land-use planning issues relating to the YEC. The by-law can be appealed to the Ontario Municipal Board, but the immediate effect will be to delay further progress on the project until the land-use planning issues are resolved.

ECO Comment

The ECO disagrees with MOE's decision to not conduct a review of O. Reg. 116/01 and the Guide. Ontario Regulation 116/01 came into force in 2001 in order to level the regulatory "playing field" for both private and public electricity projects. In 2002, the ECO gave a positive review of the regulation and stated that if it helped to achieve emission reductions and air quality targets, then its "favouring of project types will be considered prudent planning." This statement was made in the context of the environmental concerns at the time, particularly regarding the impacts on air quality from coal-fired generation. Nine years have now passed since the regulation came into effect and the regulatory landscape, and generation mix, in Ontario for electricity are shifting so dramatically that the ECO believes a review of this regulation would have been warranted.

Furthermore, the ECO believes that the central issue raised by this application was a valid one upon which to base a review of the regulation. In particular, the applicants have raised a legitimate question as to whether all natural gas projects, regardless of their magnitude, should be evaluated in the same manner. While the particular project in question is 78 times larger than the Category B threshold, projects which are potentially hundreds of times larger – with correspondingly greater impacts – would be similarly categorized. The ECO questions whether this particular outcome was anticipated and therefore suggests that a review on this basis alone would have been justified.

In its reasons for deciding not to review O. Reg.116/01, MOE referenced studies that concluded that the replacement of coal-based electricity generation with natural gas will result in improved air quality and substantial health benefits. The ECO accepts that a reduction of coal will substantially improve overall air emissions. The ECO does not believe, however, that these conclusions should have been used by MOE in determining that a review of O. Reg. 116/01 was not warranted. The key question raised by this application was whether natural gas facilities over five MW are properly categorized as Category B projects. In MOE's words, projects that are of a "similar scale and environmental effect" are placed in the same categories. Prior to the implementation of O. Reg. 359/09, other projects in Category B included wind turbines, biomass and smaller scale hydroelectric facilities – each of which release little to no air pollutants. Accordingly, the ECO believes that the appropriate comparison regarding environmental

impact would have been to compare the air emissions of larger natural gas facilities with projects such as these.

While the applicants requested a general review of the classification of large natural-gas facilities, the YEC serves as a good case study as to the adequacy of the ESP for such projects.

As indicated above, the proposed facility is located very near to prime agricultural land and the Holland Marsh, which plays a significant role in provincial food production. Valid questions were raised around the suitability of the YEC's location and the impact that the proposed facility would have on future land productivity due to air emissions. As well, issues were also raised as to whether the facility will conform to land use planning policies, particularly the Greenbelt Plan and flood plain restrictions, and whether a less-efficient single-, as opposed to a combined-cycle facility is the most appropriate option. Finally, a perceived lack of transparency in the bidding process raised several questions around whether the size of the proposed facility exceeds both the supply that is required, as well as that which was stipulated within the January 2008 Ministerial Directive.

In light of these concerns, multiple requests were made to MOE by concerned citizens and groups to elevate the YEC proposal to an individual EA yet each of these requests was ultimately denied. These concerns focused primarily on the possible impact on agricultural land and water, and whether the facility will conform to local and provincial planning policies.

In the past, the ECO has expressed concern regarding MOE's approach to elevation requests under the *EAA*. It is the ECO's understanding that the ministry receives on the order of 60-70 such requests in a typical year and, while there are no published statistics on how often these requests relate specifically to O. Reg. 116/01, the ECO is not aware of any elevations having ever been granted. The ECO questions, therefore, whether it is valid to assert, as MOE did in its decision, that the "opportunity" exists for members of the public to request an elevation through the ESP process. An "opportunity" which is never granted rings as a hollow promise.

The evidence reviewed by the ECO with regard to the YEC suggests that many of the elevation requests made compelling arguments to support a "bump-up". If such requests were not granted in this particular case given the issues that were raised, it is difficult to imagine a situation where such requests would, in fact, be allowed. While policy decisions cannot be made based on single cases, the ECO suggests that the problems with the ESP illustrated by the particular case of the YEC provide sufficient grounds for a review of O. Reg. 116/01 and the Guide, with regard to large natural gas facilities.

Review of Application R2009007:

5.2.13 Need for a Policy to Ensure Bottled Water Meets Ontario Drinking Water Quality Standards (Review Denied by MOE)

Background/Summary of Issues

In June 2009, two applicants requested that the Ministry of the Environment (MOE) review the need for a new objective or policy to ensure bottled water (labelled as spring or mineral) meets the quality standards in O. Reg. 169/03 – Ontario Drinking Water Quality Standards, under the *Safe Drinking Water Act, 2002* (*SDWA*).

Background

Ontario Regulation 169/03 sets limits on microbiological, chemical and radiological contaminants in drinking water. Water provided by municipal and regulated non-municipal drinking water systems, and water required to be "potable" in any act, regulation, order or municipal by-law is required under the

SDWA to meet these standards. Because bottled water is not covered under the *SDWA* or its regulations, however, it is not required to meet the drinking water quality standards set by O. Reg. 169/03. Bottled water is regulated federally as a food product by the *Food and Drugs Act* (*FDA*).

Summary of Issues

The applicants argued that because the Food and Drug Regulations under the federal *FDA* direct that "water represented as mineral or spring water…shall be potable water," and because the *SDWA* states that "a requirement that water be 'potable' in any [a]ct [or] regulation…shall be deemed a requirement to meet…prescribed drinking water quality standards," water bottled as mineral or spring water is therefore required to meet Ontario's drinking water quality standards.

The applicants consider MOE's position (that bottled water is a food regulated under the *FDA*, and that the *SDWA* only applies to water systems) erroneous. Moreover, the applicants argue that while one of the purposes of the *Environmental Bill of Rights, 1993* is to "encourage the wise management of our natural resources," bottling water cannot be a wise use if the product is inferior to tap water in quality and safety. The applicants believe MOE should take on the objective of ensuring bottled water (labelled spring or mineral) complies with the standards in O. Reg. 169/03.

Ministry Response

In August 2009, MOE denied the application for review, explaining that bottled water in Canada is classified, labelled and regulated as a food under federal legislation, and that the regulation of bottled water and bottled water safety already falls under the mandates of Health Canada and the Canadian Food Inspection Agency (CFIA).

Under the *FDA*, Health Canada establishes health and safety standards for bottled water sold in Canada, and the CFIA enforces these standards. MOE pointed out that regulations under the *FDA* provide definitions for different types of bottled water and specify microbiological standards, acceptable treatments and labelling requirements for these products. While the ministry also mentioned that "Division 15 of the regulations covers limits for arsenic and lead in bottled water," the ECO notes that these limits do not apply to bottled mineral or spring water. MOE stated that quality standards for bottled and municipal water are "already similar."

In its response letter, the ministry informed the applicants that in 2002, the federal government acknowledged the need to update its bottled water regulations in order to bring them in line with the Guidelines for Canadian Drinking Water Quality. MOE asserted that these federal guidelines are the national equivalent to the Ontario Drinking Water Quality Standards established under O. Reg. 169/03 and are a more appropriate set of reference limits for the regulation of bottled water in Canada. Modifications to the federal bottled water regulations had not been proposed as of July 2010.

MOE concluded that using Ontario drinking water legislation to regulate bottled water would duplicate existing federal policy, legislative authority and mandate with regard to bottled water safety in Canada. MOE referred the applicants to Health Canada and the CFIA for further information on their roles and responsibilities.

Other Information

In October 2002, a private member's Bill was introduced to provincially regulate bottled water in Ontario. Bill 183 – *An Act to Amend the Ontario Water Resources Act* would have, if enacted, prohibited the selling of bottled water that fails to meet standards prescribed by regulations made under the *Ontario Water Resources Act* (*OWRA*). The *OWRA* was the primary piece of water legislation in Ontario prior to the passage of the *SDWA* in December 2002. Although the Bill was given second reading, it was never passed into law.

ECO Comment

The ECO agrees with MOE's decision to deny this application for review. As mineral water and spring water are already regulated as foods under the federal *FDA*, regulating these products at the provincial level is unnecessary and would duplicate federal efforts.

Because the Food and Drug Regulations require mineral and spring water to be "potable," and because the *SDWA* states that water required to be "potable" under any act or regulation must meet drinking water quality standards, the applicants argued that mineral and spring water must therefore meet the *SDWA*'s drinking water quality standards. The ECO notes, however, that according to Ontario's *Legislation Act, 2006*, a "regulation" in any provincial act is defined as a regulation made under an act of the Legislative Assembly of Ontario. The *SDWA* requirement that "potable" water meet provincial drinking water quality standards therefore only applies to water required to be "potable" in provincial legislation, not federal legislation like the Food and Drug Regulations.

Review of Application R2009008:

5.2.14 Review of the Ban on Depositing Waste in Lakes (Review Denied by MOE)

Geographic area: City of Sarnia

Background

On July 7, 2009 the ECO received an application requesting that the government review the ban on using and operating a waste disposal site where waste is deposited in a lake that is one hectare in area or larger. The applicants contended that the ban on these activities should not apply to an "established site with designated waste cells." The applicants did not request a review of the other activities included in the ban – establishing, altering, enlarging and extending.

The ban came into force in June 2004, when Bill 49, the *Adams Mine Lake Act*, received Royal Assent. Not only did this Act scuttle a proposal to deposit solid, non-hazardous waste from the City of Toronto into the flooded Adams Mine site near Kirkland Lake, it also amended section 27 of the *Environmental Protection Act* (*EPA*) to prevent other lakes from being used as waste disposal sites. The ban applies to lakes, which are at least one hectare in area, and includes bodies of water that result from human activities and are directly influenced by or influence groundwater.

Excerpts from Section 27 of the *EPA*
Certificates of Approval
27. (1) No person shall use, operate, establish, alter, enlarge or extend, (a) a waste management system; or (b) a waste disposal site, unless a certificate of approval or provisional certificate of approval therefor has been issued by the Director and except in accordance with any conditions set out in such certificate.
Lakes
(3.1) Despite subsection (1), no person shall use, operate, establish, alter, enlarge or extend a waste disposal site where waste is deposited in a lake.
Same
(3.2) In subsection (3.1),
"lake" includes,
(a) a body of surface water that,
(i) results from human activities, and
(ii) directly influences or is directly influenced by groundwater, and
(b) an area of land that was covered by a body of water described in clause (a) or a lake on the day this subsection came into force,
but does not include,
(c) a body of water described in clause (a) or a lake, if the body of water or lake is less than one hectare in area, or
(d) an area of land described in clause (b), if the body of water described in clause (a) or lake that covered the area of land on the day this subsection came into force was, in total, less than one hectare in area on that day.

The subject landfill site is located in the City of Sarnia. It is a former aggregate pit that was dewatered to allow sand and gravel to be extracted from below the water table. In 1994, the site was purchased by the current owners, Inter-Recycling Systems Inc (IRS). Prior to the enactment of Bill 49, the site consisted of six approved fill areas. Areas 1, 2 and 6 had been separated by berms and dewatered so that they could receive wastes. Areas 3, 4 and 5, which had not been separated by berms and had not received any wastes, became the on-site dewatering pit – the body of water that is the subject of this application. The dewatering pit is greater than one hectare in size and under the influence of groundwater, and is within the approved fill area of the landfill site. By early 2007, Areas 1, 2 and 6 had reached their approved fill capacity. The site has not received any wastes since then.

The Ministry of the Environment (MOE) has approved Permits to Take Water (PTTWs) for the site since the mid-1970s and Certificates of Approval for Waste (C of A) since 1981. Initially, the PTTWs were granted to allow gravel extraction below the water table and then to lower the water in the dewatering pit. In 2006, MOE issued a PTTW for another five years, noting that "dewatering is necessary for the safe maintenance of the site." The Provisional C of A that was issued in 1995 and amended several times allowed IRS to receive non-hazardous, solid industrial waste and non-putrescible domestic waste at the site. It included conditions that anticipated IRS's plans to deposit wastes in Areas 3, 4, and 5, such as berms being constructed between each area and each area being filled sequentially with wastes.

Three days before the ban came into force in June 2004, MOE added numerous conditions to the Provisional C of A including Condition 43, which required IRS to submit a Design and Operations Plan (the "Plan"), a Hydrogeological and Surface Water Assessment, and a Finalized Financial Assurance Plan for approval. MOE explained that Condition 43 would ensure that the design of the site would conform to current standards but did not mention the ban in relation to Areas 3, 4 and 5. MOE also added Condition 30, which required IRS to "take all reasonable steps to avoid violating other applicable provisions" in the *EPA*. A few weeks later, MOE wrote to IRS advising that the ban appeared to apply to its landfill site.

After IRS submitted its Plan in November 2004, MOE refused to review it on the grounds that it proposed the deposition of wastes into a lake, a contravention of section 27(3.1) of the *EPA*. According to MOE, the dewatering pit was a lake under section 27(3.2) of the *EPA*. MOE requested that IRS submit a

revised Plan or a Closure Plan for the site. However according to the applicants, IRS and area residents believed that MOE had intended to allow IRS to deposit wastes in Areas 3, 4 and 5 despite the ban because it had approved a Provisional C of A that contemplated disposal of wastes in Areas 3, 4 and 5 with berms separating each area into less than one hectare bodies of water. As a result of receiving this approval, IRS had not prepared the site for closure.

In July 2008, MOE amended Condition 43 to require the Plan to comply with the ban as outlined in section 27 of the *EPA*, a Closure Plan and a Finalized Financial Assurance Plan by June 30, 2009.

The applicants provided copies of correspondence sent to the Minister of the Environment and other MPPs dating back to the consultation stage on Bill 49 expressing their concerns that the proposed legislation would affect IRS and later asking for relief from the ban.

Summary of Issues

According to the applicants, because the ban is preventing IRS from depositing wastes in Areas 3, 4 and 5, IRS has not been able to earn any revenue. The applicants explained that, without ongoing revenue:

- The environment may not be protected since IRS does not have the funds to properly close the site and may not be able to comply with its monitoring and remedial obligations. In addition, it may not be able to continue dewatering Areas 3, 4 and 5, which is a safety requirement.
- IRS has not been able to obtain credit to provide adequate financial assurance to MOE. If IRS declares bankruptcy, the Ontario taxpayer would be responsible for the cost of remediating the site and ongoing expenses such as monitoring and dewatering.

The applicants also explained that wastes, which could have been deposited at the site, are being disposed in the United States due to a lack of landfill capacity in Ontario.

The applicants contended that the ban discriminates against IRS, which "may prevent IRS from protecting the environment, and the right of those living in proximity to the landfill site to a healthful environment contrary to the principles of the *Environmental Bill of Rights*." The applicants explained that the subject landfill site is the only existing, operational landfill site affected by section 27 of the *EPA*. The applicants quoted resolutions that expressed support for IRS's efforts to gain relief from the subject ban. These resolutions were carried unanimously at the Annual General Meetings for area residents held in 2006 and 2009. According to the applicants, MOE has not considered the public's views on this matter, contrary to the principles of enhanced public participation in the *EBR*. The applicants urged MOE and the ECO to consider the public input on this issue as envisioned by the *EBR*.

The applicants explained that IRS has continued to fulfil its obligations despite the lack of revenue. For example,

- Since February 2006, IRS has removed leachate six times to protect the environment and neighbouring properties, and continued to monitor and report.
- IRS also took action when shallow cracks appeared in a containment berm separating waste and leachate in Area 6 from the dewatering pit in early 2009. The applicants explained that the containment berm was an internal berm that was not designed to be the only barrier separating the waste from the dewatering pit.

According to the applicants, if dewatering and monitoring of water levels were stopped, the water table in the area would rise, potentially flooding properties and damaging berms within the landfill site. The applicants noted that dewatering for almost 40 years has created a "new 'natural' water table" in the area.

The applicants concluded by stating that without the ongoing ability of IRS to maintain and operate the site, the following environmental concerns will develop:

- No one to monitor methane gas migration and take steps to prevent off-site impact

- No one to monitor leachate levels and prevent over-topping in Area 6
- No one to conduct the leachate removal
- No one to continue the dewatering of the storm water management pond for site safety
- No one to continue pumping from the storm water management pond to create surficial water movement for the prevention of larvae development of mosquitoes carrying West Nile disease
- No one to provide interior berm maintenance to prevent breaches or sloughing off of banks
- No one to provide odour control
- No one to provide maintenance of grounds to prevent growth of noxious weeds and infiltration of vermin.

The applicants believe that the Minister of the Environment did not know that prematurely closing the site to comply with the ban would create "potential environmental hazards." They advised that the proposed Plan dating from 2004, which included the deposition of wastes in Areas 3, 4 and 5 and measures to contain leachate, would minimize those hazards.

Ministry Response

MOE provided three reasons for denying this review:

1) The amendment proposed by the applicants "would not be protective of the environment."
2) The legislation has been "thoroughly vetted by the Ministry, the public and the Environmental Review Tribunal (ERT)."
3) "The grounds in support of the application have been previously evaluated on a number of occasions by both the Ministry and non-Ministry bodies."

MOE explained that, after it had declined to review the Plan and advised IRS to either re-submit a revised Plan or a Closure Plan, IRS sent numerous letters to MOE, including the Minister and Deputy Minister and the Environmental Assessment and Approvals Branch. IRS eventually appealed the amendments to its C of A to the ERT, which dismissed the appeal in August 2009. The ERT concluded that the body of water on the site constituted a lake under section 27(3.1)(3.2) of the *EPA*, and that IRS is prohibited from depositing waste in the body of water within the fill area.

In its Decision Summary, MOE responded to the following concerns raised in the application:

a) Applicant concern: IRS is unable to properly close the remainder of the site, which has reached its approved capacity, because of the ban. MOE response: MOE advised that IRS has not applied for an increase in the approved capacity in areas of the site where waste can be deposited, which would have provided IRS with new revenue. MOE noted that allowing disposal of waste into a lake is not protecting the environment.
b) Applicant concern: IRS may not be able to fulfil its monitoring, remediation, dewatering and financial assurance obligations. MOE response: MOE advised that financial considerations are not sufficient justification for amending the ban in a manner that would pose a "real potential for environmental harm."
c) Applicant concern: IRS should be allowed to deposit waste in the body of water due to the shortage of waste capacity in Ontario. MOE response: MOE advised that "provincial waste diversion initiatives in place or in development will address the issue of landfill capacity pressures" and that the environment is not being harmed by the "present situation"; whereas, amending the ban would negatively impact the environment.

Other Information

MOE posted the proposal notice for Bill 49 on the Environmental Registry on May 6, 2004 for a 30-day comment period. Three commenters, including one of the applicants, expressed concerns that the proposed ban would stop waste disposal at flooded pits and at sites with storm water management ponds and/or natural lakes. In response, the government amended the definition of "lake" to clarify that the ban

applied only to the deposition of wastes in a lake. MOE posted a decision notice on July 22, 2004. For additional information on this decision, refer to Environmental Registry #AA04E0001 and the Supplement to our 2004/2005 Annual Report, pages 59-61.

In August 2008, IRS appealed the amendments to Condition 43 of its Provisional C of A, which included a requirement to submit a Plan and/or Closure Plan and a Finalized Financial Assurance Plan. At the ERT hearing, IRS alleged that the amendments were unfair and unreasonable and contended that preparation of a Plan for landfilling Areas 3, 4 and 5 would result in non-compliance with the *EPA*. As a result, the only legal option available to IRS was to close the site even though it was not full and there were no environmental issues that would require its closure. A professional engineer acting on behalf of IRS advised that Areas 3, 4 and 5 were not connected hydrologically, and if Areas 3, 4 and 5 were developed sequentially with berms as required by IRS's Provisional C of A, each area would be less than one hectare in size. He noted that dewatering of Areas 3, 4 and 5 would have to continue regardless of what happens with the site to prevent basements of neighbouring homes from being flooded. The engineer confirmed that, when the ban came into force, Areas 3, 4 and 5 were not separated by berms and were flooded forming a body of water of about 2.5 hectares in area. The lawyer for IRS contended that the ban did not apply since, after each area is bermed and dewatered, each area would be less than one hectare in size and waste would not deposited in water.

MOE's lawyer contended that the *EPA* prohibits the deposition of wastes into a body of water that meets the definition of lake and overrides any provisions to the contrary in a Provisional C of A.

On August 25, 2009, the ERT concluded that the ban applied to Areas 3, 4 and 5 since the body of water was greater than one hectare in size at the time that the Act came into force, meeting the definition of a lake under section 27 of the *EPA*. IRS was therefore required to comply with Condition 43 of its Provisional C of A including payment of Financial Assurance. For the full text of the ERT decision, including other arguments, visit the ERT website, http://www.ert.gov.on.ca/, Case No.: 08-065.

In September 2009, MOE became aware that IRS was insolvent. Since the Interim Financial Assurance had not been paid, MOE sent a letter in October to IRS and its president, Michele Giampaolo, requiring payment of $4.292 million within 20 days. MOE then amended an outstanding Director's Order in December 2009, extending the requirement to pay the Interim Financial Assurance to Triple M Metal Inc. and Giampaolo Investments Ltd, who appealed the amendments to the ERT. In May 2010, the parties agreed to the terms and conditions of a settlement under the *Bankruptcy and Insolvency Act,* and in July 2010, the ERT accepted the Settlement Agreement. The appellants agreed to pay $3.7 million as financial assurance for the closure and post-closure care of the landfill site and to withdraw their appeals. For further information on the amended Director's Order, visit the Environmental Registry, exception notice #010-8704; and on the appeal, the ERT website, appeal numbers 09-159 – 09-164.

ECO Comment

The ECO is in agreement with MOE's decision to deny the application. Under the *EBR*, MOE may consider a number of factors before making a decision, including the potential for harm to the environment if the requested review was not undertaken; the fact that matters to be reviewed may be subject to a periodic review; and any social, economic, scientific or other evidence that MOE considers relevant. MOE considered these factors.

The decision to ban the deposition of waste into a lake supports MOE's primary objective, which is to protect the environment. However, MOE failed to ensure that the site was properly closed in a timely manner: two of the three cells that are filled with wastes had not received their final cover and the berm that separated the wastes and leachate in one of the cells from the dewatering pond had not been upgraded. This unsatisfactory state of affairs, which put the environment and nearby residents at unnecessary risk, was addressed by the Settlement Agreement. Steps are now being taken to properly close the site and to provide for post-closure care.

Review of Application R2009009:

5.2.15 Review of the 15-day Time Limit to Seek Leave to Appeal under the *EBR* (Review Denied by MOE)

Background/Summary of Issues

In August 2009, two applicants (the "Applicants") submitted a request for review of the 15-day time limit established under section 40 of the *Environmental Bill of Rights, 1993* (*EBR*) for members of the public to seek leave to appeal environmentally significant government decisions.

Appeal and Leave to Appeal Rights under the EBR

In Ontario, an individual or company that applies for certain environmental approvals, permits and other instruments may appeal (i.e., challenge) the ministry's decision to issue or refuse to issue an instrument. For most of these instruments, a proponent (also known as an instrument holder) has 15 days from the date of the ministry's decision to file an appeal. Notice of appeals of instruments that are prescribed under the *EBR* must be posted on the Environmental Registry.

In addition to this automatic appeal right for the instrument holder, the *EBR* provides all residents of Ontario with the right to seek permission (i.e., leave) to appeal such ministry decisions. This right is unique, as parties other than instrument holders themselves (i.e., third parties) are not usually given a formal right to challenge government decisions about environmentally significant instruments.

Under the *EBR*, when a ministry gives notice on the Environmental Registry of an instrument decision, any resident of Ontario may seek leave to appeal that decision. Leave is sought from the appropriate appellate body; for example, an application for leave to appeal a Ministry of the Environment (MOE) decision to issue a Permit to Take Water under the *Ontario Water Resources Act* must be made to the Environmental Review Tribunal. If the Tribunal determines that the applicant has met all elements of the threshold test for obtaining leave, leave to appeal is granted and the applicant's appeal can proceed to a hearing before the Tribunal.

Section 40 of the *EBR* states that an application for leave to appeal shall not be made later than 15 days from the date that the notice of the instrument decision that is being challenged was first posted on the Environmental Registry.

The Application for Review

In this application, the Applicants argued that the 15-day time limit for third parties to apply for leave to appeal is too short. The Applicants requested that it be extended to 30 days "in order to more fully respect the public participation objectives of the EBR."

The Applicants referred to the preamble to the *EBR*, which states that "the people [of Ontario] should have means to ensure that [the goal of protection, conservation and restoration of the natural environment] is achieved in an effective, timely, open and fair manner," and noted that "public participation in government decision-making, increased access to the courts, and greater government accountability are key means for achieving the purposes of the *EBR*."

The Applicants argued that the short timeframe for the public to prepare and submit an application for leave to appeal is "likely to undermine the public participation goals of the *EBR*."

The Applicants identified a list of 12 tasks that must be completed in the process of preparing a leave to appeal application (e.g., reviewing relevant laws and government policies to determine whether the decision maker acted reasonably; obtaining documents relevant to the decision; obtaining expert or technical advice and evidence about potential harm to the environment; and preparing the leave to appeal

application itself, to name a few). Given the numerous tasks that must be completed, often by volunteer-run community groups, the Applicants argued that the 15-day period is too onerous.

The Applicants cited a number of further reasons that the 15-day leave to appeal period is not long enough:

- Not all Ontarians have regular access to the internet to diligently monitor the Environmental Registry for newly-posted decision notices;
- The 15-day period favours well-resourced individuals, even though individuals and organizations with fewer resources may be equally or more directly prejudiced by the decisions. This points to a strong social justice basis for extending the 15-day timeline;
- The leave to appeal process under the *EBR* is more rigourous than other regulatory and judicial appeal processes in Ontario; and
- There is no convincing public policy reason to limit the time to seek leave to appeal to 15 days.

The Applicants noted that leave applications can be dismissed because they are received a few hours, or even a few minutes after the 15-day deadline has passed. Further, even in circumstances beyond an applicant's power, requests for extensions of the time to submit a leave application are denied. For example, the Applicants stated that requests for extensions of the time to submit leave applications due to the widespread electricity outage in August 2003 were denied, even though it would have been impossible for millions of Ontarians to access the Environmental Registry (i.e., obtain notice of a decision) during that time.

The Applicants referred to a case that went before the Environmental Review Tribunal in 2008 to illustrate that a longer leave to appeal period would be preferable. In *Miller v. Ontario (Director, Ministry of the Environment)*, the applicant, Mr. Miller, sent an application for leave to appeal by priority courier to ensure that his application would be delivered to all recipients prior to the deadline. However, the copy that was sent to the Tribunal (the appellate body) was not delivered until after the deadline. Accordingly, the Tribunal dismissed the application because it was out of time; this ruling was re-affirmed on a motion to review the ruling. The Tribunal recognized the unfortunate circumstances of the case, but found that the Tribunal does not have jurisdiction to extend a statutory deadline, and that a legislative change would be required to address the problem.

Finally, the Applicants identified a number of additional factors that exacerbate problems with the 15-day leave to appeal period, including:

- *Irregularities in the posting of ministry decisions* – the Applicants cited a March 2007 leave to appeal application related to an approval for air emissions for the Bayview Cemetery and Crematorium. The application was dismissed because it was made outside of the 15-day period. The Applicants contended that a change in the instrument holder's name, coupled with a change in Environmental Registry notice template format partway through the process, resulted in the notice on the Environmental Registry being "lost" and in the applicants submitting their leave application too late. The Applicants also pointed to a need for consistent language in Environmental Registry notices and better Environmental Registry search functions.

- *Delays in obtaining background documents that may be useful to prospective leave to appeal applicants* – the Applicants noted that the failure to post copies of all relevant background documents in an Environmental Registry notice "adds to the stress of meeting the 15-day limit." This is particularly exacerbated when ministry officials "insist that documents can only be released pursuant to a *Freedom of Information* (FOI) request…" which makes the 15-day timeline "exceptionally difficult to meet."

- *Lack of notice* – the Applicants argued that the notice required under the *EBR* is significantly less than is legally required for notice of most instruments under the *Planning Act*, which

> requires, for example: delivered notice to nearby landowners, physically posted notice at the site, publication in a newspaper, etc.

As documentary evidence in support of their request, the Applicants submitted a number of reports and articles (including several published by the ECO), as well as Environmental Review Tribunal decisions, an Environmental Registry notice and a copy of a Permit to Take Water. In particular, the Applicants provided a number of documents that indicate a strong public interest in extending the leave to appeal period, including past ECO reports recommending that the deadline be extended to 20 days.

The ECO forwarded the application to MOE.

Ministry Response

By letter dated October 16, 2009, MOE advised the Applicants of its decision that a review of the 15-day leave to appeal provision in the *EBR* "would not be appropriate," noting that it "must balance [the Applicants' concern] with timeliness in decision-making and long established appeal standards under other statutes."

MOE considered the requirements of subsection 67(2) of the *EBR*, and concluded that the potential for harm to the environment if the requested review is not undertaken is limited. MOE noted that "the existing provision provides a standard length of time to file an appeal application common to other legislation in Ontario and allows for public participation in decision-making that may have significant environmental impacts."

MOE disagreed with the Applicants' contention that the 15-day period is too onerous. In particular, the ministry noted in its Decision Summary three separate times that "an Applicant is only required to file the leave to appeal application itself with the Tribunal during this 15 day period," and that "the Tribunal allows additional time for applicants to file supporting materials." The ministry also stated that a 15-day time limit is a common deadline in several Ontario statutes, including the *Planning Act*, the *Niagara Escarpment Planning and Development Act*, the *Ontario Water Resources Act* and the *Environmental Protection Act*.

In response to the Applicants' argument that delays in obtaining background information about a ministry decision exacerbate the problem, MOE repeated that leave applicants can file additional material with the Tribunal after the 15-day deadline. MOE also pointed out that notices on the Environmental Registry provide contact information for applicants to request background documents during the proposal and decision stages, and that background documents can be obtained from staff in the applicable MOE district office and other locations by making specific arrangements. Finally, MOE noted that MOE's Freedom of Information Office can facilitate an access request for documents that are not publicly available.

Similarly, MOE disagreed that the *EBR*'s approach of providing notice only via internet contributes to the alleged problems with the 15-day time limit. MOE contended that the notice given via the Environmental Registry provides "everyone an opportunity to participate." The ministry noted that "the onus remains on the group or individual to review and/or monitor the Environmental Registry in order to get involved and take advantage of the registry on a regular basis." Further, MOE insisted that efforts have been made to make the Environmental Registry "as easy and user-friendly as possible," noting that "the public can track, save a notice and be informed of a decision notice through the customized 'MyEBR' feature" of the Environmental Registry.

MOE refuted the Applicants' allegation that irregularities in the posting of the Bayview Crematorium decision thwarted residents' opportunity to seek leave to appeal the decision. While MOE confirmed that a new decision notice was created and posted as a result of an update to the Registry notice template format of the Environmental Registry, MOE stated that the proponent's name identified in the notice did not change from the proposal stage to the decision stage, and that the new notice included a link to the earlier version. More generally, MOE defended the format of its Environmental Registry decision notices, noting that it was redesigned in 2007 "for easier read and search capabilities," and that the new format

was "tested with a number of audiences including the Environmental Commissioner's Office and the responses have been favourable."

MOE did not respond specifically to other examples cited by the Applicants, including the *Miller* decision or the problems that arose following the electricity outage in summer 2003.

Finally, MOE rejected the Applicants' argument that there are no convincing public policy reasons to limit the leave to appeal deadline to 15 days. In particular, MOE stated that it would be unfair to extend the time for third parties to seek leave to appeal when appellants (i.e, instrument holders) challenging the same decision only have 15 days to appeal from the date the decision is made. MOE explained that extending the leave to appeal deadline under the *EBR* would affect other legislation for which the Environmental Review Tribunal acts as an appeal body, and "would have significant implications for a large number of statutes, appellate bodies, interested stakeholders and ministries."

ECO Comment

The ECO is very disappointed with MOE's decision not to undertake a review of this important issue. The reasons that MOE provided for denying the application are not compelling.

In its response, the ministry repeatedly insisted that 15 days is sufficient since applicants need only submit their leave applications within that time, and may bolster their applications later as "the Tribunal allows additional time for applicants to file supporting materials." The ministry's argument is misguided on this point. First, the Rules of the Environmental Review Tribunal only provide applicants with five additional days to file supporting information without special permission of the Tribunal. This small amount of additional time hardly supports MOE's wholesale dismissal of the applicants' concerns.

More importantly, MOE's response suggests that applicants should simply file skeleton leave applications within the required timeframe, and then fill in the details later. Such an approach encourages applicants to submit applications for leave to appeal without having fully evaluated the merits and strengths of such a challenge – in effect, it encourages the filing of potentially unwarranted applications that would consume the valuable and limited resources of the appellate body, applicants and instrument holders alike. The ECO is deeply troubled by MOE's suggestion that this approach to filing leave to appeal applications is acceptable as a matter of course, rather than an exception to the rule. If MOE accepts that additional time may be routinely required by applicants, this underlines the need to consider a longer statutory deadline.

MOE concluded that, as a matter of public policy, it would be inequitable to extend the time for third parties to seek leave to appeal a decision when proponents have only 15 days to appeal the same decision. The ECO believes this position ignores the differences – and inequalities – inherent between proponents and third parties. A proponent who wishes to challenge a decision has been involved in the process from the start, has detailed knowledge about its own property, facility and operations, and has direct access to relevant background documents. A proponent may also be engaged in ongoing dialogue with the ministry throughout the decision-making process. In addition, a proponent is provided with direct notice of the decision. A third party, on the other hand, may have little or no knowledge about the issue until a proposal notice is first posted on the Environmental Registry, may have no advance warning about the timing or nature of a decision being made, and must check the Environmental Registry regularly to find out when a decision has been made. A third party also has limited ability to do "advance homework," because the conditions in a proposed instrument may be substantially different from the conditions in the final, approved permit. Finally, once a decision notice is posted – triggering the 15-day time limit to seek leave to appeal – a third party will often not have the same access to information as a proponent. The ECO questions how reasonable it is for MOE to equate a 15-day appeal period for an informed and prepared proponent with a 15-day leave to appeal period for the broader public.

The ministry's rationale that the 15-day leave to appeal deadline is reasonable simply because "the existing provision provides a standard length of time to file an appeal application common to other legislation in Ontario" is also weak. Most of the appeal deadlines in the identified statutes relate to

provisions for proponent appeals, not third party appeals, and in at least one statute the appellate body has jurisdiction to extend the deadline for third party appeals.

The ministry's response was also inaccurate, as the *Planning Act* actually provides a 20-day appeal deadline for third parties. For *Planning Act* decisions that are subject to the *EBR*, notices on the Environmental Registry advise of the *Planning Act* appeal right and include the following language: "There is an additional 'leave to appeal' right under the *EBR*. However, the *Planning Act* appeal provisions provide a broader right of appeal." While the requirements for a third party to appeal under the *Planning Act* are also more stringent, the *Planning Act* provides a longer deadline for third parties to challenge decisions than does the *EBR* – the very legislation enacted to enshrine the public's right to participate in environmentally significant decisions.

MOE neglected to respond to the Applicants' submission that the *EBR* leave to appeal process is "a more rigourous process than …numerous other regulatory and judicial appeal processes."

MOE's argument that extending the deadline to seek leave to appeal would "reduce timeliness of decision-making" is not convincing. The effect of extending the deadline by 15 additional days (as requested by the Applicants) would be negligible in the context of the entire decision-making process, which can take many months (and sometimes years) to conclude. Ministries themselves frequently take several days or more after an instrument is issued to post decision notices on the Environmental Registry, thus delaying the start of the clock on leave to appeal applications.

While the ECO agrees with MOE that it is up to members of the public to monitor the Environmental Registry on a regular basis in order to be aware of recent decisions, MOE should have considered the Applicants' concerns that many members of the public do not have regular internet access, which can make meeting the 15-day leave to appeal deadline that much more challenging. Further, MOE's claim that the public can "track, save a notice and be informed of a decision notice through the customized 'MyEBR' feature" is not entirely accurate. When a decision is made on a proposal identified on a member's list of selected notices (i.e., "Watchlist"), the MyEBR feature does not "inform" the member that a decision has been made or even automatically update the status of the notice on member's Watchlist. MyEBR is merely a convenient page for a member to list selected notices of interest; the member must still log on to MyEBR and manually select a particular notice from their Watchlist to determine whether a decision has been made.

Finally, although the ECO does appreciate the improvements of the new Environmental Registry notice format implemented in 2007, the ECO believes that the Applicants' concerns about inconsistencies in Environmental Registry content are valid. There is a wide range in the quality of notices posted on the Environmental Registry, from clarity of language used to comprehensiveness of information provided to currency of ministry contact information. All prescribed ministries should strive to make their Environmental Registry notices as readable, understandable and helpful as possible so that members of the public may fully exercise their rights under the *EBR*.

Since the *EBR* came into force in 1994, the ECO has heard from many Ontarians about the inadequacy of the 15-day time limit to file applications for leave to appeal. The ECO has called for an extension of the leave to appeal period to 20 days on several occasions. As the Applicants noted, the test for leave to appeal set out in section 41 of the *EBR* is rigourous; it can be very difficult to secure all of the information required to satisfy the test in 15 days. Requests for information from ministry contacts, District Offices or Freedom of Information Offices may not yield results promptly or within the 15-day time period at all.

Part of the problem with the tight 15-day timeframe is the lack of flexibility available to the appellate body to extend the time in appropriate cases. As the Environmental Review Tribunal noted in the *Miller* decision (and again more recently in *Ianuzzi* v. *Director, Ministry of the Environment* and *Scharfe obo Ramsayville Community Association v. Director, Ministry of the Environment*), the deadlines to appeal or seek leave to appeal ministry decisions are statutory, and the Tribunal lacks jurisdiction to alter those deadlines. Only in extreme cases of a "force majeure" (i.e., an unexpected and unpredictable event) does the Tribunal have some discretion to alter these deadlines. For example, despite the Applicants'

assertion, following the 2003 electricity outage the Tribunal did in fact extend the time to file an application for leave to appeal in at least one decision, albeit under the strenuous objections of MOE.

While the ECO would prefer to see the leave to appeal deadline extended to at least 20 days, the Applicants' concerns could also be alleviated somewhat by providing the appellate body with the statutory discretion to extend the deadline in appropriate circumstances.

The overarching purpose of the *EBR* is to provide the people of Ontario with a way to participate in environmentally significant government decision making, to ensure the protection, conservation and restoration of the natural environment. The issues outlined in the application, as well as the long history of complaints about the deadline, demonstrate that the 15-day leave to appeal period is failing to support the public's right to challenge ministry decisions on prescribed instruments. MOE should have undertaken the requested review and considered ways in which this problem could be addressed to better meet the spirit and purpose of the *EBR.*

Review of Applications R2009010, R2009011 and R2009012:

5.2.16 Review of Trail Buffers, Viewscapes, and Canoe Routes and Portages in the Temagami Forest Management Plan

(Review Denied by MNR, MOE and MNDMF)

This application was reviewed in conjunction with R2009010 (MNR) and R2009012 (MNDMF). Please see the Ministry of Natural Resouces portion of this Section for the full review.

Review of Application R2009014:

5.2.17 Review of the Need to Lower Noise Criteria for Wind Farms in Rural Areas

(Review Denied by MOE)

In December 2009, the Ministry of the Environment (MOE) received an application for review requesting that the ministry examine the provincial noise standards for wind farms in rural areas.

The applicants are concerned that rural noise standards are set unfairly, and noise from wind turbines is contributing to detrimental health effects for those living near wind farms. They argue that turbine setbacks should be increased to protect rural residents.

The applicants filed similar applications with MOE last year and in 2006, both of which were denied by the ministry. For information on these applications please see Section 5.2.17 of the Supplement to our 2008/2009 Annual Report.

Background

As Ontario moves towards its goal of phasing out coal-fired power plants (see Section 4.12 of the Supplement to our 2007/2008 Annual Report), the province is searching for cleaner sources of energy. Wind generated power is one sources the Ontario government is relying on to help meet the province's climate change targets and its plans for boosting the province's green economy (see our Annual Greenhouse Gas Progress Report, 2008/2009 and Annual Energy Conservation Progress Report – 2009, Volume One for more information on changes to Ontario's electricity system).

As wind turbines proliferate across North America and Europe, the human health affects of wind turbines are the subject of ardent scientific and political debate. Residents living close to turbines increasingly complain of nausea, headaches, dizziness, anxiety, sleep deprivation and tinnitus, all of which they attribute to the wind turbines.

Many studies aim to determine whether turbines detrimentally affect human health, and how close turbines should be sited to residential communities (e.g. appropriate setbacks). Some researchers claim that turbines contribute to "vibroacoustic disease" (low frequency noise affecting auditory and vestibular (inner ear) systems), which can damage the tissues of the heart, lungs and brain. Similarly, a U.S. doctor has devised the phrase "wind turbine syndrome" to describe the above-mentioned turbine-related symptoms experienced by those living near a turbine. In Canada, researchers at Queen's University are studying the health and well-being of residents on Wolfe Island, Ontario before and after a wind farm was established in the area, and attempting to define the appropriate setbacks for the turbines.

Other research suggests a correlation between turbine sound pressure levels and noise annoyance. Studies found annoyance from wind turbines increases in rural settings, and is influenced by terrain and level of urbanization. The studies conclude that aesthetic factors and geographic and visibility factors should be considered when constructing wind turbines.

It should be noted that there are scientific debates over the validity of the methodologies and findings of these studies. In May 2010, the Chief Medical Officer of Health of Ontario released a report that concludes the sound level from wind turbines is not sufficient to cause hearing impairment or other direct health effects, although it may be annoying to some people.

In Ontario, noise level limits for rural stationary sound sources, such as commercial and industrial businesses, are set in the MOE guideline "Sound Level Limits for Stationary Sources in Class 3 Areas (Rural), Publication NPC-232" (the "Noise Guideline (NPC-232)"). The noise levels in the guideline are applied to noise complaint investigations under the *Environmental Protection Act* (*EPA*), and used in assessments of proposed stationary sources of sound under the *EPA*, the *Environmental Assessment Act* and the *Aggregate Resources Act*.

In rural settings, noise sources are not to exceed 40 decibels (dBA) between 7:00 p.m. and 7:00 a.m. or 45 dBA between 7:00 a.m. and 7:00 p.m. according to Noise Guideline (NPC-232). In comparison, "Sound Level Limits for Stationary Sources in Class 1 & 2 Areas (Urban) (NPC- 205)" states noise sources in urban settings are not to exceed 47 dBA between 7:00 p.m. and 11:00 p.m. or 45 dBA between 11:00 p.m. and 7:00 a.m.

MOE also has the "Noise Guidelines for Wind Farms", which sets noise limits for wind turbines based on Noise Guidelines (NPC-232) and (NPC-205), and a reference wind-induced background sound level. In rural areas, the sound level ranges from the lowest level of 40 dBA at 4 km/hour wind speeds to the highest level of 51 dBA at wind speeds of 10 km/hr or higher. This guideline also includes noise settings for turbine related equipment and procedures for situating proposed turbines.

Summary of Issues

The applicants requested a review of the noise limits for rural areas contained in the Noise Guideline (NPC-232). In particular, the applicants were concerned about the noise generated from wind turbines and ancillary facilities located in rural areas. They noted that because ambient noise levels (e.g. background noise) in rural areas are lower than urban areas, any noise introduced into a rural setting is more audible and consequently more disturbing to residents.

The applicants argued that the noise limits in the Noise Guideline (NPC-232) are unfair to rural residents because they fail to consider the difference in ambient noise levels between rural and urban settings. The applicants assert the Noise Guidelines imply that ambient noise already present in an area partially masks new noise. They state that while this may be true in an urban setting where the night-time noise level is unlikely to be below 45 dBA, in rural areas the night-time noise level can be as low as 16 dBA.

The applicants argued that allowing noise levels up to 40 dBA in rural areas when background levels are as low as 16 dBA creates the potential for greater disturbance to rural residents. By comparison, the disturbance to urban residents that may result from allowing a 45 dBA noise level in urban areas with typical ambient levels of 40 dBA is less pronounced.

In addition, the applicants believe that the use of the A-weighted scale (dBA), (used to measure sound at levels that corresponds to human hearing) in the application of the Noise Guideline (NPS-232) to industrial wind turbine facilities fails to address the human health affects of low frequency noise (frequencies between 20-200 hertz (Hz), which is below the human hearing range of 20 Hz – 20,000 Hz). They believe that MOE should apply the precautionary principle when setting the standards in the Noise Guideline.

Ministry Response

In February 2010, MOE denied this request to review the Noise Guideline, citing similar reasons to the ones it gave in response to the previous applications for review.

MOE stated that a 2006 peer review of the Noise Guideline recommended no changes to the sound limits for stationary sources or to the sound level adjustments. The noise limits were based on scientific evidence and the ministry said it would ensure that its technical standards protect the environment.

The ministry also stated it was developing a document, the "Environmental Noise Guideline, Noise Assessment Criteria for Stationary Sources and Land Use Planning, Publication NPC-300" ("NPC-300"), that would consolidate current noise guidelines. This draft document would be posted on the Environmental Registry for a 30-day comment period. MOE committed to notifying the applicants when the document is posted on the Registry.

MOE explained that in 2007, the "Noise Guideline for Wind Farms" was reviewed by an independent noise expert who concluded that the ministry's approach was scientifically sound. As such, MOE stated that the noise limit for wind turbines in acoustically rural areas would remain at 40 dBA at the point of reception, with allowances for wind-generated background noise. MOE posted draft clarifications to the "Noise Guidelines for Wind Farms" on the Environmental Registry (#010-3595) for comment in June 2008. The final wind turbine guidelines contained clarifications on combined transformer and wind turbine noise, and local wind shear; and outlined more conservative guidelines for receptors, and maximum values for ground attenuation.

More recently, the government considered the 40 dBA noise limit for wind turbines in rural areas in the context of new approval requirements set out in O. Reg. 359/09 – Renewable Energy Approvals under the *EPA*. The requirements establish a 550-metre setback between wind turbines and receptors (i.e., residences). During consultations on the approvals, MOE stated that some stakeholders argued that a 550-metre setback is insufficient to protect residences from noise impacts. In its final decision posting for the regulation, however, MOE stood by the 550-metre setback and indicated its guidelines were based on scientifically sound information and were developed in a transparent and peer-reviewed process.

With respect to stakeholder concerns over low frequency noise from wind turbines, the ministry stated it is seeking expert advice on low frequency noise emissions produced by upwind wind turbines and the potential effects of these noise emissions on human health. The ministry was also seeking information on regulatory approaches to low frequency noise in other jurisdictions and whether MOE should adopt requirements for limits to low frequency sound and methods of measuring low frequency noise. MOE confirmed that any new guidelines would be posted on the Environmental Registry for comment. MOE stated it was also seeking expert advice on the development of a procedure to measure audible noise from operating wind turbines that will enhance compliance with noise limits in rural areas.

ECO Comment

In recent years, the ECO has received numerous complaints from members of the public regarding disturbances from wind turbines. At the same time, there is public demand for the province to move towards cleaner energy sources. Clearly, a balancing of priorities is needed to preserve the health and well-being of those living near rural wind farms, while undertaking initiatives to ameliorate the air we breathe and reduce our greenhouse gas emissions.

The ECO reiterates the comments we made on the Noise Guideline (NPC-232) in the Supplement to our 2008/2009 Annual Report. Many of the concerns over wind turbines in rural areas could be resolved by proper land use planning principles and situating turbines in appropriate exclusion zones set aside for wind power development.

The ECO supports the move towards creating a new noise guideline (NPC-300). One document that consolidates the various noise related guidelines would be easier for the public to access and understand. The ECO urges MOE to ensure that the document is user-friendly and written in a comprehensible format.

The ECO is pleased that MOE is seeking expert advice related to low frequency noise and its potential health effects. The ECO strongly encourages the ministry to include public consultations as part of its study since many of the health complaints rural residents are experiencing may not be easily measured by scientific studies. The ECO notes that such a consultation was absent in the 2006 peer review of sound level criteria.

Although scientific studies may not find a strong link between wind turbines and detrimental effects on human health, MOE should recognize that people have varying sensitivities to sound and are affected differently by noise. Sound levels should therefore be set to accommodate sensitive members of the population, many of which have chosen life in a rural setting because of its lower noise pollution levels. The ECO urges MOE to review the studies being conducted on this subject and consult the public in order to re-evaluate appropriate setbacks and noise level limits for wind turbines. The ECO will continue to monitor and report on developments on this topic in future reports.

Review of Application R2009015:

5.2.18 Request for a New Law or Regulation to Protect Human Health from Air Pollution (Review Pending by MOE)

Background/Summary of Issues

On December 18, 2009, the Town of Oakville used the *EBR* to request a review of the need for a new law or a regulation to protect human health from airborne fine particulate matter ("fine PM"). The Town issued a related news release arguing that existing regulatory frameworks do not protect communities from fine PM. The news release cited the mayor of Oakville, who explained "there is no limit on fine PM concentrations now, and no limit on how much more can be added into our already overtaxed airshed. We're requesting a regulation that would require extensive assessment of the total fine PM levels for an area, and then ensure the results of the assessment are public. Residents should have an opportunity to comment before the Province makes any decisions that could affect their health."

The application suggested that the Ministry of the Environment (MOE) might be most appropriate to implement this request, and noted that MOE is committed to considering cumulative effects on the environment, according to its Statement of Environmental Values. Despite this commitment, the application observed that MOE is currently not required to consider ambient air quality when approving

applications for Certificates of Approval for air emissions. The application was accompanied by extensive documentation to support the request. The ECO sent this application to MOE.

Ministry Response

In late February 2010, the applicants advised they planned to submit extensive additional information, and suggested the ministry might prefer to "re-start the clock" on the legislated 60-day timeline for deciding. MOE received the additional information on April 16, 2010 and committed to responding by June 15, 2010 if a review is to proceed.

ECO Comment

The ECO will review the handling of this application in our 2010/2011 Annual Report.

Review of Application R2009016:

5.2.19 Request for a New *EBR* Regulation Providing for Suspension of Permits and Approvals Pending Tribunal Decisions on Leave to Appeal Applications filed under the *EBR* (Decision Pending by MOE)

Background/Summary of Issues

The applicants filed a request for a new *Environmental Bill of Rights, 1993* (*EBR*) regulation providing for stays suspending operations, development or activities pending a decision on leave to appeal (LTA) applications under the EBR. As of May 2010, LTA applications under the *EBR* are adjudicated by three bodies: the Environmental Review Tribunal (ERT), the Ontario Municipal Board and the Technical Standards and Safety Authority.

The applicants argue that lack of a regulation leads to uncertainty. They further note that subsection 121 (1)(s) of the *EBR* gives Cabinet the power to make regulations "providing for stays pending decisions on applications for leave to appeal." To date, no regulation has been made pursuant to subsection 121(1)(s). The applicants also argue that a new regulation providing for stays pending leave to appeal would be in the public interest, support the purposes of the *EBR* to protect and restore the environment and to enhance public participation.

Although tribunals such as the ERT attempt to render decisions on LTA applications within thirty days of an application being received, there are many factors which can prolong deliberation on whether to grant leave. For example, sometimes it can take ERT 3-10 months to make a decision on a leave application. Delays in the leave to appeal process are problematic because there is no way for the ERT to stay the government's decision pending determination on whether leave should be granted. This lack of jurisdiction creates a situation where a decision such as a Permit to Take Water (PTTW) to drain water from a wetland can be completely acted upon and the wetland seriously impaired before residents have an opportunity to question its merits in a formal hearing before ERT.

Ministry Response

On March 22, 2010, MOE wrote to the applicants and explained they were unable to make a decision by March 19, 2010 (the original due date). The responsible ADM in the Integrated Environmental Policy Division indicated that a decision on whether to undertake the review would be provided to the applicants and the ECO by May 14, 2010. On May 14, 2010, the responsible ADM indicated that MOE would be unable to render its decision until July 30, 2010.

ECO Comment

The ECO will review the handling of this application in our 2010/2011 Annual Report as the ministry's response falls outside the current reporting period. The ECO is concerned that MOE is acting outside its jurisdiction in the handling of this application by extending the period for making its initial decision by approximately 4.5 months. Under section 70 of the *EBR*, MOE was required to give notice to the applicants of whether it would conduct a review by March 22, 2010. There is no discretion to extend the time available to make a preliminary determination under section 70.

Review of Application R2009017:

5.2.20 Request for a Review of the Nine "MISA" Regulations under the *Environment Protection Act*

(Decision Pending by MOE)

Background/Summary of Issues

On January 15, 2010, two applicants requested a review of the province's nine regulations under the *Environmental Protection Act* that regulate the discharge of industrial wastewater directly into surface water. These regulations, collectively known as the "Municipal Industrial Strategy for Abatement" or "MISA" regulations, were established in the early 1990s to set limits on the levels of toxic substances being discharged directly into Ontario's waterways from nine specific industrial sectors (the petroleum, pulp and paper, metal mining, industrial minerals, metal casting, organic chemicals, inorganic chemicals, iron and steel, and electric power generation sectors).

The applicants stated that there has not been a comprehensive review of the MISA regulations since they were first brought into force over 15 years ago. Therefore, the applicants argued that a complete review of the nine MISA regulations by the Ministry of the Environment (MOE) is long overdue.

The applicants provided two main grounds for the need to review and update the MISA regulations. First, the applicants contended that the original MISA goals and/or policies were never achieved. Specifically:

- the MISA program has failed to mandate pollution prevention, but has instead simply focused on end-of-pipe pollution control;
- the ministry has failed to make the discharge limits increasingly more stringent as technology improves;
- the regulations have failed to keep pace with other comparable jurisdictions; and
- the ministry has failed to develop a regulation for municipal wastewater effluent (i.e., the missing "M" in "MISA"), which is a major source of pollution to surface water.

Second, the applicants argued that the original MISA goals and/or policies are not sufficient to protect the environment, even if they were fully realised. In particular, the applicants noted that a number of toxic pollutants that are released by MISA industries are not included in the regulations, and also that the MISA regulations fail to consider the cumulative effects of toxic discharges, which is now required under the ministry's "Statement of Environmental Values."

The ECO sent the application to MOE.

Ministry Response

On March 23, 2010, MOE advised the applicants that it was unable to make a decision on whether to undertake the review by March 27, 2010 (the original due date). The ministry explained that, because of

the complex nature of the requested review, which involves multiple aspects of the MISA regulations as well as other ministry policies relating to industrial and municipal wastewater discharges, the ministry would need another two months (until May 14, 2010) to make a decision on the application.

On May 14, 2010, MOE advised the applicants that it was still examining the need and feasibility of undertaking the various aspects of the requested review, and that it needed until July 30, 2010 to render its decision.

ECO Comment

The ECO will review the handling of this application in our 2010/2011 Annual Report. Under section 70 of the *EBR*, MOE was required to notify the applicants of its decision as to whether it would undertake the requested review by March 27, 2010. The ECO is concerned that MOE has twice extended this deadline. There is no discretion under the *EBR* for ministries to extend the time available to make this preliminary determination.

5.3 Ministry of Municipal Affairs and Housing

Review of Application R2009018:

5.3.1 Review the Need for Amendments to the Oak Ridges Moraine Conservation Plan (2002) and O. Reg. 140/02 under the *Oak Ridges Moraine Conservation Act, 2001*

(Review Denied by MMAH)

Background/Summary of Issues

In February 2010, two applicants requested that the Ministry of Municipal Affairs and Housing (MMAH) review the need for amendments to the Oak Ridges Moraine Conservation Plan (2002) ("ORMCP" or the "Plan") and O. Reg. 140/02 under the *Oak Ridges Moraine Conservation Act, 2001*.

The applicants identify that the ORMCP struggles to provide meaning protection for groundwater aquifers in the Plan area. Due to the current legislative framework, developers are able to develop outside of the Plan area on land without sufficient water quality and pipe water from moraine aquifers to service the development. Since development is not within the Plan area, it does not need to conform to the ORMCP but permits to take water, under the *Ontario Water Resources Act* are required. The applicants claim that these types of developments would negatively impact the ecological and hydrological integrity of the Oak Ridges Moraine area.

Ministry Response

In April 2010, MMAH denied the *Environmental Bill of Rights, 1993* application for review. MMAH determined that a review is not warranted because:

- MMAH undertook extensive public consultation during the creation of the ORMCP in 2002 and the Greenbelt Plan in 2005;
- *The Oak Ridges Moraine Conservation Act* does not provide the legislative authority to regulate the use of land outside of the ORMCP area;
- The Provincial Policy Statement (PPS), *Planning Act*, the Greenbelt Plan and the Growth Plan for the Greater Golden Horseshoe collectively provide growth direction and guide infrastructure decisions;

- The PPS already includes policies that protect water resources, manage growth and promote efficient land use and development patterns;
- The PPS is currently under review and the ORMCP and Greenbelt Plan will be reviewed in 2015;
- The environmental impacts of taking water for development is already considered under the *Environmental Assessment Act* through class environmental assessments or servicing master plans, the *Ontario Water Resources Act* through permits to take water and the *Clean Water Act, 2006*.

ECO Comment

The ECO will review the handling of this application in our 2010/2011 Annual Report as it falls outside the current reporting year.

Review of Applications R2009001, R2009002, R2009003, R2009004:

5.3.2 Need to Legislate Development and Mineral Exploration in Uranium Zones (Review Denied by MNDMF, MMAH, MNR, and MOE)

This application was reviewed in conjunction with R2009001 (MNDMF), R2009003 (MNR) and R2009004 (MOE). Please see the Ministry of Northern Development, Mines and Forestry portion of this Section for the full review.

5.4 Ministry of Natural Resources

Review of Application R2006015:

5.4.1 Measures to Conserve Woodland Caribou (*Rangifer tarandus caribou*) and its Habitat (Review Undertaken by MNR)

Background/Summary of Issues

In October 2006, an application for review was submitted that raised concerns with the sufficiency of the measures that the Ontario government has in place to conserve woodland caribou (*Rangifer tarandus caribou*). The ECO forwarded this application to the Ministry of Natural Resources (MNR), the Ministry of Northern Development and Mines (MNDM), the Ministry of the Environment (MOE), and the Ministry of Energy (ENG).

This *EBR* application was discussed on pages 75-81 of our 2006/2007 Annual Report. It also was discussed at length on pages 194-201 in the Supplement to our 2006/2007 Annual Report on pages 263-265 in the Supplement to our 2007/2008 Annual Report.

All of the ministries denied this *EBR* application, except MNR chose to undertake a "scoped review." MNR originally informed the ECO that this review will be completed by February 2008. The ministry subsequently told the ECO that this review would be completed by June 2009.

The applicants asserted that this review is warranted and in the public interest for the following reasons:

- The activity of sustainable forest management, inclusive of managing for wildlife and wildlife habitat, occurs within public forests in Ontario;
- Widespread loss of caribou habitat in Ontario (including the majority of the area allocated to 'sustainable forest management') is well-documented, contributing to its status as a "threatened" species nationally;
- An important component of the mandate of the Ministry of Natural Resources, as expressed in their Statement of Environmental Values, is the stewardship obligation to the conservation of this forest species and its habitat;
- The linkages between habitat loss and the expansion of industrial forest harvesting are well established – guidelines provided to Sustainable Forest Licence holders by the Ministry of Natural Resources are a critical tool for implementing MNR's obligations in the forest;
- Without documented improvements in managing the impacts of industrial forestry upon caribou, further loss of habitat is predictable;
- Without this review it is unlikely that MNR will affect a timely review of its own, given the history of the subject guidance;
- Without this review, it is predictable that a further period of years will elapse in the name of "recovery planning", contributing to the current dire pressures on this species without any clearer direction being provided to harvesters operating around Caribou habitat; and
- In more than one audit performed on operations in Ontario under the requirements of the *Crown Forest Sustainability Act, 1994* (*CFSA*), independent auditors of forest management units containing caribou have raised concerns about the implementation and/or likelihood of success of caribou guidance provided by MNR to forest management planners.

The applicants were concerned that "while the government continues to delay actual (on the ground) implementation of a caribou recovery strategy, status quo industrial development continues... in critical caribou habitat." They expressed concern that the existing guidance is only applicable to forestry operations on Crown land and that there is "no sound premise for assuming that the well-documented range recession of caribou in the face of industrial forest harvesting will be held in check." The applicants stated that these other forms of development include mining and mineral exploration activities, road building and hydroelectric development.

The applicants requested that the existing regulatory framework that guides the management of woodland caribou be reviewed. This regulatory framework includes MNR's Class Environmental Assessment Approval for Forest Management on Crown Lands in Ontario (Declaration Order MNR-71), the Provincial Wildlife Population Monitoring Program, the *CFSA*, the Forest Management Guidelines for the Conservation of Woodland Caribou, the Natural Disturbance Emulation Guideline, the Forest Fire Management Strategy for Ontario, and the "draft" Recovery Strategy for Forest-dwelling Woodland Caribou (*Rangifer tarandus caribou*) in Ontario.

The applicants stated that many components of this regulatory regime have been in place for a significant period of time, but that their effectiveness has not been comprehensively examined. For example, the Forest Management Guidelines for the Conservation of Woodland Caribou that apply to northwestern Ontario have been in place since 1994 and no assessment has ever been made public as to its actual effect on this species at risk. Further, the applicants stated that a similar guideline for northeastern Ontario is "rumoured to exist," but that it has never been made public. The applicants expressed concern that this lack of a guideline for northeastern Ontario gives the appearance that this area is a "lower priority" despite the fact that it too has been identified as an area for the recovery of woodland caribou.

Ministry Response

In February 2007, the Ministry of Natural Resources determined that this *EBR* application warranted a self-described "scoped review" of the ministry's monitoring provisions related to woodland caribou and their habitat. MNR stated that this review would be completed by February 2008.

MNR stated that its "existing, scheduled, and planned activities" address the majority of concerns raised by the applicants and there is no potential for harm to the environment (i.e., woodland caribou) in not undertaking the full review. On this basis, MNR stated a "comprehensive" review is unwarranted as:

- MNR has already begun the Caribou Conservation Framework (CCF) initiative which will address the majority of the applicants' concerns related to MNR's areas of administration. The CCF, planned for completion in the fall of 2007, will include public consultation with a goal to provide comprehensive direction for appropriate caribou policy and the development of action plans in response to the provincial Recovery Strategy for Forest-Dwelling Woodland Caribou in Ontario.

- The *Crown Forest Sustainability Act* (*CFSA*), the *Provincial Parks Act* (*PPA*), the *Environmental Assessment Act* (*EAA*) and related regulations, policies and guides, including the Forest Management Planning Manual, provide significant guidance for ongoing protection of woodland caribou. All of these were developed with full public review and consultation.

- MNR is currently formulating new habitat guidance for woodland caribou through development of the forest Landscape Guide and Stand/Site Guide and is also undertaking a review of the provincial *Endangered Species Act* (*ESA*). Each of these initiatives have had extensive stakeholder and public involvement.

Forest management planning is conducted in accordance with the *CFSA* and Declaration Order MNR-71 (replacing the Timber Management Class EA that applied between 1994 and 2003). The ministry states that in forest management units with populations of woodland caribou, objectives for woodland caribou management are established by planning teams and the provision of habitat is a priority. Additionally, MNR has been applying the Forest Management Guidelines for the Conservation of Woodland Caribou in northwestern Ontario since 1994.

The ministry also noted that it is in the process of consolidating its 34 forest management guidelines into five new guidelines. MNR stated that these new guidelines would be finalized in 2007. As part of this consolidation, MNR would no longer be using its Forest Management Guidelines for the Conservation of Woodland Caribou. The new guidelines will provide "one approach to planning that is consistent for all woodland caribou range while recognizing differences in ecology and landscapes."

The conservation of this species has been an important factor in the establishment of several protected areas. MNR stated that management plans for protected areas within woodland caribou range address objectives for the species. The ministry explained that the park planning process provides "existing opportunities for review, meeting the public interest for transparency and public consultation."

MNR stated that it recently reviewed the sufficiency of its research and monitoring information on woodland caribou. Based on this review, MNR then "conducted an extensive survey of its staff as well as non-governmental individuals and organizations in Ontario to determine research priorities." The ministry also hosted a research workshop in the fall of 2006.

The ministry also stated that it was in the process of reviewing the *ESA*. MNR states that the new legislation "will enhance the protection of endangered and threatened species (such as woodland caribou) and their habitats."

ECO Comment

MNR did not deny this application, but, rather, it chose to conduct what it described as a "scoped review" of its monitoring provisions for woodland caribou and their habitat. MNR originally stated that this review would be completed by February 2008; the ministry then revised the date to June 2009. When MNR does complete its "scoped review," the ECO will report on it in detail.

The *EBR* directs that a review shall be conducted within "a reasonable time." This application was submitted in October 2006, and MNR now has committed to completing the review by June 2009. The

ECO believes that this is an unreasonable delay. MNR's delay on this application seriously undermines the basic purposes of accountability and transparency found in the *EBR.*

In its February 2007, response to the applicants, MNR relied heavily on its unreleased Caribou Conservation Framework to allay any possible concerns about the vulnerability of this species and its habitat. MNR told the applicants and the ECO that this framework would be released in the fall of 2007; this framework is now targeted for release in June 2009. The ministry also has committed to regulating the habitat of the forest-dwelling population of woodland caribou under the *ESA* by June 2009. Further, MNR has targeted the fall of 2009 to release its new Forest Management Guide for Boreal Landscapes that will apply to the habitat of woodland caribou. The ECO will review the framework, habitat regulation, and forest management guide in a future Annual Report.

Review of Applications R2009001, R2009002, R2009003, R2009004:

5.4.2 Need to Legislate Development and Mineral Exploration in Uranium Zones (Review Denied by MNDMF, MMAH, MNR, and MOE)

This application was reviewed in conjunction with R2009001 (MNDMF), R2009002 (MMMAH) and R2009004 (MOE). Please see the Ministry of Northern Development, Mines and Forestry portion of this Section for the full review.

Review of Application R2009005:

5.4.3 Request for Amendments to the *Conservation Authorities Act* and a Review of the Adequacy of Provincial Transfer Payments to Conservation Authorities (Review Denied by MNR)

Background/Summary of Issues

Since the establishment of the first Conservation Authority (CA) in Ontario in 1946, these watershed-based agencies have evolved to do more than just regulate development in natural hazards such as flooding and erosion prone areas. Many CAs also plant trees, secure land for natural area protection, restore and rehabilitate streams and wetlands and educate local communities on the importance of healthy ecosystems.

When the province significantly cut funding to CAs in the 1990s, the authorities began to charge fees (e.g., development applications and entrance to conservation areas) and accept donations to stay afloat. In May 2009, the ECO received an application for review asserting that it is a conflict of interest for CAs to accept donations from developers and other organizations that have a vested interest in expanding or intensifying the development of lands under the purview of the CAs. The applicants requested: a provision in the *Conservation Authorities Act* (*CAA*) to regulate private donations to CAs in order to prevent conflicts of interest from occurring; and a review of the adequacy of provincial transfer payments to CAs under section 39 of the *CAA*.

Conflict of Interest/ Conservation Authority Permits

CAs are created under the *CAA* and the objectives of a CA are to "establish and undertake, in the area over which it has jurisdiction, a program designed to further the conservation, restoration, development

and management of natural resources other than gas, oil, coal and minerals." Each CA is governed by a Board of Directors whose members are appointed by municipalities located within the CA's watershed.

Each CA has an individual regulation under section 28 of the *CAA* and in 1998 the Act was amended to ensure that the regulations would become consistent across the province. Ontario Regulation 97/04 under the *CAA* outlines the content required for these individual regulations (the ECO reported on O. Reg. 97/04 in the Supplement to our 2005/2006 Annual Report).

CAs regulate development and activities in or adjacent to river or stream valleys, Great Lakes and large inland lakes shorelines, watercourses, hazardous lands and wetlands. Permission for development may be required from a CA to confirm that the control of flooding, erosion, dynamic beaches, pollution or the conservation of land is not affected. CAs also regulate the straightening, changing, diverting or interfering with an existing channel of a river, creek, stream, watercourse or for changing or interfering with a wetland. The ECO noted in our 2006/2007 Annual Report that CAs are not consistently regulating wetlands across the province because of a lack of resources or a lack of political will.

The CA Board of Directors is responsible for approving (or denying) all permit applications under the *CAA*. Board decisions are guided by (Board approved) policies and procedures for administering its regulation. An applicant can request a CA hearing under *CAA* to object to a permit refusal or conditions of a permit. An applicant also has the ability to appeal the CAs decision to the Office of the Mining and Lands Commissioner. The *CAA* does not have a provision for third parties to appeal permits. In addition, these permits are not prescribed as instruments under the *EBR* and therefore not required to be posted on the Registry for public input.

CAs accept private donations to conduct a variety of local environmental projects. For example, donations have been used to build and maintain nature trails, plant trees, conduct biodiversity monitoring and research, rehabilitate gravel pits, and acquire greenspace land. Many CAs have established foundations, which are registered as charitable agencies, to handle donations and fundraising. While the *CAA* speaks to the receiving of grants from the Minister of Natural Resources, it does not address the accepting of donations from third parties.

In some cases, donations come from organizations, such as real estate developers, construction companies, and energy and resource companies, with a vested interest in expanding or intensifying the development of lands. The applicants reasoned that by accepting donations, the objectives of the CA (as defined in the *CAA*) are compromised, creating a conflict of interest.

The applicants provided an example of a potential conflict of interest in which a developer, interested in building a subdivision in and around the provincially significant Leitrim wetland near Ottawa, committed to donating land and money to the South Nation River Conservation Authority (SNC). The applicants alleged that the CA failed to properly administer its regulation (O. Reg. 170/06 under the *CAA*) because it received donations from the developer. SNC does not have an established foundation or associated charitable organization to handle its donations. Despite the developer's commitment, the land has not yet been transferred to the CA.

The applicants argued that because similar conflicts of interest could be occurring throughout the province, the Ministry of Natural Resources (MNR) should establish a provision in the *CAA* that clearly regulates private donations to CAs. In addition to this application for review, the applicants also submitted an application for investigation related to this example; for more information, please see Section 6.2.3 of this Supplement.

The applicants requested that MNR consider its Statement of Environmental Values (SEV) when considering the application. The applicants stated that by accepting private donations, CAs are pressured to "subordinate their watershed conservation, restoration, and management responsibilities to the interests of economic development." The applicants claim that this poses a serious risk of harm to the environment and is therefore incompatible with MNR's SEV.

Provincial Underfunding of Conservation Authorities

Under section 39 of the *CAA*, MNR provides an annual operating cost transfer payment grant to each of the CAs for provincially mandated activities. In 1992, MNR provided CAs with approximately $59 million per year total as transfer payments for flood and erosion control activities. During the late 1990s, MNR reduced the amount provided, stating that it would no longer fund certain activities (i.e., construction of flood and erosion control works, municipal plan review for natural hazards, implementation and enforcement of section 28 regulations and shoreline management activities). The applicants stated that CAs responded to the funding reduction by "cutting back programs, seeking increased municipal funding and maximizing self-generated revenue." For the past decade, the total amount allocated by MNR amongst Ontario's 36 CAs has remained stagnant at approximately $7.6 million per year.

The types of projects eligible for funding are outlined in MNR's Policies and Procedures for Determining Eligibility for Provincial Grant Funding to Conservation Authorities (1997), a chapter in the CAs Policies and Procedure Manual (1997). This document states that MNR would fund 50 per cent of the cost of eligible projects. Eligible projects include:

- Operation of Flood and Erosion Control Structures;
- Routine/Minor Maintenance of Flood and Erosion Control Structures;
- Preventative Maintenance of Flood and Erosion Control Structures;
- Flood Forecasting and Warning;
- Ice Management;
- Plan Input;
- Information;
- Legal Costs; and
- Administration.

Historically, MNR and municipalities would jointly fund the cost of these eligible projects – MNR through the transfer payment grants and municipalities through levies. When MNR cut the amount provided to CAs in the late 1990s, the amount provided by municipalities increased as did self generated revenues (e.g., fees for municipal plan input and review, land rentals and conservation area gate fees).

Conservation Ontario, the network for all 36 CAs, examined CA audited financial statements from 2002 to determine MNR's funding shortfall in its report, Now and in the Future (2004). Given MNR's commitment to fund 50 per cent of eligible projects, Conservation Ontario found that MNR should have provided CAs with $16 million because the total cost of eligible projects was approximately $33 million. Since MNR only provided $7.6 million to CAs as transfer payments in 2002, Conservation Ontario estimated that MNR's funding shortfall was over $9 million. Conservation Ontario requested that MNR provide:

1) fair, equitable and sustainable funding for those basic operational activities defined to be eligible for provincial transfer payment in accordance with its own policies;
2) re-instatement of funding to some activities that were specifically excluded in 1997; and
3) an annual Consumer Price Index adjustment to funding.

In 2007, Conservation Ontario re-estimated the shortfall to be $14.3 million, based on the same criteria as the 2002 assessment, and stated that "[a]t the current funding levels in Ontario, our collective ability to protect lives and property from natural hazards is diminishing."

The applicants requested that the province review the level of funding provided to CAs through transfer payments under section 39 of the *CAA* because insufficient funding is linked to the potential conflict of interest created by accepting private donations. As part of the application for review, the applicants submitted a copy of the report, Now and in the Future, to MNR. The applicants argued that MNR's decision to keep transfer payments below historic levels has significantly contributed to the conflict of interest described above and is therefore incompatible with the ministry's SEV.

Ministry Response

In July 2009, MNR denied this application for review. MNR stated that a review for the need of a provision in the *CAA* to regulate private donations is unwarranted because:

- the application does not provide sufficient evidence to support the claim that the mandate of CAs is compromised through the acceptance of donations and that conflicts of interest have occurred;
- the CA application and decision making process under the *CAA* for permitting of development and development related activities is open, transparent and demonstrates impartiality and is based on policies guided by provincial guidelines; and
- MNR ensures its acts and policies, including the *CAA* and policies and guidelines related to the act, are regularly reviewed and updated.

MNR stated that a review of the adequacy of funding provided to CAs is unwarranted because:

- MNR provides an annual operating cost transfer payment grant to each of the 36 CAs for specific provincially mandated activities related to public safety and emergency management and not for a broad mandate of activities;
- CAs can secure funding from other sources such as municipal special levies to carry out additional programs under their broad mandate; and
- As additional funding will not be reasonably available in the foreseeable future, there is no reasonable prospect that the CA operating cost transfer payment will be increased.

MNR stated that additional funding is provided to CAs, including $5 million annually under the Water and Erosion Control Infrastructure (WEI) Capital Program for repairs and studies on existing CA owned dams, dykes and flood and erosion control works. It also highlighted that in 2008/2009, $16.8 million was provided through a separate transfer payment to CAs for source water protection under the *Clean Water Act, 2006*.

Other Information

The ECO described flood prevention and mitigation measures in Ontario in our 2006/2007 Annual Report. The ECO reported that about one-quarter of Ontario's dams are more than 50 years old and in need of maintenance and repair. The ECO also noted that "CAs are struggling to prohibit development and site alteration in flood prone areas." Moreover, aging and/or inadequate flood control structures and insufficient funding for flood management activities are "increasing the risk that future rainfall events will overwhelm existing flood prevention and mitigation measures" in Ontario. Since climate change may bring more frequent and intense rainfall events, the ECO noted that "bold pro-active steps are required to reduce the risk of significant flooding." The ECO urged the Ministry of the Environment, MNR and the Ministry of Municipal Affairs and Housing to update current flood hazard regulations, policies and guidelines so that infrastructure and development will be able to handle or withstand projected flood events from climate change.

In November 2009, MNR posted a proposal on the Environmental Registry (#010-8243) for a new chapter in the CA Policies and Procedures manual. The proposed chapter "Policies and Procedures for Conservation Authority Plan Review and Permitting Activities" outlines "the roles of CAs in the areas of municipal planning, plan review, and permitting related to development activity and the protection of environmental interests." It includes new policies related to applicant pre-consultation, complete application requirements, timelines associated with permit decision-making, and permit appeals processes. The ECO may review this decision in our 2010/2011 Annual Report.

ECO Comment

The ECO believes that MNR's decision not to review the need for a provision in the *CAA* to regulate private donations, was reasonable. Although some CAs accept donations from organizations with an interest in land development projects, the ECO is not aware of evidence to support allegations that

conflicts of interest are occurring province-wide. The applicants alleged one instance of a potential conflict of interest from the acceptance of third party donations. The ECO notes that CAs also accept donations from the general public, environmental foundations and community service groups.

Donations provided to CAs, either in the form of land or money, enable valuable environmental projects to be completed on the ground, such as planting trees and teaching children about healthy ecosystems and biodiversity. Some CAs have established foundations, separate from the CA, to manage donations and fundraising. Foundations work in partnership with the CA, municipalities and other partners to implement environmental projects. The ECO suggests that MNR should consider this model for all CAs to better ensure a transparent process for receiving donations from third parties.

Upon review of this application, it became clear to the ECO that the issuance of CA permits is not an open process for third parties. Applicants are able to appeal decisions made by the CA regarding permits issued under Section 28 of the *CAA* but there is no third party appeal process. This is important because CA permits are not prescribed as instruments under the *EBR* and therefore not required to be posted on the Registry for public input. Currently, the public has limited, if any ability to participate in the issuance of *CAA* permits. It is at the discretion of the CA board to allow public delegations to the board before a permit decision is made. Environmental organizations have recommended MNR amend the CA board structure to include representation from non-municipal members, such as environmental organizations or the public, in order to participate in the review of permit applications. The ECO is not sure this is the best solution but suggests, at the least, MNR consider prescribing CA permits as instruments under the *EBR*,

The ECO believes that MNR's decision not to review the adequacy of funding provided to CAs as transfer payments under section 39 of the *CA Act* was not reasonable. The total amount MNR provides to CAs on an annual basis, $7.6 million, has not changed in over a decade. Why would MNR not take this opportunity to review whether or not the amount provided to CAs is still enough? The applicants provided MNR with a copy of a Conservation Ontario report that identified a rather large shortfall ($9 million) in transfer payment funding to CAs. Also, Conservation Ontario has identified to the province that the current level of funding is "diminishing" the CAs' ability to protect lives and property from natural hazards.

The ECO acknowledges that MNR provides certain earmarked additional funding to CAs, such as funding for source water protection under the *Clean Water Act*. The ECO notes, however that money provided to CAs for source water protection cannot be used to cover the cost of flood and erosion control activities. Furthermore, MNR's conclusion that a review is not warranted because CAs could get additional funding from municipal special levies for broad mandate activities is somewhat irrelevant; the application for review does not ask MNR to review funding for CAs' broad mandate activities, but the funding provided under section 39 of the *CAA* for specific flood and erosion control activities, as defined by MNR policy.

In Ontario, climate change will bring more extreme weather events (e.g., an increase in the intensity, frequency and duration of rain) and with it a greater risk of flooding and erosion. The ECO has previously expressed concern that inadequate funding for flood control and prevention measures has created a situation where, due to climate change, Ontario is now vulnerable to significant flooding events. With this in mind, the ECO believes that the MNR should have conducted a thorough review of the amount provided to CAs as transfer payments for flood and erosion control activities.

Review of Applications R2009010, R2009011 and R2009012:

5.4.4 Review of Trail Buffers, Viewscapes, and Canoe Routes and Portages in the Temagami Forest Management Plan

(Review Denied by MNR, MOE and MNDMF)

Geographic Area: Temagami

Background

Two individuals and Nastawgan Trails Inc. (the "applicants") requested a review of the protections given to hiking trails, viewscapes, and canoe routes and portages in the Temagami 2009 – 2019 Forest Management Plan (Temagami FMP). According to the applicants, the Ministry of Natural Resources (MNR) did not comply fully with the 1997 Temagami Land Use Plan, the Management Guidelines for Forestry and Resource-Based Tourism or Ontario's Resource-Based Tourism Policy when it developed the Temagami FMP. In addition to a review of the protections, the applicants requested a review of the need for a new policy requiring the Ministries of Tourism (TOUR) and Northern Development, Mines and Forestry (MNDMF) to be "actively involved" in developing the Temagami FMP. The applicants explained that both ministries have promoted and funded facilities that depend on Temagami's forests to attract hikers and canoeists. The applicants also raised concerns with the Ministry of the Environment's (MOE's) approval of the Temagami FMP under MNR's Class Environmental Assessment (EA) for timber management.

Temagami Forest:
The Temagami area is an ecologically, culturally and recreationally significant area of Ontario and well-known for its old-growth trees, rugged wilderness and spectacular scenery. Located 100 kilometres north of North Bay, it is bordered by the Ottawa River and Lake Temiskaming on the east and the Sturgeon River and Lady Evelyn-Smoothwater Provincial Park on the west. In 1989, the Temagami Forest was recognized as holding the largest known old-growth red and white pine forest in Ontario. Old-growth forests, which are described by some as being endangered, are now less than one per cent of their pre-colonial range. As home to the Teme-Augama Anishnabai and Temagami First Nation, and used by the Matachewan First Nation, the Temagami area has a rich cultural heritage going back at least 6,000 years. It is also the third most popular wilderness canoeing destination in the world providing about 2,400 kilometres of interconnected canoe routes for visitors. Canoe campers were the first tourists in the area beginning as early as 1893.

> More than half of the world's remaining old-growth red and white pine ecosystems are found in Temagami.

The Temagami Forest covers about 650,000 hectares, of which 94 per cent is Crown land. It includes part or all of seven regulated provincial parks and 16 conservation reserves. About two-thirds of the Crown productive forest is available for forest management. Logging in the area began as early as 1850. However most of the old-growth pines, many 200 – 400 years old, were cut between the 1940s and 1980s.

The Temagami Forest has been the subject of sometimes acrimonious debate on resource-based tourism, logging interests and First Nations land claims. By the 1980s, the public, local residents and First Nations realized that the last stands of old-growth pines were about to be allocated for logging purposes and began to take action. In a five-year period in the late 1980s, there were seven court decisions, three road blockades, more than a hundred protestors arrested and considerable national and international media attention. In response to the concerns raised in Temagami and changes in the way that we view forests, the government undertook a series of steps that have led to the current approach to managing forests in Ontario and the Temagami Forest in particular. These steps included developing several policies related to land use in the Temagami area and resource-based tourism in general. The government also replaced its existing legislative framework for managing forests. The three policies and

the Temagami FMP that the applicants reference in their request for review are described below. Other relevant policies and the current legislative framework are described in the Other Information section of this review.

Development of the Temagami Land Use Plan (TLUP) and Formation of Nastawgan Trails Inc. (NTI):
One step that the government took in response to the protests in the 1980s was to develop the TLUP with the objective of addressing land use issues, including motorized access to the area, cultural heritage, economic development, hunting, natural heritage protection, recreation and tourism on Crown land in the Temagami area. Released in 1997, the TLUP defined four land use zones, each with objectives for consumptive (e.g., logging and mining) and non-consumptive (e.g., canoeing and hiking) resource users. The zones were in addition to the seven provincial parks – the best known of which is Lady Evelyn-Smoothwater Provincial Park – that were in the process of being created in the area.

Nastawgan is the Ojibwe term for traditional travel routes in northeastern Ontario. Many of the routes are still in use.

The TLUP was supported by seven strategies, one of which, the Recreation Area Strategy, envisioned additional non-motorized recreational trails in Temagami. However, there was no mechanism to develop a long-distance backpacking or snowshoeing trail until Nastawgan Trails Inc. (NTI) was established in 1999 with the assistance of MNR as a not-for-profit community-based organization with charitable status. NTI subsequently drafted a proposal for the subject trail, entitled "Temiskaming Trail Corridor." The proposal describes the proposed route for the trail and values along the trail and was submitted to MNR in November 2006 for review.

Meanwhile NTI developed the Ottawa-Temiskaming Highland Trail (OTHT), a 134-kilometre trail that provides spectacular views of the old-growth pines in the Temagami Forest to the west and the Ottawa River and Lake Temiskaming to the east.

Ontario's Resource-Based Tourism Policy (ORTP):
Also in 1997, the government published the ORTP to "promote and encourage the development of the Ontario resource-based tourism industry in both an ecologically and economically sustainable manner." The objectives of ORTP include recognition of the importance of the resource-based tourism industry, sustainably managed natural resources and a "fair and open" process for allocating tourism-related natural resources. The policy includes a resource allocation model for accommodation and hunting and fishing, but does not specifically discuss hiking trails or canoe routes.

Management Guidelines for Forestry and Resource-Based Tourism (RBT Guidelines):
In addition to the TLUP and ORTP, MNR drafted the RBT Guidelines with input from MNDM (now MNDMF), TOUR and representatives of the tourism and forestry industries. The RBT Guidelines, which were released in 2001, must be used during the development of forest management plans if forest management operations affect a resource-based tourism industry's operations. The RBT Guidelines recognize that the forestry industry requires roads; whereas resource-based tourism depends in part on a "visually forested landscape and a forest that is free from unwanted or disturbing noise." According to the RBT Guidelines, the "desired degree of remoteness in the forest … and other needs of the resource-based tourism industry" are established first and then the forestry tool or technique is selected.

Temagami Forest Management Plan:
In May 2009, MOE approved the Temagami FMP, which was developed according to MNR's 2004 Forest Management Planning Manual and the Class EA for timber management. The Temagami FMP describes how forest operations will be conducted from 2009 to 2019 on Crown land in the Temagami Forest. It also identifies the locations of the harvest blocks and protections, such as buffers, afforded to non-timber values including hiking trails, canoe routes and portages, wetlands, viewpoints, and designated wildlife species. The Temagami FMP also establishes a management objective of providing "greater emphasis on non-timber values of the Temagami forest."

The Temagami FMP categorizes trails as either T1 or T2. T1 trails are hiking trails that are authorized by MNR and have a land use permit or are maintained by a club or formal organization. The Temagami

FMP requires T1 trails to be protected from logging operations by a 30-metre no cut buffer plus a 30-metre modified cut buffer, i.e., some trees will be cut within the 30-metre modified cut buffer. According to the Temagami FMP, this 60-metre buffer – the width of a football field – on each side of the trail will protect the aesthetic value of the trail for hikers and prevent "windthrow," i.e., trees being blown down, onto the trail. However, it also acknowledges that the buffer will allow hikers to see forest operations in some areas. T2 trails are trappers' trails that are recognized as a non-timber value by MNR and are maintained by individuals at the time of the harvest operation. The Temagami FMP does not require T2 trails to be protected by buffers but does require forest operations to maintain the usability, integrity and safety of the trails. According to the Temagami FMP, new trails will not be protected until after the public has been consulted.

The Temagami FMP categorizes canoe routes as either primary or secondary canoe routes. Primary canoe routes will be protected from logging operations by a 60-metre no cut buffer plus the lesser of the limit of viewscape or one kilometre, modified cut buffer. According to the Temagami FMP, this buffer should provide windthrow, noise and aesthetic protection. Since no canoe routes have been categorized as secondary canoe routes in the Temagami FMP, protection requirements for this non-timber value were removed from the plan. The Temagami FMP requires primary canoe portages to be protected by a 30-metre no cut and a 30- to 60-metre modified cut buffer to protect against windthrow, noise and visual impacts of logging operations.

The Temagami FMP also protects eight viewscapes. In particular, there will be a 120-metre no cut and a 120-metre to limit of viewscape or six kilometres, modified cut buffer.

NTI was a member of the Local Citizens Committee that provided advice to the Temagami FMP planning team and input during the public consultation stages. For additional information on the Temagami FMP, refer to Environmental Registry #010-0008 and #PB02E2001 and the MNR website.

Summary of Issues

In general, the applicants are concerned with how non-timber values, such as hiking trails and canoe routes, are protected from the effects of exploiting timber values, i.e., logging operations.

Failure to Comply with the TLUP, RBT Guidelines and the ORTP:
The applicants asserted that when developing the Temagami FMP, MNR did not fully comply with the provisions in the TLUP that require the ministry to protect environmental values and wilderness aspects, or with the ORTP and section 3.1 of the RBT Guidelines that require it to protect the "wilderness characteristic for remote tourism activity." As evidence to support these claims, the applicants noted that the Temagami FMP:

- Allows old-growth pines to be logged along the T1 trails with only a 60-metre buffer; and
- Provides no buffers for canoe route portages. (Note: according to the Supplement to the Temagami FMP, primary canoe portages will be protected by a buffer; whereas, secondary canoe portages will not be protected.)

The applicants explained that during the development of the Temagami FMP, NTI had requested that all portages be treated as T1 trails and that T1 trails should be protected with a 250-metre buffer. NTI had explained to the FMP planning team that a hiker can see about 300 metres over flat ground in a mature forest due to the lack of undergrowth. In response, the FMP planner had advised that 30-metre buffers had been used alongside trails in Algonquin Provincial Park." The applicants noted that in discussions with NTI, MNR had acknowledged that a 250-metre buffer would have affected less than one per cent of the area available for logging. When MNR refused to agree with the requested protections, NTI used the forest management planning Issue Resolution process but was unsuccessful.

The applicants provided additional evidence that MNR failed to comply with the TLUP as follows:

- The South Timiskaming Shoreline Conservation Reserve was established in 2004 under TLUP for the purpose of providing a wilderness hiking trail. However according to NTI the boundaries of the reserve would have required a proposed hiking trail to include a steep slope, which NTI did not believe would be safe. When NTI brought this to MNR's attention, MNR refused to change the reserve's boundaries to accommodate a safer route for the trail and a buffer that included a wilderness aspect.
- The applicants explained that the village of Temagami has relied on tourism and recreational activity, which has brought more money into the area than logging and mining in the last 100 years, for its economic survival. The applicants noted that under section 3.2 of the TLUP "planning decisions are intended to benefit the local residents and communities of the planning area, traditional users, the people of Ontario, the natural resource base and the environment" and that the TLUP "seeks to minimize the disruption of traditional or existing uses."

The applicants noted that tourists come from all around the world to see the Temagami region and to hike its trails, but if logging occurs within sight of the trails, the view will be destroyed for about 100 years.

According to the applicants, the TLUP directs that tourism and recreational activity should be given preference over logging and mining. They believe that trail buffers should be established before decisions about where buffers can be reduced are made. The applicants believe that MNR is "heavily biased towards the logging industry to the detriment of the environment and the recreational activities that depend on wilderness characteristics."

MNDMF and TOUR Not on the FMP Planning Team:
The applicants noted that, although MNDMF and TOUR participated in the development of the TLUP, they were not represented on the planning team for the Temagami FMP. The applicants believe that this was a violation of the Forest Management Planning Manual.

MOE's Denial of Requests for an Individual Environmental Assessment (EA) for the Temagami FMP:
The applicants asserted that MOE's review of the Temagami FMP was perfunctory and ignored the TLUP and ORTP. The applicants claimed that MOE relied on MNR's assurances rather than doing an independent review of environmental issues.

The applicants advised that NTI was one of four groups that had requested an Individual EA of the Temagami FMP, all of which were denied by MOE. According to the applicants, MOE made a number of erroneous statements in the letter that explained to NTI why it was denying the request. For example:

- MNR had advised MOE that buffers were a planning issue that should be addressed through MNR's Resource Stewardship and Facility Development Class EA process. According to the applicants, this statement contradicted MNR's advice to NTI three years earlier in which MNR advised that buffers must be addressed through the FMP process.
- MOE stated that the protection NTI was requesting constituted a land use decision that was inconsistent with the TLUP. According to the applicants, one of the objectives of TLUP was to "ensure the continuing availability of natural resources for the long term benefit of the people of Ontario; that is, to leave future generations a legacy of the natural wealth that we enjoy today." In addition, the Recreation Area Strategy under TLUP required protection of significant recreation values.
- MOE asserted that only viewpoints identified in the TLUP are considered during the FMP process. According to the applicants, it was recognized during the development of TLUP that additional areas requiring protection would be identified after the TLUP was approved and that they would be identified in amendments.

The ECO forwarded the application to MNR, MOE and MNDMF for review and to TOUR as a non-prescribed review.

Ministry Response

MNR, MOE and MNDMF denied the application for the reasons that are outlined below.

Ministry of Natural Resources:
MNR provided three reasons for not undertaking the review of the protections in the Temagami FMP:

1) FMPs are not prescribed instruments for the purposes of Part IV – Applications for Review under the *EBR*.
2) The Temagami FMP was approved in August 2009. Under Part IV of the *EBR*, decisions that have been made within the last five years are exempted from review unless new evidence is brought forward. In addition, the new evidence must not have been considered when the decision was approved and it must indicate that failure to undertake the review could result in significant harm to the environment. MNR asserted that the applicants did not provide any new social, economic, scientific or other evidence as part of their application.
3) The Temagami FMP is already subject to periodic review. Under forest planning legislation, the public is given "extensive opportunities," which are consistent with the intent and purpose of the *EBR*, to comment on the proposed FMP. The FMP will be reviewed after three and seven years of implementation and recommendations will be incorporated into the next FMP.

MNR indicated that, despite the above, it considered the application for review in a "preliminary way to determine whether the public interest warrants a review." MNR explained that it considered its Statement of Environmental Values (SEV), which includes principles related to ensuring sustainability of ecosystems, the precautionary principle, participation in resource management decisions, consideration of social, economic and ecological aspects of decisions and adaptive management. MNR also explained that no potential harm to the environment would result if the review was not undertaken and that development of the Temagami FMP followed a "comprehensive evaluation and consultation process spanning 21 months." MNR noted that in developing the FMP input was received from a Local Citizens Committee, the public, stakeholders, an interdisciplinary planning team, and advisors with expertise in tourism, recreation, forest allocation and mining. MNR also noted that the planning team considered the various forest management guides related to silviculture, wildlife habitat and societal values, such as tourism, that guide the forest management planning process.

MNR also provided the following reasons for not undertaking a review of the need for a new policy requiring MNDMF and TOUR to be actively involved in the development of the Temagami FMP:

- The FMPM, which has been approved by regulation, already requires MNR to include representatives from MNDMF and TOUR as advisors to the FMP planning team. This was done during the preparation of the Temagami FMP.
- MNDMF and TOUR were provided with opportunities to comment on the Temagami FMP at five different planning stages.

MNR explained that MNDMF provided information on wood supply and mineral values, economic and social considerations related to wood supply and mineral exploration, and reviewed relevant aspects of the draft and final FMP.

MNR also explained that the FMP planning team must consider tourism and recreational values. During the preparation of the Temagami FMP, TOUR provided advice to the Local Citizens Committee and provided information to MNR on the approximately 70 licensed tourist operations in the area to determine if they were interested in signing Resource Stewardship Agreements (RSAs). An RSA is an agreement between a licensed resource-based tourism establishment and the logging company describing which forest resources will be protected for tourism purposes during logging operations. According to MNR, no RSAs were signed but a number of resource-based tourism operators provided input to and commented on the draft FMP.

Ministry of Northern Development, Mines and Forestry:
MNDMF also refused to review the applicants' request for a new policy requiring it and TOUR to be actively involved in the development of the Temagami FMP. MNDMF explained that until it has updated its SEV to reflect its new forestry responsibilities, it will use MNR's SEV as it relates to the planning and implementation of forestry activities. MNDMF explained how it had been involved in the Temagami FMP and how it supports economic and community development in northern Ontario by supporting Ontario's forest industry and mineral exploration, mining and geosciences sectors; and various programs and funding opportunities. MNDMF advised that since MNR is still responsible for developing FMPs, MNDMF has no plans to develop new policies, acts or regulations that would have it more involved in the process.

Ministry of the Environment:
MOE also denied undertaking a review of the protections in the Temagami FMP and of the need for a new policy requiring MNDMF and TOUR to be actively involved in the development of the Temagami FMP on the grounds that these matters were being addressed by the appropriate ministries. MOE explained that its decision to approve the Temagami FMP was not a policy or a prescribed instrument for the purposes of Part IV of the *EBR* and was based on material in the Temagami FMP and from the requestors for an Individual EA. MOE assured the applicants that its decision was not based solely on documentation from MNR and that it also considered whether or not the Temagami FMP complied with the Class EA and the *Environmental Assessment Act*.

Ministry of Tourism:
Although TOUR was not required under the *EBR* to consider this application for review, it did provide a statement outlining how tourism values are being considered in the forest management planning process. In particular, TOUR noted that the ORTP, the RBT Guidelines and the RSA process require resource-based tourism values to be considered. TOUR acknowledged that commercial forestry operations are an "important source of northern jobs and economic benefits" and that compromises by all parties are sometimes required. TOUR expressed regret that a mutually agreeable solution was not found for the protection of viewscapes and trails in the Temagami FMP and encouraged NTI, MNR and the local forest companies to continue to work on NTI's concerns.

Other Information

Forest Management Regulatory and Policy Framework:
Since the 1980s, the government has updated its regulatory and policy framework for managing Crown forests. Two of the drivers of the updated framework were the adoption of the concept of sustainability of forest resources and recognition of resource-based tourism as a forest value. The framework includes but is not limited to the following documents:

- *Crown Forest Sustainability Act, 1994* (*CFSA*), which provides for the sustainability and management of Crown forests to meet "social, economic and environmental needs of present and future generations."
- Class Environmental Assessment for Timber Management on Crown Lands in Ontario ("Class EA"), which provides general direction on various forest management activities and how to prepare, review and approve forest management plans. The Class EA requires MNR to prepare maps showing the locations of various non-timber values including natural resource features, such as baitfish lakes; wildlife values, such as raptor nests and moose calving areas; tourism establishments and recreational trails. Guidance on appropriate protections for some of these values, e.g., biodiversity, is provided in various guidelines, but not for hiking trails or canoe routes.
- Forest Management Planning Manual (FMPM), which explains that the FMP planning team will normally include individuals with expertise in forest management, fish and wildlife, forest ecology, parks and natural heritage, etc., but not in resource-based tourism. However, the MNR District Manager is required to consult with others, including MNDMF and TOUR, to determine if they have specific interests that should be addressed. If they do, they are to be invited to act as advisors to the FMP planning team.

- Forest Resource Assessment Policy (FRAP), which sets out criteria and elements for measuring forest sustainability. One of the elements is "maintaining or enhancing recreation, tourism and other social and environmental values associated with the forest."
- State of the Forest Report (SOFR) – Indicators of Forest Sustainability, which establishes indicators and measures of forest sustainability. One of the indicators is "opportunities for forest-based recreation and tourism." The measures for this indicator relate only to provincial parks and protected areas, game licences and moose-hunting opportunities. None of the measures relate to wilderness trails. In the SOFR, MNR states that non-timber values are "difficult to assess because many of the activities are not monitored or valued by a market economy."
- Temagami Land Use Plan (TLUP) and Recreation Area Strategy. The Strategy noted that "trail-related recreation in general has the greatest potential for additional opportunities since only snowmobile trails and short distance hiking trails have had significant development in the [Temagami] area."
- Management Guidelines for Forestry and the Resource-Based Tourism ("RBT Guidelines"); and
- Ontario's Resource-based Tourism Policy.

Tourism and Forestry Industry Memorandum of Understanding (MOU):
This MOU established a framework for negotiating RSAs to allow resource-based tourism and forestry industries to "co-exist and prosper." The MOU was endorsed by MNR, TOUR and MNDM (now MNDMF) in 2000. An RSA can be negotiated between a holder of a Resource-Based Tourism Establishment License and a holder of a Sustainable Forest License only. The RSA must contain a map showing the tourism values to be protected over the next 20 years. The RSA Program outlines the roles and responsibilities of each party to the agreement and a dispute resolution mechanism.

Although, on December 15, 2009, the government revoked the requirement for a resource-based tourism establishment to obtain a license, an RSA can still be negotiated according to TOUR.

MNDM – Ontario Resource-Based Tourism Diversification Program:
In October 2000, MNDM announced a $6.3 million Resource-Based Tourism Diversification Program to help resource-based tourism operations that use Crown Land and Crown resources to grow and local economies to diversify. Operators, who were surveyed as part of the program, advised that more than half of their guests were "seeking a wilderness experience" and wanted peace and quiet. They identified regulatory uncertainty and issues related to the purchase/lease and use of Crown Land as some of the barriers to growing their businesses. Many of the operators in the survey indicated that they "are under the impression that MNR and TOUR are working at cross-purposes in relation to tourism."

TOUR - Discovering Ontario: A Report on the Future of Tourism:
In this 2009 report, the authors stated "for far too long, tourism has been viewed as a sidebar in the overall makeup of the provincial economy" and recommended that the government "ensure that regulations and policies impacting the use of Crown Land and nat ural resources for tourism purposes are efficient, minimize barriers and support business opportunities." The authors also noted that there is a "need for a stronger provincial trails strategy."

ECO Comment

Under the provisions of the *EBR*, MNR, MOE and MNDMF were justified in not undertaking a review of the protections afforded hiking trails, viewscapes, and canoe routes and portages and of the need for a new policy requiring TOUR and MNDMF to be "actively" involved in the development of the Temagami FMP. The Temagami FMP is exempt under the *EBR* for applications for review, and even if it were not, the *EBR* does not require ministries to undertake reviews of policies that have been decided in the last five years unless the applicants present evidence that was not considered and that would result in significant harm to the environment if not considered. Since no new evidence was presented, the ministries were not required to undertake the review.

The ECO believes that during the development of the Temagami Forest Management Plan, the Temagami Land Use Plan, Ontario's Resource-Based Tourism Policy and the Management Guidelines

for Forestry and Resource-Based Tourism were considered and notes that TOUR and MNDMF were consulted and provided input in accordance with the Forest Management Planning Manual. However, the protections afforded non-timber values are troubling. Not only do they fail to protect the wilderness aspect, they also fail to protect hikers and canoeists and other resource-based tourists from the sight, noise and dangers of being in close proximity to logging operations. Since the Temagami FMP was developed in accordance with current regulatory and policy framework, the ECO has concluded that the existing forest management framework is flawed in how it values resource-based tourism. The ECO notes that:

- The only tourism representative on the FMP planning team was from the Local Citizens Committee (on a rotational three-month basis) and of the 28 advisors to the FMP planning team only one represented tourism.
- Timber values are planned on a 10-year basis in FMPs; whereas MNR required non-timber values, e.g., hiking trails, to exist and be recognized as a value by MNR prior to them being considered during the development of the Temagami FMP.
- The resource allocation model in Ontario's Resource-Based Tourism Policy does not specifically address the requirements of non-consumptive resource users, such as the allocation of land for trails or viewscapes.
- MNR has developed guidance material describing what protections should be followed for many non-timber values but not for hiking trails and canoe routes.
- The FMP process uses Resource Stewardship Agreements to establish protections for resource-based recreational values. However, these agreements were designed to protect forest resources on which resource-based establishments that have made significant financial investments, such as hunting and fishing lodges, depend. Although TOUR encourages volunteer groups, such as NTI, and others without such investments to negotiate agreements with the forestry industry, such agreements are outside the Resource Stewardship Agreement Program.
- None of the measures in the State of the Forest Report used to evaluate progress to achieving sustainable forests relate to wilderness trails and other non-consumptive uses of Crown forests. In particular, indicator 5.4.2, "opportunities for forest-based recreation and tourism", which is the most relevant indicator, uses measures related to provincial parks and protected areas, game licenses and moose-hunting opportunities only.

The ECO believes that the *Crown Forest Sustainability Act, 1994* fails to adequately protect wilderness trails and should be amended to make the Ministry of Tourism responsible for ensuring that resource-based tourism values are appropriately valued and protected during forest management planning. The ECO would see much merit in having a representative of the Ministry of Tourism added to FMP planning teams. In addition, the ECO believes that relying on current market values for assessing non-timber values stifles the growth of the resource-based tourism industry and diversification of local economies. The potential for growing resource-based tourism opportunities when non-timber values are protected must be considered. Non-financial measures for non-timber values and direction on how to balance financial and non-financial measures when determining protections for timber and non-timber values are also required. The new measures should also be considered when assessing the sustainability of our forests in the State of the Forest Reports. Until non-timber values are no longer viewed as a constraint on forestry interests, growth of resource-based tourism will be slow and sustainability of our forests will not be achieved.

The government has repeatedly promoted the wilderness values of the Temagami area. However it has impeded initiatives that would both protect them and allow visitors to experience them. The MNDMF survey of visitors clearly indicated that visitors expect "peace and quiet" and a wilderness aspect when they visit the Temagami Forest. However the government has continued to allow cutting operations perilously close to trails and has undermined future efforts to create a wilderness trail by making it unsafe to do so. The ECO recommends that the government review its approach to growing non-consumptive resource-based tourism opportunities in the Temagami area with the objective of defining a clear set of priorities, removing barriers and establishing effective protections.

5.5 Ministry of Northern Development, Mines and Forestry

Review of Applications R2009001, R2009002, R2009003 and R2009004:

5.5.1 Need to Legislate Development and Mineral Exploration in Uranium Zones (Review Denied by MNDMF, MMAH, MNR and MOE)

In April 2009, two applicants requested a review of the need for a new act to legislate activities in areas with elevated naturally occurring uranium. These activities include not only uranium exploration but also residential and industrial development. The applicants asserted that Ontario's existing legal framework provides no avenues for addressing community concerns about uranium exploration and provides few tools for monitoring and mitigating impacts of uranium exploration on water resources and the environment. The applicants argued the Ontario government should undertake this review to prevent impacts on human health and the environment from uranium exposure.

The ECO forwarded this application to the Ministry of Northern Development, Mines and Forestry (MNDMF), the Ministry of the Environment (MOE), the Ministry of Natural Resources (MNR) and the Ministry of Municipal Affairs and Housing (MMAH) for review. The ECO also forwarded the application to the Ministry of Health and Long-Term Care (MOHLTC) and the Ministry of Energy and Infrastructure (MEI) as a non-prescribed matter. There is no obligation on the part of a ministry to acknowledge a non-prescribed review or communicate further with the ECO or the applicants.

Background

Uranium is a naturally occurring heavy metal found in low concentrations in all soils, rocks and water. Significant concentrations of uranium, however, occur in substances such as phosphate rock deposits and minerals such as uraninite in uranium-rich ores. Natural uranium is comprised of three radioactive isotopes: ^{238}U, ^{235}U and ^{234}U. It is the release of gamma radiation during the radioactive decay of these isotopes that especially raises health concerns. Uranium is mined primarily for use in nuclear power generation and nuclear weapons.

A person can be exposed to uranium (or its radioactive daughters) either by inhaling dust or ingesting uranium in water or food. Although the amount of uranium in air is usually very small, people who live near facilities that mine or process uranium ore may have increased exposure to uranium. Due to its radioactivity, uranium exposure increases the risk of developing cancer, and since it tends to concentrate in specific locations in the body, uranium exposure is associated with an increased risk of bone cancer, liver cancer and blood diseases. Inhaled uranium increases the risk of lung cancer. The greatest health risk from large intakes of uranium, however, is toxic damage to the kidneys, because, in addition to being weakly radioactive, uranium is a toxic metal.

Given the potential for environmental and health impacts, some Canadian jurisdictions, such as New Brunswick and Saskatchewan, have applied restrictions and/or guidelines related to uranium exploration. Others, like Nova Scotia, have imposed a moratorium on uranium exploration. Several Ontario municipalities (e.g., the City of Ottawa) and organizations (e.g., the David Suzuki Foundation, Amnesty International and the United Church of Canada) have requested that the Government of Ontario suspend uranium prospecting, exploration and mining in eastern Ontario until the associated health, environmental and economic issues are resolved.

Summary of Issues

The applicants provided evidence of the toxic accumulating effects of uranium when released through human activities such as bedrock excavations and drilling for residential and commercial development, and activities related to mining exploration and development. The applicants asserted that "unearthed

uranium when exposed to the atmosphere decays into its various toxic daughter products (other isotopes) over time thereby getting into the environment and food chain." The applicants stated "this occurs in the air as dust and heavy gas (radon) as well as leaching into surface water or groundwater thereby contaminating aquifers that may provide drinking water."

The applicants expressed concern that continued or expanded exploration for uranium and an influx of new residents into uranium zones (such as the upper Mississippi Valley in Eastern Ontario) could put the public at risk. Moreover, they asserted that large, local residential and commercial development and expansion of towns in areas with naturally elevated levels of uranium would create more excavations and well drilling, potentially increasing human exposure to uranium over time.

The applicants noted that while it may appear that there are sufficient regulations related to mineral exploration, uranium is not mentioned in the *Mining Act* and no precautions are taken to treat uranium any differently than other minerals. Given the additional/unique risks associated with uranium compared to other minerals, the applicants asserted that it is important to have a new act that both protects the environment and requires a public review prior to advanced exploration and development of a uranium mine. The applicants proposed that a new act would do several things, including: regulate exploration for uranium and other minerals in areas with known elevated levels of uranium; protect against increased levels of uranium in groundwater through human causes; prohibit exploration for uranium in surface water-supply watersheds; and impose mandatory testing of well water in uranium sensitive areas.

The applicants asserted that a review is necessary due to the following alleged deficiencies in Ontario's existing legal framework governing uranium exploration.

Inadequate Public Participation and Consultation

As an example of the need for public consultation on the issue of uranium exploration, the applicants pointed to community opposition to uranium exploration near Sharbot Lake, west of Ottawa. Frustration over this exploration and lack of public participation led to several protests, a hunger strike, the incarceration of an Aboriginal leader and a grassroots citizens' inquiry, which heard 157 presentations and received 230 submissions. The applicants also pointed out that while a project to explore for uranium in the Mississippi River watershed west of Ottawa included negotiations with two First Nations groups, "there was no participation with taxpaying property owners, businesses or any of the 20 municipal governments in southern Ontario that have petitioned the Province to address their issues and concerns about uranium exploration and drilling."

Provincial vs. Federal Jurisdiction over Uranium Exploration in Ontario

Although Canada's *Constitution Act, 1867* gives the provinces exclusive jurisdiction over mineral exploration and development, the applicants noted that provincial jurisdiction over minerals does not exclude federal legislative powers under section 91 of the act in relation to matters of federal authority. In Ontario, mining and exploration activities are regulated by the province via the *Mining Act*. However, the federal government, through the Canadian Nuclear Safety Commission (CNSC), exerts control over uranium and other nuclear substances under the *Nuclear Safety and Control Act* (*NSCA*). Given the overlapping federal and provincial jurisdictions, the applicants expressed confusion over whether advanced exploration for uranium projects is subject to licensing requirements of the *NSCA*.

Limitations of O. Reg. 6/96 – Assessment Work

Once a claim is staked in Ontario, the prospector must perform $400 worth of assessment work per year to maintain the claim in good standing. Assessment work includes prospecting, conducting geological, geotechnical, and geochemical surveys and exploratory work (such as surface stripping, pit digging, bedrock trenching, drilling, and some mineral extraction). Ontario Regulation 6/96 – Assessment Work, under the *Mining Act* provides guidelines to prospectors reporting assessment work performed on mining claims.

The applicants argued that while other Canadian jurisdictions (e.g., Saskatchewan and the Northwest Territories) have special environmental requirements for uranium exploration, O. Reg. 6/96 does not draw any distinctions between mineral types. Therefore, even though uranium is radioactive and has the potential to cause more of an impact than other minerals, the applicants argued there are no more stringent conditions on uranium exploration than there are for other minerals. Moreover, the applicants asserted that because mineral, including uranium, exploration can be carried out without formal government permission, the earliest mining stages can be carried out without government oversight.

Preliminary Exploration and other Environmental Authorizations

Although authorizations are required for many projects related to mineral exploration activities (e.g., road building, water crossings, water takings and discharges), the applicants argued that these permits do not directly regulate mineral, and therefore uranium, exploration activities. Moreover, the piecemeal permitting process means that the entire environmental scope of the project is not examined.

Uranium Issues not considered in the Modernization of the Mining Act

At the time that this application was submitted, the Ontario government was considering amendments to the *Mining Act* (see Environmental Registry #010-6559 and #010-4327). The applicants argued that despite the intended overhaul of the dated *Mining Act*, because the Minister of Northern Development, Mines and Forestry had indicated that uranium concerns would not be considered, the review of the need for a new act to regulate uranium exploration was still necessary.

Declaration Orders Exempt Mineral Exploration from Environmental Assessment

In 2003, MOE granted two declaration orders (MNDM-3 and MNDM-4) exempting some MNDMF activities from provisions of Ontario's *Environmental Assessment Act* (*EAA*). MNDM-3 deals with discretionary dispositions such as leases issued in special circumstances or licenses of occupation. MNDM-4 applies to MNDMF's rehabilitation of abandoned mining sites. These declaration orders have been extended several times by MOE and were most recently extended until December 2012. The applicants asserted that MNDM-3 exempts the exploration for minerals, including uranium, from Ontario's environmental assessment (EA) process and objected to its repeated extension.

Inadequate Land Use Planning

The applicants asserted that in northern Ontario, where the majority of mining activities occur, there is no comprehensive land use planning process for Crown lands. They pointed out that the *Public Lands Act*, through which MNR manages Crown lands, has been described as a "patchwork" of government approaches. And while the applicants acknowledged that in southern Ontario, the *Planning Act* directs that mine development be in accordance with official plans and zoning, they argued that "exploration does not require municipalities to be notified or to give approval for exploration projects." Moreover, because "municipal governments do not have the ability to prohibit activities, such as exploration for uranium, when they would do harm to the health, the business interests or the livelihood of any other residents in their municipality," over 20 Ontario municipalities have petitioned the province to initiate a "moratorium or a suspension on uranium mineral exploration, mining and related processing until all environmental and health issues related to uranium mining are resolved."

The Clean Water Act, 2006 Inadequately Protects Private Drinking Water Wells

Although the purpose of the *Clean Water Act, 2006* (*CWA*) is to protect existing and future sources of drinking water, the applicants point out that the act focuses on the protection of municipal residential drinking water systems, leaving private drinking water wells with limited protection. And while the *CWA* allows the designation of certain non-municipal drinking water systems for protection, the applicants questioned to what extent the *CWA* will protect drinking water against the impacts of exploration and development in uranium zones.

Drinking Water Quality Standards

Given the standards recommended or targeted by the World Health Organization, the U.S. Environmental Protection Agency (EPA) and the California EPA (see Table 1), the applicants question the validity of Ontario's Drinking Water Quality Standards for the chemical uranium and uranium 238 (^{238}U).

Table 1. Uranium Drinking Water Standards

	Ontario's Drinking Water Quality Standards	World Health Organization	U.S. EPA	California EPA
Uranium	0.02 mg/L	0.015 mg/L	0.03 mg/L	<0.02 mg/L
Uranium 238	4 becquerels/L		2.22 µg/L	0.5 µg/L

The applicants are also concerned that only drinking water provided through "drinking water systems" is required by the *Safe Drinking Water Act* (*SDWA*) to meet Ontario's Drinking Water Quality Standards. Because uranium exploration generally occurs where there are no "drinking water systems" and residents rely on private water supplies, the drinking water that may be most affected by uranium exploration may also be the least screened for protection.

Ministry Responses

The Ministry of Northern Development, Mines and Forestry

On June 18, 2009, MNDMF denied the application for review, stating that regulations under the *Mining Act*, other provincial legislative permitting requirements, and federal and provincial environmental protection measures ensure that mineral exploration and development occurs in a manner that endeavours to mitigate the short-term and eliminate the long-term environmental effects of mining. The ministry noted that in addition to regulations imposed by the *NSCA*, numerous requirements in federal and provincial legislation with respect to environmental issues must be met prior to project approval, and that new mining projects are subject to EA processes.

The ministry clarified that while it controls advanced mineral exploration (and bulk sample) activities via the *Mining Act*, the province also consults with the CNSC to determine whether the requirements for a CNSC licence have been triggered. The CNSC reviews the project description to determine the risk and whether a licence is required. The ministry explained that if it is decided that a project will proceed from exploration to production, the entire project must undergo the CNSC licensing and federal EA processes. The ECO notes, however, that at the time MNDMF provided this response to the applicants, the extent of the federal EA process that some mining projects actually underwent was as minimal as a simple screening (see Other Information).

With regard to the applicants' assertion that the *Mining Act* reform would not address uranium concerns, MNDMF responded that while the proposed amendments do not expressly address municipal or public consultation prior to uranium exploration, the public could submit comments on this issue both to standing committees while the Bill was before legislature and via the Environmental Registry.

MNDMF did not address the applicants' concern that, despite the unique risks posed by uranium exploration, O. Reg. 6/96 does not distinguish between uranium and other minerals. The ministry did, however, indicate that as part of its review of the *Mining Act*, MNDMF was proposing a graduated regulatory approach for exploration, which would require filing of exploration plans for lower impact activities and exploration permits for activities with higher impacts. Furthermore, the ministry indicated that if amendments to the *Mining Act* were passed, MNDMF may provide special considerations as part of exploration plans and permits on a case-by-case basis.

MNDMF acknowledged that MOE has issued two declaration orders that exempt MNDMF from some of the provisions of the *EAA* in respect of the disposition of Crown resources (i.e., discretionary mining land grants) and mine rehabilitation projects. MNDMF also acknowledged that the day-to-day administration of the *Mining Act* is not subject to the *EAA*. The ministry noted, however, that new mining projects are

subject to EA processes, including the *Canadian Environmental Assessment Act* (*CEAA*), the Electricity Projects Regulation under the *EAA* and MNR's Class EA for Resource Stewardship and Facility Development Projects. MNDMF also responded that numerous requirements in federal and provincial legislation with respect to environmental issues must be met prior to project approval, including the *Environmental Protection Act* (*EPA*), the *Ontario Water Resources Act* (*OWRA*), the *Public Lands Act*, the *Lakes and Rivers Improvement Act*, and the *Aggregate Resources Act*. Moreover, the ministry stated that the *Mining Act* and other legislation ensure that mineral exploration and development is conducted to minimize environmental impacts.

The Ministry of the Environment

On June 12, 2009, MOE denied the application for review. The ministry stated that a review is not warranted because MOE has a number of acts, regulations and instruments which already provide for human health and environmental protection (e.g., the *SDWA*, *EAA*, *EPA*, *OWRA* and *CWA*) sufficient to handle mining activities in uranium zones. MOE concluded that where uranium mining activities have the potential to create environmental impacts, the established measures under existing provincial and federal legislation, environmental assessment, approval and permitting requirements allow for the identification of environmental impacts and development of mitigating measures to address them.

MOE stated that activities that may cause environmental impairment are regulated under the general provisions of the *EPA*, the *OWRA* and other applicable legislation. Moreover, MOE responded that it has numerous means to require responsible parties to reduce or eliminate environmentally adverse effects. Any discharges to (or taking of water from) the natural environment would be subject to ministry approvals, which would be subject to appropriate terms and conditions, ongoing monitoring and reporting, contingency planning and other safeguards developed through a transparent public consultation process. MOE indicated that issued instruments would be subject to ministry inspections to ensure compliance and identify any necessary amendments to existing conditions of approval. Furthermore, in developing appropriate terms and conditions and enforcing those requirements, MOE would work with residents and municipal representatives to respond to local concerns, complaints and questions.

With regard to the applicants' concern that declaration order MNDM-3 exempts mineral exploration activities from Ontario's EA process, MOE clarified that private sector undertakings, such as staking and mine development by mining companies, do not fall under the *EAA* unless designated by its regulations. Rather, the *EAA* generally applies to undertakings by municipalities, public bodies, and the Crown (including MNDMF), although declaration orders MNDM-3 and MNDM-4 currently exempt MNDMF from some of the provisions of the *EAA*.

MOE explained that extensions to these declaration orders give the government the time to develop and approve a Class EA covering the activities subject to the declaration orders, as well as additional activities resulting from amendments to the *Mining Act*. MOE is working with MNDMF on a work plan to ensure that the proposed Class EA is in place prior to the declaration orders' December 2012 expiry date. MOE also pointed out that while the declaration orders exempt MNDMF from some of the provisions of the *EAA*, they contain conditions that require MNDMF to provide for public consultation and review of such activities before implementation to ensure any environmental impacts are identified and mitigated.

The applicants were concerned that gaps in the *CWA* leave private drinking water wells with limited source water protection. In response, MOE explained how in each source protection area, the vulnerability of drinking water sources and the ability of an activity to contaminate drinking water are used to calculate risks, which are in turn used to develop source protection plans and policies to eliminate significant threats to drinking water. MOE's response, however, failed to address the applicants' concern that most northern residences do not fall within a source protection area and private drinking water wells are generally not protected under the *CWA.*

MOE confirmed that only water from municipal drinking water systems (and other systems required to supply "potable" water) must be regularly tested and meet the Drinking Water Quality Standards established under O. Reg. 169/03 under the *SDWA*. The responsibility for ensuring that a private well is

providing quality drinking water rests with the owner of the well. MOE explained that Ontario's Drinking Water Quality Standards can be used as a benchmark by private well owners to assess the safety of personal drinking water supplies. Moreover, the ministry has identified licensed drinking water testing laboratories on its website where testing for drinking water standards can be conducted. MOE did not, however, address the applicants' concerns about the validity of Ontario's Drinking Water Quality Standards for uranium when compared to other jurisdictions.

The Ministry of Natural Resources

On June 19, 2009, MNR denied this application for review, stating that it has a number of acts, regulations, policies and instruments, which already provide for human health and environmental protection and are sufficient to control activities in uranium zones within the ministry's mandate.

Although MNR does not have the mandate or legislative authority to directly regulate exploration, development and mining activities/operations, MNR does issue permits for certain ancillary mining activities (e.g., road construction, aggregate extraction, forest harvesting) that may occur on provincial Crown land. Prior to issuing approvals, MNR must consider whether the activity is consistent with management objectives and ministry/provincial policy, objectives and *EAA* requirements. MNR stated that it exercises discretion to permit activities on Crown land in keeping with its Class EA for Resource Stewardship and Facility Development requirements, which require MNR to screen and evaluate projects for potential environmental effects and establish/require appropriate mitigation measures to protect the environment.

With respect to land use planning, MNR responded that its Crown land use planning determines what land use designations will apply to specific areas of Crown land, and establishes the land use policies that apply to specific areas. Prospecting, staking and the development of mineral interests or working mines are prohibited in provincial parks and conservation reserves. MNR can restrict prospecting or mine development where land use planning recommends the establishment of a provincial park or conservation reserve. In other situations where MNR believes it desirable to prohibit further mineral exploration, MNR can make a request to MNDMF for a withdrawal order. Although MNR does not control land use planning on private land, MNR does provide policy direction through the lead ministry, MMAH, on matters of provincial interest related to natural heritage protection, water quality/quantity, aggregate resources and natural hazards.

The Ministry of Municipal Affairs and Housing

On June 11, 2009, MMAH denied the application. The ministry stated that it considered the *Planning Act* and the Provincial Policy Statement, 2005 (PPS) in determining whether the public interest warranted a review. The *Planning Act* describes how land uses may be controlled and who may control them, while the PPS provides policy direction on matters relating to land use planning.

MMAH stated that a review is unwarranted for the following reasons:

- The policies of the PPS recognize the importance of protecting public health and safety, and natural heritage and water resources while providing appropriate direction for municipalities to meet the range of land use needs of their communities. This includes policy direction that directs development away from areas of natural and human-made hazard, where these hazards cannot be mitigated;
- Revisions to the PPS and amendments to the *Planning Act* were implemented within the past five years. Moreover, the *Planning Act* requires the Minister to undertake a review of the PPS every five years to determine the need for revision;
- Recent amendments to the *Planning Act* have strengthened the PPS by requiring that decisions that affect a planning matter "shall be consistent with" the PPS; and
- MMAH undertook extensive public consultation on the PPS revision and *Planning Act* amendments.

Other Information

In late June 2009, the Ontario government transferred responsibility for forestry from MNR to the Ministry of Northern Development and Mines (MNDM), renaming the ministry the Ministry of Northern Development, Mines and Forestry (MNDMF).

In October 2009, the government passed the *Mining Amendment Act, 2009* (*MAA*), which makes numerous amendments to Ontario's *Mining Act* and modernizes the way mining exploration is carried out in the province.

Amendments to the *Mining Act* made via the *MAA* include:

- plans to introduce a map staking system, through which prospectors can stake a claim on a map reference system rather than through the on-the-ground physical demarcation of claim boundaries;
- requiring awareness training to obtain a prospector's licence;
- provisions for the withdrawal of Crown mineral rights where surface rights are privately held;
- expanding the list of lands where no claims may be staked except with permission of the Minister of Northern Development, Mines and Forestry;
- requiring the filing of exploration plans for lower impact activities and requiring exploration permits for higher impact activities;
- incorporating consultation with Aboriginal communities in mining legislation and regulations;
- introducing a dispute resolution process for Aboriginal-related mining issues; and
- prohibiting the establishment of a new mine in the "Far North" if there is no community-based land use plan for the area, or if the land use designation is "inconsistent" with the opening of a new mine.

See Section 4.22 of this Supplement for the ECO's review of the amendments to the *Mining Act*.

Under the *CEAA* and its regulations, metal mines processing more than 3,000 tonnes of ore per day must undergo comprehensive environmental assessments with public participation. The federal government, however, only gave the Red Chris mine project in British Columbia – a project that plans to process 30,000 tonnes of ore each day – a simple screening-level assessment with no public consultation before approving the project in May 2006. The government also chose to assess only a small fraction of the project, leaving out the actual mine and mill. In June 2007, MiningWatch (represented by Ecojustice) took the case to court, arguing that the federal government violated the law when it refused to consult the public in its environmental assessment of the project.

After hearings in the Federal Court and the Federal Court of Appeal, in December 2008 MiningWatch took the matter to the Supreme Court of Canada. In January 2010, the Supreme Court sided with the appellants, ruling that a federal EA should have been conducted and that the federal government "cannot reduce the scope of the assessed project to less than what is proposed by the proponent." While this decision was expected to mean that large development projects would need to go through full environmental reviews, in July 2010 the federal government made amendments to the *CEAA* (via the *Jobs and Economic Growth Act*) that effectively reverse the Supreme Court's decision. Section 15.1(1) of the amended *CEAA* now gives the federal Minister of the Environment the authority to limit the scope of an environmental assessment to one or more components of the project.

ECO Comment

The ECO agrees with MNR and MMAH's decisions to deny this application for review since most of the concerns raised by the applicants are largely the direct responsibility of MNDMF and MOE. And while MMAH also had technical justification for turning down this application (because the PPS is reviewed every five years), the ECO has expressed disappointment before that MMAH has used this same excuse to deny all 28 PPS-related applications the ministry has received over the past decade (see Part 3.1 of our 2008/2009 Annual Report). The ECO hopes MMAH will consider the applicants' concerns when conducting its 2010 review of the PPS.

The ECO also concurs with MNDMF not undertaking this application. While the applicants raised valid concerns about the potential for uranium exploration and mining to cause environmental harm, the ECO expects that MNDMF would have considered these issues during its drafting and consulting on amendments to the *Mining Act*. And although the ECO also agrees with MOE's decision not to review this application, the ECO is disappointed with MOE's failure to respond to each of the applicants' concerns in sufficient detail.

The ECO recognizes the serious impacts that mining and other development in uranium areas can have on the environment and human health. Nevertheless, the ECO believes that adverse effects must be prevented and mitigated irrespective of whether they are caused by uranium or some other mineral. Therefore, while the ECO agrees that the effects of uranium exposure are concerning and need to be mitigated, the ECO believes this should be addressed through a fully protective *Mining Act* rather than a uranium-specific regulatory framework.

The amended *Mining Act* affords some new protective measures to mitigate the impacts of mining. In particular, the amended act withdraws from prospecting, staking, sale and lease lands in southern Ontario where a person owns the surface rights but not the mineral rights to the land. In northern Ontario, such lands may be withdrawn by order. The ECO believes that the reuniting of surface and mineral rights will address some of the concerns raised in the application since mining companies will no longer be able to conduct potentially environmentally destructive exploration work on privately owned property.

Other measures in the amended *Mining Act* include requirements for exploration plans and permits, community-based land use plans in the Far North, and Aboriginal consultation. Nonetheless, the Act still does not require proponents to comprehensively evaluate the potential harm of mining exploration before it occurs. While MOE asserts that it has "numerous means by which…responsible parties can be required to undertake activities to reduce or eliminate [an] adverse effect," as the ECO has expressed before, existing approvals processes, such as Class EAs or permits, are highly compartmentalized and do not adequately assess the cumulative impacts of development. The ECO is concerned that this type of environmental protection is largely reactionary and may fail to address an issue until after the damage is done.

To ensure that public concerns and potential environmental impacts are fully considered, the ECO encourages the government to classify exploration plans and permits as instruments under the *EBR*. This would allow the public to comment on exploration permits via the Environmental Registry and also to file applications for review and investigation on permits. Furthermore, to ensure that the unique aspects of uranium are considered and that appropriate uranium-specific environmental safeguards are included in exploration permits, the ECO encourages MNDMF and MOE to cooperatively develop guidelines for mineral exploration in uranium zones. The ECO likewise urges MNDMF to post these guidelines on the Registry for public comment.

The ECO has expressed before that MOE should not reward MNDMF's tardiness in preparing a Class EA by repeatedly extending the declaration orders. The ECO is pleased that MOE is working with MNDMF to ensure that the Class EA is completed before the declaration orders' December 2012 expiry date and that MOE has advised MNDMF that no further extensions to the declaration orders will be considered.

The ECO has observed before that the *CWA* does not protect all drinking water sources, leaving most private wells with no source water protection. The ECO notes, however, that MOE does have policies under the *OWRA* that provide ministry direction for cases of groundwater contamination. In particular, Guideline B-9 and the accompanying Procedure B-9-1: "Resolution of Groundwater Interference Problems" provide guidance to MOE staff in evaluating and resolving cases of groundwater quality interference caused by activities carried out without a Certificate of Approval. If the groundwater contamination is deemed significant and caused by "unnatural" processes from an outside or unknown source, MOE is to prepare an action plan to deal with the problem. MOE states that a number of mechanisms, including Ministerial Orders, are available to ensure that appropriate action is taken.

Finally, the ECO is disappointed that MOE did not respond to the applicants' questions about the adequacy of Ontario's Drinking Water Quality Standards for uranium. MOE's failure to acknowledge the applicants' concern and explain the basis for Ontario's standards does little to assure the applicants that these standards are scientifically sound.

Review of Applications R2009010, R2009011 and R2009012:

5.5.2 Review of Trail Buffers, Viewscapes, and Canoe Routes and Portages in the Temagami Forest Management Plan

(Review Denied by MNR, MOE and MNDMF)

This application was reviewed in conjunction with R2009010 (MNR) and MOE (R2009011). Please see the Ministry of Natural Resouces portion of this Section for the full review.

SECTION 6

ECO REVIEWS OF APPLICATIONS FOR INVESTIGATION

SECTION 6: ECO REVIEWS OF APPLICATIONS FOR INVESTIGATION

6.1 Ministry of the Environment

Review of Application I2008011:

6.1.1 Alleged *EPA* Contraventions at a Closed Oshawa Landfill Site (Investigation Undertaken by MOE)

Geographic Area: City of Oshawa

Background/Summary of Issues

In an application submitted to the ECO in October 2008, Lake Ontario Waterkeeper and another applicant claimed that potentially hazardous leachate has been seeping from a closed Oshawa landfill site onto a heavily used path. Local residents, who use the path to access the Harmony Valley Conservation Area, have become alarmed that the seepage might be posing a threat to themselves, their dogs and the environment. The applicants alleged that Rossland Acres, the owner of the landfill site, had contravened the following three sections of the *Environmental Protection Act* (*EPA*):

1) Section 6, by allowing a discharge of a contaminant into the natural environment in an amount in excess of that prescribed by regulations;

2) Section 14, by allowing a discharge of a contaminant that may cause an adverse effect; and

3) Section 15, by not notifying the Ministry of the Environment (MOE) of the discharge.

The applicants explained that residents strolling along the path in the summer and fall of 2008 saw a rust-coloured material on the ground and an oily sheen on the water regularly after rainfalls. According to the applicants, landfill leachate had seeped onto the path along the south side of the landfill site and into nearby streams, which empty into Harmony Creek. The applicants noted that numerous homes have been built around the landfill in the last 30 years. Some of these homes have backyards adjacent to the site.

Background

Industrial Disposal (Oshawa) Limited began operating this landfill in 1957. It was a former sand and gravel pit, located between a residential area on the north and west sides and the Harmony Valley Conservation Area on the south and east sides. Only the north and west sides of the 35-acre site are fenced. Harmony Creek flows through the southeast corner.

According to MOE, approximately 1,000,000 tonnes of industrial waste were deposited on the north section of the site between 1957 and 1980. Most of the waste came from the General Motors plant in Oshawa. The first Provisional Certificate of Approval (C of A) for the site was issued in 1971 but was re-issued in 1976 with three significant amendments as a result of a decision by the Environmental Appeal Board, which:

1) Required closure of the site by the end of 1979;

2) Restricted the types and quantities of wastes that could be deposited at the site; and

3) Required improvements to the leachate control system, gas control and monitoring, and ground/surface water monitoring.

The C of A was amended in 1979 to allow certain wastes to be deposited until June 30, 1980. The collection tile drains along the east and south perimeter of the site discharged leachate into a lagoon until 1980. The drains were then connected to Oshawa's sanitary sewer system and the lagoon system was decommissioned. According to MOE, the site owner stopped shipping wastes to the site in 1980.

MOE issued an amended C of A in 1985 approving the site for "closure and maintenance" activities only and requiring the installation of a leachate collection system along the west side. The site was not allowed to receive wastes. Although the 1985 C of A did not require a closure plan or include specific ground and surface water monitoring, the owner was required to close the site to the satisfaction of MOE's Environmental Assessment and Approvals Branch. According to MOE, this was done. In 1986, collection tile drains were installed along the west side of the site. MOE explained that the development plans for the west side of the site included a buffer zone and required groundwater to be monitored in the buffer zone.

The current owner, Rossland Acres, purchased the site in 2003 for $100.

Concern – Potentially Hazardous Leachate is Seeping onto a Popular Path

The applicants provided photographs of parts of old cars, a rust-coloured material and an oily sheen along a well-worn path on the south side of the site. According to the applicants, the rust-coloured material and oily sheen were particularly evident whenever it rained in the spring, summer and fall of 2008. The applicants arranged for Maxxam Analytics to test soil and surface water samples that they had taken from the site. The applicants summarized the test results as follows:

- Soil samples - the levels of chromium and copper exceeded the Canadian Soil Quality Guidelines (CSoQGs) and cobalt, exceeded the Interim CSoQGs. (An interim guideline for a chemical is specified if the data is insufficient or inadequate to determine a CSoQG.)
- Water samples – the levels of aluminum, arsenic, cadmium, chromium, copper, iron, lead, nickel, silver, toluene and zinc significantly exceeded the Canadian Water Quality Guidelines for the Protection of Aquatic Life.
- Water samples – the levels of arsenic, cadmium, chromium, cobalt, copper, iron, lead, nickel, silver and zinc significantly exceeded the Ontario Provincial Water Quality Objectives (PWQOs).
- Water samples – the levels of aluminum, arsenic, vanadium, toluene and zirconium far exceeded the Interim PWQOs.

The applicants explained that exceedances of the PWQOs mean that the "quality of the natural environment has been and continues to be impaired;" and that exceedances of the CSoQGs indicate that "there may be a threat to human or ecological health" and that further investigation is required.

The applicants provided information obtained from a 1992 Ontario Municipal Board (OMB) decision, which listed various types of liquid waste that had been disposed at the site including: lubricating and hydraulic oils, isopropyl alcohol, trichloroethylene sludge, paint, antifreeze and paint sludge. The applicants also included an extract from MOE's Waste Disposal Site Inventory, which was prepared in 1991, indicating that the site was classified as "A3" meaning that it is an "urban site containing municipal or domestic waste that is of the highest hazard level to humans."

The applicants provided evidence of prior concerns related to leachate and methane gas including:

- At a 1992 OMB Hearing, a hydrogeological and geological expert presented his considered opinion of what would happen if the landfill leachate collection system was not working properly. He testified that, based on the soil conditions and direction of water movement through the soil, leachate should be expected to seep from the south side of the site or to a mound within the site, eventually breaking out on the sides.

- The Official Plan for the City of Oshawa prohibits any permanent structures on the site and requires MOE approval of any development adjacent to the site due to potential methane gas migration and leachate release.
- A 2003 OMB decision on a proposed condominium development on land adjacent to the site identified landfill impacts and methane gas migration as potential threats and advised that a "more thorough review of hydrological site conditions was required" to "protect the public interest and the health and safety of all citizens."
- The 2006 Harmony Valley Park Master Plan Report indicated that remediation of the landfill site would be required before the park could expand because of safety and environmental concerns.
- The developer of the houses on the north and west sides of the landfill site installed a gas venting and barrier system in 1987.

The applicants explained that the LFS operated when landfill sites were subject to less stringent regulations and rules including rules for monitoring. They noted that the monitoring wells at the south end of the site have been inactive since the 1990s and that there is no regular monitoring of ground and surface water along the south side. The applicants were concerned that leachate may contaminate the Harmony-Farewell Iroquois Beach Wetland Complex, a provincially significant wetland, which lies immediately south of the seepage area. Harmony Creek flows through the wetland. (According to our information, the municipality has designated the wetland as "environmentally sensitive" but the Ministry of Natural Resources has designated it as a "non-provincially significant wetland.")

The applicants supported their allegations with maps, photos, sampling results and other documents. For example, they provided:

- maps showing the locations of the landfill, observed seepage, residences, Harmony Creek and the Conservation Area;
- photos of old car parts, rust-coloured seepage, surface water with a sheen, and pets and people using the path where the seepage was found;
- results of water and soil sampling that they conducted; and
- news articles describing people's concerns.

The applicants alleged that the leachate may be harmful to people, children, pets and/or the ecosystem. The applicants explained that the discharge was "out of the normal course of events," was not authorized under any regulation or act and has "impaired the quality of the natural environment for any use that can be made of it."

Other Information

Under section 46 of the *EPA*, landfill sites cannot be developed for 25 years after closure of the site, which means that development would be allowed on the landfill site as of 2010. In June 2008, the owner of Rossland Acres briefly offered 20 acres of the landfill site and 50 acres of land to the south for sale with an asking price of $4,900,000. The offer was withdrawn a few days later.

The CSoQGs are federal guidelines intended to protect both human health and ecological receptors on land. They are to be used as benchmarks for evaluating the need for further investigation or remediation. The Canadian Water Quality Guidelines are also federal guidelines and are intended to protect plants and animals that live in waterbodies. They are based on toxicity data for the most sensitive plants and animals found in Canadian waters. The Provincial Water Quality Objectives are provincial criteria that are "protective of all forms of aquatic life and all aspects of the aquatic life cycles during indefinite exposure to the water." They include consideration of public health and aesthetics.

Until the early 1970s, landfill sites were regulated by the Ontario Department of Public Health and municipalities. In general, anyone could setup and operate a landfill site without having to install a liner or other leachate management system. In 1971, the Ministry of the Environment was created and the *EPA* was passed. Since then, increasingly more stringent requirements for managing wastes have been

passed, including O. Reg. 232/98 – Landfilling Sites, made under the *EPA*, which outlines the standards for the design and operation of new and expanding landfill sites. However, many of the current standards do not apply to closed landfill sites, including the Oshawa landfill, and were not in force when it operated.

On July 22, 2009, the "Oshawa This Week" newspaper reported that a dog became violently ill after he ran into orange-coloured water along the edge of the landfill site and the Harmony Valley Park. MOE advised the newspaper that in April 2009, the owner of the landfill site had excavated the seepage area, installed new drains to redirect groundwater and erected fencing along the east side in compliance with a draft Provincial Officer's (PO) Order issued in 2008.

The owner of Rossland Acres, Mr. James Sinclair, is well-known to MOE. In December 2008, he and two of his companies, Demolition and Recycling Inc. and Bakelite Thermosets Ltd., were convicted of failing to comply with orders issued by MOE related to the former Bakelite site in Belleville. MOE had warned Mr. Sinclair in 2002 not to disturb sediments behind the Bakelite site that were contaminated with PCBs. However, he proceeded to excavate and discharge the sediments into the Bay of Quinte. Mr. Sinclair also failed to comply with orders to remediate the site and clean up the discharged sediment. He and his companies were fined a total of $659,000 plus victim surcharges and he was sentenced to four months in jail. A consulting company that he hired was fined $54,000 for submitting results to MOE that did not indicate the presence of PCBs on the property.

The subject application for investigation is available on the Ontario Lake Waterkeeper website at http://www.waterkeeper.ca/documents/2008-10-harmonyAFI.pdf and MOE's decision at http://www.waterkeeper.ca/documents/2009-04-Harmony_decision.pdf.

Ministry Response

MOE agreed to undertake the investigation. In its initial investigation (sent to the applicants in April 2009), MOE concluded that the seepage was not in violation of sections 6 and 14 of the *EPA*, and, since there was no violation, the owner could not be in violation of section 15 of the *EPA*. MOE advised that it has conducted inspections of the site since it stopped receiving waste in 1980 and has collected and analyzed surface water samples; and reviewed hydrogeology and monitoring reports for the site. MOE also advised the applicants that it continues to communicate with the site's owner to ensure ongoing compliance.

MOE explained that no offsite impacts to the residential properties to the north and west were found when the site's hydrogeology and surface and groundwater quality were last assessed in 2001 and 2002. However, on the south side, onsite impacts to ground and surface water, specifically chloride and iron impacts, from landfill leachate were identified in 1992. MOE concluded that iron in the landfill leachate was having a "minimal" impact on water quality in Harmony Creek." Furthermore in 2000, MOE found that iron levels were below the PWQOs for iron. During the 2007 inspection, MOE did not observe any leachate seepage.

The City of Oshawa last monitored the north and west sides in 2005 and did not report any groundwater contamination concerns. MOE advised that the City is planning to monitor the groundwater again in 2010.

MOE explained that on May 14, 2008, MOE staff confirmed a complaint that there was onsite seepage. Staff concluded that increased precipitation in late 2007 and early 2008 probably contributed to the seepage. Although the owner made repairs in July 2008, MOE again found seepage. Since then, MOE, the owner and a consultant have met several times to discuss further remediation measures. MOE noted that residents are able to access the landfill site without authorization. On October 24, 2008, MOE issued a draft PO Order requiring Rossland Acres to prepare a plan to remediate the area of seepage, install fencing and signage to control access to the site, and to monitor the groundwater. MOE assured the applicants that it would ensure the owner complied with the draft PO Order.

In November 2008, the owner completed onsite groundwater sampling. MOE reviewed the results and found "minor exceedances" of its drinking water standards for manganese, sodium, chloride and

selenium. Although the groundwater in the area is not used for drinking water purposes, MOE explained that exceedances of the drinking water standards can trigger further groundwater assessment. MOE also conducted surface water sampling in Harmony Creek upstream and downstream of the site and found no measurable impact. The results compared "favourably" to the PWQOs, which are protective of the creek ecosystem and more stringent than the drinking water standards. MOE indicated that it would continue to monitor water quality in Harmony Creek.

MOE explained that it reviewed the results of the soil sampling done by the applicants against the background and generic potable groundwater soil quality standards in its "Soil, Groundwater and Sediment Standards for Use Under Part XV.1 of the *EPA*." For many of the parameters, the results met the background quality standards (Table 1) – the most stringent standards – and for the majority of the parameters, the less stringent generic quality standards (Table 2). Only the beryllium and nickel results for one sampling location exceeded the generic quality standards. MOE explained that the soil could be used as inert fill.

MOE explained that it had also reviewed the results of the water sampling done by the applicants against the Ontario Drinking Water Quality Standards for chemical parameters and the background groundwater standards in Table 1 (where applicable) in the Soil, Groundwater and Sediments Standards described above. Although the standards for some non-health-based parameters, for example, iron and aluminium, were exceeded, MOE explained that elevated iron and aluminium can be indicative of landfill leachate but that "they are also commonly elevated in natural, untreated waters across the province." MOE concluded that the leachate from the site is of weak to moderate strength, which was also the conclusion of the consultant's report prepared for the City of Oshawa in 2000.

MOE noted that the elevated level of arsenic found by the applicants at one water sampling location and lead at another are inconsistent with levels found in nearby soil and water samples. MOE explained that the elevated results were not a violation of the *EPA* but are sufficiently concerning to warrant further sampling.

MOE explained that the photographs provided by the applicants indicate iron and manganese oxidation and iron bacterial activity. Iron bacteria are found in most parts of the world and are not a health risk. MOE also explained that the bacteria can produce: rust-coloured deposits; a broken, oily "rainbow" sheen on the water; and a smell similar to fuel oil, cucumber or sewage. MOE advised that it had made similar observations during the 2008 inspection. Since the water sampling results supplied by the applicants did not indicate the presence of volatile organic compounds except for a trace level of xylene, MOE concluded that the sheen was not due to petroleum hydrocarbons. Water sampling conducted in 1992 and 2000 also supports this conclusion.

According to MOE, the Harmony-Farewell Iroquois Beach Wetland Complex is a "non-sensitive, unrestricted Environmentally Sensitive Area" that is designated in the Official Plan for the City of Oshawa.

MOE concluded by stating that the owner of the site was in the process of implementing the remediation plan developed under the draft PO Order and that there appears to be no offsite impacts. However, MOE agreed that the applicants' concerns were significant and committed to "undertake a comprehensive examination of compliance with the requirements of the site's Provisional C of A and conduct surface and groundwater sampling at the site and surface water from Harmony Creek by late spring 2009." Attached to MOE's reply to the applicants was a copy of the letter that MOE sent to the owner of the site explaining the outcome of the initial investigation and MOE's intention to undertake a comprehensive examination and conduct sampling. In both letters, MOE indicated that it would advise the applicants of the results of the second investigation in approximately three months.

MOE sent the results of the second investigation to the applicants on February 8, 2010 (and an updated version on April 19, 2010). In the letter, MOE explained: that the surface water results indicated no measurable impacts on the creek; and that groundwater results indicated elevated concentrations of non-health-related parameters as expected but no exceedances of the Ontario Drinking Water Standards for health-related parameters with the exception of cadmium in one sample. MOE explained that the "on-site

impacts to groundwater are consistent with historical information for this site and similar to other, smaller to medium-sized dumps and landfills in the province that were operated for the disposal of municipal waste." MOE indicated that it will continue to monitor the site to determine trends and changes in surface and groundwater quality and offered to provide the applicants with an annual update of activities.

ECO Comment

The ECO agrees with MOE's decision to undertake this investigation. The ECO is also pleased that, although its initial investigation did not reveal any potential violation of the *EPA*, MOE was sufficiently concerned to do a more detailed, second investigation, which confirmed the original conclusion. However, when MOE reported the results of the second investigation to the applicants, it did not include an explanation of why its results differed from theirs, which left the applicants with a new set of questions. In the future, the ECO recommends that MOE include such an explanation so that applicants can have more confidence in the results. The ECO is also pleased that MOE has committed to continue monitoring and has offered to keep the applicants informed of activities at the site.

Concerns that aging small landfill sites are posing risks to the environment and endangering human health are not new. Lax regulations when these sites operated/closed, unclear obligations of owners, and/or little or no monitoring of the sites have raised fears among the public that aging landfill sites pose a threat to neighbouring residential areas and natural areas, including surface and groundwater, which may be the source of their drinking water. In our 2005/2006 Annual Report, the ECO explained that MOE's inventory of landfill sites was 15 years old, and that municipal waste disposal sites are subject to different standards depending on their size and age. In general, small older landfill sites, including closed sites, are subject to less stringent standards. The ECO outlined concerns related to the province's approach to managing landfills, including:

- Lack of publicly accessible, up-to-date information on landfill sites;
- Lack of a comprehensive plan to update waste management Cs of A; and
- Two-tiered system standards.

The ECO urged MOE to "implement a more rigorous system for tracking all aspects of landfill status." The ECO also urged MOE to update the standards for aging, active landfill sites, both large and small, approved prior to August 1998 when the current more stringent standards came into force. In response to the ECO's comments, MOE reviewed its records and identified 2,449 active and closed landfill sites in Ontario with Cs of A. It has also created the Integrated Database System to track them. However, the system has limited capabilities and is not accessible by the public. MOE advised the ECO that it did not have the resources to create sophisticated landfill tracking and monitoring systems. For the full update on the ECO's 2005/2006 discussion on aging landfills, refer to Part 6.1 of this Annual Report.

Review of Application I2009001:

6.1.2 Alleged *EPA* Contravention re: Presence of VOCs in Groundwater (Investigation Denied by MOE)

Background/Summary of Issues

Contaminated Property in Cambridge

In April 2009, the applicants submitted an application for investigation to the Ministry of the Environment (MOE) regarding the alleged contravention of the *Environmental Protection Act* (*EPA*) on properties situated in Cambridge, Ontario. The concern is in regards to the discovery of volatile organic compounds (VOC) in the groundwater on a property located on Holiday Inn Drive, called the Tri-City Centre.

The applicants, who own the property in question, allege that the contaminants present in the groundwater are a breach of section 14(1) of the *EPA*, which prohibits the discharge of a contaminant into the natural environment that may cause an adverse effect.

The Tri-City Centre is mixed retail and office space with a free standing coffee shop. In October 2001, the coffee chain informed the property managers that while they were constructing their store, VOC contamination was detected in the groundwater at the site. Subsequent investigations revealed that the contaminants were chlorinated solvents trichloroethylene (TCE) and 1,1-dichloroethylene (1,1-DCE), which were present at levels that exceeded MOE groundwater standards. Analyses of groundwater flow patterns and concentration gradients conducted by environmental consultants retained by the applicants indicated that the suspected source of the contamination was located east of the site. The consultants' review of environmental and governmental databases revealed that a number of properties up-gradient (to the east) of the property handled chlorinated solvents such as TCE. The consultants confirmed that there was no off-site migration of contaminants from the applicants' property. An MOE hydrogeologist also came to the same conclusions as the consultants in an August 2007 memorandum.

The applicants are concerned by the environmental and human health effects of the contaminants. The City of Cambridge relies on potable drinking water from groundwater sources located in close proximity to the contaminated site.

In response to the contamination, MOE placed an encumbrance on the applicants' property, which prevented the sale of the property. The applicant's invested millions to clean their site and place a barrier along their property to prevent TCE from migrating on or off their site.

The TCE concentration levels found in the groundwater of the Cambridge property were 125 ppm. MOE's groundwater clean-up standard is 50 ppm for industrial and residential properties.

These applicants had been in contact with the ministry on several occasions since 2006. However, they were displeased with MOE's inaction on the investigation of this matter, and subsequently filed an application for investigation. In July 2009, the applicants sent MOE a letter re-stating their concerns regarding the contamination, the lack of timelines for completing the investigation, and disapproval with MOE's decision to only take samples at one site and not other up-gradient sites.

TCE and its Breakdown Products

TCE is a volatile, non-flammable, colourless liquid that is somewhat soluble in water. It is primarily used as a metal degreaser and industrial solvent, and it can be released from some dry-cleaning processes, paints and coatings. In groundwater, TCE can break-down under anaerobic conditions into DCE, chloroethane and vinyl chloride.

TCE can be absorbed by the body through inhalation, ingestion and dermal absorption. Inhalation of TCE can cause headaches, dizziness and damage to facial nerves. Contact with the skin can result in rashes. Ingestion or inhalation can result in liver and kidney damage in animals, as well as developmental effects on mouse foetuses. Human epidemiological studies and animal studies suggest that TCE may cause cancer. The International Agency for Research on Cancer classifies TCE as "probably carcinogenic to humans" based on "limited evidence" from human studies and "sufficient evidence" from animal studies. Health Canada also gave TCE the same rating based on similar evidence from animal studies.

1,1 DCE, a transformation product of TCE that was also found at the site in question, has similar health effects as TCE including damage to the nervous system, liver and lungs, and can trigger birth defects. The US Environmental Protection Agency considers DCE a possible human carcinogen.

Vinyl chloride, another breakdown product of TCE, is far more toxic than TCE. It is a colorless gas that burns easily and is unstable at high temperatures. Vinyl chloride is used to make polyvinyl chloride, which is used in the production of a range of plastic products. Inhaling vinyl chloride for long periods may

result in permanent liver damage, immune reactions, nerve damage, and liver cancer. At extremely high levels, it can cause death. The U.S. Department of Health and Human Services classified vinyl chloride as a known carcinogen. Studies on workers who breathed vinyl chloride over a span of years exhibited an increased risk of liver, brain and lung cancer, as well as some cancers of the blood.

Other ECO Applications

TCE has been a long-time concern for the residents of Ontario. The ECO has received applications regarding this contaminant as far back as 1995, when we received four applications requesting that the Ontario Drinking Water Objectives (1994) for TCE be tightened. In 2000, the ECO received another application from the residents of Beckwith Township, whose wells were contaminated by TCE. In 2006, MOE finally decided to strengthen the TCE drinking water standards from 0.05 mg/L to 0.005 mg/L set under O. Reg. 169/03 of the *Safe Drinking Water Act, 2002*. For more information on these applications and the TCE guideline, please refer to page 50 of the Supplement to the 2006/2007 Annual Report.

In 2008, the ECO received an application for review from two other applicants, also residing in Cambridge, requesting that MOE create a regulation under the *EPA* that would establish standards for indoor air quality and a remediation methodology in order to address concerns regarding vapour intrusion into residences. Vapour intrusion refers to chemicals in soil or groundwater that migrate upward from the subsurface zone and volatilize into the air space of buildings, homes and other structures. The application was triggered by TCE industrial contamination in the Bishop Street neighbourhood resulting in 457 homes being tested for TCE. In May 2008, MOE denied the application for review, stating that it was already undertaking a similar review that addressed the applicants' concerns. For more information, see Section 5.2.15 of the Supplement to the 2008/2009 Annual Report.

Other Information

The *EPA* gives the authority to the ministry director to issue Orders to *any* person who currently or in the past has owned, managed or controlled a property to stop, control, prevent or clean-up any contamination that is being discharged from the property.

Until recently, there has been some confusion over the factors that should be considered when deciding who should be named in a Clean-up Order. A recent Environmental Review Tribunal decision (*Corporation of the City of Kawartha Lakes v. Director, Ministry of the Environment* (2009)) clarifies matters by stating that "fairness factors" are largely irrelevant for the purposes of the *EPA*, and therefore, a person may no longer be able to argue they should be relieved of their liability due to their lack of wrongdoing. Instead, the Tribunal stated that MOE's Compliance Policy: Applying Abatement and Enforcement Tools, 2007 ("Compliance Policy") superseded and rejected the use of "fairness factors" that were established in a previous Tribunal decision known as *Appletex*, in determining liability because the purpose of the *EPA* would be frustrated.

The Compliance Policy outlines the various abatement and enforcement tools that can be used to address a range of violations of MOE administered legislation. Each incident is evaluated using the Informed Judgment Matrix that determines the appropriate response based on factors such as compliance history and environmental and health consequences of the violation. One possible outcome is the issuance of Control Orders, an authority under MOE legislation, which requires a person to address a violation. Failure to comply with most Orders is an offence. Follow-up and ongoing monitoring are also considered as components of effective compliance.

Guideline G-3: Environmental Clean-up Fund (April 2001) ("Clean-up Fund") was established to allow MOE to respond quickly to serious or urgent environmental problems. However, the funding is only available if a responsible party cannot be identified, located or refuses to take the necessary remedial action.

Ministry Response

The ministry rendered its decision on June 17, 2009, denying the application for investigation. MOE stated its staff was already conducting an investigation into the source of TCE present in the groundwater at the applicants' property. As such, it was denying the application under section 77 of the *Environmental Bill of Rights, 1993* (*EBR*), which outlines that a Minister is not required to duplicate an ongoing or completed investigation.

In its letter, MOE explained that one of the neighbouring sites was identified in the mid-1990s as a potential source of TCE. The site is used as a trailer depot. At the time, the owner of that site conducted hydrogeological tests that suggested it was not the source of contamination. MOE reviewed these results and concurred with the property owner.

In 2006, after the applicants initially contacted MOE regarding the contamination on their property, ministry staff reviewed files and waste records, and conducted site visits to the trailer depot property and other properties adjacent to the applicants' property. Groundwater sampling in the area indicated an increase in TCE levels. This increasing trend and additional hydrogeological data for the area prompted the re-opening of the file on the trailer depot property to examine whether it is the source of the contamination.

In 2008, at the request of MOE, the owner of the trailer depot property hired a consultant to sample a number of existing groundwater monitoring wells located on the property. MOE also requested that three additional adjacent properties voluntarily conduct and submit Phase 1 Environmental Site Assessments. The owners of these properties refused MOE's request. MOE wrote in its decision letter that based on its visits to these up-gradient properties, there was no evidence to suggest that TCE was used on these properties, and it did not have legal grounds to compel these owners to undergo Phase 1 Assessments.

In November 2008, the owner of the trailer depot submitted a groundwater sampling report to MOE that revealed that groundwater in several monitoring wells on the property exceeded ministry TCE standards. As a result, MOE determined further assessments of the property were warranted.

In April 2009, MOE held a meeting with the owner of the trailer depot and asked them to voluntarily undertake additional hydrogeological assessments. The property owners did not agree to the request. As a result, MOE installed the additional groundwater monitoring wells on the trailer depot property because the source of the contamination was still unknown.

MOE acknowledged in its decision letter that it met with the applicants or their representatives who repeatedly expressed dissatisfaction with MOE's investigation. MOE reassured the applicants that it was committed to investigating the source of the contamination and would keep them informed of its findings.

Recent Developments

The TCE contamination is affecting the applicants' use of their land and consequently their business operations. Understandably, the applicants are concerned that their investment to remediate their property could be undermined the longer the TCE plume goes untreated. Section 14 of the *EPA* clearly prohibits the discharge of a contaminant likely to cause an adverse effect into the natural environment. Included in the Act's definition of "adverse effect" is the "loss of enjoyment of normal use of property" and "interference with the normal conduct of business."

The *EPA* authorizes the Minister to clean a spill likely to have an "adverse effect" when it is in the "best interest of the public" in circumstances where the responsible party cannot be readily identified to "promptly" mitigate and restore the natural environment. In order to conduct this work "promptly", the *EPA* provides the Minister with several powers including: permission to enter a property and remove pollutants; the ability to order a person, municipality or public authority to assist in the clean-up; and the authority to order the identified source to pay the costs incurred to clean the contamination. Despite having these powers, MOE waited until January 2010 to issue Orders to the up-gradient properties.

MOE's decision letter indicated that the ministry simply monitored and sampled water, conducted interviews and reviewed records, but it did not use its stronger investigative and enforcement powers to respond to the situation. This raised questions for the ECO on the scope and thoroughness of the investigation. Consequently, in February 2010, the ECO wrote to MOE requesting an opportunity to examine the investigation file and to speak with the staff person overseeing the process.

MOE responded soon thereafter and informed the ECO that in January 2010, the ministry issued Orders to four adjacent properties to complete Phase 1 and 2 Environmental Site Assessments (ESA) on their properties.

Documents provided to the ECO by MOE indicated that MOE began re-examining the source of the TCE contamination in 2006 when the applicants notified them of the presence of TCE on their property. This was verified by the applicants' consultants and confirmed by MOE's expert. In May 2008, MOE's hydrologist released a report recommending that further assessments be undertaken, and recommended that a list of properties should undergo a Phase 1 ESA. No Orders were issued at that time. In December 2009, a subsequent hydrologist report was produced, which again recommended that ESAs be conducted for the up-gradient properties. In January 2010, 19 months after the 2008 report, MOE finally issued the Orders for Phase 1 and 2 ESAs against four adjacent properties.

ECO Comment

Four years since the applicants alerted MOE of the TCE contamination, the source of TCE contamination remains undetermined. Although MOE relied upon subsection 77(3) to deny the application, the ECO is troubled by its handling of this matter because delays in the remediation of TCE, a hazardous chemical, suggest MOE has failed to devote adequate resources to its investigative process. The applicants' frustration with the slow pace of MOE's investigation led them to resort to the *EBR* and file the application for investigation. Notably, much of the ministry's actions occurred after the *EBR* application was filed and the ministry released its decision letter.

The ECO is pleased that MOE continues to investigate and is taking active steps to locate and remediate the TCE in this area. However, we believe that these actions, i.e., issuing Orders, could have occurred much earlier than January 2010, and the delay contradicts the prompt remediation objective of the *EPA.*

During the period between the two hydrological reports, MOE conducted additional monitoring. However, after examining the reports it is not evident why the Orders were not issued after the May 2008 report, especially when testing indicated that TCE levels were increasing on the properties being monitored and several TCE hotspots were identified. This evidence should have been sufficient to satisfy subsection 157.1(1) of the *EPA* which requires a provincial officer to reasonably believe a contaminant is being discharged into the natural environment to issue an Order. Waiting until January 2010 to issue the Orders delayed the remediation of these properties and the extra time does not appear to have resulted in the revelation of additional critical information.

The slow investigative pace raises questions as to how MOE classified this contamination problem based on the ministry's Compliance Policy, 2007. Although this is an industrial area and testing did not indicate drinking water was immediately threatened, TCE is a possible carcinogen and should be classified as a medium or major risk according to the policy's matrix. The matrix recommends that the ministry issue Orders to the adjacent properties owners irrespective of their innocence. Instead, MOE opted to request that properties owners voluntarily undergo testing and monitoring, and initially accepted their refusal to comply.

MOE explained in July 2010 that the low concentrations of TCE in the groundwater would not likely cause harm. However, if the TCE levels present a low risk, the ECO questions why the ministry placed an encumbrance on the applicants' property, forcing the applicants' to incur clean-up expenses and decreased property value in the millions of dollars.

The encumbrance on the property suggests MOE was concerned about the harm posed by the TCE on the property. If this is the case, then the applicants should be protected under section 14 of the *EPA*, which prohibits the discharge of a contaminant into the natural environment that is likely to cause an adverse effect. The applicants have demonstrated the adverse effects they suffered including the "loss of enjoyment of normal use of property" and "interference with the normal conduct of business". Instead, MOE shifted the short-term burden of remediating the spill from the ministry or the polluters to the applicants.

The ECO also notes that MOE did not include in its decision any discussion of 1,1 DCE, the other contaminant of concern identified in the application for investigation. Although 1,1 DCE may be present as a result of the breakdown of TCE, MOE should determine if that is the case or whether there may be another source of the contaminant or other contaminants of concern. It is not apparent whether MOE is monitoring for other TCE breakdown products, such as vinyl chloride, in the course of its investigation.

By relying on voluntary monitoring measures, MOE is possibly undermining the prompt remediation purposes of the *EPA,* and is not using the ministry's Compliance Policy to its full potential. The applicants established *bona fide* concerns, which MOE's scientists verified, and TCE is known to have serious health effects. Strong evidence suggests a specific property and its immediate neighbour may be the likely source of the contamination. MOE should have exercised its powers earlier rather than waiting more than a year and a half to issue Orders to property owners who refused to voluntarily undertake additional monitoring.

The ECO urges MOE to be persistent in its TCE investigation and ensure the natural environment is promptly restored. Furthermore, MOE should continue to keep the applicants and the ECO informed of its progress. Lastly, the ECO will continue to use its discretion to monitor ministry investigations where subsection 77(3) of the *EBR* has been invoked as the basis for denying an *EBR* investigation (for more information, see Box below).

Investigation Denied: Ministry Over-Reliance on *EBR* Subsection 77(3)

MOE and other ministries are often using subsection 77(3) of the *EBR* to deny applications for investigation. This provision gives ministries the discretion to deny *EBR* investigation applications to avoid duplicating a ministry's ongoing or completed investigation.

In some of these cases, the *EBR* applications for investigation were filed in frustration with the ministry's investigative process, timeliness or transparency. Regrettably, these applications are often denied under subsection 77(3) because the applicants had triggered the "investigation" by first alerting the ministry to their environmental issue. Unsatisfied with the ministry's handling of their matter, they subsequently filed their application.

The ECO is concerned by ministries denying the applications of applicants who contacted the ministry prior to filing their application. Since subsection 77(3) is discretionary, a Minister can accept an *EBR* application for investigation on a matter already being investigated. The ECO would like ministries to exercise this discretion more.

Applicants benefit by having their investigation conducted under the *EBR* because the investigation is afforded the *EBR*'s safeguards: transparency and timeliness. Furthermore, the ECO can monitor the investigation's progress and report on the results publicly.

The ECO believes that ministries and the public should work together to resolve environmental issues in a prompt and efficient manner. Filing an *EBR* application instead of contacting a ministry could delay action on pressing environmental concerns. However, the *EBR* should not lose its ability to hold ministries to account when the public is dissatisfied with the investigative process.

The ECO urges ministries to seriously consider the benefits of the *EBR* before using subsection 77(3) to deny an application for investigation. In its decision letters, ministries should provide greater detail on

ongoing investigations i.e., timelines and evidence being collected, and regularly update applicants of its progress.

The ECO will continue to monitor ministries' use of subsection 77(3). When warranted, the ECO will formally request to review ministries' investigation files for applications denied under this provision.

Review of Applications I2009002 and I2009003:

6.1.3 Alleged Contraventions of O. Reg. 116/01, Section 17(1) of the *Environmental Assessment Act*, and Section 23 of the *Aggregate Resources Act* re: Road Widening and Culvert Replacement on Wolfe Island

(Investigation Denied by MNR and MOE)

This application was reviewed in conjunction with I2009003 (MNR). Please see the Ministry of Natural Resources portion of this Section for the full review.

Review of Applications I2009005 and I2009006:

6.1.4 Alleged Contraventions of the *Aggregate Resources Act* and Other Statutes

(Investigation Denied by MNR and MOE)

This application was reviewed in conjunction with I2009006 (MNR). Please see the Ministry of Natural Resources portion of this Section for the full review.

Review of Application I2009008:

6.1.5 Alleged Contraventions of the *Environmental Protection Act* by an Automotive Repair Business and the City of St. Catharines

(Investigation Undertaken by MOE)

Background/Summary of Issues

On April 18, 2009, two applicants filed an application for investigation into alleged contraventions of the *Environmental Protection Act* (*EPA*) by an automotive repair business and the City of St. Catharines. The applicants claim that the automotive repair business dumped contaminated material into a ravine, without approvals or permits, which altered the drainage pattern in the area and caused contaminated runoff to flood nearby homes and a park. The applicants requested that the Ministry of the Environment (MOE) test contaminant levels in the fill, the runoff from the fill and residential properties. The applicants also requested that MOE require the automotive repair business to remove the materials deposited into the ravine.

Background

The rear of the automotive repair business is adjacent to a railway line and a ravine. On the other side of the ravine is Valleyview Park. Although the business was re-located to this site in 2008, the applicants claim that the owners began dumping material and fill into the ravine in September 2007. The applicants allege that the fill contained concrete (slabs and blocks) and asphalt and that the automotive repair business covered the fill with contaminated soil from another industrial property. The applicants allege that the fill and runoff from the ravine may contain contaminants such as mercury, lead and fuel oil. The applicants stated that the fill was dumped into the ravine to avoid paying for proper disposal of the materials.

The applicants assert that the fill dumped into the ravine caused flooding in Valleyview Park and in homes on Pinecrest Avenue from 2008 - 2009. One neighbourhood resident claimed that at one point he had two inches of water in his basement. As part of the application, the applicants submitted a petition signed by area residents to MOE that outlined their concerns about contaminants in the fill.

In response to numerous complaints from area residents regarding flooding, city engineers visited the site in early 2008 but no further action was taken to resolve the issue. In April 2008, the city approved an application for variance to re-locate the automotive repair business to its present location near the railway line and Valleyview Park. The applicants assert that the city should not have approved the application for variance because city staff were aware of flooding and environmental concerns, as raised by area residents.

The applicants contacted the Niagara Escarpment Commission in January 2009 with their concerns, however the site was outside of the development control area within the Niagara Escarpment Plan. The applicants stated that the Niagara Escarpment Commission advised them that the dumping of fill was done without approvals.

Section 14 of the *EPA* prohibits any person from discharging, or causing or permitting the discharge of a contaminant into the natural environment, including water, where it may cause an adverse effect, unless a certificate of approval (C of A) is obtained. The applicants claim that the automotive repair business did not obtain a C of A under the *EPA*.

As stated above, the applicants allege that the fill contains waste, such as asphalt and concrete. Under Regulation 347 under the *EPA*, certain waste materials, including tires and asphalt, cannot be buried or used as fill (regardless of adverse effect), with some exemptions, (e.g., storage for use as a construction aggregate).

Ministry Response

In October 2009, MOE informed the applicants that an investigation would be conducted to determine if there was a contravention of the *EPA* and its regulations. MOE stated that during an initial site visit, staff observed an area of fill and water flowing from the automotive repair business' property to the adjacent railway line.

On March 3, 2010, MOE completed its *EBR* investigation. It conducted further site inspections, analyzed soil and surface water samples, interpreted the results against provincial standards for soil and compared results of upstream and downstream water sample. MOE also interviewed area residents, representatives of the automotive repair business, the City of St. Catharines, Trillium Railway and the Niagara Peninsula Conservation Authority. The ministry concluded that the investigation:

- Did not uncover any evidence that the City contravened the *EPA* since it does not own the property under this investigation or was in the care and control of the alleged contaminants;
- Did not uncover any evidence that the concentrations of contaminants in soil samples taken from a private residence, the neighbourhood park, the fill area and the alleged source of the fill material would cause an adverse effect off-site;

- Did not uncover any evidence that the concentrations of contaminants in stormwater runoff would cause an adverse effect off-site;
- Found that certain contaminants (i.e., manganese, magnesium, calcium, sodium, strontium, and titanium) had higher concentrations downstream of the site, but determined that results are typical of urban runoff;
- Found that iron had a higher concentration downstream, but concluded that it would not cause an adverse effect to aquatic life; and
- Determined that the fill contained some waste materials (i.e., tires, asphalt and concrete with rebar) and the automotive repair business was advised to remove the waste uncovered and to do an assessment. Pending the results of the assessment, further abatement or enforcement actions may be required.

ECO Comment

The ECO is pleased with MOE's decision to investigate the alleged contraventions of the *EPA* related to the placement of contaminated fill into a ravine in St. Catharines. The ECO is satisfied that MOE collected and tested soil samples from various sites and compared the results to provincial (brownfield) standards. The ECO is also pleased that MOE consulted two neighbourhood residents, the Niagara Peninsula Conservation Authority and the railway owner as part of its investigation. The ministry clearly explained that there was no evidence that the City of St. Catharines contravened the *EPA*.

The ECO is satisfied that MOE collected and tested surface water samples to compare contaminants upstream and downstream. However, the ECO believes that MOE should have compared the surface water samples to the Ontario Provincial Water Quality Objectives (PWQO). The PWQO set criteria for water quality that is protective for aquatic life, recreational use and public health. The PWQO are used to assist MOE in making decisions under or related to the *EPA* and the *Ontario Water Resources Act* – clearly within the realm of this application for investigation.

Through its analysis, MOE found that some contaminants had elevated concentrations downstream of the fill, such as iron. Without a comparison of the downstream water samples to the PWQO standards, the ECO is unsure how MOE could assert that contaminant concentrations would not have an adverse effect on aquatic life. For example, the ECO found that from MOE's results, iron levels downstream of the fill (2.45 mg/L – 4.8 mg/L) greatly exceeded the PWQO standards (0.3 mg/L).

While MOE determined that soil samples did not exceed provincial standards, MOE discovered that the company buried tires, asphalt and concrete with rebar – an action prohibited under the *EPA*. While the ECO supports MOE's decision to advise the automotive repair business to remove the uncovered waste, the ECO encourages MOE to ensure all waste is removed from the entire site and to address any future compliance issues in a prompt manner.

Review of Applications I2009009, I2009010 and I2009011:

6.1.6 Alleged *EPA, OWRA* Contraventions re: Soil and Groundwater Contamination at a Former Industrial Property

(Investigation Denied by MOE)

Background/Summary of Issues

On November 2009, the applicants filed three applications for investigations related to contaminated properties on Glendale Avenue in St. Catharines, Ontario. The applicants requested that the Ministry of the Environment (MOE) investigate allegations of illegal dumping of contaminated soil from two

brownfield redevelopments, and the release of contaminated water from one of the construction sites into a storm sewer.

The applications relate to industrial property formerly owned by Domtar Paper Mill. A portion of the property has since been redeveloped and includes a restaurant ("restaurant site"), while another portion was redeveloped for a supermarket ("supermarket site"). The surrounding land use is predominantly residential.

In 2008, the applicants also filed four similar applications for investigation related to the Glendale properties. MOE investigated certain allegations and concluded the property met MOE's standards. For more information on the 2008 investigations, refer to page 217 of the Supplement to our 2008/2009 Annual Report.

Restaurant Site on Glendale Ave.

The applicants allege that contaminated soil was removed from the site in October and November 2009, despite the fact that soil samples were still being collected from the site. The applicants are concerned the soil may have been illegally dumped. A landfill requires laboratory documentation before accepting soil, and the necessary documentation would not be available if samples were collected the same day the soil was removed. Furthermore, the applicants question why soil was being removed from the site after MOE determined, in its 2008 investigation, that the soil met its standards.

Supermarket Site on Glendale Ave. (Contaminated Water)

The applicants allege that water contaminated with petroleum-based chemicals was intentionally pumped from an excavated site and into a storm sewer over a six-day period in April 2009. They are concerned that the released contaminated water could detrimentally affect drinking water sources, harm aquatic ecosystems and risk human health.

In the 2008 *Environmental Bill of Rights, 1993* (*EBR*) investigation (filed by the applicants) MOE found that the Record of Site Condition for the supermarket site property was accurate and the sampling undertaken was reasonable. There was no evidence that chemical concentrations on the property contravened the *Environmental Protection Act* (*EPA*).

Supermarket Site on Glendale Ave. (Contaminated Soil)

The applicants allege that contaminated soil and asphalt from the construction site was dumped by the contractors into a ravine and an adjacent municipal yard belonging to the City of St. Catharines between April 2009 and July 2009. They are concerned about the hazards posed to the environment by the leachate excreted by asphalt and contaminated soil.

In response to the 2008 *EBR* application for investigation filed by the applicants, MOE found that the *EPA* was not contravened.

Applicable Legislation

The applicants did not specify the provisions of the legislation that may be contravened by the alleged mishandling of contaminated soil and water outlined in the three applications. However, MOE inferred that the following provisions related to the concerns outlined by the applicants:

- Section 14(1) of the *EPA* prohibits a person from discharging a contaminant into the natural environment that may cause an adverse effect.
- Regulation 347 under the *EPA* outlines the criteria for the definitions, designations and exemptions of waste.

- O. Reg. 153/04 under the *EPA* provides the requirements related to the filing of a Record of Site Condition (for brownfield remediation) including site assessment requirements and applicable standards.
- Section 30 of the *Ontario Water Resources Act* (*OWRA*) prohibits the discharge of any material into waters that may impair the quality of the waters.

The applicants also referred to the *Clean Water Act* and the *Fisheries Act*. The *Fisheries Act* is federal legislation and has not been a prescribed act under the *EBR* since 2007 (see page 194 of the Supplement to our 2007/2008 Annual Report). The *Clean Water Act*, which requires watershed committees to prepare reports to assess threats to drinking water sources, is not applicable in this situation. Therefore, both were not considered by MOE.

Ministry Response

In its decision letters sent on February 2010, MOE decided to deny all three applications for investigation.

Restaurant Site on Glendale Ave.

MOE reviewed the photographs and correspondence the applicants included as evidence with their application, and interviewed the consultants working on the site. It determined that an investigation was not warranted because there was no evidence of a contravention of the *EPA*.

MOE explained that exceeding the standards set out in O. Reg. 153/04 (Table 3) on portions of the property not being re-developed to a more sensitive land-use is not an offence if off-site migration does not result in an adverse effect. MOE also added that it is acceptable for soil from brownfield remediation projects to be taken to non-hazardous landfills for use as cover soil or disposal.

The ministry's 2010 response echoes its findings from its 2008 investigation, when it concluded the beryllium on the property exceeded the Table 3 standard of O. Reg. 153/04, however, the concentration did not contravene the *EPA* provision of having an adverse effect. This soil was excavated and disposed in a landfill in accordance with Reg. 347 under the *EPA*.

MOE stated that the soil samples the applicants witnessed being collected were solely for the purposes of verifying that the remaining soil met O. Reg. 153/04 Table 3 standards. The property owner is undertaking a risk assessment for the entire property. MOE staff will ensure that the property meets the requirements of the brownfields regulation under the *EPA*.

Supermarket Site on Glendale Ave. (Contaminated Water)

After reviewing the applicants' evidence and related ministry files, interviewing the consultants and visiting the site, the ministry concluded that an investigation was not warranted.

In December 2009, ministry staff went to the site and confirmed that the site had a private engineered storm water pond for the re-developed commercial property. The pond was installed in accordance with the registered Site Plan Agreement prepared for the municipality.

Although the applicants had reported the presence of an oily sheen on the water surface, ministry staff did not observe this residue during their visit.

MOE explained there have been numerous studies conducted on this site over the years, which included "extensive" sampling by both private consultants and the ministry. No evidence was found that indicated contamination remains on these lands at concentrations contravening the *EPA*.

Supermarket Site on Glendale Ave. (Contaminated Soil)

The ministry reviewed the photographs, evidence and ministry files, and interviewed the consultants who worked on the site as well as municipal staff. It concluded an investigation was not warranted.

City of St. Catharines staff reported to MOE that the asphalt and soil deposited in its yard originated from municipal construction projects. The materials were placed at the site for recycling. MOE requested municipal staff to consolidate the asphalt on the site. The supermarket's contractors also confirmed that no materials were removed to the city's yard.

MOE determined that there was no evidence indicating the supermarket, its contractors or the municipality contravened the legislation.

ECO Comment

The ECO believes MOE's handling of these applications was reasonable. MOE previously conducted investigations of these sites, which were triggered by applications for investigation filed by the applicants. In our 2008/2009 review of the applicants' previous applications, the ECO reported that the ministry's investigations appeared to be thorough.

In regards to these applications, MOE reviewed its past investigations of the sites, made site visits and interviewed those involved in the remediation projects. Consequently, it denied the three applications for investigations because it did not find conclusive evidence to warrant these matters being re-opened.

The ECO echoes its 2008/2009 comments and reminds the ministry that the evidentiary burden for applicants is low in comparison to other evidence gathering professions. Photographs, samples and correspondence are legitimate forms of evidence. Applicants should not be expected to provide evidence of the same calibre as that which could be gathered by ministry staff.

The applicants repeated submission of applications and evidence gathering indicate they have a strong interest in the brownfields remediation process occurring in this area. MOE is urged to keep the applicants informed of any opportunities for public consultation in the remediation of these sites or of any developments related to their concerns. The applicants may take some comfort in the fact that the brownfield remediation process has been improved with updated scientific modelling and more stringent standards for many contaminants. For more information on the recent amendments to the brownfield regulation under the *EPA*, refer to Section 4.3 of this Supplement.

Review of Applications I2009012 and I2009013:

6.1.7 Alleged Contraventions at a Quarry Site under the *Aggregate Resources Act* (*ARA*), the *Endangered Species Act* (*ESA*), the *Environmental Protection Act* (*EPA*) and the *Ontario Water Resources Act* (*OWRA*)

(Investigation Denied by MNR and MOE)

This application was reviewed in conjunction with I2009013 (MNR). Please see the Ministry of Natural Resources portion of this Section for the full review.

Review of Application I2009015:

6.1.8 Alleged Contraventions of Several Acts, Regulations and Certificates of Approvals by Ontario Parks

(Investigation Undertaken by MOE)

Background/Summary of Issues

In February 2010, two applicants requested that the Ministry of the Environment (MOE) investigate the Ministry of Natural Resources (MNR) for alleged contraventions of multiple acts, regulations, and Certificates of Approvals (Cs of A). The applicants alleged that Ontario Parks – the branch of MNR responsible for operating the province's protected areas – had contravened the *Environmental Protection Act* (*EPA*), the *Ontario Water Resources Act* (*OWRA*), O. Reg. 129/04 (Licensing of Sewage Works Operators) and Regulation 903 (Wells Regulation) under the *OWRA*, and four Certificates of Approval (Cs of A) in several provincial parks. These alleged contraventions involved the:

- failure to comply with the basic maintenance of sewage works;
- discharge of untreated sewage into the natural environment, including groundwater; and
- the alteration of sewage works without appropriate approvals.

Ministry Response

By letter dated April 16, 2010, MOE notified the applicants that it would undertake the requested investigation. The ministry noted that based on the timelines in the *Environmental Bill of Rights, 1993*, this investigation was required to be completed by June 17, 2010.

ECO Comment

The ECO is pleased that MOE agreed to undertake this investigation. Since MOE's investigation was not completed by the end of the ECO's 2009/2010 reporting year, the ECO will review the outcome of this investigation and the ministry's handling of this application in a future Annual Report.

6.2 Ministry of Natural Resources

Review of Applications I2009002 and I2009003:

6.2.1 Alleged Contraventions of O. Reg. 116/01, Section 17(1) of the *Environmental Assessment Act* and Section 23 *Aggregate Resources Act* re: Road Widening and Culvert Replacement on Wolfe Island

(Investigation Denied by MNR and MOE)

Geographic Area: Kingston

Background/Summary of Issues

On May 8, 2009, two residents of Ontario submitted an application for investigation to the ECO alleging that two companies – Canadian Hydro Developers Inc (CHD) and their subcontractor, Canadian Renewable Energy Corporation (CREC) – had contravened approvals issued under O. Reg. 116/01 (Electricity Projects), made under the *Environmental Assessment Act* (*EAA*). They alleged that a road-

widening and culvert replacement involving CHD/CREC actions impinged on a provincially significant wetland (Sand Bay Wetland) on Wolfe Island near Kingston, resulting in harm to the protected wetland that had not been addressed. The applicants maintained that the road widening and placement of fill reduced the area of the wetland and also raised concerns that the new culvert (larger in diameter and set 18 inches deeper than the older one) would lead to accelerated drainage of the wetland as the flow appeared to be only from the wetland towards Lake Ontario.

The applicants also alleged that the Corporation of the Township of Frontenac Islands used materials excavated from a site controlled by CHD/CREC adjacent to the wetland as fill in the road widening and, as such, contravened section 17(1) of the *EAA* as they did not obtain approval from the Ministry of the Environment (MOE) for the disposal of this 'waste' material. The applicants further alleged that this fill material was collected and used in violation of section 23(1) of the *Aggregate Resources Act (ARA)* – as it was aggregate used from a source that was not under license or permit – and that the Township had failed to apply for a wayside permit. The ECO forwarded the application to MOE and the Ministry of Natural Resources (MNR) for their consideration.

The context for this dispute relates to the Wolfe Island Wind Project ("wind project"), developed and constructed by CHD and CREC respectively, wherein 86 wind turbines were installed across the island in 2008 and early 2009. Among other aspects of the wind project, the project's Environmental Review Report (ERR) approved the use of an underground cable to traverse the area at the margin between 2nd Line Road and the wetland as well as the need to widen the road at this location to accommodate the underground cable. Further, there were provisions in the ERR "to convert to overhead" wires, if needed.

For reasons discussed below, CHD eventually chose the overhead wire option and requested approval from the Township in October 2008 to allow the use of overhead cables on shared poles with Hydro One so that "the Township would be left with only one set of poles within the [municipal right-of-way] ROW; the situation that currently exists" and thus eliminate the need to widen the road.

However, the Township elected to widen the road at the location in question to ensure the "safety of the traveling public and to facilitate road maintenance" as quoted in correspondence by the Township Clerk included in the applicants' submission. The Township used materials excavated on the wind project site for the road widening. This material was generated as CREC dug the foundations for the 86 turbine towers.

Ministry Response

MOE responded to the allegations related to contraventions of O. Reg. 116/01 and section 17(1) of the *EAA* (file #I2009002) while MNR responded to the allegation related to the contravention of section 23(1) of the *ARA* (file #I2009003).

MOE prefaced its decision by noting that it considered "the ministry's Statement of Environmental Values; and whether the alleged contravention is likely to cause harm to the environment if the *EBR* investigation is not undertaken". It reviewed the ERR associated with the wind project and concluded that an *EBR* investigation was not warranted, for the reasons noted below, and denied the request.

With regard to the allegation that CHD and CREC contravened approvals issued under O. Reg. 116/01 under the *EAA,* MOE concluded that the road widening was undertaken by the Township as part of its responsibilities to provide routine maintenance and upgrading of its road network and was subject to the Municipal Class EA developed by the Municipal Engineers Association (MEA). (The serendipitous availability of clean, inert fill at no material cost to the municipality may have been a factor in the Township's decision to undertake the widening at this time and location.)

The ministry also noted that the ERR stipulated that culverts "be repaired appropriately [and that] the work related to the culvert replacement was done in accordance with the commitments made by CHD/CREC in the ERR". MOE concluded that, based on the above, no contravention of O. Reg. 116/01 occurred.

In response to the allegation that the material used by the Township in the road widening was 'waste' and as such the Township was subject to section 17(1) of the *EAA,* MOE determined that the excavated materials "are considered to be 'inert fill' (as defined by Reg. 347, General – Waste Management) and as such is [sic] exempt from the waste management provisions of the *Environmental Protection Act* and *EAA*". Further, the ministry concluded that, as the road widening was within the existing municipal ROW and was covered by the Municipal Class EA, "the actions of the municipality did not contravene section 17(1) of the *EAA* or the Class EA" and so required no approval for disposing of the material obtained from the wind project site.

MNR reviewed the application as it pertained to section 23(1) of the *ARA* and determined that an investigation under section 77 of the *EBR* was not warranted. MNR noted that section 23(1) of the *ARA* does not require a wayside permit if the excavated material is the result of the erection of a building or structure on the excavation site. "Since the excavation is integral to the development [of] a structure (i.e. foundation of a wind turbine) the extraction activity does not meet the definition of quarry under the *ARA.* Consequently, subsection 23 (1) of the *ARA* does not apply" as the primary purpose of the excavation activity was not aggregate production but was "incidental and necessary for the construction of the wind project structures".

Other Information

MNR also responded to the concerns raised by the applicants about the impacts of the new culvert on the water levels in the wetland. The ministry made visits to the site in the fall and spring of 2008/2009, noting that they "did not observe any change to the wetland water levels that could not be attributed to seasonal changes". According to MNR, these visits confirmed that the base of the culvert was below the water level at both ends such that this "would allow the free flow of water in both directions". The ministry also indicated that "MNR staff does not have any information to indicate that there was a change in the wetland water level".

MNR indicated that it was contacted by a "complainant" in January 2009 regarding possible impacts on fisheries habitat in the area of Sand Bay Wetland. In its July 13, 2009 decision, the ministry noted: "Since no conservation authority covers the Wolfe Island area, the complainant was advised to contact the federal Department of Fisheries and Oceans to determine if habitat loss had occurred".

ECO Comment

The decisions by both ministries not to investigate were reasonable. In the case of MOE, the allegations raised by the applicants and the evidence they provided in support of the allegations were shown to be based on incorrect interpretations of the statutes and regulations. MOE noted that the ERR for the wind project recognized and approved the need for the road widening and stipulated that any damaged culverts be replaced appropriately while providing flexibility to CHD and CREC in carrying out the work.

While it could be argued that the decision by CHD/CREC to abandon the underground cable option in favour of overhead wires removed the need for the road widening (in fact, CHD made this observation in correspondence to the Township), the ECO interprets this position as being moot in light of the Township's authority under the Municipal Class EA to undertake road widenings within municipal road ROWs, as pointed out by MOE in its decision.

Interestingly enough, CHD sent correspondence to the Township on October 11, 2008 pointing out that the installation of the underground cable, as noted in the ERR, would require the widening of the road, resulting "in the displacement of about 0.15 acres of wetland area". CHD noted that this loss of wetland "will further reduce the: i) flood storage and flow attenuation capacity of the wetland; ii) availability of productive year-round fish habitat; iii) amphibian and reptile breeding and foraging habitat, and iv) potential nesting and foraging habitat for wetland bird species." CHD listed these environmental implications associated with the widening as a key rationale for requesting the Township to approve the request to pursue the overhead wire option.

When CHD made the request to convert to overhead wires, it maintained that "it did not have any knowledge that the Township may have been considering widening activities on the 2nd Line". As noted above, MOE confirmed that the road widening was covered under the Municipal Class EA. However, MOE was silent on what protections, if any, are provided to provincially significant wetlands by the Municipal Class EA.

The ECO believes that MNR was correct in its interpretation of the applicability of section 23(1) of the *ARA.* Neither the excavation of materials from the wind project site nor the application of this material in the road widening could be interpreted as falling within the purview of the *ARA.*

However, the ECO does have some concerns about the apparent lack of concern expressed by MNR regarding potential impacts of the new culvert and its placement in terms of longer-term impacts on water levels in the Sand Bay Wetland – designated as a provincially significant wetland (PSW). MNR noted that it had not observed any change in the wetland's water levels over the fall 2008-to-spring 2009 period that could not be attributed to seasonal changes but also indicated it had no historical information on water levels in the wetland.

The ECO wonders why historical water levels are not available for this PSW. MNR's lack of information about the wetland is troubling and suggests that the ministry does not sincerely embrace its responsibilities to protect PSWs such as Sand Bay Wetland. The ECO has raised concerns about MNR's approach to wetlands in numerous Annual Reports, including our 2006/2007 and 2008/2009 Annual Reports.

The ECO also notes MNR's apparent lack of interest in its decision regarding loss of fisheries habitat. In the ECO's 2007/2008 Annual Report, we noted the arrangements within the *Fish Habitat Compliance Protocol,* the purpose of which was to clarify interagency actions in seeking compliance with fish habitat legislation. Under this protocol, these matters were referred to the federal Department of Fisheries and Oceans (DFO). The ECO also noted recent DFO staff cutbacks with only nine federal fisheries officers responsible for protecting fish habitat in Ontario. The ECO went on to strongly advise MOE and MNR to modify the 2007 Compliance Protocol agreement so that their responsibilities to protect fish and fish habitat are met. To date, this modification has not occurred. This situation continues to be a concern to the ECO, particularly in light of MNR's own admission that it has no historical information to determine what constitutes a change in water levels in this PSW.

The ECO believes that it would have been appropriate for the ministry to commit to longer-term monitoring of water levels in this wetland. This is a particularly important area of water resource management as the full effects of a warming climate begin to take hold in the years to come. This would also be in keeping with the wider provincial government's mandate to manage climate change adaptation issues in the future.

Review of Applications I2009005 and I2009006:

6.2.2 Alleged Contraventions of the *Aggregate Resources Act* and Other Statutes (Investigation Denied by MNR and MOE)

In June 2009, two individuals submitted an application for an investigation of sand removal from a private property in the community of Curran, located in the Township of Alfred and Plantagenet (east of Ottawa). The applicants alleged that, over the last 13 years, hundreds of thousands of tons of sand had been extracted from the property without an aggregate license, contrary to section 7 of the *Aggregate Resources Act* (*ARA*).

The applicants further alleged that, in addition to breaching the *ARA*, the proponents of the sand extraction had also contravened the *Lakes and Rivers Improvement Act*, the *Environmental Protection Act*, the *Ontario Water Resources Act* and the *Conservation Authorities Act*. The applicants argued that the proponents' excavation has caused a number of environmental impacts, including degradation of the local creek and deterioration of the agricultural value of the farmland.

The ECO forwarded this application to the Ministry of the Environment (MOE) and the Ministry of Natural Resources (MNR).

Background

In the spring of 1996, the owners of a large farm property in eastern Ontario (the "proponents") sent a letter to MNR seeking permission to remove "sand hills" from the property without an aggregate licence for the purpose of "improving the agricultural value" of the property. The proponents stated that the extraction would take about five years.

In August 1996, MNR's Aggregate Resources Officer confirmed that no license would be required; however, the exemption would expire when 5,400 tonnes of sand had been removed or by July 3, 2001, whichever came first. MNR clearly noted that if there were any violations of this term, "the exemption will void and a full licence will be required."

Pursuant to the 1996 letter, the exemption would have expired at the very latest in July 2001. However, after July 2001, MNR verbally communicated to the proponents that the *ARA* did not apply to the excavation and the proponents were allowed to continue extracting sand from the property.

In early October 2004, MNR notified the proponent to cease and desist extraction, stating that any future extraction would require an exemption letter or order from the ministry. MNR aggregate staff then visited the property to review operations. Based on this visit, in late October 2004, MNR again concluded that the excavation did not constitute a "pit", and thus, the licensing requirements under the *ARA* did not apply. MNR agreed that the proponents could complete "what [they] termed as agricultural improvement" for a defined area of the property.

In October 2008, over 12 years after the extraction had begun, an MNR Aggregate Inspector visited the property with a Land Resource specialist from the Ministry of Agriculture, Food and Rural Affairs (OMAFRA) to determine if there was any improvement to the fields from an agricultural perspective. OMAFRA found that there was "no change to the soil classification other than providing higher moisture content. It was also observed that there were some locations where it appeared to be too wet to plant which may be a result of extracting too deep or the wet year we had." This observation suggests that there was very little agricultural improvement resulting from the extraction. Nonetheless, MNR allowed the proponents to continue extracting sand for the remaining area defined in 2004. MNR did note, however, that the proponents were close to the excavation limit and reminded them that, upon reaching this limit, they would no longer be able to extract sand except under an aggregate licence.

As of January 2010, extraction was ongoing. While it is not known exactly how much sand has been removed from the property, MNR's best estimate is that between 1996 and October 2008, approximately 163,000 tonnes were removed from the southern portions of the property.

Summary of Issues

Aggregate Resources Act (ARA)

The *ARA* regulates the production of aggregate in the province. Section 7 of the *ARA* states that no person may operate a "pit" except in accordance with an aggregate licence. "Pit" is defined in the Act as any land from which aggregate is being excavated, unless it meets one of the two (and only) exceptions set out in the Act:

1) The land is excavated for a building or structure on the excavation site; or
2) The Minister (or an authorized delegate) is of the opinion that "the primary purpose of an excavation is not for the production of aggregate" *and* has issued an Order declaring that the excavation is not a pit for the purposes of the *ARA*. (Note: The power to issue this Order may be exercised by the Minister's delegate, the Manager of the Aggregate and Petroleum Resources Section.)

The *ARA* does not establish any other exceptions.

The applicants contend that, pursuant to section 7 of the *ARA,* the proponents should not have been allowed to remove the sand without an aggregate licence.

Environmental Impacts

In addition to the *ARA*, the applicants alleged that the proponents violated several other statutes (discussed below), and in so doing, have caused various environmental impacts, including:

- degrading the quality and quantity of the water in the local creek through excessive siltation; and
- degrading the farmland to the point that it can no longer be used for agriculture (e.g., by failing to return the topsoil to the property and extracting sand too deeply – as far down as 25 feet in some areas – below the water table).

Lakes and Rivers Improvement Act (LRIA):
The applicants alleged that the proponents contravened section 36 of the *LRIA*, which prohibits the discharging of any substance into a lake or river under circumstances that conflict with the purposes of the Act (i.e., the protection of lakes and rivers). The applicants alleged that the proponents caused silt and sediment to flow into the adjacent creek and migrate downstream to a pond located on one of the applicants' properties.

In April 2001, MNR visited the proponents' property to assess the alleged siltation, but they did not observe silt entering the creek. In 2004, in response to the applicants' ongoing concerns about siltation, MNR concluded that "the sedimentation is not a direct result of the work that has occurred on this property, [but rather] sedimentation may have occurred as a result of a cumulative effect of erosion along the creek bank and runoff from properties in the area."

Despite MNR's response, the applicants continue to believe that silt and sediment from the proponents' excavation is flowing into the creek. To support their claim, the applicants provided copies of letters and documents from the federal Department of Fisheries and Oceans (DFO) that noted that the proponents were engaging in activities in 2005 (such as creating ditches, storing dirt piles and exposing soils close to the creek) that were resulting in sediment flowing into the creek. In a July 2005 letter from DFO to the proponents, DFO noted that the excavation "may have resulted in a contravention of the *Fisheries Act*," namely the potential "harmful alteration, disruption, or destruction of a fish habitat." Therefore, DFO encouraged the proponents at that time to stabilize five sites on the property to "prevent silt laden water from entering the creek."

Ontario Water Resources Act (OWRA):
The applicants alleged that the proponents contravened section 30 of the *OWRA*, which prohibits the discharge of a material into a water course that may impair water quality. Similar to the *LRIA* claim, the applicants alleged that the proponents caused or allowed silt and sediment to enter the creek, resulting in the impairment of the creek and the downstream pond.

Conservation Authorities Act (CAA):
The applicants alleged that the proponents had contravened requirements of the South Nation River Conservation Authority (SNC) by removing and stockpiling fill in a regulated area without the SNC's permission. Ontario Regulation 170/06, Development, Interference with Wetlands and Alterations to Shorelines and Watercourses, under the *CAA* (the "SNC Regulation") prohibits development (e.g.,

placing, dumping or removal of any material) within 15 metres of a river valley, except with the express permission of SNC. To support their claim, the applicants provided a copy of a DFO log documenting a March 2009 site visit to the proponents' property by both DFO and SNC staff, where they found large "spoil piles" (old drainage tiles, topsoil, gravel, etc.) located within 15 metres of the creek.

Environmental Protection Act (EPA):
The applicants also alleged that the proponents contravened section 14 of the *EPA*, which prohibits the discharge of a contaminant into the natural environment (other than water). The applicants did not specify which contaminant they were alleging had been discharged. MOE assumed the allegation referred to noise discharges from the truck traffic related to the sand extracting activities.

Ministry Responses

Ministry of Natural Resources

MNR denied this application for investigation. MNR stated that it had reviewed each of the alleged contraventions and concluded that an investigation was not necessary.

MNR noted that it had determined in 1996, and that it continues to be of the view, that the primary purpose of the excavation is for agricultural purposes. As the primary purpose of the excavation is not for aggregate extraction, the ministry does not consider the excavation to be a "pit" for the purposes of the *ARA*. Therefore, in MNR's view, the proponents did not require a licence under section 7 of the Act, and cannot be considered to have contravened the *ARA*. MNR also stated that a Minister's Order declaring that the excavation was not a "pit" for the purposes of the *ARA* was not necessary as an Order is only required "where there is a dispute between the MNR and the relevant municipality" about whether the excavation is a pit. As support for this position, MNR referred to its Policy A.R. 5.00.05, entitled "Determination that Excavation is not a Pit or Quarry," which states that an excavation is not a "pit" or "quarry" where the "primary purpose" of the excavation is not for the production of aggregate.

In response to the alleged contravention of the *LRIA*, MNR referred to information that it had received from DFO in 2005 that stated that the proponents had completed measures necessary to stop the discharge of sediment into the creek. MNR concluded that, in the absence of new evidence regarding this issue, an investigation into the alleged contravention of the *LRIA* is not required.

Regarding the alleged contravention of the *CAA*, MNR explained that the *CAA* provides conservation authorities with the legal authority to enforce their own regulations. As such, MNR claimed that it is not in a position to consider any alleged contraventions of the SNC Regulation. MNR also noted that SNC was aware of the applicants' concerns.

Ministry of the Environment

MOE denied the application for review. The ministry stated that a review was not warranted based on the absence of any defined contravention or observable adverse environmental impact.

MOE noted that it had never received any complaints relating to a violation of either the *EPA* (i.e., noise discharge) or the *OWRA* (i.e., discharge of a material into a water course that may impair water quality) prior to receiving the application. Upon receiving this application, MOE undertook a site inspection in July 2009 to investigate the applicants' claims. MOE stated that it observed only minimal truck traffic with no excessive noise. Therefore, MOE concluded that there was no contravention of section 14 of the *EPA*. MOE also observed that the proponents had established a large vegetative buffer zone on either side of the creek, as well as other preventative measures (such as silt screening fences) to minimize any potential for water impairment resulting from the sand extraction activities. MOE did not observe any signs of recent or ongoing water quality impairment. Therefore, MOE concluded there was no contravention of section 30 of the *OWRA*.

ECO Comment

The ECO agrees with MOE's decision not to review this application. Upon being made aware of the applicants' concerns, MOE undertook reasonable efforts to look into the matter and concluded that there was not sufficient evidence of any alleged contraventions to warrant an investigation.

The ECO is very disappointed with MNR's response to this application. While the ECO accepts MNR's conclusion that the proponents have not contravened the *ARA* (precisely because MNR determined that the *ARA* does not apply, and thus no contravention is possible), this case has highlighted some serious issues with the ministry's policies and practices in exempting excavations from the requirements under the *ARA*.

First, the ECO has significant concerns with MNR's Policy A.R. 5.00.05. This policy appears to create additional exemptions from the legislative definition of pit, such as creating a small quantity exemption. Furthermore, the policy also appears to modify the "primary purpose" exemption by stating that an Aggregate Inspector may determine that an excavation is not a "pit" if the primary purpose of the excavation is not for the production of aggregate, and that a Minister's Order is generally not required to carry out this exemption. This interpretation seems contrary to the language of the Act, which explicitly requires that an Order be issued in order to establish the "primary purpose" exemption. The policy is setting out a much less formal process for exempting excavations. Whereas an Order provides certainty of process, the informal nature of the exemptions set out in the policy provides less transparency for the public, as well as a weaker process for issuing and overseeing exemptions.

A policy document simply has no authority to override legislation. A policy document is intended to provide additional direction on a matter; it cannot modify legislative requirements. Given the questionable legal authority for the expanded exemptions provided in the policy, the ECO strongly encourages MNR to review this policy and its implementation.

Second, even accepting that MNR staff may informally exempt an excavation where the primary purpose is not aggregate extraction, the ECO has serious concerns with MNR's approach to determining the primary purpose of the excavation. It appears that the ministry simply relied on the proponents' statements that the extraction was for agricultural improvement. The ministry did not seek supporting materials or independently verify the validity of the proponents' claim. Even after 12 years had passed and 160,000 tonnes of sand had been trucked away, and even in the face of contrary evidence from OMAFRA, MNR continued to accept the proponents' assertions that the extraction was for agricultural improvement.

Based on this case, it would appear that any proponent could merely state that their extraction was not for the purpose of producing aggregate, and MNR would allow them to remove large quantities of aggregate without a licence. The ECO believes that there needs to be more rigour to the determination of the purpose of an extraction before such a blanket exemption from the requirements of the *ARA* is provided. The ECO strongly encourages the ministry to review its policy and practices in excluding extractions from the purview of the Act.

In addition, the ECO notes that OMAFRA, while not directly responsible for the exemption, also bears some responsibility in ensuring that exemptions provided in the name of protecting or improving agricultural values are exercised appropriately. In Ontario public policy, agricultural activities are protected through many privileges; OMAFRA must ensure that these privileges are not abused.

Finally, regarding MNR's response to the alleged contravention of the regulation under the *CAA*, the ECO notes that MNR does indeed have the authority to investigate such contraventions under the *EBR* if it wishes to do so.

Review of Application I2009007:

6.2.3 Alleged Contraventions of O. Reg. 170/06 under the *Conservation Authorities Act* (Investigation Denied by MNR)

Background

In southern Ontario there is a constant struggle between protecting wetlands and building houses for the growing population. Often environmental organizations clash with developers in an effort to preserve these ecologically important areas before they are lost forever. Conservation Authorities (CAs) play a key role in protecting wetlands through regulating development and other activities in and adjacent to wetlands under the *Conservation Authorities Act* (*CAA*).

In July 2009, the ECO received an application requesting that the Ministry of Natural Resources (MNR) investigate alleged contraventions of O. Reg. 170/06 – South Nation River Conservation Authority: Regulation of the Development, Interference with Wetlands and Alterations to Shorelines and Watercourses, (SNC) made under the *CAA*. The applicants claim that SNC and the developer, Tartan Homes contravened O. Reg. 170/06 when SNC allowed Tartan Homes to construct a residential development, Findlay Creek Village, in and adjacent to the Leitrim Wetland and to alter Findlay Creek without written permission. Moreover, the applicants expressed concern that the developer's commitment to donate land and money to SNC created a conflict of interest for SNC, and may have played a role in the alleged contravention of the *CAA*.

In addition to this application for investigation, the applicants also submitted an application for review requesting a provision in the *CAA* to regulate private donations to all CAs and the amount of money provided to CAs through transfer payment grants; for more information, please see Section 5.2.12 of this Supplement.

Leitrim Wetland and Findlay Creek Village

The Leitrim Wetland is located within the City of Ottawa (formally within the City of Gloucester), south of Leitrim Road and dissected by Albion Road (see figure below). The developer owns a major portion of this area (east of Albion Road, south of Leitrim Road and west of Bank Street), including a majority of the Leitrim Wetland. Findlay Creek Village is located along the north-east border of the wetland.

In 1988 the Regional Municipality of Ottawa-Carleton designated the wetland area as "urban" in its official plan. In 1989, the City of Gloucester re-designated the area for development, in accordance with the Region's "Urban" designation (Official Plan Amendment #10). In that same year, MNR categorized the Leitrim Wetland as a Class 1 Provincially Significant Wetland, protecting it from development. However, a portion of the wetland area identified as provincially significant had also been the location of a proposed residential development. The municipality could not approve the development unless the boundary was changed.

In 1991, MNR reassessed and altered the provincially significant wetland (PSW) boundary by removing the one-fifth of "altered" or "unstable" land in the north-east part of the wetland. MNR's reduction was part of a deal with the developers in return for: the creation of new linked habitats along the creek and a proposed stormwater pond; and protection of the core of the wetland by turning it over to a public agency. MNR's PSW boundary reduction allowed the developers to proceed with the Findlay Creek Village project since it was no longer within a PSW.

As part of the deal, the developer agreed to convey 96 hectares of the core wetland to SNC for protection and to donate $40,000 for maintenance of the wetland and $200 per home sold to support programs and fund wetland education. Despite this commitment, the wetland core has not yet been transferred to SNC.

With the boundary changed, the developers obtained the required land use planning and environmental approvals, including but not limited to:

- *Planning Act* approvals;
- two federal environmental assessments;
- *Fisheries Act* authorization;
- a provincial class environmental assessment;
- several certificates of approval for stormwater management facilities;
- certificates of approval for water works; and
- eight permits to take water.

The developer began construction of Findlay Creek Village in 2003 and by July 2009, approximately 50 per cent of the development (900 of the planned 1800 residential units) was completed.

Figure: Boundary of the Leitrim Provincially Significant Wetland and Findlay Creek Village (east of Bank Street and south of Leitrim Road), in the City of Ottawa.

How Conservation Authorities Regulate Wetlands

CAs are created under the *CAA* and are organized on a watershed basis. Each CA has an individual regulation under section 28 of the Act and in 1998 the Act was amended to ensure that the regulations would become consistent across the province. These amendments required all CAs to start regulating development and site alteration in and adjacent to wetlands, although some had already been regulating these areas prior to the amendment. O. Reg. 97/04 under the *CAA* outlines the content required for these individual regulations (the ECO reported on O. Reg. 97/04 in the Supplement to our 2005/2006 Annual Report). In 2006, MNR filed SNC's individual regulation - O. Reg. 170/06.

Each CA is governed by a Board of Directors whose members are appointed by municipalities located within the CA's watershed. The CA Board of Directors is responsible for approving (or denying) all permit applications under the CA's regulation. Board decisions are guided by Board approved policies and procedures for administering its regulation.

In addition to regulating development and activities in or adjacent to river or stream valleys, Great Lakes and large inland lakes shorelines, watercourses, and hazardous lands, CAs also regulate:

- activities within wetlands;
- development within wetlands; and
- development adjacent to a wetland (120 metres of Provincially Significant Wetlands and 30 metres of all other wetlands), unless development has been approved under the *Planning Act* or other public planning or regulatory processes.

To be regulated by a CA, a wetland must meet the definition provided in the *CAA* and be delineated on regulation limit maps held at the CA office. The CAs have discretion on which wetlands they regulate (e.g., include in the regulation limit maps). SNC only regulates PSWs identified in municipal Official Plans, within the city of Ottawa. Some CAs regulate and map smaller, non-provincially significant wetlands. For example the Lake Simcoe Region CA has mapped and is regulating all wetlands larger than 0.5 hectares. The ECO noted in our 2006/2007 Annual Report that CAs are not consistently regulating wetlands across the province because of a lack of resources or a lack of political will.

Protection of Wetlands under the Provincial Policy Statement

In Ontario, there is no provincial legislation that specifically requires the protection of wetlands. Land use planning legislation and policies such as the *Planning Act* and the Provincial Policy Statement (2005) (PPS) provide indirect protection for certain wetlands. For example, the PPS prohibits development and site alteration in MNR-identified PSWs in much of southern and central Ontario. However, the ECO previously reported in our 2006/2007 Annual Report on the weakness of Ontario's policy approach to protecting wetlands, including that it does not address "locally significant wetlands or wetlands that have not yet been evaluated for their significance." This is important, since many of the wetlands that remain in southern Ontario have been fragmented by development, are smaller in size and may not be considered provincially significant by MNR's standards. For example in the Credit Valley Conservation Authority watershed, the majority (approximately 1400) of wetlands are less than one hectare in size and represent 25 per cent of the total wetland area within the watershed.

Summary of Issues

The applicants claim that SNC did not issue the required written permission for either development in the wetland or the alteration of Findlay creek. In the absence of valid permission, the applicants conclude that SNC and Tartan Homes contravened O. Reg. 170/06. Furthermore, the applicants allege that SNC's allowing of the development stems not from an unbiased evaluation of the control of flooding, erosion, pollution or the conservation of land, as provided for in section 3(1) of its regulation, but rather from a conflict of interest whereby the SNC stands to benefit financially (from donations) by allowing the development.

Ministry Response

MNR denied the application for investigation for the following reasons:

- SNC permission was not required for development in or adjacent to the Leitrim Wetland;
- SNC had advised MNR that it had in fact issued permission to the developer to alter Findlay Creek;
- SNC was reviewing two permit applications related to altering Findlay Creek; and
- SNC monitors the development area for compliance with permit requirements.

MNR clarified that permission was not needed for development in the wetland because:

- wetlands under O. Reg. 170/06 are areas delineated as such on SNC maps;
- the Leitrim Wetland is delineated in SNC maps as the provincially significant boundary identified by MNR; and
- since there was no development within the provincially significant wetland boundary, SNC was not required to issue any permits.

MNR also explained that Findlay Creek Village did not need permission from the CA for development adjacent to the wetland. Under O. Reg. 170/06, the CA is not required to grant permission for development within 120 metres of a provincially significant wetland if the development has been approved pursuant to an application made under the *Planning Act* or other public planning or regulatory processes. MNR stated that because the developers obtained prior approval under the *Planning Act* for Findlay Creek Village, permission from SNC was unnecessary.

As follow-up to MNR's response, the ECO requested that MNR provide copies of SNC's permits and SNC's policies and procedures for administering the regulation. MNR advised the ECO that this "background information" was not housed at MNR and the request was passed along to SNC. MNR further stated that "verbal confirmation by [SNC] of the presence of the permits was sufficient to address the allegation." Also, MNR explained that it was unnecessary for MNR to review the policies and procedures because the "alleged contravention was absence of written permission, not contravention of policies and procedures."

The ECO contacted SNC directly to obtain copies of the permits and its policies and procedures. The SNC forwarded the documents the next day. SNC issued eight permits to Tartan Homes related to the construction of Findlay Creek Village under O. Reg. 170/06, from the period of March 2006 to June 2009. SNC issued written permission for interference with a watercourse, construction of a stormwater management facility, installation of culverts, and filling a watercourse on Findlay Creek.

Other Information

For more than a decade, several environmental organizations and members of the public have opposed this particular residential development because of potential adverse impacts on the Leitrim Wetland. The controversy has included an Environmental Review Tribunal hearing and four "bump-up" requests under the *Environmental Assessment Act*. The ECO has also received a number of telephone calls, letters and emails from the public on this issue.

In 2007, some environmental groups disputed the official boundary of the provincially significant wetland in an Ontario Municipal Board (OMB) hearing. Opponents to the proposed development claimed that MNR never officially accepted the 1991 boundary change and that the original (1989) boundary remained in effect. The developers asserted that the 1991 boundary became MNR's official position and proceeded with the project. The OMB concluded that the 1991 boundary represents MNR's official position. In 2008, MNR amended its digital maps to reflect the 1991 Leitrim Wetland boundary.

In December 2009, the ECO was notified by MNR that it received a request under the *Freedom of Information and Protection of Privacy Act* to disclose information relating to this application for investigation. The ECO advised MNR of our consent for the ministry to disclose the requested records, provided that portions containing names, addresses, phone numbers and any other personal information were obscured (blacked out). In January 2010, MNR notified the ECO that it would release the documents in their entirety, but excluding all personal information.

Two *EBR* leave to appeal applications were submitted for permits to take water issued for the construction of the Findlay Creek Village. For a more detailed review of these appeals (Environmental Registry #010-4670 and #010-1607), please refer to Section 7 of this Supplement and to Section 8 of the Supplement to our 2008/2009 Annual Report.

ECO Comment

MNR's decision to deny this application for investigation is understandable, given that SNC had issued permission to alter Findlay Creek and that CAs are not required to issue permission to develop adjacent to a PSW when the development is already approved under the *Planning Act*, as was the case with Findlay Creek Village.

Despite our agreement with MNR's decision, the ECO is troubled by the way MNR addressed this investigation. The ECO believes it is unacceptable that MNR assessed and made a decision regarding an alleged contravention without reviewing the said permits. Verbal confirmation that SNC issued permission under O. Reg. 170/06 of the *CAA* is insufficient when reviewing an application for investigation under the *EBR.* While the ECO recognizes that MNR does not issue permits under the *CAA* and therefore does not normally house these permits, as the subject of an application for investigation, MNR should have obtained copies before making its decision. Furthermore, to determine whether O. Reg. 170/06 was contravened, MNR should have reviewed SNC's policies and procedures, since they define which wetlands SNC shall regulate.

The ECO considers MNR's reason for denying this application valid only because this CA has a very narrow interpretation of regulated wetlands in its watershed – only those identified as PSWs in Official Plans, within the City of Ottawa. Many CAs in Ontario have chosen to regulate locally significant wetlands, regardless of whether they are identified as provincially significant by MNR or designated as PSW by municipalities in official plans. Given the lack of protection the PPS provides for non-provincially significant or non-evaluated wetlands, the CA regulations are currently the primary on-the-ground tool to protect wetlands from development and site alteration in Ontario. MNR should provide additional support to CAs to ensure that the regulation of wetlands under the *CAA* is undertaken consistently across the province.

Review of Applications I2009012 and I2009013:

6.2.4 Alleged Contraventions at a Quarry Site under the *Aggregate Resources Act* (*ARA*), the *Endangered Species Act* (*ESA*), the *Environmental Protection Act* (*EPA*) and the *Ontario Water Resources Act* (*OWRA*)

(Investigation Denied by MNR and MOE)

Geographic Area: Nippissing, District of Parry Sound, Ontario

Background/Summary of Issues

On January 18, 2010, two applicants submitted an application for investigation regarding a licence for an aggregate quarry in Pringle Township. The applicants alleged violations of the *Environmental Protection Act (EPA),* the *Ontario Water Resources Act (OWRA),* the *Aggregate Resources Act (ARA)* and the *Endangered Species Act (ESA).* In February 2008, this site had been issued an aggregate licence, after the geographical coverage of the *ARA* had been expanded to this region in January 2007. The applicants alleged that: the operation standards under the licence were not adhered to; a crushing machine was operated without a required certificate of approval (C of A); and there may have been damage to the habitat of a species at risk (the Blandings turtle) and to a local creek. The *EPA* and *OWRA* are administered by the Ministry of the Environment (MOE), while the *ARA* and *ESA* are administered by the Ministry of Natural Resources (MNR).

The ECO sent this application to both MNR and MOE.

Ministry Response

Ministry of the Environment

On March 29, 2010, MOE advised the applicants that an investigation under the *EBR* was not warranted and would be duplicative, invoking section 77(3) of the *EBR.* MOE noted that the quarry site had been inspected during a joint visit by MOE and MNR on March 24, 2009 – nine months before the *EBR*

application was submitted. The ministry confirmed that the quarry operator had been using a crusher without the required C of A., and that the crusher was ordered shut down until a C of A was issued on May 22, 2009. The ministry did charge the operator with operating equipment without a C of A, and the matter is now before the courts.

MOE also advised that ministry staff had spoken to local residents in 2009, and that no well owners reported any suspected well interference or groundwater quality problems associated with quarry operation.

Ministry of Natural Resources

On April 16, 2010 (20 days after the due date), MNR advised the applicants that an investigation under the *EBR* was not warranted. MNR noted that the ministry had already inspected the site and had taken appropriate enforcement measures. With regard to the concern about species at risk, the ministry explained that subsection 10(1) of the *ESA* does not currently apply to habitat of the Blanding's turtle and consequently no contravention of section 10 of the *ESA* can occur.

ECO Comment

Since MNR's response was received approximately three weeks after the end of the ECO's 2009/2010 reporting year, the ECO will review how both ministries handled this application in our 2010/2011 Annual Report.

Review of Application I2009014:

6.2.5 Alleged Contravention of the *Endangered Species Act, 2007* Section 10(1)(a) in the Nighthawk Forest at Gibson Lake – Endangering the Eastern Cougar (Investigation Denied by MNR)

Background/Summary of Issues

The applicants submitted this application to the ECO on January 25, 2010. They allege that commercial forestry operations in the Nighthawk Forest, in Gibson Lake, contravene the *Endangered Species Act, 2007 (ESA)* due to the damage and/or destruction of Eastern cougar habitat.

The Eastern cougar is currently listed as "endangered" on the Species at Risk in Ontario List. During the passage of the Act, the Eastern cougar was listed on Schedule 1 as an "endangered – regulated" species. As such, it received automatic general habitat protection when the *ESA* came into force on June 30, 2008. Therefore, the applicants claim that the damage or destruction of this species' habitat is prohibited under the *ESA*.

The applicants contend that the Nighthawk Forest is Eastern cougar habitat, as it is located in the boreal forest and sightings of cougars have been reported in the area. The applicants contend that MNR did not follow its Statement of Environmental Values when approving the forest management plan (FMP) for the Nighthawk Forest as it did not take a precautionary or ecosystem approach. The applicants assert that the FMP fails to identify or protect Eastern cougar habitat.

An affidavit was included with the application of one witness who sighted an Eastern cougar in the Gibson Lake area of the Nighthawk Forest in summer 2008. The application also lists several other individuals who can confirm sightings of cougars in the region.

Ministry Response

MNR denied this application for investigation on April 21, 2010.

ECO Comment

The ECO will review the handling of this application in our 2010/2011 Annual Report as the ministry's response falls outside the current reporting period.

SECTION 7

EBR LEAVE TO APPEAL APPLICATIONS

SECTION 7: *EBR* LEAVE TO APPEAL APPLICATIONS

Appeals

Many Ontario statutes provide individuals and companies with a right to appeal government decisions that directly affect them (such as decisions to deny, amend or revoke a permit or approval). Where such appeals relate to an instrument that is prescribed under the *Environmental Bill of Rights, 1993* (*EBR*) as a "Class I" or "Class II" instrument, the ECO is required to post notice on the Environmental Registry, alerting the public to the appeal. The ECO also posts notice of the final disposition of these appeals (i.e., allowed, denied or withdrawn) on the Registry for the public's information.

During the 2009/2010 reporting year, the ECO posted five "instrument holder" notices of appeal on the Registry. All of these appeals related to instruments issued by the Ministry of the Environment (MOE) – including permits to take water (PTTW), certificates of approval (C of A) for air emissions, Cs of A for waste management systems, and a Director's Control Order.

Third-Party Leave to Appeal

The *EBR* expands the basic appeal rights granted to instrument-holders by enabling members of the public to also apply for leave (i.e., permission) to appeal government decisions to issue a "Class I" or "Class II" instrument (such as a permit, licence or approval) to a company or individual. Ontario residents who wish to seek leave to appeal a decision must apply to the appropriate appeal body – generally the Environmental Review Tribunal (ERT) or Ontario Municipal Board (OMB) – within 15 days of the ministry posting its decision on the Registry.

Applicants are not automatically granted permission to appeal. To be granted leave, third-party applicants must overcome several hurdles. First, the applicants must show that they have an interest in the decision. Next, they must satisfy the two-part leave to appeal test set out in section 41 of the *EBR*, by successfully demonstrating that:

1) There is good reason to believe that no reasonable person, having regard to the relevant law and policies, could have made the decision; and
2) The decision could result in significant harm to the environment.

If leave to appeal is granted, the dispute can proceed to a full tribunal hearing.

The ECO posts notices on the Registry of all applications for leave to appeal, as well as posts notice of the decisions made by the appeal tribunal on the applications and appeals. During the 2009/2010 reporting year, members of the public filed ten leave to appeal applications under the *EBR*. All but one of the applications filed during this reporting year involved instruments issued by MOE; the remaining instrument was issued by the Technical Standards and Safety Authority (TSSA), which operates under the Ministry of Consumer and Business Services.

Total leave to appeal applications filed in 2009/2010	**10**
Leave granted	4
Leave denied	4
Leave decision pending (as of March 31, 2010)	2

This section provides a brief summary of each leave to appeal application filed during the 2009/2010 reporting year. Additional details on the instruments and appeals can be found in the notices posted on the Environmental Registry. In addition, the full text of the decision for each appeal can be found on the Environmental Review Tribunal's website at www.ert.gov.on.ca.

Imperial Precast Corp. (Registry #IA04E0896)

Instrument Issued:
In April 2009, MOE granted a C of A for air emissions (under section 9 of the *Environmental Protection Act*) to Imperial Precast Corp, a company that manufactures concrete products. The C of A provides approval for an exhaust system, a baghouse filter to control particulate matter, two storage tanks, and combustion equipment.

Leave Application:
The applicants (Georgina Beattie and others) sought leave to appeal MOE's decision to issue the C of A. The applicants argued that the C of A should include stronger requirements for pollution, noise and odour control in light of the fact that the facility is located in close proximity to a residential neighbourhood.

Leave Decision:
On July 10, 2009, the ERT denied the application for leave to appeal. The ERT found that the applicants had failed to satisfy the first part of the test for leave to appeal – i.e., to establish that no reasonable person could have made the decision to issue the C of A with the terms and conditions imposed by the Director. However, in response to the applicants' concerns regarding noise emissions from the facility, the ERT urged the MOE Director to require completion of an acoustic assessment as soon as possible.

Findlay Creek Properties Ltd. (Registry #010-4670)

Instrument Issued:
On April 27, 2009, MOE issued a PTTW to Findlay Creek Properties Ltd. and 1374537 Ontario Ltd. The PTTW authorizes the proponents to take water from both groundwater and surface water sources at different times over a ten-year period during the construction of a new subdivision (the 'Findlay Creek Village') in the City of Ottawa.

Leave Application:
The applicants (the Greenspace Alliance of Canada's Capital and Sierra Club Canada) sought leave to appeal the MOE Director's decision to issue the PTTW on a number of grounds, including:

- The development is in a provincially significant wetland, which is prohibited by the Provincial Policy Statement, 2005, and the PTTW does not include appropriate conditions to protect the wetland from adverse effects;
- The Director's decision fails to comply with O. Reg. 387/04, the Water Taking and Transfer Regulation under the *Ontario Water Resources Act*; and
- The Director failed to consider and incorporate MOE's Statement of Environmental Values in the PTTW.

Leave Decision:
On July 29, 2009, the ERT granted the applicants leave to appeal, in part. The ERT concluded that the applicants had satisfied the first branch of the test for leave to appeal (i.e., that no reasonable person could have made the decision), but only with respect to a small number of the issues argued under the ground that the Director's decision failed to comply with O. Reg. 387/04. The ERT concluded that the applicants satisfied the second branch of the test, having provided sufficient evidence to demonstrate that the MOE Director's decision to issue the PTTW could result in significant harm to the environment.

Accordingly, the ERT granted the applicants leave to appeal only specific provisions of the PTTW. The remaining grounds raised by the applicants were not allowed as part of the appeal.

Status of Appeal:
The final decision of this appeal is pending.

Thomas Cavanagh Construction Limited (Registry #010-5806)

Instrument Issued:
On June 9, 2009, MOE granted a PTTW to Thomas Cavanagh Construction Limited. The PTTW, which is a renewal of a previous PTTW, authorizes the taking of water for the purposes of industrial dewatering, aggregate washing and dust control at the proponent's quarry in the City of Ottawa. The PTTW authorizes the taking of a maximum of 6,480,000 litres of water per day, 365 days per year, for a period of 10 years.

Leave Application:
The applicant (Ken McRae) sought leave to appeal the entire PTTW. The applicant provided a number of documents dating back to 2001 to support his assertion that he has an interest in the PTTW, and to support his concerns that the PTTW would have a negative impact on the Provincially Significant Huntley Wetlands Complex. The applicant identified several grounds for leave to appeal, including:

- The permit holder has a long history of violating environmental protection laws;
- The permit holder has no regard for the importance of the wetland; and
- No reasonable person could have decided to issue the PTTW because MOE's Statement of Environmental Values, 2005 PTTW Manual and regulations under the *Ontario Water Resources Act* all indicate that a PTTW that would result in the destruction of a Provincially Significant Wetland should not be issued.

Leave Decision:
On August 21, 2009, the ERT denied the application for leave to appeal. The ERT concluded that the applicant met the first part of the leave to appeal test by demonstrating that there is good reason to believe that no reasonable person could have made the decision to issue the PTTW. In particular, the ERT agreed with the applicant that the permit holder's compliance history could be considered under the *EBR* section 41 test and that "a proponent's history of environmental compliance is relevant to whether the conditions in a PTTW will be complied with."

However, the ERT concluded that the applicant had failed to meet the second part of the test, namely that the MOE Director's decision to issue the PTTW could result in significant harm to the environment. The ERT found that, although the applicant asserted that the water-taking by the permit holder has resulted in significant harm to the Provincially Significant Huntley Wetlands Complex, the information supplied by the applicant was "light on supporting material that establishes the second branch of section 41 of the *EBR*" and was not sufficient to enable the ERT to assess the applicant's allegation of significant harm to the environment. As the applicant did not fully satisfy the leave to appeal test, the ERT dismissed the application.

Michael Wade Construction Co. Limited (Registry #010-5869)

Instrument Issued:
On July 3, 2009, MOE granted a PTTW to Michael Wade Construction Co. Limited for the purposes of irrigating the proponent's golf course in the City of Quinte West, County of Hastings. The PTTW authorizes the proponent to take up to 32,750 litres of water per day from a well, plus another 250,000

litres of water per day from each of two ponds, for a maximum of 138 days per year, for a period of 10 years.

Leave Application:
The applicant (the City of Quinte West) sought leave to appeal the PTTW. The applicant argued that there is good reason to believe that no reasonable person could have made the decision to issue the PTTW as it is contrary to the ministry's Statement of Environmental Values, which requires the ministry to assess the cumulative effects of the PTTW on the environment, as well as contrary to section 2.2 of the Provincial Policy Statement, which requires planning authorities to minimize potential negative impacts on the quality and quantity of water and to restrict development or site alteration that may impact water quality and quantity. The applicant also alleged that MOE's decision was based on incomplete hydrogeological data.

Leave Decision:
On September 28, 2009, the ERT granted the application for leave to appeal, in part. The ERT concluded that the applicant had satisfied the two-part test for leave to appeal. However, under each part of the test, the applicant succeeded on only one of the grounds pleaded: that MOE's decision did not assess potential contamination of neighbouring wells from fertilizers, pesticides and herbicides as a result of the water-taking under the PTTW. Accordingly, the ERT limited the scope of the applicant's appeal to this sole ground. The ERT specifically stated that "no other grounds may be pursued in the appeal unless the Tribunal orders otherwise."

Status of Appeal:
The final decision of this appeal is pending.

New Sabby Concrete and Supplies Inc. (Registry #010-6576)

Instrument Issued:
In April 2009, MOE granted a C of A for air emissions to New Sabby Concrete and Supplies Inc., a cement plant in Toronto that emits contaminants, including particulate matter, dust and noise, as a result of its aggregate processing and transfer operations. The new C of A included approval for a storage silo and a natural gas fired process boiler, as well as approval for the facility to operate and emit noise at times of day contrary to the City of Toronto's municipal noise by-law.

Leave Application:
The applicant (the City of Toronto) sought leave to appeal the ministry's decision to issue the C of A on the following grounds:

- The Emission Summary and Dispersion Modelling report for the facility failed to account for all relevant sources of emissions and did not assess the potential environmental impact of trace metal emissions;
- The instrument holder is not compliant with MOE's noise publication NPC-205, entitled "Sound Level Limits for Stationary Sources in Class 1 & 2 (Urban)";
- The facility's "Particulate Matter Control Plan, May 2009" is not sufficient; for example, it fails to specify who is responsible for determining when particulate suppression measures are required, or to specify the required frequency of particulate suppression measures;
- The C of A does not restrict outdoor activity at the facility on weekends or holidays.

Leave Decision:
On November 2, 2009, the ERT granted the application for leave to appeal, in part. The ERT concluded that, under the first part of the section 41 *EBR* test, the applicant had succeeded on only one of the four grounds pleaded: that MOE should not have issued the C of A because the instrument holder is not compliant with the requirements of MOE's noise publication. The ERT agreed with the applicant that the

MOE Director erred by accepting the instrument holder's acoustical assessment for the facility when the assessment did not identify a nearby community centre as a "sensitive receptor."

Under the second part of the section 41 test, the ERT agreed with the applicant that if the C of A does not adequately address the concerns about dust and noise impacts from the facility, "there will remain the potential for significant environmental harm to result." The ERT also accepted the applicant's argument that the Director should have considered the precautionary principle when deciding to issue the C of A.

Status of Appeal:
The final decision of this appeal is pending.

Orgaworld Canada Ltd. (Registry #010-4040 and #010-4049)

Instruments Issued:

On September 16, 2009, MOE issued two Cs of A to Orgaworld Canada Ltd. for a 10-hectare composting facility in Ottawa. The first C of A (waste disposal site) authorized the processing of up to 1,200 tonnes of organic waste per day, including source separated organics, leaf and yard waste, food waste, commercial waste and other non-hazardous organic sludges. The second C of A (air) was a Basic Comprehensive Certificate of Approval that included all sources of air emissions at the facility, addressing: a biofilter, bioscrubber, ammonia scrubber, emergency generator, and fugitive fumes from the compost storage areas.

Leave Application:
The instrument holder (Orgaworld) appealed certain conditions in both of the Cs of A. On October 9, 2009, a third-party applicant (Mark Scharfe) also sought leave to appeal the Cs of A, on behalf of the "Ramsayville Community Association", a group that represents dairy farmers, greenhouse operators, sod farmers, home owners, beef farmers and horse farmers in the area surrounding the proposed facility. The third-party applicant sought leave to appeal the Cs of A on various grounds, including:

- The odour of the materials (including rotting cat feces, fruits and vegetables) will greatly affect the natural environment in the area surrounding the composting facility;
- There have been hundreds of complaints about the odour of rotting diapers, vegetables, fruit and garbage at other sites owned by the instrument holder;
- The instrument holder has a history of "total and flagrant disregard for the law," raising concerns about how the instrument holder will satisfy its obligations under the C of A to monitor the functions of the facility – for example, the instrument holder started construction of the facility without having obtained the required municipal permits or approvals and was issued a stop work order by the municipality;
- There is a substantial risk that blasting from the adjacent quarries will rupture the concrete holding tanks and cement pads of the composting facility, resulting in runoff and leakage from the holding tanks that will contaminate local water resources and harm residents, animals, livestock, vegetables and crops.

Leave Decision:
On October 15, 2009, the ERT informed the applicant that his application for leave to appeal was received too late as it was beyond the 15-day period permitted under the *EBR*. On December 2, 2009, the ERT issued a formal decision, denying the application for leave to appeal. The decision on the instrument-holder appeal is still pending.

K4S Gas & Convenient Store Inc. (Registry #010-7553)

Instrument Issued:
In September 2009, the TSSA granted a variance to K4S Gas & Convenient Store Inc., in the town of Stayner, from a requirement under the Liquid Handling Fuel Code that underground fuel storage tanks must be double walled. The TSSA allowed the proponent to re-use its existing single-walled underground, fibreglass storage tanks.

Leave Application:
The applicant (Colleen Newell) sought leave to appeal the TSSA's decision. The applicant argued that the Director overstepped the provisions of the Liquid Fuel Handling Code, and that the TSSA policy for granting variances for the re-use of underground single-walled tanks is outdated and does not adequately address the effects of ethanol-based fuels on fibreglass tanks. The applicant also argued that TSSA's decision failed to consider its Statement of Environmental Values by failing to prevent discharges of hydrocarbon fuels into the soil and water supply and failing to adopt environmentally sound technology with respect to the storage of hydrocarbon fuels.

Leave Decision:
On December 1, 2009, the TSSA Director denied the applicant's request for leave to appeal on the basis that the applicant had failed to meet the section 41 *EBR* leave to appeal test. The Director explained that K4S Gas had met the required conditions for a variance for the re-use of single-walled underground storage tanks – K4S has submitted information in support of its application (including a precision leak test of the storage tank and a report prepared by an environmental consultant) that demonstrated that the facility "should not present a significant harm to the environment." The Director found that the applicant did not provide any real foundation to grant the request for leave. Therefore, the Director dismissed the appeal.

M.A.Q. Aggregates Inc. (Registry #010-1673)

Instrument Issued:
On December 3, 2009, MOE granted a PTTW to M.A.Q. Aggregates Inc., which authorizes the company to take groundwater for the McCarthy Quarry located in Simcoe County. The permit was granted for 5 years. There was considerable public interest regarding this application, and significant concern that the water-taking would lead to unacceptable impacts to surrounding water resources.

Leave Application:
The applicants (Jodi McIntosh and the Trent-Talbot River Property Owners Association) sought leave to appeal the ministry's decision to issue the PTTW, or, alternatively, if the PTTW stands, the terms and conditions of the PTTW. The applicants raised several grounds, including:

- The PTTW violates the doctrine of *res judicata* (i.e., the matter has already been decided) and the doctrine of abuse of process, as a similar PTTW had previously been issued and then revoked by MOE, and therefore offends the common law;
- The PTTW is inconsistent with provisions in O. Reg. 387/04 under the *OWRA*;
- The PTTW is inconsistent with some of the guidelines/policies in the PTTW Manual, 2005;
- The PTTW is inconsistent with the principles set out in the ministry's Statement of Environmental Values, including to adopt an ecosystem approach to environmental protection and resource management and to consider the cumulative effects on the environment;
- The PTTW is based on unsubstantiated, inaccurate or misinterpreted information;
- The Director did not consider "Guideline F-15, Financial Assurance Guideline for the Ministry of the Environment, November 2005"; financial assurance should be a condition of the PTTW;
- The PTTW issued by the Director could result in significant harm to the environment; the

dewatering activity could interfere with the neighbours' water supply.

Leave Decision:
On July 10, 2009, the ERT granted the application for leave to appeal, in part. The ERT found that the applicants had met the first part of the test for leave to appeal on the ground that the Director failed to adequately consider the cumulative effects of the McCarthy Quarry when the PTTW was issued. However, the ERT found that the applicants had not met the first part of the section 41 test for any other ground. The ERT also found that the applicants had met the second part of the test – i.e., that the PTTW could result in significant harm to the environment. Evidence provided by the applicants suggests that there may be a risk to the applicants' water supply from dewatering the quarry, as well as potential harm to other water users in the area of the quarry.

Since both parts of the test were met, the ERT granted the applicants' request for leave to appeal on the specified ground; no other grounds may be raised at the appeal.

Status of Appeal:
The final decision of this appeal is pending.

Maple Stamping (Registry #010-0536)

Instrument Issued:
In November 2009, MOE granted a C of A for air emissions under section 9 of the *EPA* to Cosma International Inc., operating as Maple Stamping, for a metal stamping plant in the City of Vaughan. The ministry issued a Basic Comprehensive Certificate of Approval, which is a single C of A that includes all sources at the facility. The new C of A replaced all of the facility's existing Cs of A, as well as added new or historically unapproved sources of emissions from the automotive parts manufacturing facility.

Leave Application:
The applicant (Tesmar Holdings Inc.) sought leave to appeal the ministry's decision to issue the C of A. The applicant argued that noise and vibration emissions from the proposed metal stamping plant could cause environmental harm on the sensitive land uses in the vicinity of the plant, and that these noise and vibration impacts were not properly assessed. The applicant also argued that the C of A should not have been issued as it raises broader land use compatibility issues. Specifically, the C of A authorizes a use prohibited under the local by-law, and it also relates to a land use planning issue that is the subject of an ongoing appeal before the OMB.

Leave Decision:
Leave decision is pending.

Solaris Energy Partners Inc. (Registry #010-7409)

Instrument Issued:
In September 2009, MOE granted a C of A for air emissions to Solaris Energy Partners Inc. to operate the Stardale Solar Park located in the Township of East Hawkesbury. The facility is a solar energy site that uses stationary solar panels. The C of A authorizes the noise emissions from the operation of the facility's 60 inverters and 30 transformers.

Leave Application:
The applicants (Shawn Wylie and 2216122 Ontario Inc.) sought leave to appeal the C of A. The applicants argued that MOE did not provide sufficient opportunity for the public to provide input into the ministry's decision to issue the C of A, and did not give due consideration to public input or evidence provided. The applicants also argued that several of the conditions in the C of A were not specific enough or were otherwise insufficient.

Leave Decision:
Leave decision is pending.

SECTION 8

STATUS OF ECO AND PUBLIC REQUESTS TO PRESCRIBE NEW OR EXISTING MINISTRIES FOR LAWS, REGULATIONS OR PROCESSES UNDER THE *EBR*

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SECTION 8: STATUS OF ECO AND PUBLIC REQUESTS TO PRESCRIBE MINISTRIES, LAWS, INSTRUMENTS OR PROCESSES UNDER THE *EBR*

One of the challenges facing the Environmental Commissioner of Ontario (ECO) and the Ontario government is keeping the *Environmental Bill of Rights, 1993* (*EBR)* in sync with new laws and government initiatives. The ECO strives to ensure that the *EBR* remains up-to-date and relevant to Ontario residents who want to participate in environmental decision-making. The Commissioner and his staff constantly track legal and policy developments at the prescribed ministries and in the Ontario government as a whole, and encourage ministries to update the *EBR* regulations to include new laws and prescribe new government initiatives that are environmentally significant.

The Need to Prescribe New Acts, Ministries and Processes under the EBR

There are five main factors that may trigger the need to update the regulations under the *EBR* to include new laws, ministries, instruments and processes:

New Environmentally Significant Acts and Regulations:
The Ontario government constantly enacts new legislation, some of which has environmental implications. However, before the public can request investigations and reviews of the new law or can participate in decisions related to the implementation of the law (including decisions to develop regulations or issue instruments under the law), the new law must be added to the list of prescribed statutes set out in O. Reg. 73/94, General, made under the *EBR*.

When the Ontario government passes a new law that is environmentally significant, the ECO reviews the law to determine whether it should be prescribed for the purposes of the *EBR*. Where appropriate, the ECO will contact the responsible deputy minister to ask the ministry to prescribe the new law under the *EBR*. Prescribing new environmentally significant laws quickly under the *EBR* is important as it helps to ensure that Ontario residents are extended the rights to participate in the decision-making process on proposed new regulations and instruments issued under the new law.

In some cases, the new law might amend existing laws that are already prescribed (such as the *Green Energy and Green Economy Act, 2009*). In these cases, the ECO may request that the ministry determine if any new environmentally significant instruments are created under the amended law, and if so, that the ministry consider amending O. Reg. 681/94, Classification of Proposals for Instrument, made under the *EBR*. Similarly, when a ministry files a new regulation, the ECO will review the regulation to determine if any new environmentally significant instruments are created under it that should be included in O. Reg. 681/94. Inclusion of such instruments under the *EBR* ensures the public's right to participate in environmentally significant decisions, file leave to appeal applications, and request *EBR* investigations and reviews.

Re-Organization of Ministry Portfolios:
From time to time, the Ontario government re-organizes ministries, creates new ministries, or redistributes portfolios between ministries. For example, in June 2009, the Ontario government announced that responsibility for certain aspects of forestry management was being moved from the Ministry of Natural Resources (MNR) to the new Ministry of Northern Development, Mines and Forestry (MNDMF) and that the Consumer Services portfolio (including oversight of the Technical Standards and Safety Authority) was being transferred from the Ministry of Small Business and Consumer Services to the newly created Ministry of Consumer Services (MCS).

Transfer of Program to an Outside Agency or Organization:
When the government transfers oversight of a program that is subject to the *EBR* to an outside agency or organization, the government must prescribe the new governing legislation, or the existing rights under the *EBR* will be lost.

For example, when the *EBR* was proclaimed in 1994, gasoline handling permits (including approvals for underground storage tanks) were prescribed instruments issued by the Ministry of Consumer and Commercial Relations under the *Gasoline Handling Act* (*GHA*). In 2000/2001, the *GHA* was replaced by the *Technical Standards and Safety Act, 2000* (*TSS Act*), and the power to issue gasoline handling permits was transferred to the newly formed Technical Standards and Safety Authority (TSSA), under O. Reg. 217/01, Liquid Fuels. made under the *TSS Act*. This change required amendments to the regulations under the *EBR* to ensure that the gasoline handling permits would remain prescribed under the *EBR*. In 2002, the ECO asked MOE and the responsible ministry to update the *EBR* regulations to prescribe the relevant portions of the *TSS Act*, O. Reg. 217/01 and the Liquid Fuels Handling Code under the *TSS Act.* O. Reg. 73/94 was updated in 2003 to clarify that the *TSS Act* was prescribed for posting new regulations. However, O. Reg. 681/94 was not amended to reflect the changes until May 2010, eight years after the ECO first raised the issue with the ministries.

ECO Recommendations Resulting from Internal Reviews:
The ECO sometimes recommends that a ministry, agency, law or process be prescribed under the *EBR* based on the outcome of an ECO review. In the current reporting period, the ECO recommended that the Ministry of Research and Innovation (MRI), established in June 2005, and the Ministry of Community Safety and Correctional Services (MCSCS) be prescribed for Statement of Environmental Values consideration, Registry notice and comment, regulation proposal notices and for applications for review and investigation. The ECO also recommended that the *Fire Prevention and Protection Act, 1997*, a law administered by MCSCS, be prescribed for posting regulations.

Applications from the Public to Prescribe a Ministry, Law or Process:
Lastly, members of the public may file an application for review requesting that a certain ministry that is not currently prescribed (such as the Ministries of Education and Finance) be prescribed under the *EBR*, or that O. Reg. 73/94 be amended to require a currently prescribed ministry to accept applications for review or investigation. The ECO has received nine applications of this nature since February 1995.

<u>*Progress in Prescribing Acts, Ministries and Processes in the 2009/2010 Reporting Year*</u>

If a ministry agrees with a request from the ECO or the public to prescribe a new law, the ministry must work with MOE, which is responsible for administering the *EBR*, to ensure that the appropriate amendments to the regulations under the *EBR* are made and that the proposed changes are posted on the Environmental Registry for public comment.

Usually this process takes between one and three years. In some cases, however, the process can take much longer. Table 1 below illustrates the current status of the ministries' efforts to prescribe various Acts, regulations or instruments. Table 2 provides an update on the government's status of prescribing certain ministries or expanding the number of *EBR* processes that apply to a prescribed ministry, as requested by either the ECO or the public. As indicated in Table 1, there have been serious delays in making certain laws subject to the *EBR*. The ECO is concerned that these lengthy delays deprive the public of important rights to participate in environmentally significant decisions, file leave to appeal applications, and request *EBR* investigations and reviews.

In the 2009/2010 reporting period, the ECO observed some progress in expanding *EBR* coverage. In September 2009, MOE filed important and necessary amendments to O. Reg. 73/94 by prescribing the *Green Energy Act, 2009,* the *Ontario Heritage Act*, the Ministry of Energy and Infrastructure (MEI) and MCS, as well as revising the names of some ministries listed in O. Reg. 73/94.

In May 2010 (early in the 2010/2011 reporting period), MOE filed more important changes to O. Reg. 73/94, prescribing the *Lake Simcoe Protection Act, 2008*, the *Toxics Reduction Act, 2009*, and the *Food*

Safety and Quality Act, 2001. On the same date, MOE also made changes to O. Reg. 681/94, including prescribing instruments issued under the *Endangered Species Act, 2007*, and the *Safe Drinking Water Act, 2002*. The ECO commends the ministries for completing this work. However, many needed updates and changes (as described in the tables below) remain unaddressed.

Table 1 - Status of ECO Requests to Prescribe New Laws, Regulations and Instruments under the *EBR* (as of June 1, 2010)

Act (Ministry)	ECO Request to Prescribe	Status as of June 1, 2010	ECO Comment
Building Code Act, 1992 (*BCA*) (MMAH)	In October 2006, the ECO's 2005/2006 Annual Report recommended that MMAH and MOE fully prescribe the *BCA* under the *EBR* for regulation-making and instrument proposal notices and applications for reviews.	In March 2007, MMAH and MOE advised the ECO that MMAH has no plan to implement the ECO recommendation on prescribing the *BCA.*	This is an unfortunate decision. It means that transparency and accountability for MMAH policy- and law-making on green building materials and energy technologies will be reduced. In May 2009, the *Green Energy and Green Economy Act*, *2009* (*GEGEA*) was passed, which contains amendments to the *BCA* that make energy efficiency a central tenet of the Building Code. Given this new development and growing public concern about climate change, the ECO urges MMAH to reconsider its decision.
Endangered Species Act, 2007 (ESA) (MNR)	The ECO's 2006/2007 Annual Report recommended that MNR and MOE fully prescribe the *ESA* under the *EBR* for regulation-making and instrument proposal notices and applications for reviews. In May 2008, the ECO urged MNR to move swiftly to prescribe certain instruments under O. Reg. 681/94 in light of the imminent coming into force of the Act.	The *ESA* was prescribed for most purposes of the *EBR* in June 2008. The *ESA* was prescribed under sections 3, 6, 9 and 12 of O. Reg. 73/94, with an exception from sections 3 and 6 of O. Reg. 73/94 for non-discretionary regulations made under section 7 of the *ESA*. In May 2010, MOE prescribed specific permits and agreements issued under the *ESA* as Class I instruments under O. Reg. 681/94.	The ECO notes that instruments that are subject to the *Environmental Assessment Act* (*EAA*) exception contained in s. 32 of the *EBR* will not be subject to the *EBR* notice requirements. However, MNR states that it intends to continue voluntarily posting information notices for comment where notice is required under an *EAA* process.

Food Safety and Quality Act, 2001 (FSQA) (OMAFRA and MOE)	In 2001, the ECO requested that OMAFRA prescribe the *FSQA* for the full range of rights including regulation proposal notices and applications for review and investigation under the *EBR*. In June 2002, OMAFRA informed the ECO that it did not consider the *FSQA* to be environmentally significant, as the primary purpose of the Act is to provide for the safety and quality of food. However, in 2004, OMAFRA began developing a new regulatory framework for deadstock, including repeal of the *Dead Animal Disposal Act* and Regulation 263 under this Act, and the development of new deadstock disposal regulations under the *FSQA* and *Nutrient Management Act, 2002*. In November 2008, the ECO wrote to OMAFRA saying it is essential to prescribe the *FSQA* to provide greater certainty and clarity and ensure that future environmentally significant amendments to *FSQA*, its regulations, and	In summer and fall 2009, OMAFRA and the ECO met to discuss the various issues related to prescribing the *FSQA* and instruments issued under the *FSQA*. In May 2010, MOE amended O. Reg. 73/94 under the *EBR* to prescribe regulations under the *FSQA* that relate to the disposal of deadstock, and amendments to or the replacement of O. Reg. 105/09, Disposal of Deadstock, made under the *FSQA* for the purposes of posting regulations and the whistle blower provisions under the *EBR*.	The ECO commends the ministries for prescribing the *FSQA* for new regulations. The ministries are now required to give notice to the public of any proposed environmentally significant *FSQA* regulation related to deadstock disposal and O. Reg. 105/09. However, the recent amendments indicate that MOE and OMAFRA do not intend to prescribe *FSQA* instruments. This means that a number of *FSQA* instruments will not be subject to applications for review, SEV consideration, and other *EBR* rights. The ECO finds this decision on the instrument issue very disappointing.

	instruments are posted.		
Green Energy Act, 2009 (GEA) (MEI and MOE)	In May 2009, the ECO requested that MEI prescribe the *GEA* under the *EBR* for regulation and instrument proposal notices and applications for review and investigation.	In September 2009, MOE prescribed the *GEA* under the *EBR*.	The ECO commends MOE and MEI for quickly making this regulatory change.
Section 23.1 of the *Lakes and Rivers Improvement Act (LRIA)* (MNR)	The *Reliable Energy and Consumer Protection Act, 2002* received Royal Assent in June 2002 and created section 23.1 of the *LRIA* (replacing the former section 23). This provision regulates water levels on rivers and lakes through water management plans (WMPs). In our 2002/2003 Annual Report, the ECO encouraged MNR to amend O. Reg. 681/94 to include WMPs issued under section 23.1 as prescribed instruments.	The repealed section 23 of the *LRIA* remains as a prescribed instrument under the *EBR,* but it appears to be of little or no force and effect. MNR posted information notices for two WMPs during the 2009/2010 reporting period. These notices should have been subject to public notice and comment under the *EBR*. In March 2006, MNR advised the ECO that it is not proceeding with the classification of WMPs as instruments under the *EBR* because its Water Management Planning Guidelines for Waterpower "establishes a comprehensive approach to public engagement." MNR also noted that the majority of WMPs are complete or close to completion.	The ECO finds this decision very disappointing.

Lake Simcoe Protection Act, 2008 (LSPA) (MOE)	In April 2009, the ECO requested that MOE prescribe the *LSPA* under the *EBR* for regulation and instrument proposal notices and applications for review and investigation. The ECO noted that the protection of water quality and shoreline habitat and the provision of water and wastewater services are clearly environmentally significant matters. In addition, many regulations that may be made under the *LSPA* are similarly environmentally significant.	On May 14, 2009, MOE informed the ECO that MOE staff were finalizing the regulations under the *LSPA* and completing work on the Lake Simcoe Protection Plan, and that the ECO's request to prescribe the *LSPA* would be considered as part of these processes. In June 2009, MOE passed O. Reg. 219/09, a general regulation under the *LSPA* that addresses various matters related to implementing the Lake Simcoe Protection Plan including transition and the watershed boundary. This regulation was not posted as a proposal on the Registry, highlighting the need to prescribe the *LSPA* under the *EBR*. In May 2010, MOE amended O. Reg. 73/94 to prescribe the *LSPA*.	The ECO is pleased that MOE prescribed the *LSPA*, but urges the ministry in the future to prescribe Acts as soon as possible so that regulations under the Act may be posted as proper proposal notices on the Registry.
Nutrient Management Act, 2002 (NMA) (OMAFRA and MOE)	The ECO wrote to OMAFRA in 2001, 2002 and 2003 requesting that it prescribe the *NMA* under the *EBR* for regulation and instrument proposal notices and applications for review and investigation. In January 2006, the *NMA* and its regulations were	OMAFRA advised the ECO that the purpose of *EBR* investigations and prescribing of instruments is to achieve transparency, and that this is already achieved by clearly articulating the requirements for NMSs and NMPs in O. Reg. 267/03, the general regulation made under the *NMA*. OMAFRA also noted	The ECO strenuously disagrees with OMAFRA's approach. Instruments issued under O. Reg. 267/03 will not be subject to *EBR* notice and comment processes, reviews, investigations, SEV consideration, etc. Unless NMSs and NMPs are designated as instruments, the public and municipalities will not be notified on the Registry of local nutrient

	prescribed for notice and comment and for applications for review. However, the *NMA* and its regulations were not prescribed for applications for investigation, and Nutrient Management Strategies (NMSs) and Nutrient Management Plans (NMPs) were not prescribed as instruments. In March 2008, the ECO asked OMAFRA for an update on its work prescribing the *NMA* for applications for investigation and prescribing NMSs and NMPs.	that there is sensitivity in the farm community to posting NMSs and NMPs on the Registry because they contain proprietary information, and that public access to this information could cause business problems for these farmers.	management activities, and residents will be unable to request an investigation under the *EBR* into possible non-compliance and request reviews of specific NMSs and NMPs.
Ontario Heritage Act, 2005 (*OHA*) (MCL)	The *OHA* is the legislative framework for heritage conservation in Ontario. In 2005, the *OHA* was amended to formally recognize the natural environment conservation function of the Ontario Heritage Trust. In June 2005, the ECO requested that MCL prescribe the *OHA* for regulation proposal notices and for applications for review under the *EBR*.	In July 2005 MCL committed to review the matter; however, no timeline was provided. In July 2008 the Deputy Minister of MCL advised the ECO that her ministry had completed its review and will be working with MOE to prescribe the *OHA* for the purposes of posting proposals for regulations. In September 2009, the *OHA* was prescribed under the *EBR*.	The ECO commends MCL for completing its review and making this regulatory change.

Provincial Parks and Conservation Reserves Act, 2006 (PPCRA) (MNR)	In March 2009, MNR posted an information notice (Registry # 010-6162) stating that all proposed instruments under the *PPCRA* are covered by the section 32 exception under the *EBR*, as a result of the Class EA for Provincial Parks and Conservation Reserves. However, MNR stated that it would voluntarily post information notices that invite public comment for all proposals to enter into commercial agreements, under section 14 of the Act for new resort/hotel development within a provincial park or conservation reserve. In spring 2009, the ECO sent several letters to MNR and MOE expressing concerns about MNR's proposed reliance on the section 32 *EBR* exception for *PPCRA* instruments.	In May 2010, MOE filed amendments to O. Reg. 681/94, in which it prescribed instruments issued under the *ESA*, but not those issued under the *PPCRA.*	The ECO finds MNR and MOE's approach on this issue very disappointing. A number of *PPCRA* instruments (i.e. those issued under sections 19(3), 35(2) and 14) will not be subject to applications for review, SEV consideration, s. 118 judicial reviews and other *EBR* rights.
Public Lands Act (PLA) (MNR)	Many MNR instruments are not classified for the purposes of the *EBR* due to MNR's application of the s. 32 *EBR* exception in developing its list of classified instruments. This includes instruments under the *PLA* that provide for the sale	No update.	Under the *GEA* and *GEGEA*, a new regime for renewable energy approvals has been introduced, increasing the likelihood that public lands will be made available for renewable energy projects. Since existing *EAA* requirements were removed in relation to these projects, the unclassified instruments may not be subject to any public participation processes, under

	or lease of public lands, for orders releasing land from letters patent and for licences of occupation.		either the *EAA* or *EBR*. As a result, it is of the utmost importance that MNR amend its classification of prescribed instruments under O. Reg. 681/94 to include all environmentally significant instruments.
Safe Drinking Water Act, 2002 (*SDWA*) (MOE)	In April 2008, the ECO wrote to MOE requesting that licences issued under the *SDWA* be prescribed as instruments under the *EBR*.	In May 2010, MOE filed amendments to O. Reg. 681/94, prescribing specific instruments issued under the *SDWA* as Class I proposals for instruments.	The ECO is pleased that certain instruments, including licences, have been prescribed under the *EBR*.
Technical Standards and Safety Act, 2000 (*TSS Act*) (MCS and MOE)	When the *EBR* was proclaimed in 1994, gasoline handling permits (including underground storage tank approvals) were prescribed instruments issued by the Ministry of Consumer and Commercial Relations under the *Gasoline Handling Act* (*GHA*). In 1997, the Technical Standards and Safety Authority (TSSA) was established and the power to issue gasoline handling permits was transferred to the TSSA. In 2000/2001, the *GHA* was repealed and the gasoline handling permits were moved to O. Reg. 217/01, Liquid Fuels, and the Liquid Fuels Handling Code, made under the *TSS Act*.	In May 2010, MOE finally amended O. Reg. 681/94 to reflect the changes.	The ECO is pleased that MCS and MOE made these needed regulatory updates.

	While O. Reg. 73/94 was updated in 2003 to clarify that the *TSS Act* was prescribed for posting new regulations, the ECO asked MOE and the ministry overseeing the TSSA to update O. Reg. 681/94 to reflect the changes.		
Toxics Reduction Act, 2009 (TRA) (MOE)	The ECO wrote to MOE in October 2009 requesting that it prescribe the *TRA* under the *EBR* for regulation and instrument proposal notices and applications for review and investigation. The ECO noted that the *TRA* requires regulated facilities to track and quantify the toxics they use and create, to develop plans to reduce their toxic substances, and to make summaries of their plans available to the public.	In September 2009 and again in April 2010, MOE posted information notices on the Registry for proposed regulations under the *TRA* (Registry # 010-7792 and 010-9349). These information notices highlight the need to prescribe the *TRA* under the *EBR* in a more timely manner. In May 2010, MOE amended O. Reg. 73/94 to prescribe the *TRA* for the purposes of posting environmentally significant proposed regulations, making the *TRA* and its regulations subject to applications for review and investigation, and subject to the whistle blower provisions under the *EBR*.	While the ECO commends the ministries for prescribing the *TRA* for new regulations, the ECO is disappointed that MOE did not prescribe any *TRA* instruments. This means that *TRA* instruments will not be subject to applications for review, SEV consideration, s. 118 judicial reviews and other *EBR* rights.

Table 2 - Status of Public and ECO Requests to Prescribe New Ministries and Agencies (as of June 1, 2010)

Ministry or Process	ECO or Ontario Resident Request to Prescribe	Status as of June 1, 2010	ECO Comment
Ministry of Aboriginal Affairs (MAA and MOE)	The Ministry of Aboriginal Affairs (MAA) was established by the Ontario government in November 2007 with a mandate to protect the rights of Aboriginal peoples, and promote the health and economic well being of Aboriginal Ontarians. In November 2007, the ECO wrote to MAA requesting that the ministry be prescribed for Statement of Environmental Values (SEV) consideration, Registry notice and comment, regulation proposal notices and for applications for review under the *EBR.*	In early 2009, in response to an ECO request for an update, MOE explained that MOE and MAA have discussed the potential MAA activities that might be subject to the *EBR* and the Registry. MOE also offered its ongoing assistance as MAA reviews its options. In the fall of 2009 MOE indicated that discussions with MAA were ongoing.	The ECO urges MOE and MAA to move forward on this matter.
Ministry of Consumer Services (MCS and MOE)	In July 2008, MCS's mandate was expanded to include oversight of TSSA. In September 2008, the ECO wrote to MCS requesting that the ministry be prescribed for SEV consideration, Registry notice and comment, and oversight of the rights provided by the *TSS Act*.	In September 2009, MCS was prescribed under the *EBR*.	Prescribing MCS is appropriate. Previous consumer ministries with oversight responsibility for the TSSA were subject to the *EBR*.
Ministry of Community Safety and Correctional Services (MCSCS and	In July 2009, the ECO wrote to MCSCS requesting that the ministry be prescribed for SEV consideration, Registry notice and	In October 2009, MCSCS advised the ECO that the ministry had decided not to move forward with the ECO's	The ECO is disappointed with MCSCS's approach. The ECO disagrees with MCSCS's position on the *FPPA* and notes that prescribing MCSCS would allow the public to

MOE)	comment, regulation proposal notices and for applications for review and investigation under the *EBR*. The ECO also recommended that the *Fire Prevention and Protection Act, 1997, (FPPA)* administered by MCSCS, be prescribed for posting regulations.	proposals. MCSCS determined that the *FPPA* should not be prescribed at this time because the statute does not have any environmental impacts. Moreover, it stated that MOE is responsible for providing advice on cleaning up the environmental impacts associated with fires.	participate in future consultations on environmentally significant aspects of its work.
Ministry of Education (EDU and MOE)	In May 2004, two applicants requested that MOE review O. Reg. 73/94 to determine whether the Ministry of Education (EDU) should be prescribed under the *EBR*. (A similar request was made to MOE in 1999 and was reviewed in the ECO's 2000/2001 Annual Report.) In September 2005, MOE completed its review and recommended prescribing EDU for the purposes of SEV consideration. (For the ECO comment on this review, please see pages 123-128 of the ECO's 2005/2006 Annual Report.) In November 2005, MOE posted a proposal notice (Registry # RA05E0016) to amend O. Reg. 73/94 by prescribing EDU for the purposes of SEV considerations for	In 2009, MOE and EDU stated that EDU is committed to supporting the environment in education. With the assistance of MOE, EDU staff are currently reviewing potential elements for a SEV and intend to post a decision notice relating to the status of EDU under the *EBR*. On July 9, 2009, the ECO wrote to the Deputy Minister of EDU and invited EDU to work with the ECO to ensure that Ontario students receive basic information about their rights under *EBR* as part of Ontario's basic curriculum. The ECO also noted that information about the *EBR* was not included in some recent EDU publications on environmental	The ECO urges MOE and EDU to move forward on this matter.

	environmentally significant proposals. The proposal stated, however, that EDU would not be required to post environmentally significant proposals for changes to policy and curriculum on the Registry. The proposal remains on the Registry. In early 2009, the ECO requested an update from MOE.	education. In early May 2010, the Deputy Minister of EDU advised the ECO that EDU would direct MOE to develop regulatory changes which would prescribe EDU for the purposes of creating a SEV and considering the SEV when EDU makes environmentally significant proposals, consistent with MOE's November 2005 Registry proposal.	
Ministry of Energy and Infrastructure (MEI and MOE)	On June 20, 2008, the Premier announced that the former ministries of Energy and Public Infrastructure Renewal would be merged into the Ministry of Energy and Infrastructure (MEI). In August 2008, the new ministry began reviewing how the *EBR* should apply to its work.	In September 2009, MEI was prescribed under the *EBR*. MEI also posted a draft of its new SEV on the Registry in December 2009.	
Ministry of Health Promotion (MHP and MOE)	The Ministry of Health Promotion (MHP) was established by the Ontario government in July 2005 with a mandate to promote the health and well being of Ontarians. In June 2006, the ECO wrote to MHP requesting that the ministry be prescribed	In the fall of 2009, MOE indicated that discussions with MHP are ongoing. MOE stated that MOE and MHP have discussed potential MHP activities that might be subject to the *EBR* and the Registry.	

	for SEV consideration, Registry notice and comment, regulation proposal notices and for applications for review under the *EBR.* In the ECO 2006/2007 Annual Report, the ECO again urged MOE and MHP to ensure that the ministry is prescribed under the *EBR* before the end of 2007. In early 2009, the ECO requested an update from MOE.		
Ministry of Research and Innovation (MRI and MOE)	The Ministry of Research and Innovation (MRI) was established by the Ontario government in June 2005. According to MRI's website, its mandate includes: developing an integrated innovation strategy and guiding its delivery; and investing in green technology that balances Ontario's commitment to both the environment and the economy. In July 2009, the ECO wrote to MRI requesting that the ministry be prescribed for SEV consideration, Registry notice and comment, regulation proposal notices and for applications for review under the *EBR*. The ECO noted the potential for MRI to make nanotechnology-related decisions, which may affect the	In February 2010, MRI advised the ECO that it had reviewed the ECO's comments in our 2008/2009 Annual Report on nanotechnology-related decisions but disagreed with the ECO's conclusion that MRI should be prescribed. In addition, MRI explained that the posting of proposals for funding of research on the Registry would be strongly resisted by MRI's stakeholders and funding recipients and its peer review process for funding proposals is internationally-recognized.	The ECO finds MRI's approach very disappointing. The ECO had suggested that MRI consult on its program and policy development with interested stakeholders, not on specific funding decisions for projects.

	environment and is of growing public interest.		
Ontario Heritage Trust (MNR, MCL and MOE)	The *Ontario Heritage Act, 2005* (*OHA*), which provides the legislative framework for heritage conservation in Ontario, was amended in 2005 to formally recognize the natural environment conservation function of the Ontario Heritage Trust (OHT). The OHT, an agency of the Ministry of Culture (MCL), is the province's lead heritage agency and is dedicated to identifying, preserving, and promoting Ontario's heritage for the benefit of present and future generations. OHT holds in trust a portfolio of more than 130 natural heritage properties, including over 90 properties that are part of the Bruce Trail. Protected land includes the habitats of endangered species, rare Carolinian forests, wetlands, sensitive features of the Oak Ridges Moraine, nature reserves on the Canadian Shield and properties on the Niagara Escarpment. In March 2006, the ECO requested that MCL prescribe OHT for: SEV consideration and Registry notice and comment for	In August 2007, MCL indicated to the ECO that it was not planning to implement the ECO recommendation because OHT is not a policy-making agency. All policies and programs related to the work of OHT are developed by MCL and MNR; the OHT merely implements those programs. MCL also noted that MNR would ensure that future changes to the NSLASP would be posted on the Registry by MNR. MCL also stated that it continues to study whether it will prescribe the *OHA* for the purposes of posting *OHA* regulations and instruments issued by MCL on the Registry. In July 2008, MCL reconfirmed that it will not be prescribing OHT under the *EBR*.	The ECO is very disappointed by MCL's approach and feels that the current funding, policy-making and reporting relations and functions are confused and lack transparency because they are fragmented between MNR, MCL and OHT. The ECO notes that MCL retains important decision-making powers and functions related to the work of OHT, including decisions on the funding of OHT.

	proposal notices for environmentally significant Acts and policies. This would ensure that future changes to the Natural Spaces Land Acquisition and Stewardship Program (NSLASP) administered by the OHT would be posted on the Registry for comment. Changes made to the NSLASP in late 2005 were not posted as a regular proposal notice on the Registry. The ECO also requested that MCL post a regular Registry notice about the NSLASP on behalf of the OHT. The ECO's 2005/2006 Annual Report recommended that OHT become an *EBR*-prescribed agency (see pages 76-79).		

SECTION 9

UNDECIDED PROPOSALS

SECTION 9: UNDECIDED PROPOSALS

As required by section 58 of the *EBR*, the ECO is required to produce a list of all proposal notices posted on the Environmental Registry between April 1, 2009 and March 31, 2010 that were not decided by March 31, 2010. A detailed list is available from the ECO by special request.

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