ENVIRONMENTAL COMMISSIONER OF ONTARIO

2001–2002 ANNUAL REPORT

DEVELOPING SUSTAINABILITY

ECO CEO

A society grows great when old men plant trees whose shade they know they shall never sit in.

–Greek proverb

Environmental
Commissioner
of Ontario

Commissaire à
l'environnement
de l'Ontario

Gord Miller, B.Sc, Sc.
Commissioner

Gord Miller, B.Sc, Sc.
Commissaire

September 2002

The Honorable Gary Carr
Speaker of the Legislative Assembly
Room 180, Legislative Building
Legislative Assembly
Province of Ontario
Queen's Park

Dear Mr. Speaker:
In accordance with Section 58 of the *Environmental Bill of Rights, 1993*, I am pleased to present the 2001/2002 annual report of the Environmental Commissioner of Ontario for your submission to the Legislative Assembly of Ontario.

Sincerely,

Gord Miller
Environmental Commissioner of Ontario

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Developing Sustainability

Sustainable development was popularized as a concept by "Our Common Future," the 1987 report of the World Commission on Environment and Development. That Commission recognized that an emphasis on "development" was essential to emerging nations in order to bring them out of poverty and up to basic standards of health and well-being.

But the concept also meant that such development had to be "sustainable" – that it had to meet the needs of societies today without compromising the ability of future generations to meet their needs. In short, the Commission didn't want the developing world to repeat the kind of mistakes the wealthy developed nations made in their rise to affluence.

Of course, sustainable development was also intended to apply to developed countries. But with their sophisticated economies and institutions, the need for sustainable development and its implications were not as immediately obvious to some. Those who advocate sustainable development have been constantly under attack, and the concept is regularly vilified. Many of its critics wrap themselves in the banner of "free marketers" and paint sustainable development as an elaborate plot by "collectivists" to bog commerce down in bureaucracy and red tape. Others see it as threatening wealth creation by increasing costs and denying the right to choose the "cheapest" alternatives in energy or commodities. Still others say it is nothing new. They see it simply as the concept of "maximum sustained yield" that was for years the basis for managing – and depleting – resources such as the North Atlantic cod.

In truth, sustainable development is none of these things. And yet the arguments of the naysayers are loudly heard, and sustainable development has not been substantially incorporated into decision-making in Ontario.

The dissension from the concept of sustainable development by those who support capitalism is a paradox. A central tenet of sustainable development is that it *preserves* capital – and not just the natural capital of our ecosystems, but our invested financial capital, too. Inherently, sustainable development requires conservation of materials and energy and, thus, inspires efficiency and innovation, the stated aspirations of free enterprise. Venture capitalists and entrepreneurs should, in all logic, embrace the concept because it creates new opportunities and new ventures.

But perhaps this contradiction reveals the truth behind the paradox. The opposition to sustainable development is, at heart, the wailing of those who would perpetuate the status quo, who would see us cling to technologies that matured half a century ago, such as gasoline-powered automobiles, coal-fired electrical power plants, and sprawling suburban subdivisions. These technologies were innovative in their time, but now, in the face of much advanced thinking, materials and expertise, they are environmentally damaging, flagrantly wasteful or, at best, simply bad design.

Perhaps some of the resistance to sustainable development is simply clinging to the familiar. The tremendous rate of technological change we are experiencing in our society is unsettling. It may be difficult to determine what sustainable development really is when the institutions we call upon to make such judgments are themselves in upheaval. In such circumstances, the status quo seems comfortable and secure.

But an accelerated rate of change does not excuse us from the need to pursue sustainable development. If anything, it makes the need more acute. Adopting this approach forces us to think, instead, about the broad impacts of our decisions on all of society. It compels us to consider what economists call the external costs of our actions and technologies – such as the damage to our ecological systems. And, most of all, it implores us to think about the consequences of our decisions and our lifestyle for future generations. This is the kind of thinking that is to be cultivated and encouraged in times of turmoil and uncertainty.

Perhaps some of the confusion over sustainable development lies in the grammar. "Development" is the noun and "sustainable" is the adjective modifying that noun. Intrinsically, the rules of language give the importance to the noun. But, in contrast to emerging countries, in our society there is no shortage of "development." We have been constantly developing for more than two centuries. It's the "sustainability" thing that we have to work on. That's why I have chosen to name this year's report "Developing Sustainability." I suggest that this is a better term for the approach required in developed economies. The goal is, properly stated, sustainability. The challenge is to develop techniques and policies to achieve that goal.

This report has been released a few weeks after the conclusion of the World Summit on Sustainable Development in Johannesburg, South Africa. I hope that this Summit brings sustainable development back into the public forum with a prominence it has not received since the Rio Summit 10 years ago. I also hope that the debate is renewed in Ontario, with the result that the Province re-commits itself to the necessity of developing sustainability. In Ontario, we have the wealth and the knowledge to do things properly. In so doing, we can show leadership to the world. We need to find the courage and the wisdom to do so.

Gord Miller
Environmental Commissioner of Ontario

PART 1:

The *Environmental Bill of Rights*

The *Environmental Bill of Rights (EBR)* gives the people of Ontario the right to participate in ministry decisions that affect the environment. The *EBR* helps to make ministries accountable for their environmental decisions, and ensures that these decisions are made in accordance with goals all Ontarians hold in common — to protect, conserve, and restore the natural environment for present and future generations. While the government has the primary responsibility for achieving these goals, the people of Ontario now have the means to ensure they are achieved in a timely, effective, open and fair manner.

The *EBR* gives Ontarians the right to . . .

- comment on environmentally significant ministry proposals.
- ask a ministry to review a law or policy.
- ask a ministry to investigate alleged harm to the environment.
- appeal certain ministry decisions.
- take court action to prevent environmental harm.

Statements of Environmental Values

Each of the ministries subject to the *EBR* has a Statement of Environmental Values (SEV). The SEV guides the minister and ministry staff when they make decisions that might affect the environment.

Each SEV should explain how the ministry will consider the environment when it makes an environmentally significant decision, and how environmental values will be integrated with social, economic and scientific considerations. Each minister makes commitments in the ministry's SEV that are specific to the work of that particular ministry.

What is the Role of the Environmental Commissioner?

The Environmental Commissioner of Ontario (ECO) is an independent officer of the Legislative Assembly and is appointed for a five-year term. The Commissioner reports annually to the Legislative Assembly — not to the governing party or to a ministry.

In the annual report to the Ontario Legislature, the Environmental Commissioner reviews and reports on the government's compliance with the *EBR*. The ECO and staff carefully review how ministers exercised discretion and carried out their responsibilities during the year in relation to the *EBR*. They review whether applications from the public requesting ministry action on environmental matters were handled appropriately, and whether ministry staff complied with the procedural and technical requirements of the law. The ECO also monitors whether the actions and decisions of a provincial minister were consistent with the ministry's Statement of Environmental Values and with the purposes of the *EBR*.

The Environmental Commissioner and ECO staff assess how ministries use public input to draft new environmental Acts, regulations and policies, and how ministries investigate reported violations of Ontario's environmental laws. Each year the ECO also reviews the use of the Environmental Registry, monitors appeals and court actions under the *EBR*, and reviews the use of *EBR* procedures to protect employees who experience reprisals for "whistle-blowing."

Ministries Prescribed Under the EBR *

Agriculture and Food	(OMAF)
Consumer and Business Services	(MCBS)
Enterprise, Opportunity and Innovation	(MEOI)
Environment and Energy	(MOEE)
Health and Long-Term Care	(MOHLTC)
Labour	(MOL)
Management Board Secretariat	(MBS)
Municipal Affairs and Housing	(MAH)
Natural Resources	(MNR)
Northern Development and Mines	(MNDM)
Tourism and Recreation	(MTR)
Transportation	(MTO)

* *Three ministries under the* EBR *were reconfigured during 2001/2002. The Energy portfolio of the former Ministry of Energy, Science and Technology (MEST) has been transferred to the Ministry of the Environment, recreating the Ministry of Environment and Energy (MOEE). The former Ministry of Economic Development and Trade has been changed to the Ministry of Enterprise, Opportunity and Innovation (MEOI), and MEST's Science and Technology portfolio has been transferred to MEOI. The Ministry of Tourism, Culture and Recreation was divided into two ministries, creating the Ministry of Culture and the Ministry of Tourism and Recreation (MTR). In addition, the Rural Affairs portfolio of the Ministry of Agriculture, Food and Rural Affairs was transferred to the Ministry of Municipal Affairs and Housing, and OMAFRA was renamed the Ministry of Agriculture and Food (OMAF). The ECO's 2001/2002 annual report and Supplement use the new ministry names even though some of the decisions and actions described in the following report may have been taken by the former ministries as they then were named. It is expected that MOEE will revise O. Reg. 73/94 to reflect the new ministry names in 2002.*

Ministry Statements of Environmental Values

When the *Environmental Bill of Rights* was first enacted in 1994, its drafters intended that ministerial Statements of Environmental Values (SEVs) would perform a keystone function for the new legislation. It was hoped that the SEVs would help break down the prevailing "silo mentality" under which ministries focused strictly on their own core mandates and, for the most part, ignored how interrelated their mandates on environmental matters were with those of sister ministries. Through its SEV, each ministry would recognize its responsibility for cross-cutting environmental issues. Each ministry prescribed under the *EBR* was required in 1994 to produce its own tailor-made SEV, outlining how the ministry would apply the purposes of the *EBR* in its environmental decision-making, and how it would consider the purposes of the *EBR* along with social, economic, scientific and other considerations.

The drafters of the *EBR* clearly intended that ministry staff would rely on these documents for guidance whenever environmental decisions were made. Section 11 of the *EBR* states: "*The minister shall take every reasonable step to ensure that the ministry statement of environmental values is considered whenever decisions that might significantly affect the environment are made in the ministry*." The *EBR* also established an oversight function for the Environmental Commissioner, by requiring the ECO to report annually on compliance with ministry Statements of Environmental Values.

All prescribed ministries did produce SEVs in 1994, after some public consultation, and they have been available for ministry staff to consider ever since. It is important to note that ministries need only *consider* their SEVs. There is no legal requirement for ministries to keep their environmental decision-making *consistent with* their SEVs. Despite this, in 1996 a leading Canadian environmental lawyer observed that the SEVs create "new substantive environmental law" and "may profoundly impact" decision-making.

Over the years, the ECO and other observers have noted some significant weaknesses both in the way ministries have used their SEVs, and in the SEVs themselves. These weaknesses can be summed up as follows:

SEVs are vague

Although all ministry SEVs contain a standard statement of support for the *EBR*, very few ministries have translated those general principles into specific SEV commitments reflecting their own core business activities, goals and priority issues. This in turn has made it hard for the ECO to monitor ministry compliance with SEVs, as required by the *EBR*. One notable exception is found in the SEV of the Ministry of Transportation, which commits the ministry to study ways to minimize the use of road salt. *(See "Evaluating MTO's Commitment to Reducing Road Salt Releases," page 9.)*

Developing Sustainability

Evaluating MTO's Commitment to Reducing Road Salt Releases

The Ministry of Transportation has had a commitment in its Statement of Environmental Values (SEV) since 1994 to improve its salt management practices, stating that it will "continue to study ways to improve salt management practices and to minimize releases to the environment." MTO is also committed to "seek ways to reduce transportation-related discharges of contaminants to water," since the ministry believes "that the protection of air, water, and land resources is necessary to sustain future generations and the long term survival of plants, animals and aquatic life."

Road salt is composed primarily of sodium chloride, commonly known as table salt. However, road salt may also contain chlorides of calcium, potassium and magnesium, as well as small amounts of ferrocyanide salts (an agent which prevents "caking" when stored) and other specialized additives. It has been known for at least several decades that road salt can have an adverse effect on the natural environment, especially on small water bodies, groundwater, aquatic organisms and roadside vegetation. In recent winters, as much as 1.8 million tonnes of road salt have been spread on Ontario's roads. MTO or its contractors account for about one-quarter of the provincial road salt use; the balance is spread by municipal or other agents on roads that are not provincially maintained.

While MTO's SEV commitments have been in place for eight years, it appears that recently the ministry has stepped up its efforts to minimize salt releases to the environment by using a variety of methods and technologies that control snow and ice and reduce salt use. Some of these include using road weather information systems to determine where and when salt is needed; deploying advanced salt-spreading equipment; and pre-wetting road salt to help it melt ice and snow more quickly.

These methods, according to MTO, should allow the ministry and its contractors to achieve an estimated 20-30 per cent reduction in the amount of salt applied to provincial roads, although the ministry is not setting itself a formal reduction target.

During the 2001/2002 reporting period, Environment Canada proposed declaring road salt a toxic substance under the *Canadian Environmental Protection Act (CEPA)*, helping to focus attention on strategies to reduce road salt use. Many municipalities have begun to institute road salt reduction programs, including the Regional Municipality of Niagara, Grey County, and the Cities of Toronto and Greater Sudbury.

With the *CEPA* developments adding a sense of urgency to the ministry's SEV commitment, MTO could demonstrate the efficacy of its road salt release minimization programs in ways that would "prove" the value of ministry efforts. These could include:

- Establishing a road salt use monitoring and reporting program that correlates road salt use to weather conditions for a given year. Over time, MTO could use this program to assess whether it is using less salt under the same weather conditions, and over a total season.
- Establishing an ecological monitoring program to track the health of sensitive plants and aquatic organisms near areas where road salt release has been reduced in order to evaluate the impact of ministry programs over time.

(For ministry comments, see page 171.)

Recommendation 1

The ECO recommends that the Ministry of Transportation explore the establishment of an ecological monitoring program involving vegetation or aquatic organisms near road salt release reduction areas in order to evaluate the impact of reducing road salt releases over time.

SEVs are not integrated with ministry Business Plans

All ministries produce annual Business Plans, which are high-profile documents outlining the ministry's key priorities, goals and targets. The Business Plans help to guide spending and staffing decisions in each ministry. The ECO has previously reported that for five consecutive years, most ministries have failed either to incorporate environmental values or insert more than a passing reference to SEV commitments into their Business Plans. The Business Plans also contain very few environmental performance measures.

No consistency among ministries in applying SEVs to activities

Since there are no regulations spelling out how ministries are to apply their SEVs, the practice varies considerably from ministry to ministry. The effectiveness of the SEV depends on the commitment of each ministry to the concept of the EBR. For example, MOEE has taken the position that the ministry's SEV is not to be considered when staff prepare and issue instruments such as permits and approvals. The ECO has noted on several occasions that MOEE's approach is not in keeping with Section 11 of the EBR and the intentions of Ontario legislators. In 2001, the Environmental Review Tribunal also raised concerns about MOEE's decision not to consider its SEV when issuing instruments (see also pages 11-12 and 138 in the sections on Instruments and Appeals).

SEVs are out of date

Most SEVs were developed in 1994, and the priorities and mandates of many ministries have changed considerably since then. Although the *EBR* enables ministries to update their SEVs from time to time, only three ministries have chosen to do this since 1994. The Ministry of Agriculture and Food revised its SEV in 1998, but in the process removed several important environmental commitments. The former Ministry of Energy, Science and Technology developed its new SEV in 1998. The former Ministry of Tourism, Culture and Recreation prepared a substantive draft in late 2000, and is continuing to work on revisions to reflect the core businesses and strategies for the new Ministry of Tourism and Recreation and the Ministry of Culture.

In January 2002, the ECO asked all prescribed ministries a number of SEV-related questions, including whether ministries were planning to review or update them.

In March 2002, most ministries responded that they were planning to review their SEVs in the near future, acknowledging that they had become dated. Several ministries also noted that their environmental mandates had grown or become more complex since the establishment of their SEVs. More recently, MOEE has informed the ECO of preliminary plans to lead a broader cross-ministry review, aiming to have the SEVs reflect a government-wide vision, and to respond to some of the concerns

noted above. The ECO has been assured that such a review would involve extensive public consultation. The ECO encourages progress on such a review and will continue to monitor next steps. *(For ministry comments, see page 171.)*

Instruments

What are Instruments?

Instruments are legal documents that Ontario ministries issue to companies and individuals granting them permission to undertake activities that may adversely affect the environment, such as discharging pollution into the air, taking large quantities of water, or mining for aggregates. Instruments include licences, orders, permits and certificates of approval.

Classifying Instruments

Under the *Environmental Bill of Rights*, certain ministries must classify the instruments they issue into one of three classes according to how environmentally significant they are. A ministry's instrument classification regulation is important for Ontario residents wishing to exercise their rights under the *EBR*. The classification of an instrument determines whether a proposal to grant a licence or approval will be posted on the Registry. It also determines the level of opportunity for public participation in the decision-making process, whether through making comments or applying for appeals, reviews or investigations under the *EBR*. If instruments are not classified, they are not subject to the *EBR* notice and comment provisions. Moreover, if instruments are not classified, the public cannot seek leave to appeal when they are issued, or request an investigation into allegations regarding violations of instruments or reviews of instruments.

Statement of Environmental Values

Before making any environmentally significant decisions, ministries are mandated by Section 11 of the *EBR* to consider their Statements of Environmental Values (SEVs). Values outlined in the ministry SEV are not meant to pre-empt any other considerations, but are to be considered in conjunction with social, scientific and economic considerations that may influence a decision. The role of the ECO is to review how a ministry considered its SEV in making a particular decision.

In 1995, the Ministry of Environment and Energy advised the ECO that MOEE staff were not required to consider the ministry's SEV when making decisions on instruments because its SEV is considered in the development of MOEE policies, Acts and

regulations. Considering it again for the granting of instruments is unnecessary, according to the ministry. This rationale is not in keeping with the intention of the *EBR*. Also, it is incorrect to assert that MOEE policies, Acts and regulations were developed with SEV consideration, since most of them predate the existence of the *EBR*. By excluding proposals for instruments from SEV consideration, MOEE removed from the requirement for SEV consideration more than 95 per cent of the environmentally significant decisions it makes that are subject to the *EBR*.

In a February 2002 decision, *Dillon et al. v. Director, MOEE*, the Environmental Review Tribunal noted that MOEE's SEV indicates on its face that it does not apply to instruments issued by the ministry. However, in the Tribunal's view, this narrow interpretation is inconsistent with the *EBR*. The Tribunal held that the SEV should be considered each time an application for permit to take water is considered by MOEE. (For more about the *Dillon* decision, see page 138.) MOEE should explicitly subject all of its environmentally significant instrument decisions to SEV consideration and ensure that this is documented.

Ensuring Public Comments are Considered

It came to the ECO's attention in January 2002 that a comment submitted in relation to a Registry proposal concerning a permit to take water was not noted in the Registry decision notice. As of May 2002, the ECO had not received a response to our inquiry of MOEE as to whether or not this comment was considered in making the decision. In regard to a different proposal, in May 2002 MOEE republished a decision notice on the Registry that had originally been posted with the incorrect information that no comments had been received. In fact, seven comments had been received, and the decision notice was updated to reflect that. Ministries must ensure that all comments received in response to proposals on the Registry are considered and noted in the decision notice.

Ministry of Natural Resources Classifies its Instruments

In June 2001, the ECO issued a special report on the extreme delay in finalizing MNR's instrument classification regulation. MNR was required to develop this regulation within a reasonable time after April 1, 1996. During the 2001/2002 reporting period, Cabinet finalized a regulation that classified the environmentally significant instruments under the various Acts MNR administers.

Cabinet's decision to finalize MNR's instrument classification regulation is important because, for the first time, members of the public have the opportunity to use their rights under the *EBR* in relation to classified MNR instruments. Since the regulation came into force on September 1, 2001, the public has received notice of certain proposals for instruments on the Registry and may review and comment on these proposals, seek to leave to appeal certain instruments and make applications for review or investigation with respect to classified instruments. For example, members of

the public may be particularly interested in commenting on proposals in their communities relating to sand and gravel pits and quarries; land sales by conservation authorities; wood-processing facilities, pulp and paper mills and sawmills; and aquaculture facilities.

However, a significant number of MNR instruments were not classified in the regulation and are therefore not subject to the *EBR*. After consultation with the public and the ECO, MNR had proposed in November 1997 to include in its classification regulation instruments that would be excepted from the notice and comment requirements in Part II of the *EBR*, such as instruments covered by the *Environmental Assessment Act* and orders issued by MNR field staff on an immediate basis. Classifying these instruments would have meant that they remained subject to EBR applications for review and investigation.

Ultimately, the final regulation did not classify most of these instruments proposed by MNR in November 1997. Among the key instruments that were not classified in the final regulation are wayside permits to operate pits or quarries under the *Aggregate Resources Act*; forest management plans under the *Crown Forest Sustainability Act*; approvals to construct and operate facilities in provincial parks under the *Provincial Parks Act*; and work permits under the *Public Lands Act*.

Because instruments such as these are issued to implement projects approved or exempted under environmental assessment (EA), they would have been excepted from the notice and comment provisions in the *EBR* so the public would not have had notice and comment rights under the *EBR* in any case. However, since they have not been classified, the public has not been guaranteed other rights under the *EBR*, such as the right to apply for reviews and investigation. MNR has advised the ECO of its interpretation that every environmentally significant MNR instrument is subject to applications for investigation under the *EBR*, even if they are not prescribed, because the contravention of an instrument would also constitute a contravention of the Act under which that instrument is authorized. According to MNR, all MNR Acts make it an offence to contravene conditions of instruments issued under those Acts. While the ECO concedes this is a valid interpretation, the unprescribed instruments will not be subject to *EBR* applications for review, which is a loss for the public.

The ECO is pleased that the instrument classification regulation has now been implemented, and that since September 1, 2001, the public has finally been able to access *EBR* rights in relation to many MNR instruments. However, the ECO is disappointed that the final regulation did not include many of the instruments that were included in MNR's November 1997 proposal for the regulation. The ECO also questions whether there is, in fact, public participation equivalent to the *EBR* in all of MNR's EA and Class EA consultation processes. The ECO addresses this issue in the context of several ministries in this annual report. (Please see pages 34-41 for further analysis of this issue.)

Ministry of Northern Development and Mines

The ECO's 2000/2001 annual report noted that 1996 amendments to the *Mining Act* had not yet been incorporated into MNDM's part of the instrument classification regulation under the *EBR*, which is administered by the Ministry of Environment and Energy. The ECO encouraged MOEE to implement these changes as soon as possible in order to protect the public's right to notice of instruments and, if necessary, the right to request their review or investigation. MOEE amended the instrument classification regulation to reflect MNDM's amended instruments by making Ontario Regulation 313/01 on August 8, 2001.

Effect of Public Comments on Instruments

As part of our work, the ECO reviews ministry decision-making on selected instruments. See "Permit to take Water for Bottling," below, for a good example of how public comments can influence government decision-making. *(For ministry comments, see page 171.)*

Permit to Take Water for Bottling

In January 2001, a proposal for the renewal of a permit to take water (PTTW) was posted on the Environmental Registry that would grant a company permission to take a maximum of 773 litres of water per minute, up to 1,112,860 litres per day, 365 days per year, for bottling and sale. This PTTW is one of several major water taking permits issued in the Town of Erin. Concern has been raised that the cumulative impacts of these operations may impair the supply and quality of groundwater in the Township of Erin and the health of the local watershed.

MOEE received nine comments in response to this proposal, all of which opposed the PTTW. Some opposed the export of bottled water to the United States and other countries; several of these opposed the sale of water for profit in general. Local residents alleged that the cumulative permitted water taking exceeded the recharge rate of the aquifer and would lead to water shortages in the area.

Many of the local residents observed that several bottling operations already had permits to take water from the area, and questioned whether MOEE had sufficient groundwater data to determine the cumulative effects of PTTWs accurately.

These concerns motivated MOEE to add conditions to the PTTW, issued in September 2001, to address the potential for interference with local water supplies. One condition states that if the PTTW interferes with other water supplies that were in use prior to the issuance of the PTTW, the company must either reduce the rate and amount of the taking, or provide another equivalent supply of water (such as bottled water). Also, the company must carry out a hydraulic monitoring program and maintain a daily record of amounts of water taken, and the rates and hours of operation. MOEE may also issue a notice to suspend or reduce the water taking during times of drought or water shortage.

Recommendation 2

The ECO recommends that the Ministry of Environment and Energy explicitly consider its Statement of Environmental Values when making final decisions on the instruments issued by the ministry, and ensure that this is documented.

ECO Educational Initiatives

The quality of environmental decisions in any jurisdiction depends on both its government and its residents. In Ontario, the *Environmental Bill of Rights* sets a minimum standard for public participation and consultation in environmentally significant decision-making. Ontarians can use the *EBR* to best effect only when they are aware of their rights and their government's responsibility to respect and uphold them. This is why the Environmental Commissioner of Ontario continues to pursue energetically its mandate to educate Ontarians about the *EBR*.

This year the ECO continued to demonstrate a commitment to enhancing transparency and accountability in environmental decision-making by expanding our multi-faceted approach to education. We participated in a broad range of environmental education and awareness events, and spoke to groups ranging from grade-five school children to experienced professionals from virtually every area of interest and expertise. We distributed more than 10,000 publications at events, with a combined total of over 18,000 participants. ECO staff also promptly responded to over 1,200 public inquiries.

The Environmental Registry, the main window on environmentally significant decision-making, continued to attract a high numbers of users, averaging 5,600 user sessions per month throughout the year.

This year the ECO produced several Public Service Announcements (PSAs), and they continue to air on many television channels. Together with our longstanding open invitation to Ontarians to have ECO staff speak to their groups, the PSAs have kept our education staff and the Environmental Commissioner busier than ever this year. Audiences continue to grow and to learn more about using their environmental rights and about the ECO. As always, we invite you to call us with questions, comments, and requests for information, or for a speaker from our office (416-325-3377 or 1-800-701-6454).

PART 2:

The Environmental Registry

The Environmental Registry is the main component of the public participation provisions of the *Environmental Bill of Rights (EBR)*. It's an Internet site where ministries are required to post environmentally significant proposals for policies, Acts, regulations and instruments. The public then has the opportunity to comment on these proposals prior to a decision's having been made. The ministries must consider these comments when they make their final decision and explain how the comments affected the decision. The Registry also provides a means for the public to learn about appeals of instruments, court actions and other information on ministry decision-making. The Environmental Registry can be accessed at **www.ene.gov.on.ca/envision/ebr**.

Quality of Information

The Environmental Registry is only as good as the information it contains. The *EBR* sets out basic information requirements for notices that ministries post on the Registry. The ministries also have discretion on whether to include other information. Previous annual reports of the Environmental Commissioner have recommended that in posting information on the Registry, ministries should:

- use plain language
- provide clear information about the purpose of the proposed decision and the context in which it is being considered
- provide a contact name, telephone and fax number
- clearly state the decision and how it differs from the proposal, if at all
- explain how all comments received were taken into account
- provide hypertext links to supporting information whenever possible.

The ECO evaluates whether ministries have complied with their obligations under the *EBR* and exercised their discretion appropriately in posting information on the Registry. This ensures that ministries are held accountable for the quality of the information provided in Registry notices.

Comment Periods

The *EBR* requires that ministries provide residents of Ontario with at least 30 days to submit comments on proposals for environmentally significant decisions. Ministries have the discretion to provide longer comment periods, depending on the complexity and level of public interest in the proposal.

All proposal notices placed on the Registry in 2001/2002 were posted for at least 30 days. MOEE posted nine out of 27 proposals for new policies, Acts or regulations for 45 days or more. MNR posted 24 out of 50 proposals for new policies, Acts or regulations for 45 days or more. In some instances, the ministries re-posted notices several times, thereby extending comment periods beyond 60 days. In these circumstances, the prescribed ministries did not always indicate that comments received under the previous notice(s) would be considered under the re-posted notice.

Again this reporting year, the ECO reviewed all Registry notices for proposed policies, Acts and regulations to determine whether the ministries had provided sufficient comment periods according to the complexity of their proposals. This review determined that prescribed ministries were generally allotting an adequate period for comment. However, ministries should have allowed for longer comment periods for the majority of proposals for new Acts, including Bill 135, the *Heritage Hunting and Fishing Act*, proposed by MNR, and Bill 56, the *Brownfields Statute Law Amendment Act*, proposed by MOEE and MAH, and enacted in late 2001.

Adequate Time to Comment on New Acts

The *Oak Ridges Moraine Conservation Act* is a noteworthy example of a proposal notice on the Environmental Registry with an insufficient comment period. It was introduced in the Ontario Legislature on November 1, 2001. The proposed Act and Conservation Plan were both included in the same Registry notice. The comment period of 30 days for the Act and Plan was inadequate. There had been an earlier period of policy consultation concerning the Oak Ridges Moraine, but this was the first opportunity for the public to see the specific provisions of the Act and the Plan. While it is understandable that the government wished to pass the *Oak Ridges Moraine Conservation Act* quickly, especially given that it would be retroactive to November 16, 2001, the combination of Act and Plan was far too complex for the minimum comment period. Since the Plan was not finalized by MAH until April 22, 2002, a much longer comment period could have been provided for comments on the Plan if two separate Registry notices had been used for the Act and Plan.

The proposal notice for the proposed Act and accompanying Oak Ridges Moraine Conservation Plan was posted on the Registry on November 2, 2001, with a 30-day comment period. The initial Registry proposal notice had to be amended because it stated that the deadline for submission of public comments was November 30, 2001. Because the actual comment period ended on a Sunday, December 2, the ECO received an inquiry asking whether MAH would consider public comments on the Registry notice on Monday, December 3, the next business day. In response, MAH confirmed that it would.

Description of Proposals

Ministries are required to provide a brief description of proposals posted on the Registry. The description should clearly explain the nature of the proposed action, the geographical location(s), and the potential impacts on the environment.

During this reporting period, descriptions of proposals for policies, Acts and regulations generally met the basic requirements of the *EBR*. The proposal notices provided brief and understandable explanations of the actions the ministries were proposing. However, ministries could still improve the contextual background information for their proposals, since readers may not be familiar with environmental law and policy in Ontario. By contrast, MNR's provincial park management plans, for example, communicate important background information in plain language, while avoiding scientific and technical jargon.

In previous annual reports, the ECO expressed concern that instrument notices contained sketchy descriptions of the proposed activities. The quality of descriptions for instrument proposal notices was again varied in 2001/2002. Prescribed ministries have taken steps toward providing better descriptions. However, improvements can be made, particularly by MOEE and TSSA. Instrument proposal notices by MNR and MAH generally contained enough basic information to allow the reader to understand the proposal.

Access to Supporting Information

The majority of proposals on the Registry in 2001/2002 provided access to supporting information by listing a contact person, phone number and address. The vast majority of proposed policies, regulations and Acts had "hypertext" links to supporting information. However, in many cases, users who tried to access the supporting material found that the link connected to a list of all government statutes and not directly to a specific document of interest.

In the instrument proposal notices reviewed, MAH, MNR and MNDM consistently provided the name of a person the public could contact for more information. However, the majority of MOEE instrument proposals in 2001/2002 once again failed

to provide a contact name. The Technical Standards and Safety Authority was also inconsistent in this regard. *(See pages 28-34 for further discussion of this issue.)*

Environmental Impacts

The ECO has expressed its concern in previous annual reports that ministries are not adequately explaining the environmental impacts of proposals. Although the *EBR* does not legally require ministries to include this information, it provides the public with the information necessary to make informed comments on these proposals. In 2001/2002, all ministries consistently failed to provide an adequate explanation of potential environmental impacts in their proposal notices for policies, Acts, and regulations. Environmental impacts were typically explained only in regulations proposed by MNR and MOEE.

MOEE, MAH, MNR and TSSA also consistently failed to explain the potential environmental impacts in their instrument proposal notices. MNDM was the only ministry to describe these impacts consistently, particularly with regard to instruments dealing with mine closures.

The Ministry of Environment and Energy should develop a regulation under Section 121 of the *EBR* that would spell out the requirements for ministries in explaining the environmental impacts of their proposals.

Description of the Decision

Once a ministry has made a decision on a proposal posted on the Registry, the *EBR* requires the minister to provide notice of the decision as soon as possible. The description of the decision in a Registry notice lets residents of Ontario know the outcome of the public consultation process. Most descriptions of ministry decisions continue to be quite brief. Many simply stated that the decision was "to proceed with the proposal." In the interest of clarity and transparency, ministries should include the dates on which the decision was made and when it becomes effective, and the regulation number, if applicable.

Explaining How Public Comments were Addressed

The *EBR* requires the prescribed ministries to explain how public comments were taken into account in making a decision. Ministries should take the time and effort to summarize the comments, state whether the ministry made any changes as a result of each comment or group of related comments, and explain why or why not. Without this description, commenters will not know whether their comments were considered. In situations where there is a large number of comments, ministries should make an effort to summarize them appropriately and relay their effect on the decision.

The ECO commends MOEE on its handling of public comments with regard to the emissions trading and NO_x and SO_2 emission limits for the electricity sector. The consultation involved three separate proposal notices between January 2000 and July 2001. In January 2000, MOEE announced that it would introduce lower regulated emission limits on NO_x and SO_2 for the electricity sector as a first step and then later apply limits to other industrial sectors in the province. At the same time, the ministry proposed an emissions trading system to help industries meet the new limits. These concepts were laid out in a January 2000 Registry proposal notice that received 36 comments. MOEE also went to the additional effort of consulting the public on two successive detailed versions of its proposed trading system. In March 2001, MOEE released a discussion paper, Emissions Reduction Trading System for Ontario, and posted it on the Registry for a 90-day public comment period. The ministry received over 60 detailed submissions, mainly from specialized organizations such as industry associations, other levels of government, consultants and environmental groups. These submissions included a very wide range of substantive and often conflicting recommendations for changes to MOEE's proposed direction on emissions trading.

About a month after the close of the first comment period, MOEE released a summary of the comments received, and posted a revised version of its proposal as a draft regulation, with a 30-day comment period. Stakeholders raised two procedural concerns with this stage of MOEE's consultation process. First, stakeholders were skeptical that the ministry could have properly evaluated over 60 complex submissions between the closing date for comments for the first proposal, June 24, and the posting of the draft regulation on July 31. Many stakeholders also complained that the 30-day comment period on the second proposal was too short, especially given the complexity of the draft regulation and the fact that the second notice was loaded during August, a peak vacation time. In response to this concern, MOEE re-opened the proposal for a further 30 days of public comment, until October 5, 2001. MOEE received 36 comments during this stage and the ministry addressed many of them in its decision.

Summary

The Environmental Registry usually provides the first point of contact for Ontario residents who want to participate in environmental decision-making. The Registry should be as user-friendly as possible. The recommendations contained in this and previous annual reports are intended to improve the quality of information on the Registry and to ensure that the public is able to participate fully in Ontario's environmental decision-making process. *(For ministry comments, see page 172.)*

Unposted Decisions

Under the *Environmental Bill of Rights*, prescribed ministries are required to post notices of environmentally significant proposals on the Environmental Registry for public comment. When it comes to the attention of the Environmental Commissioner that ministries have not posted such proposals on the Registry, we review that decision to determine whether the public's participation rights under the *EBR* have been respected.

The ECO's inquiries of ministries on "unposted decisions" can lead to one of several outcomes. In some cases, the ministry responsible provides the ECO with legitimate reasons for not posting the decision on the Registry. For example, the decision may not be environmentally significant, it may have been made by a related non-prescribed agency instead of the ministry itself, or it may fall within one of the exceptions allowed in the *EBR*. In other cases, the ministry subsequently posts a notice on the Registry under Sections 15, 16 or 22 of the *EBR*. Finally, in certain cases, the decision may remain unposted, with the ECO disagreeing with the ministry's position that the particular decision does not meet the posting requirements of the legislation.

Pages 1–7 in the Supplement to this report contain more information on the ECO's tracking of unposted decisions and our findings on ministry responses to our inquiries. The following two examples show the outcome of the ECO's tracking efforts.

Ministry of Municipal Affairs and Housing: Smart Growth

As described in more detail on pages 70-71 of this report, the government is developing a broad policy framework called "Smart Growth," which links environmental health, strong communities and a strong economy. However, consultations on Smart Growth, including release of a consultation paper by the Ministry of Municipal Affairs and Housing on the development of Smart Growth Management Councils, Management Plans and Management Zones, proceeded for most of 2001 without the posting of a policy proposal notice on the Environmental Registry.

The *EBR* defines policy as a "program, plan or objective" and states that "a proposal to make, pass, amend, revoke or appeal a policy...is a proposal for a policy." The ECO believes that Smart Growth meets this definition of policy. In addition, the *EBR* requires prescribed ministries to post policy proposals on the Registry prior to their implementation. Over the past year, the government has made decisions about some aspects of implementing Smart Growth.

In November 2001, the ECO wrote to MAH and encouraged the ministry to post a policy proposal notice on the Registry. The ECO also encouraged MAH and any other prescribed ministries working on the Smart Growth policy to uphold the public's

rights under the *EBR* by posting additional proposal notices on the Registry as specific Smart Growth initiatives are proposed.

Several weeks after the ECO's inquiry, MAH posted a proposal notice for the "Continuing Development of a Made-in-Ontario Smart Growth Strategy" on the Registry. The notice invited the public to submit comments or concerns about the Smart Growth strategy, including potential provincial and local actions or objectives, Smart Growth Management Councils, and a framework for provincial action. The ministry acknowledged that it could have posted a Registry notice earlier and committed to posting additional notices for Smart Growth on the Registry as appropriate.

As of early May 2002, MAH had not posted a decision notice related to its November 2001 proposal notice on the Smart Growth Strategy. Yet that ministry and others continue to implement Smart Growth initiatives. To keep the public informed in a timely manner, the ministry should expedite the posting of a decision notice on the Strategy. MAH should also ensure that new proposal notices for initiatives related to the Strategy are also posted for comment before they are decided upon and implemented.

Ministries of Natural Resources and Northern Development and Mines: Mining Exploration within Ontario Living Legacy Sites

In March 2002, the Ministers of Northern Development and Mines and Natural Resources announced that there will be no new mining exploration on untenured land within the 378 Ontario Living Legacy (OLL) sites. This is a noteworthy policy shift. As explained in previous ECO annual reports, the government had previously permitted "environmentally sensitive mineral exploration" in OLL areas containing "provincially significant mineral potential." (For further discussion of this issue, see pages 117-120 of this report.)

Given the environmental significance and high level of public interest associated with this change in direction, the ECO wrote to the ministries and informed them that they should have posted a policy proposal on the Environmental Registry for public comment.

In March 2002, MNR and MNDM also announced they would begin developing options to address existing mineral tenure on or within the OLL sites, in consultation with stakeholder groups. The ECO has also urged these ministries to post a policy proposal related to these consultations on the Registry as soon as possible. Such a notice is needed to facilitate public dialogue and involvement before further environmentally significant decisions are made. *(For ministry comments, see page 172.)*

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" on the Registry under Section 6 of the *EBR*. These notices keep Ontarians informed of important environmental developments.

During the 2001/2002 reporting year, six ministries posted 37 information notices related to policies, regulations and instruments, slightly less than last year's total of 46. This year's notices were distributed as follows:

Number of Information Notices
(Other than Forest Management Plans)
April 1, 2001–March 31, 2002

Ministry	
MBS	1
MAH	14
MNDM	1
MNR	7
MOEE	8
MTO	6
Total	**37**

(Please refer to Section 2 in the Supplement to this report for a more detailed description of these notices.)

The Ministry of Natural Resources posted 17 additional information notices for Forest Management Plans during this reporting period. Last year, the ministry posted more than 30. These plans establish long-term objectives for sustainability, diversity, timber harvest levels and forest cover in particular forests. Once again, the ECO commends the ministry for posting them.

The Use of Information Notices

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 Registry and information notices. When regular proposal notices are posted on the Registry, a ministry is required to consider public comments and post a decision notice explaining the effect of comments on the ministry's decision. The ECO then reviews the extent to which the minister considered those comments when he or she made the final decision. The ministry must also consider its Statement of Environmental Values in the decision-making process. This approach is superior to posting an information notice and provides greater public accountability and transparency.

As in past years, some ministries sought public comment through information notices. This practice causes confusion for the public, since, as noted above, there is no legal requirement for the ministries to consider public comments or to post a final decision

with regard to 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 Registry, the correct procedure is to post a regular notice, not an information notice. Ministries that post information notices can certainly inform the public in the text of the notice about the availability of any other "non-*EBR*" consultation opportunities.

Inappropriate Use of Information Notices

In January and February 2002, the Ministry of Transportation posted four separate Draft Strategic Transportation Directions (DSTD) documents as information notices on the Registry. According to the notices, the DSTD documents contain "strategies the MTO may pursue in relation to the region's overall transportation network" and set out "the broad context for the . . . region, how the transportation system could evolve in the long term, and the strategies that could be pursued to achieve the vision." The documents present population and transportation data, refer to the need for improved public transportation, and include an extensive list of proposed and current highway development projects.

Clearly, MTO's proposed strategic directions for transportation are environmentally significant and will affect all Ontarians. While the ministry provided stakeholders with an opportunity to influence decision-making through numerous workshops province-wide, MTO failed to comply with the *EBR* requirement to post regular policy proposal notices in order to involve the public in these major policy development issues. According to the ECO's *Environmental Registry Notice and Comment Procedures* (August 1996), a ministry should consider posting a policy proposal notice on the Registry as soon as an initial draft of a policy has been approved for consultation at the appropriate level in the government's approval system. This gives a reasonable time for public comments to influence revisions of the draft. A proposal should be posted at the same time any other public consultation begins.

The ECO is also concerned that MTO's information notices failed to explain adequately why the ministry felt that policy proposal notices were not warranted. To provide clarity for the public, it is important that ministries ensure information notices contain a clear and complete rationale for their use.

Appropriate Use of Information Notices

Several ministries did use information notices appropriately during the ECO's reporting period. For example, MOEE posted an information notice to advise the public of its initiative to clear up a backlog of over 1,200 decision notices for instruments. The notice provided an important public service. It explained how the ministry would identify the notices as being related to old files and provided an estimated project

time frame. The ministry should follow up on its commitment to update the notices and advise the public about the conclusion of this project.

In a second example, MNR first published an information notice about the Northern Boreal Initiative in 2000. MNR advised that it had begun discussions with several First Nations communities about possibilities for sustainable commercial forest management opportunities in Ontario's far north. This year the ministry updated the information notice. It advised the public that a regular policy proposal was posted on the Registry seeking public input regarding a community-based land use planning approach for the Northern Boreal region. The ECO is pleased that MNR used an information notice to advise the public of the availability of the regular notice.

Quality of Information Notices

Since its 1999/2000 annual report, the ECO has expressed concern that the Environmental Registry "template" incorrectly classifies information notices as "exceptions," and has urged MOEE, which is responsible for the template, to make corrections. Despite promises to develop a stand-alone information notice to eliminate confusion between information notices and exception notices, two years have passed without the release of a final template. The ECO urges the ministry to complete this work.

Last year, the ECO encouraged ministries to update information notices if new developments occurred in relation to an ongoing project. Several ministries, including MNDM, MOEE and MNR, provided updated notices this year. While the ECO is encouraged by this practice, improvements to the content of notices are still required. Updated notices should preserve as much of the original content of the notice as possible and clearly indicate which information is new.

Most notices explained specifically why it was appropriate to post an information notice on the Registry as opposed to a regular notice seeking public comment. However, several notices contained explanations that seemed vague and excessively legalistic. Therefore, ministries should continue to be aware of the need to use plain language and precise explanations. As always, ministries should ensure that all information notices are written clearly and include the name, address, phone number and fax number of a ministry contact person. *(For ministry comments, see page 172.)*

Exception Notices

In certain situations, the *Environmental Bill of Rights* relieves provincial ministries of their obligation to post environmentally significant proposals on the 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*, where 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, the 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*.

Ministry	Emergency Exception (Section 29 of the *EBR*)	Equivalent Public Participation Exception (Section 30 of the *EBR*)
MNDM	3	0
MNR	0	17
MOE	3	2
TOTAL	**6**	**19**

Please refer to Section 3 of the Supplement to this report for a more detailed description of all these notices.

In the 17 exception notices posted by MNR, all related to regulations that establish or modify parks and conservation reserves set out in Ontario's Living Legacy, the ministry sets out specific reasons for using the Section 30 exception. (For more information on the nature of these notices, see pages 40-42 of the ECO's 2001/2002 annual report.)

Late Decision Notices

When ministries post notices of environmentally significant proposals for policies, Acts, regulations or instruments on the Environmental Registry, they must also post notices of their decisions on those proposals, along with explanations of the effect of public comment on their final decisions. But sometimes ministries either fail to post decision notices promptly or do not provide the public with updates on the status of old, undecided proposals. In those cases, neither the public nor the ECO is able to tell whether the ministry is still actively considering the proposal, has decided to drop the proposal, or has implemented a decision based on the proposal while failing to post a decision notice. This reduces the effectiveness of the Registry, and may make members of the public reluctant to rely on the Registry as an accurate source of information.

While there is no legal requirement that ministries provide updates on old, undecided proposals, it is helpful to the public. The ECO encourages ministries to post decision notices stating that the ministry has decided not to proceed or has postponed a particular decision. This action is more informative than allowing original proposal notices to languish on the Registry for years.

The *EBR* requires the ECO to monitor ministries' use of the Registry, and specifically requires the Environmental Commissioner to include in the ECO annual report a list of all proposals posted during the reporting period for which no decision notice has been posted. That list is included in the Supplement to the annual report. The ECO periodically makes inquiries to ministries on the status of proposals that have been on the Registry for more than a year and suggests they post either updates or decision notices. Below is a list of some selected proposals for policies, Acts and regulations posted before March 31, 2001, and still found on the Registry in April 2002. A complete list would be much longer. Ministries have provided neither a decision notice nor an update for these proposals as of April 1, 2002. Some of these proposals were posted as far back as 1996 and 1997, and some were flagged by the ECO in its previous annual reports. However, ministries did not address them in this reporting year. The ECO urges ministries to update the public and the ECO on the status of these proposals.

MNR

Registry Number	Proposal Title (date first posted)
PB6E7001	Forest Operations Prescription Guideline (06/04/1996)
PB7E6014.P	Enforcement Guidelines for Aboriginal Persons (EGAP) (08/05/1997)
RB8E3001	Regulation to Prohibit Hunting and Trapping of Wolves in Clyde, Bruton and Eyre townships of Algonquin Provincial Park
RB8E2002	Amendment to Ontario Regulation 951, R.R.O. 1990, made under the Provincial Parks Act – Finlayson Point Provincial Park boundary (06/18/1998)
PB8E6013	Toward the Development of Resource Tenure Principles in Ontario – A Discussion Paper on Natural Resource Tenure (10/07/1998)
PB8E2015	Water management plan for the Michipicoten River (08/07/1998)
PB8E2016	Water management plan for the Montreal River (08/07/1998)
PB8E6018	Killarney Provincial Park Management Plan Review – Invitation to Participate (08/24/1998)
RB8E3003	Amendments to Ontario Regulation 245/97 under the *Oil, Gas and Salt Resources Act* (09/29/1998)

MOE

Registry Number	Proposal Title (date first posted)
PA6E0012	Lake Superior Lakewide Management Plan – Stage 2: Load Reduction Targets (10/25/1996)
PA7E0001	A Guide to Preparing Terms of Reference for Environmental Assessments (02/19/1997 & 02/01/2001)
RA7E0018.P	Amendment to the Electric Power Generation Sector Regulation (12/30/1997)
RA7E0019.P	Amendment to the Iron and Steel Sector Regulation (12/30/1997)
RA7E0020.P	Amendments to the Industrial Minerals Sector Regulation (12/30/1997)
RA7E0021.P	Amendments to the Inorganic Manufacturing Sector Regulation (12/30/1997)
RA7E0030.P	Consolidation of Acid Rain Regulations (12/30/1997)
PA8E0007	Consultation on the proposed Canadian Drinking Water Guideline for Protozoa (03/18/1998)
RA8E0023	Draft Waste Management Regulation (06/02/1998)
RA8E0025	Regulation 903 – Water Wells (08/25/1998)

Field Audit: Access to Information

Does the public really have access to sufficient information on the "instruments" – permits, licenses and approvals – that ministries post as proposals on the Environmental Registry? How easy is it for the public to access information provided in a ministry's accompanying files? Are ministry staff available to answer telephone inquiries so that the public can obtain information and be fully informed about the implications of an instrument a ministry is planning to issue?

The ECO set out to determine how well Ontario ministries are discharging their responsibilities in this regard. While some of our findings were reassuring, we found too many cases where the public's right to comment on proposed instruments is being frustrated.

Public Rights to Access

The *Environmental Bill of Rights* allows Ontarians to have a say on whether or not ministries issue instruments to applicants. Members of the public can also comment on conditions that the ministry may be proposing to attach to the instrument to protect the environment. For example, instruments can include amendments to certain municipal official plans for land use, mine closure plans, water taking permits, aggregate licences, and air discharge permits. Often, these permits control the amount or types of pollutants that can be released into the air or water.

People need information about a proposal before they can participate in a ministry's decision-making. That's why the *EBR* requires ministries to post a proposal notice on the Registry. This notice must state how and where the public may review additional written information about the proposal.

Most instruments are "Class I" proposals and are usually placed on the Registry for a 30-day comment period – the minimum time required by the *EBR*. To provide ministries with informed comment on Class I proposals, the public needs timely and efficient access to supporting information. Accordingly, ministry staff must be able to access the information quickly and make it available for viewing within a reasonable time after a request is made. (Ministries are required to provide additional notice for instruments that are "Class II" proposals, and also have the discretion to lengthen the comment period for these proposals to 90 days or more.)

Since members of the public may not live near the ministry office where supporting information is located, it is also important that staff be available to answer questions by telephone. While not explicitly required by the *EBR*, ministry staff should also be available to answer public inquiries after an official public comment period is over. Public interest in a matter sometimes stretches beyond the minimum 30-day comment period.

EBR Requirements for Instrument Proposals Posted on the Environmental Registry

Many permits and approvals (instruments) issued by provincial ministries are subject to the *EBR* because they are environmentally significant. The *EBR* spells out very specific public rights to participate in decision-making on these instruments.

- A minister shall do everything in his or her power to give public notice of a proposal for certain instruments that are listed in the *EBR* and under consideration within the ministry.
- The notice must be posted for a minimum 30-day comment period on the Environmental Registry before a ministry decides whether or not to grant the permit or approval.
- The notice must include the following information at a minimum:
  - a brief description of the proposal
  - how and by what date the public may participate in decision-making
  - where and when the public may review written information about the proposal
  - an address to which the public may direct:
    - written comments
    - written questions about the public's right to participate in decision-making on the proposal

The ECO's Research

This year, the ECO conducted spot checks to observe how well staff at the Ministries of Environment and Energy and Natural Resources could provide information about a sample of instrument proposal notices posted on the Registry. The ECO's goal was to compare each ministry's performance against the requirements of the *EBR* and basic government-established principles regarding access to information.

We retained the services of environmental researchers to pursue information from the appropriate ministry offices. This is a realistic scenario because members of the public and environmental organizations also hire consultants to conduct environmental and policy-related research.

MOEE was selected for several reasons. First, in past years, the ECO has reported its concerns with the poor quality of some of the ministry's instrument proposal notices. Poor quality notices can impede the public's ability to understand the proposals and make informed comments.

Second, the ECO felt it was time to follow up on similar research we conducted during our 1994/1995 reporting year. (See the Supplement to this report for further information.) Third, the ECO has received complaints from residents who have been frustrated in their attempts to make inquiries of MOEE staff about various environmentally significant issues.

The MOEE sample included proposals to issue air-related permits and permits to take water. These instruments are posted frequently on the Registry and are often "high profile" in terms of public interest.

MNR was selected because its instrument classification regulation was promulgated in July 2001 and began to apply to certain MNR instruments on September 1, 2001. The ECO was interested in how well MNR staff were implementing the new instrument classification regulation.

The MNR instrument sample focused on licences for pit and quarry and other aggregate operations. These instruments constituted the majority of proposals posted on the Registry by the ministry between September 2001 and March 31, 2002. In addition, aggregate operations often generate controversy and many public inquiries to ECO staff.

ECO Findings

Ministry of Natural Resources

MNR offices throughout Ontario are listed as points of public contact for aggregate-related instrument proposal notices posted on the Environmental Registry. The ECO selected a representative sample size of six, comprised of three site visits and three telephone calls. An attempt to extend the time frame of its research and contact additional offices was hampered by the provincial labour dispute, although the review process itself was not affected.

At all the office visits, MNR staff made the instrument proposal file available for viewing. ECO researchers were generally satisfied with the completeness of the files based on site plan and licence information the ministry had committed to providing.

In only one of those cases was a particular MNR employee unable to answer several questions about the file. For all telephone calls, MNR staff made the relevant file information available by answering questions that the ECO researcher posed. MNR staff generally were very helpful, although in one case an MNR staff member was hesitant to respond, making the information more difficult to obtain.

Ministry of Environment and Energy

MOEE offices throughout Ontario are listed as points of public contact for air and water- related instrument proposal notices posted on the Registry. The ECO selected 12 offices that were listed as contact points in instrument proposal notices posted during January 2002. This provided province-wide representation. The findings gathered during this research are disappointing and worse than those gathered in the ECO's 1994/1995 study.

The instrument proposal file was made available for viewing only at one of the six MOEE offices scheduled for visits. In this case, the MOEE staff person was also able to answer all of the researcher's questions about the proposal and the process that MOEE would use to decide whether or not to grant the permit. At the remaining five offices, ECO researchers were either denied access to relevant file information or not put in touch with staff who could potentially provide that information.

In one case, despite having called ahead to ensure that someone would be able to assist with file viewing, no knowledgeable MOEE staff were present in the office to provide file access or to answer questions when the ECO researcher arrived. The researcher was told that all ministry staff who could help were attending a conference.

In another case, when the telephone call was made to arrange a visit, MOEE staff informed the ECO researcher that file access was possible only after contacting the company directly and signing a non-disclosure agreement with that company's officers. In this case, it was decided that the ECO researcher should not sign the agreement or visit the MOEE office. MOEE staff also refused to answer any questions about the file over the telephone until the requested non-disclosure agreement was signed.

In another example, the MOEE staff person indicated more time was needed to review the file before providing access. Staff indicated that the ECO researcher would be contacted the following week regarding file availability, but this never occurred. The MOEE contact person did answer general questions, but refused to refer to the file to answer specific questions.

At the two offices visited in connection with air discharge proposals, MOEE staff would make the file available only if a formal application was submitted under the *Freedom of Information and Protection of Privacy Act (FIPPA)*. At both these offices, ministry staff refused to answer reasonable queries about the types of emissions

that would enter the air if the ministry granted the permit. The public should have access to this information because it is central to developing an understanding of the effects of these air discharge instruments.

Our researcher experienced similar frustration during telephone contacts with ministry staff. Only one of the six MOEE offices was able to provide full information about the instrument proposal file and answer all questions posed by the ECO researcher. In the remaining five cases, ministry staff were willing or able to answer questions about the file only to varying degrees.

In two cases, MOEE staff told the ECO researcher that the company making the proposal would have a say on what information would be released. And in two cases, MOEE staff stated that the ECO researcher would have to file an access to information request through *FIPPA* if file viewing was desired.

Analysis

MNR

The ECO is pleased that MNR staff appear to be providing adequate access to information on proposed aggregate operations or changes to operations posted as proposals on the Environmental Registry. The ECO encourages the ministry to continue providing public access to *EBR* files in an open and transparent manner.

MOEE

It is unacceptable for MOEE staff to obstruct the public's legal right to access information and comment on instrument proposals posted on the Environmental Registry. MOEE has had ample opportunity to train staff in providing reasonable access to information. The ministry has been subject to the *EBR* since 1994 and has been reviewed by the ECO on this topic once before. MOEE's 1994 Procedures Manual on the *EBR* states that ministry staff should respond to inquiries in a timely manner and strive to answer questions verbally at the time they are asked.

The ECO is disappointed that the ministry applies a restrictive approach to public inquiries. During this reporting period, MOEE also told ECO staff that the ministry normally asks people to make requests to view certificates of approval (permits) through *FIPPA*, saying that this makes the inquiry official and assists with prioritizing workload. Ministry staff always treat *FIPPA* requests as high priority because they must be processed within 30 days, while general requests from the public and from professionals working outside the government are assigned low priority.

If the public is broadly denied access to all or part of a file until a 30-day *FIPPA* process is complete, then the minimum 30-day comment period provided for under the *EBR* will likely have expired. Without access to supporting documentation, the

public may not be able to provide informed comment on the proposal, contrary to the provisions in the *EBR*.

Public requests for information under *FIPPA* and the *EBR* both deserve priority attention. But if MOEE insists on giving *FIPPA* requests priority, changes to ministry practice need to be invoked to preserve the public's right to a minimum 30-day *EBR* comment period. In cases where the ministry believes that a request for access must be processed under *FIPPA*, the ECO recommends that MOEE automatically bump up the instrument to a Class II (if it was originally a Class I instrument) or extend the comment period to 60 days or more.

It appears that ministry staff are operating under unclear direction regarding companies' rights to have information protected. MOEE should not abdicate its responsibilities under the *EBR* and the *FIPPA* by sending an individual directly to a company to sign a non-disclosure agreement.

While some documentation submitted to support an environmental permit application may be kept confidential under *FIPPA* (such as commercially sensitive material), most information should remain in the public domain. In our 1999/2000 annual report, the ECO cited a May 1999 ruling made by an Information and Privacy Commission (IPC) adjudicator. Ministries "should not as a matter of general policy direct members of the public seeking information for the purpose of an *EBR* consultation to *FIPPA*, but should address the issue using its own expertise and statutory powers." Furthermore, Management Board Secretariat has advised that, for government-held records potentially subject to routine disclosure, front-line staff should be delegated the authority to disclose that information to the extent possible. Information relating to instrument proposals under the *EBR* is subject to routine disclosure.

The ECO is also concerned about the cost implications of requiring the public to use *FIPPA* to access information on instrument proposals. In addition to the $5.00 application fee, the public is likely to be charged for photocopying and shipping, the time required to locate and prepare the requested records, and any other costs associated with replying to the request. This can cost hundreds of dollars.

The Office of the Information and Privacy Commissioner appears to share the ECO's views about the impact of excessive user charges. In September 2001, an IPC adjudicator ordered MNR to provide information requested under *FIPPA* for a substantially reduced cost. In doing so, the adjudicator noted that information disclosure would benefit public health by assisting the public in participating in any consultation on the subject at hand.

The ECO recommends that the Ministry of Environment and Energy move quickly to clarify its procedures and educate MOEE staff about the legal rights provided to the public by the *Environmental Bill of Rights* and the *Freedom of Information and*

Protection of Privacy Act. MOEE staff should routinely provide free and unfettered public access to information on environmental permit proposals posted on the Registry.
(For ministry comments, see page 173.)

Recommendation 3

The ECO recommends that the Ministry of Environment and Energy uphold the public's right to view the non-proprietary contents of certificates of approval at local ministry offices, free of charge and without unnecessary delays

Recommendation 4

The ECO recommends that the Ministry of Environment and Energy clarify its procedures and educate staff with regard to the legal rights provided to the public by the Environmental Bill of Rights *and the* Freedom of Information and Protection of Privacy Act.

Accountability and Transparency: Gaps in the System

The *Environmental Bill of Rights* allows the public to comment on many proposals for environmentally significant permits and approvals – or "instruments" – issued by the provincial government. These permits can, for example, govern the types and amounts of substances entering Ontario's air and water. In many cases, ministries must consider public comments before issuing these permits, and in some cases residents have appeal rights under the *EBR*. These legal rights and responsibilities foster transparent, accountable decision-making and promote environmental sustainability.

The *EBR* works in tandem with other environmental approvals and planning processes. One of the most important of these is Ontario's *Environmental Assessment Act (EAA)*. The *EAA* sets out a decision-making process used by many provincial government ministries and municipalities to promote good environmental planning. However, under Section 32 of the *Environmental Bill of Rights*, ministries do not have to provide an opportunity for public comment for permits being issued to implement a project approved (or exempted) under the *EAA*. Every year the ECO hears from Ontarians who feel that their rights to comment on environmentally significant approvals have been compromised as a result of this *EBR* exception.

One of the reasons the Task Force on the *EBR* created this exception was to avoid duplication. Task Force members felt that applicants for environmentally significant instruments should not have to conduct public consultation under two pieces of legislation that, in theory, had similar requirements.

In a research project undertaken during this reporting year, the ECO found that public participation rights on environmentally significant instruments issued through *EAA* processes are not consistently comparable to those provided by the *EBR*. In their broad application of the exception provided by Section 32 of the *EBR*, ministries are depriving the public of their right to comment on many instruments that affect Ontario's environment. This exception applies to many proposals covered by the *EAA*, for the most part involving public-sector projects such as municipal water taking permits, sewage and water works, provincial roads, most new electricity projects, and the use of natural resources or public (Crown) land.

Take the example of permits to take water. Many private-sector proposals to take water from wells, streams or lakes are posted on the Environmental Registry for public comment because drawing large water quantities from local surface or groundwater sources may have significant environmental impacts. If the public continues to have concerns once the permit is issued, the *EBR* provides the right to request an appeal. An independent tribunal applies strict criteria to decide whether or not to grant the appeal, hears the case if an appeal is granted, or facilitates a settlement.

However, if a municipality wants to take water, it is required to go through an *EAA* process and no *EBR* notice is required. Without the Ontario-wide notice provided by the Registry, the public misses important opportunities to provide input on these municipal water-taking approvals even though water quality and quantity issues are foremost concerns for many Ontarians. Moreover, the public, environmental non-government organizations, and conservation authorities cannot rely on the Registry to provide an accurate overview of water taking trends in a region or over a specific time period.

The crafters of the *EBR* assumed that, in most cases, the environmental impacts addressed by specific instruments would be considered and addressed as part of an *EAA* approval or an exemption from *EAA* requirements. However, there are many cases where these *EAA* approvals or exemptions address only preliminary planning for a project and do not address the specific environmental controls that an instrument would put into effect. For example, the public may be notified locally that the municipality is making changes to the water supply, but they would not likely be told the precise location and volume of the proposed water taking.

What the ECO Studied

There are many different planning processes covered by the *EAA*. The ECO did not review the individual environmental assessment (EA) process that is detailed and tailored to specific proposed projects, but instead focused on several streamlined *EAA* planning processes that apply a "template" of rules to groups of projects like new electrical generating stations or provincial roads.

Streamlined EA planning rules are written into various legal documents. Sometimes the rules are found in documents called "Class Environmental Assessments"; sometimes they are contained in a specific regulation and sometimes in an "Exemption Order." This year, the ECO compared and contrasted the public notice, comment and appeal opportunities for environmentally significant instruments available through the *EBR* and under the following streamlined *EAA* processes:

- Environmental Assessment Requirements for Electricity Projects (EAREP)
- Municipal Class Environmental Assessment (Municipal Class EA)
- Class Environmental Assessment for Provincial Transportation Facilities (MTO Class EA)
- MNR's Draft Class EA for Resource Stewardship and Facility Development Projects (MNR Draft Class EA – not yet in effect)
- MNR Exemption Order 26/7 – Disposition of Rights to Crown Resources (MNR Ex. O. 26/7 – still in effect as of April 2002)

(A summary chart of our findings can be found on pages 312 – 319 of the Supplement to this report.)

"Dispositions" are important because they comprise most of the instruments issued by the Ministry of Natural Resources. Examples of dispositions include leases and sales of public lands, permits for activities affecting lakebeds and shorelines, and fisheries and wildlife projects. The ECO reviewed MNR's Draft Class EA because, once in effect, it will cover significant projects undertaken by MNR or its partners, and because it will incorporate dispositions covered by MNR's Ex. O. 26/7.

Most of the streamlined *EAA* processes noted above establish various categories of environmental study depending on the significance of the project. For the purposes of this review, the ECO took a consistent approach and examined only the screening processes for projects deemed to have moderately significant environmental effects. It is important to note that each streamlined EA process contains different rules about the types of instruments or projects subject to it and the scope of consultation opportunities afforded to the public.

While ECO's analysis focused on screening processes, we also identified another serious issue. Many projects covered by the streamlined EA processes are considered to be "pre-approved" with no consultation or public notice provided. This means that

thousands of projects proceed with no public involvement or notice through either the *EAA* or the *EBR*, even though some have a degree of environmental importance. For example, MNR's Draft Class EA includes in its list of pre-approved projects some sewage systems and water works. (See MOEE's "New EA Process…" below for a noteworthy exception.)

MOEE's New EA Process for Electricity Projects: Toward a More Complete Framework for Public Consultation

In 2001, MOEE presented its new regulation and the procedure that will be used to screen and approve electricity projects in the province. Applying these requirements to a proposed electricity project could result in the project's undergoing an Environmental Screening or Review (in Category B), an Individual EA (in Category C) – or if the project fits neither of these categories, then it will be dealt with in Category A. While these Category A projects will not receive any study or consultation under the EA requirements, most of their associated permits will be posted on the Registry as proposals for public comment, i.e., they will not be excepted as if they were not environmentally significant or had already received equivalent public participation. MOEE's procedure is the only one of its type to date. This new approach could serve as a model on which further harmony and compatibility between *EBR* and *EAA* processes could be built.

Pre-approvals are a far-reaching problem. Ontario municipalities use pre-approved projects extensively. In some municipalities, approximately 90 per cent of the environmental assessment projects/activities undertaken fall within the Municipal Class Environmental Assessment's "pre-approved" category. Environmentally significant pre-approved projects under this Class EA include some repair and replacement of culverts, some stormwater works to service municipal roads, establishment of new biosolids organic soil conditioning sites, and installation of new wells or increased pumping capacity of existing wells within the approved yield of a municipal well site.

Comparing the Public's Rights Under the EBR *and Streamlined EA Approvals*

Trigger for Public Comment

The *EBR* requires a minister to do everything in his or her power to give notice to the public of a proposal for an environmentally significant instrument under consideration in his or her ministry at least 30 days before a decision is made whether or not to implement the proposal. Ontario Regulation 681/94 under the *EBR* explicitly lists the types of proposed permits and approvals that must be posted for comment on the Registry.

The streamlined EA processes for municipal projects, provincial roads and electricity projects also list the activities that are subject to environmental screening. But the public is not guaranteed the right to provide input on the specific details of any permits

or approvals that may follow, such as the amount of water being taken from a municipal well or the types of air emissions that are allowed from a moderate-scale electrical generating station.

Under MNR's current Ex. O. 26/7, Disposition of Rights to Crown Resources, the public is not automatically given notice as they would for a prescribed instrument under the *EBR*. MNR staff have the discretion to make the decision on a case-by-case basis. MNR's Draft Class EA has clearer triggers for consultation on MNR dispositions, and the public should be able to comment more frequently on the details of instruments.

The streamlined EA processes reviewed by the ECO are seriously flawed because public input and participation opportunities are not clearly established for both project planning and the issuance of environmentally significant instruments. Public comment should be provided for at both these stages.

Geographic Extent of Public Notice (local vs. province-wide)

Through the Environmental Registry, the *EBR* provides province-wide notice, giving all members of the public an opportunity to comment on proposed instruments subject to the *EBR*. For some instruments, called "Class II," the *EBR* requires ministries to provide additional notice, such as advertisements in local newspapers, at the time the instrument is posted on the Registry.

It is common for proponents using a streamlined EA process to have discretion in deciding whom to contact and by what method. This approach is weak. Some individuals with an interest in the project or instrument, such as landowners in the vicinity of a project but not adjacent to it, may not receive information on participating. Because notice may have been given only to local property owners, environmental and other non-government organizations will not necessarily receive notice of environmental projects having regional or provincial significance.

On a positive note, the streamlined EA processes reviewed by the ECO sometimes provide for focused consultation with potentially affected neighbours and local stakeholders. For example, MOEE's newly developed Guide to EA Requirements for Electricity Projects provides considerable detail for proponents about whom to contact, and how to contact them when conducting project planning. Furthermore, MOEE's new Electricity Project Guide goes an extra step, requiring that permits for small electricity projects (called "Category A") be subject to public notice and consultation through a notice posted on the Environmental Registry. The ECO commends MOEE for providing the public with this opportunity.

Content of Public Notice

Notices posted on the Registry must, at a minimum, include a brief description of the proposed instrument. These notices are always available on the Internet.

In contrast, public notices issued under the streamlined EA processes focus on providing information about project planning – as opposed to details of the subsequent permit(s). Although proponents often provide notice by direct mailings or newspaper advertisements, there is no requirement to provide the additional benefit of a continuously available Internet announcement.

Nevertheless, some of the EA notices examined by ECO staff were of a high calibre – written in plain language; making good use of maps; providing clear instructions on how to participate; and noting the availability of reports, documents and even Web sites with more extensive project information. In addition, many streamlined EA processes require the issuance of more than one notice.

Effect of Public Comment on a Ministry's Decision

Under the *EBR*, public comments go directly to the ministry proposing to issue the instrument approval. The minister must take every reasonable step to ensure that all comments relevant to the proposal are considered when making a decision about whether or not to issue the instrument. The decision notice posted on the Registry must describe the effect of public comments on the decision.

In contrast, the streamlined EA processes are premised on self-assessment by the ministry or body doing the work. The public's comments are directed toward the proponent or applicant, and unless someone lodges a complaint or appeal, MOEE plays a limited role in overseeing these processes. There is no way to know if comments received during project planning under the various streamlined EA processes are routinely worked into the specific operating conditions spelled out in the permits.

Appeal Rights

Under the *EBR*, the public has the right to request an appeal of certain types of instruments. The ECO is concerned about a lack of appeal rights for instruments issued as a result of the Municipal Class EA. Under those rules, the public often has no appeal rights on permits that may be issued under the *Ontario Water Resources Act* or the *Environmental Protection Act*. And no appeal rights exist under the *EBR* because those instruments are excepted under Section 32 of the *EBR*. While it may be unintentional, this lack of appeal rights under the *EBR* is a serious consequence of the Section 32 exception.

Tracking and Monitoring

Using the Environmental Registry, the public can easily track the status of any proposed instruments, gather information on instruments proposed or issued in a certain area of the province, and even study all those issued to a certain proponent.

The information on the Registry provides a good historical database because old notices date back to 1997. There is no equivalent comprehensive database for the streamlined EA processes.

The ECO monitors whether or not the ministries' use of the Registry meets *EBR* requirements and reports publicly through its annual report to the Ontario Legislature. No consistent monitoring system exists for projects following the streamlined EA processes.

Monitoring and reporting requirements vary between the streamlined EA processes reviewed by the ECO. To understand how many or which types of EA projects have progressed through any of the streamlined EA planning processes over a certain time period, the public must make a specific request of MOEE's Environmental Assessment and Approvals Branch (EAAB). Finding out which permits or approvals have been granted subsequent to EA decision-making can be difficult and in some cases – such as approvals related to projects under MTO's Class EA – virtually impossible. By the time the public gets answers, it may be too late to participate in or influence the decision about the specific permits or approvals.

Neither MOEE nor MNR could provide the ECO with information about the thousands of instruments or projects carried out under MNR Ex. O. 26/7, Disposition of Rights to Crown Resources, because no coordinated monitoring system exists for them. MNR does have project files at its field offices, but no central files. Staff could only estimate the number of instruments issued. MNR's Draft Class EA proposes a more comprehensive tracking and reporting system.

Several features of the streamlined EA processes make it difficult for anyone, including MOEE as the regulator, to evaluate the effectiveness and compliance of the streamlined EA program as a whole. First, each streamlined EA process has a unique monitoring and reporting scheme, each with varying degrees of rigour and documentation. This makes an assessment of trends difficult. Second, the "pre-approved" projects proceeding under the streamlined EA processes lack documentation even though some are environmentally significant. As these projects are not typically tracked and reported by proponents, no one knows if proponents are correctly interpreting projects' "pre-approved" status and the accompanying lack of public notice or comment.

The lack of consistent monitoring and reporting of streamlined EA processes detracts from openness and transparency. If these instruments were posted on the Registry, the public could easily find this information.

It is critical that MOEE, as regulator under the *EAA*, make a concerted effort to monitor compliance with that legislation, especially when the planning for thousands of environmentally significant projects is being conducted on a self-assessment basis.

MOEE says that its EAAB intends to establish a program for monitoring compliance with streamlined EA processes. The ECO is encouraged that the EAAB is undertaking this exercise. We urge the Branch to find a way to include "pre-approved" projects in its monitoring and to make links between streamlined EA work and the permits and approvals flowing from it. MOEE should make the information derived from this monitoring program readily available to the public.

Conclusions

The ECO is disappointed that public participation rights on instruments issued through *EAA* processes are deficient in many respects, especially when compared with those of the *EBR*. Ontario's environmental assessment program under the *EAA* should operate in a manner that is compatible with and complementary to the *EBR*.

The Task Force on the *EBR* recognized the challenges associated with integrating the *EBR*'s public participation regime with the consultation processes required under the *EAA*. They raised questions about the adequacy of public involvement in decision-making under the *EAA* and "expected that over time, existing environmental legislation would be brought into compliance" with provisions of the *EBR* respecting the issuance of environmentally significant regulations and instruments. In the past eight years of the *EBR* in Ontario, MOEE has done little to address this gap in compliance. In fact, the expanded scope of approvals subject to streamlined EA approvals has removed more instrument decisions from the Environmental Registry and insulated them from consideration by the public and review by the ECO.

In light of the systemic problems in transparency and accountability arising from the *EBR*'s Section 32 exception, MOEE and the other prescribed ministries should move promptly to review this matter. Such an examination should focus on improving the public's opportunity to comment on environmentally significant permits and approvals and should include a review of the ministries' current policies that guide the interpretation of Section 32. Any proposals for improvement should be placed on the Environmental Registry for public comment.

Although Section 32 of the *EBR* was drafted to protect environmental projects from being subject to duplicate public consultation, the ECO has found that excessive use of that exception can result in minimal or no public consultation on some important instruments. The public deserves an opportunity to comment on environmentally significant projects at the planning stage and before specific permits are granted. Far-reaching use of ministry discretion in providing notice at either the project planning or instrument stage is greatly reducing opportunities for public input, contrary to the goals of the *EBR*. *(For ministry comments, see page 173–174.)*

PART 3:

Significant Issues – 2001/2002

Each year the ECO highlights a number of environmental issues that have been the subject of recent applications under the *EBR* or are related to recent decisions posted on the Environmental Registry.

This year, the ECO has focused on several important issues of process and law. For example, the update on the *Fisheries Act* offers some insight into how one of the most powerful environmental laws in Canada is currently being enforced in Ontario.

In previous years, the ECO has reviewed the environmental impacts of land-spreading of manures and sewage sludges. This year the ECO examined how MOEE monitors water quality in rural southern Ontario's streams, rivers and lakes, which are often impacted by these types of non-point pollution sources. This section also includes discussions of several high-profile and contentious forestry issues. For example, MNR is adopting a new approach to forest harvesting in much of northern Ontario that is intended to emulate some of the effects of large-scale forest fires. Some of the expected ecosystem impacts and knowledge gaps that may affect implementation of the new approach are outlined in the ECO's discussion. The management of woodland caribou, which rely on old growth forest habitat, is also discussed.

Monitoring of Trends in Rural Water Quality in Southern Ontario

The ECO has focused on water quality issues many times in recent years. In the 1997 ECO annual report, we found significant weaknesses in several of the province's monitoring programs and, as a result, shortcomings in the provincial ability to track and report on the state of our ecosystems. Since then, there have been some gains, but also some losses. Recommendations made in the Report of the Walkerton Commission of Inquiry suggest that new Ministry of Environment and Energy policies and programs are needed to ensure water protection at the watershed scale.

Too often streams, lakes and rivers are viewed as separate from the rest of the landscape. In reality, all human and natural activities on land are intrinsically connected to water. To live and work sustainably, Ontarians must know how activities on the land affect water resources. In this section, the ECO focuses on some of the principal water pollution concerns in rural southern Ontario, draws conclusions about the province's ability to track water quality with the existing water monitoring framework, and identifies some necessary improvements.

Changes on the Rural Landscape

Some kinds of cropping and livestock management activities are intensifying in southern Ontario, raising concerns about their potential for affecting water quality. Livestock, poultry and hog producing facilities in Ontario have become larger and more intensive over the last two decades. Today, just 2 per cent of Ontario's hog operations account for nearly one-quarter of the 5.6 million hogs produced each year. As the larger hog and cattle operations appear to achieve lower production costs, the intensification trend is likely to continue. In October 2001, the federal Commissioner of the Environment and Sustainable Development warned that farming practices in the Great Lakes and St. Lawrence River basin are having serious effects on the environment and that current practices are unsustainable. However, in southern Ontario the province currently lacks the monitoring system and, consequently, the data necessary for assessing the effects of these land use changes and making the needed strategic decisions.

Among the major concerns with intensive farming is the handling of manure. Enormous amounts of manure are produced in Ontario, and the risk to the environment is significant unless proper manure management practices are used. Between 1988 and 1998, 214 manure spills were documented in southwestern Ontario, resulting in 42 known fish kills. Most of those were from liquid manure applications and delivery to streams by way of field tile drainage systems. Although it is difficult to identify conditions leading to fish kills with routine monitoring programs, specialized sites with the capability of continuously monitoring for conditions lethal to fish have occasionally been established.

The highest per-unit-area production of manure in Canada, at 7,610 kilograms per hectare, is located in the Middle Maitland watershed, just south of Walkerton. The Upper Thames River and Grand River subwatersheds are also among the top five manure producing areas in the country, at over 5,000 kilograms per hectare. Provincial ministries, conservation authorities and some municipalities have at various times established programs to protect water quality by funding and promoting best manure management practices in all three of these areas. However, problems persist: Provincial Water Quality Objectives for *E. coli*, phosphorus and other parameters are frequently exceeded, and manure spills continue to occur.

The Nature of Water Quality Impairment

Microbiological Issues

Data reviewed by the ECO show that fecal coliforms are found in contaminated water from many rural sources. These include leakage from faulty septic systems or liquid manure storages, discharges from dairy milkhouses, and runoff from manure applied on wet or frozen soil. Infiltrated liquid manure, applied to some farm fields and carried away by drainage tiles, can also be a significant source. Water sampling results show that elevated levels of fecal coliform bacteria in streams and rivers and municipal drainage ditches can also be found downstream of cattle watering access points.

In certain areas of southwestern Ontario, *E. coli* strain 0157:H7 is found in association with the bacteria from such sources. The tragedy in Walkerton in May 2000 underscored the need to be vigilant of such potential sources where drinking water sources are at risk. Other pathogenic bacteria such as *Campylobacter* and protozoa such as *Cryptosporidium* can also be transferred from animal herds to humans over broad areas – generally, wherever manure sources exist.

Beach closures, or warnings due to high *E. coli* counts along the Lake Huron shoreline, have been chronic occurrences during the summer tourist season. In the summer of 2001, the Huron County Health Unit reported 354 beach user-days (about 21 per cent of potential user-days) lost due to non-compliance with the recreational beach criterion of 100 *E. coli* per 100 millilitres for 18 Huron County shoreline beaches. Permanent signs warning that pollution levels are elevated for up to three days after a rainstorm are posted at 17 public beaches in Huron County. Numerous studies have attempted to categorize sources of the problem. Known sources include animal manure and faulty septic systems in rural areas. At beaches near urban areas, sewer overflows and lagoon discharges are sometimes implicated.

One major program, since discontinued, that attempted to deal directly with bacterial contamination of beaches from rural sources was the Clean Up Rural Beaches Program (CURB) initiated by MOEE and operated in conjunction with conservation authorities and health units between 1984 and 1996. Watershed and subwatershed sources of bacteria and phosphorus sources were mapped and strategies developed to cost-share with farmers and rural residents those practices that would effectively reduce pollutant sources. As a result of the program, downward trends in bacterial densities were documented in several tributary streams, and some inland beaches that had been closed due to high bacterial levels were re-opened. In 1999, the Ministry of Agriculture and Food established the $90 million Healthy Futures for Ontario Agriculture program, which includes rural water quality as one of its themes.

Nitrates, Human Health and Aquatic Life

Nitrogen in the form of nitrate is naturally occurring, but it is also introduced into the aquatic environment through wastewater discharges and through drainage water or runoff from fields where sludge, manure or fertilizers have been spread. Human consumption of water containing high concentrations of nitrate and nitrite poses a risk, particularly to pregnant women, nursing mothers and infants under six months of age. Of 1,292 farm wells tested in Ontario in 1992, 14 per cent exceeded the current Canadian Drinking Water Guideline for nitrate/nitrite.

Alarmingly, nitrate concentrations appear to be trending upward in surface waters in many of the river systems in agricultural areas of Ontario where sandy soils predominate. For example, nitrate concentrations in the Middle Maitland River rose from below 1.0 milligram per litre in the 1970s to about 4.5 milligrams per litre in 1994. As well, Lake Ontario nitrate concentrations steadily increased between 1968 and 1993. A possible explanation for these trends is the continued accumulation of inorganic nitrogen in agricultural soils. Over 70 per cent of soils on farm lands in the Great Lakes Basin and St. Lawrence lowlands are building up residual nitrogen. Between 1981 and 1986, nitrogen in drainage water from agricultural lands increased in concentration by at least 1 milligram per litre over almost all of southwestern Ontario. The ECO was unable to identify any more recent data to determine whether or not the situation has changed since 1986.

Aquatic life is also affected adversely by elevated nitrates. Across Canada, population sizes of 17 of 24 species of frogs and toads and 21 salamander species have declined in recent years. Recent Environment Canada studies show a high susceptibility of amphibians to nitrate toxicity, a likely link to these population declines. To protect amphibians, fish and reptiles, a new Canadian Water Quality Guideline (CWQG) of 3.0 milligrams per litre nitrate-N is currently under consideration. There is no equivalent provincial water quality objective for surface water. However, the current Ontario Drinking Water Standard is 10.0 milligrams per litre nitrate-N. The province has never had an ambient water quality objective for nitrate to protect aquatic life, so we have not been alerted to the problem – nor to its extent across our southern waters.

The proposed new CWQG for nitrate brings the degraded condition of the water quality of many southern Ontario rivers and streams into sharp focus. Measured against the guideline of 3.0 milligrams per litre, a high proportion of the river water in parts of the province dominated by sandy soils with agricultural land uses would be deemed unsuitable for sustaining amphibian life.

Phosphorus

In many river systems in the southern part of the province, phosphorus concentrations exceed the Provincial Water Quality Objective (PWQO) for rivers and streams of 30 micrograms per litre. Higher phosphorus concentrations cause problem aquatic weed and algae growth, particularly in reservoirs where dead plant matter decays, sinks and uses up oxygen needed by aquatic fauna. Respiration at night by dense aquatic plant growths during summer can reduce oxygen to levels that can cause fish kills. Phosphorus concentrations have trended downward in river systems since the 1970s, when major sewage treatment plant upgrades began to be implemented, and as a result of detergent reformulation. However, recent evidence shows that the significant reductions of phosphorus in Lake Erie observed in the 1970s and 1980s have not continued. As a result, in 2000, open lake concentrations of phosphorus are still about three times higher than the target concentration. The sources are not definitively known because of the lack of surveillance and monitoring programs since 1994, but farming activities in Ontario are believed to be contributing 300 times more than municipal sources. In southwestern Ontario, concentrations of phosphorus in river water are generally much higher than the PWQO target of 30 micrograms per litre, and they tend to be higher in areas of more intensive cropping systems, higher livestock production densities and clay soils.

MOEE's Monitoring Programs

MOEE states in its 2001/2002 Business Plan that it is committed to leadership in the monitoring and dissemination of environmental information and knowledge. MOEE has a number of monitoring strategies in place for Ontario's lakes, rivers and streams, with a range of histories and purposes. These include:

- Provincial Water Quality Monitoring Network
- Enhanced Tributary Monitoring Program
- Great Lakes Tributary Toxics Monitoring Program (including high-volume toxics sampling)
- Great Lakes Water Intake Biomonitoring Program
- Sport Fish Contaminant Monitoring Program
- Streamflow Monitoring Network (funding partner with MNR)
- Great Lakes Nearshore Monitoring and Assessment Program
- Inland Lakes Monitoring Programs (Including Lake Partner Program)

Some of these programs have a high public profile, and their data are widely distributed by MOEE, e.g., the Lake Partner Program and the Sport Fish Contaminant Monitoring Program (incorporated in the biyearly Guide to Eating Ontario Sport Fish). Other programs have primary, although not exclusive, clients – for example,

the Enhanced Tributary Monitoring Program that compiles information for the International Joint Commission. The Tributary Toxics Monitoring Program has been valuable in identifying contributing areas for priority organic pollutants such as PCBs. Core activities of the Nearshore Monitoring and Assessment Program are carried out on a lake-by-lake basis over a multi-year cycle. This program has been of particular value in measuring environmental indicators in nearshore areas of the Great Lakes and has been supportive of the Remedial Action Plans for Great Lakes Areas of Concern.

From the above list, there would appear to be a comprehensive list of monitoring activities under way that could address the status of a broad range of ecosystem components. The Provincial Water Quality Monitoring Network, however, has provided the main overview on water quality data for rivers and streams. Unfortunately, MOEE severely cut back on its monitoring network, from 730 stations in 1995 to 240 by 2000. Only six of these stations are located across the vast expanse of northern Ontario. The remainder represent less than six stations per major watershed in southern Ontario. The dismantling of the network seems clearly inconsistent with MOEE's 2001/2002 Business Plan. The water bodies at the stations are sampled between 2-12 times per year for up to 39 parameters, mostly metals, nutrients, and ions. No consolidation or interpretive reports are produced from the acquired data, and this severely limits the usefulness of the data to environmental decision-making and to the public.

There are alternatives to the direct monitoring of the effects of land use practices on water quality. "Agri-environmental indicators" have been developed by the federal government and by Ontario to help determine how environmental conditions and trends within agriculture are changing over time, and what environmental risks exist within various areas. Decision-support tools for nutrient management planning on farms could be developed by Ministry of Agriculture and Food staff to ensure proper nutrient application rates under various soil, terrain and cropping system applications. Such tools can reduce the risk of contamination of surface and ground water by nitrogen and phosphorus from agricultural land. They are a step in the direction of sustainable agricultural practices and their use should lead to improving water quality over time. However, indicators and models are no replacement for long-term water quality data from a well-designed monitoring network that would represent the "bottom line," indicating progress toward (or away from) our provincial water quality goals in the watersheds of rural Ontario.

More Effective Monitoring Needed for the Future

Aquatic ecosystems in Ontario are under tremendous stress from a variety of changes and environmental pressures. Reacting appropriately to these changes requires a commitment to monitoring programs that collect relevant data over the long term, that are technically state-of-the-art and that convey information to both experts

and the public. Surface water quality is sensitive to season, time of day, temperature, flow-stage, spills, soil types, basin topography and many other factors. Stream and river monitoring networks have allowed only gross assessments of water quality and need upgrading to take better account of the dynamic effects of these processes in the monitored watersheds.

Most Ontario residents have little knowledge of the state of water quality in their local streams or lakes, or how the character of those water bodies might be changing as a result of climate change, changes in land use, population growth or other major forces. The monitoring programs Ontarians rely on to observe and report on surface water quality have become too fragmented and piecemeal to allow for accurate overviews. Now, more than ever, it is important for the province to take on the responsibility of determining the impacts on stream flows and water quality of such major influences. The province should have the ability to determine both present conditions and trends in water quality. Timely and pertinent information is important, as environmental managers cannot be put in the position of making decisions with outdated information.

In order for members of the public to be aware of the state of Ontario's water resources, they must have ready access to relevant information. The ECO encourages MOEE to facilitate public access to data through innovative methods such as Web site downloads or on-line access to graphically presented data and trends. MOEE should consider possible interpretive approaches that display water quality data in comparison with Provincial Water Quality Objectives, Ontario Drinking Water Standards, or other relevant criteria.

In our 1999/2000 annual report, the ECO recommended that MOEE and MNR develop "current and comprehensive information that would allow for the development of scientifically defensible rationales for habitat protection activities and the identification of emerging ecosystem problems." The need for adequate monitoring was also put forward in the report, *Managing the Environment*, prepared for MOEE in January 2001, which stated that comprehensive environmental information is the cornerstone of effective environmental management. MOEE has indicated in its 2001/2002 Business Plan that it is committed to implementing this principle of environmental management.

The ECO is pleased to note that the Ministries of Environment and Energy and Natural Resources are currently discussing plans for expanding hydrometric and water quality monitoring networks, in partnership with Conservation Ontario. These partnerships can have major cost efficiencies and can encourage local interest in and analysis of the database. The ECO encourages MOEE to continue to take the necessary steps to ensure that streams, lakes and rivers in Ontario are being monitored on a long-term basis and that the quality of our water resources is adequately assessed and reported.

(For ministry comments, see page 174.)

Recommendation 5

The ECO recommends that the Ministry of Environment and Energy institute an effective long-term provincial water quality monitoring program and make the resulting data readily available to the public.

Developing Sustainability

Will the Nutrient Management Act *Protect Rural Water Quality?*

The primary objective of the *Nutrient Management Act, 2001 (NMA)*, which received first reading in June 2001 and Royal Assent in June 2002, is to establish province-wide standards to regulate farm practices relating to nutrient management. The Act is part of Ontario's Operation Clean Water initiative, and aims to protect water quality and the environment in the province. Standards will be established through regulations, but since the draft regulations have not yet been made public, the real effect of the new nutrient management regime will not be known until they are available. The Act also provides for the establishment of a provincial registry of nutrient management plans, inspections by provincial officers, orders for preventive measures, and appeals to the Environmental Review Tribunal.

The Act provides that regulations passed under the *NMA* will supersede municipal by-laws relating to nutrient management, but since it may take up to five years before all of the regulations are in place, the Ministry of Agriculture and Food is encouraging municipalities to pass nutrient management by-laws in the interim. As of March 2002, some municipalities had passed by-laws to help address pressing land use conflicts, and OMAF was encouraging other municipalities to do the same by providing model nutrient management by-laws on its Web site.

In February 2002, OMAF also placed a proposal on the Environmental Registry for a Minister's Directive under the *Farming and Food Production Protection Act (FFPPA)*. Passed in 1998, the *FFPPA* stipulates that no municipal by-law can restrict a normal farm practice if it is determined to be "normal" by the Normal Farm Practices Protection Board.

(For ministry comments, see page 174.)

Under the proposed Directive, however, the Board cannot find that a municipal by-law restricts a normal farm practice if it regulates new and expanding livestock or poultry operations by requiring land application criteria that follow an approved mandatory nutrient management plan, farmstead site criteria, and contingency planning for leaks and spills. Until the *NMA* is put in place and supported by accompanying regulations, the Minister's Directive, once finalized, will likely remain in place.

In a November 2001 ruling, Ontario's Divisional Court affirmed that municipalities may make by-laws protecting agricultural resources and the environment under the *Planning Act* that are more restrictive than federal and provincial laws as long as they are not in conflict with them. This would include by-laws to regulate and control intensive livestock production. The court found that a municipal by-law capping the number of animals at a farm operation does not restrict normal farm practice in Ontario.

OMAF has committed to continue posting all initiatives related to the proposed *NMA*, including future consultation papers and draft regulations, on the Environmental Registry for public comment. However, the ministry has not answered inquiries from the ECO as to whether the *NMA* will be prescribed under the *EBR* for the purposes of posting regulations on the Registry, applications for review and investigation, and classification of instruments. If the *NMA* is not prescribed, certain *EBR* rights will not be available to the public. For example, the public will not have the right to make *EBR* applications.

MNR's New Guide for Forest Harvesting

The "Forest Management Guide for Natural Disturbance Pattern Emulation" (NDPE) sets out new rules for planning and carrying out clearcuts, which account for almost 90 per cent of the total area harvested in Ontario. The Guide directs the forest industry to plan clearcuts in a range of sizes closer to the historical natural pattern of wildfires. In the boreal forest especially, this means that most of the area harvested will be in large clearcuts. Cut areas will include residual patches of forest and individual trees, however, to emulate landscape patterns created by fire. (A more detailed review appears in the Supplement to this report.)

The rationale of the Ministry of Natural Resources for this new approach is that the most reasonable course for sustaining forests and their biological diversity is to emulate the processes under which they have evolved. This is a relatively new concept in forest policy and is the subject of considerable study and evaluation in many jurisdictions in North America. It appears to be progressive forestry policy, but many information gaps remain. MNR acknowledges that there is uncertainty about the ability of the Guide to conserve biodiversity, and that most of the direction in the Guide represents new and untested approaches. (See our discussion of biodiversity on pages 153-156.)

Historically, the dominant natural disturbance in Ontario's boreal forest was fire, which created large, even-aged stands of species such as black spruce and jack pine. MNR asserts that fire control measures have significantly reduced the number of wildfires and the total area burned in Ontario since the 1950s. The ministry also says that harvesting guidelines introduced in the 1980s to provide habitat for a few wildlife species have resulted in a checkerboard pattern of clearcuts smaller than historical fires. The ministry concludes that, in combination, these factors have resulted in forest fragmentation and negative impacts on biodiversity. MNR asserts that consolidating harvesting activities by making some larger cut patches on the landscape will result in larger patches of both disturbed and undisturbed forest, providing for the habitat needs of a broader array of forest wildlife.

There has been longstanding controversy over clearcut size in Ontario. Two rulings under the *Environmental Assessment Act (EAA)* influenced MNR's development of this Guide. First, a condition of the 1994 approval of MNR's timber management activities under the *EAA* was that clearcuts should normally be planned in a range of sizes up to 260 hectares, with exceptions above 260 ha allowed for biological and silvicultural reasons. The Environmental Assessment Board ordered MNR to implement the restriction and to develop standards for configuration and contiguity of clearcuts. Second, due to controversy in 1999 over large cuts planned in the Temagami area, the Minister of Environment and Energy ordered MNR to finalize the guidelines in 2001.

MNR's finalized NDPE Guide restricts the *number* of cuts that may exceed 260 ha to 20 per cent in the boreal forest and 10 per cent in the Great Lakes-St. Lawrence forest. The Guide states that "MNR believes this is consistent with the EA Board's direction that clearcuts should not routinely exceed 260 ha." There is no upper limit on the *size* of the cuts exceeding 260 ha, so they are expected to account for most of the *area* cut in the boreal. MNR says that fires in the boreal can range in size up to hundreds of thousands of hectares, and the natural pattern is for a few large fires to consume about 95 per cent of the forest burned in any year. An early draft of the Guide said that although fires may be larger, 10,000 ha was the largest disturbance, or cluster of clearcuts considered practical. That proposed limit was removed from the final version of the Guide.

New clearcuts must be separated in time from older clearcuts long enough to allow vegetation in the old clearcut to reach 3 m in height or by 20 years, whichever is earlier. If this cannot be achieved, clearcuts should be separated by 100 m or more, determined during planning. These are the main restrictions on the size and distribution of clearcuts. The new standards intended to replicate some of the structural legacies of fire require the retention of internal patches and peninsular patches in each cut and 25 well-spaced individual trees per hectare. The Guide says that, generally, the identification of internal patches will be made during operations.

Each five-year forest management plan prepared by a licence holder for their local forest management unit must be prepared using an estimate of the historical natural disturbance for that forest. MNR says that the period 1921 to 1950 provides the best available data to represent the "natural" disturbance regime in Ontario. The Guide says that data for an earlier time period, if available for a forest management unit, could show different fire frequencies and extent.

Estimating the "average" fire frequency and size is an inexact science because of the enormous variability of fire, lack of data, and the different assumptions and methods that may be used. Forest management plans must also include forest composition objectives and age class structure objectives that move toward the estimated natural forest condition. A benchmark forest condition must be established for each forest management unit, usually in consideration of a larger ecoregional context. This is an improvement over past forest management planning, but some of the guidance for developing these objectives is vague.

MNR put a great deal of effort into the public consultation process for the NDPE Guide, including posting two drafts of the Guide on the Environmental Registry for comment. The ministry admitted that they were not able to reach consensus on the Guide with stakeholders such as the environmental community and the forest industry. The ministry received almost 3,000 comments on the two postings, and only a few were supportive of the direction of the Guide. The majority of comments were form letters and petitions.

Many members of the public, environmental groups, and scientists predicted that larger cuts would amplify the negative impacts of clearcutting, and pointed to the many chemical and biological differences between fire and clearcutting. The ministry was criticized for reducing the complex dynamics of fire to its size and distribution and for minimizing or ignoring other equally important elements. MNR acknowledges that the application of the Guide will not mimic fire because harvesting is a mechanical process while fire is a chemical one. The Guide mentions some of the ways in which clearcutting differs from fire – for example, impacts on nutrient recycling, pathogen control, soil compaction and species regeneration – but offers little direction for addressing those differences.

The Guide says that "forest management activities should be modified to reflect more closely the structural/biological legacy that occurs post-fire," but most of the direction is provided as guidelines for forest managers to consider, rather than as standards. These progressive measures include leaving living trees vs. dead trees; leaving downed woody debris on site to return nutrients to the soil; using prescribed burning as frequently as possible in order to simulate the fire process and promote rapid turnover of nutrients and regeneration; maintaining old growth and natural age class structures; and avoiding salvage logging after fires in some areas. Many of these practices have not been applied much in the past in Ontario, and it is unknown whether the Guide will increase their use.

It is impossible to predict the environmental, economic or social impacts of the Guide. MNR commissioned a major study to evaluate the economic and ecological impacts of the existing guidelines and proposed new Guide on two case-study forest management units, using computer simulation and evaluation tools. Few clear findings applied to both units, except that application of the new Guide resulted in significantly fewer active roads. In one management unit, harvest increased substantially at the expense of marten habitat, but benefited moose habitat. In the other management unit, all harvesting scenarios (even the existing caribou guideline) resulted in a dramatic loss of caribou habitat. One generalization the study was able to make was that as the area and volume harvested increases, there is a corresponding decrease in the older conifer forest important for some wildlife species. The consultants concluded that the trade-offs between timber production and biodiversity depend on each particular forest and its characteristics.

Many commenters from the public expressed concern that the larger cuts represented a "timber grab" and would increase the amount of forest harvested. The forest industry, on the other hand, said they could not support the new guidelines, primarily because they were untested with respect to impacts on wood supply and cost. MNR stated in its media release and a summary of the Guide, however, that the amount of timber allocated to forest companies will not increase or decrease as a result of these new guidelines. MNR's consultants concluded that it was not possible to make any "across the province" generalizations about wood supply. The Guide states that its impact on wood supply and costs will be monitored.

Developing Sustainability

Can Forestry and Woodland Caribou Coexist?

MNR finalized its Forest Management Guidelines for the Conservation of Woodland Caribou in 2001. The guidelines are for use in forest management in northern Ontario. The province's boreal population of woodland caribou (*Rangifer tarandus caribou*), which number approximately 2,700 animals in Ontario and 1,800 in the area of commercial forestry, are considered a "threatened" population.

The guide explains that woodland caribou are sensitive to habitat disturbance and that they require large areas of undisturbed forest. MNR acknowledges "there has been a gradual recession in caribou range over the long term and local extirpation coincident with the expansion of forest harvesting." MNR says this is likely due to changes to forest composition and structure, increased access by hunters and predators, and the elimination of large contiguous patches of older forest adjacent to occupied caribou range. (See Figure 1.)

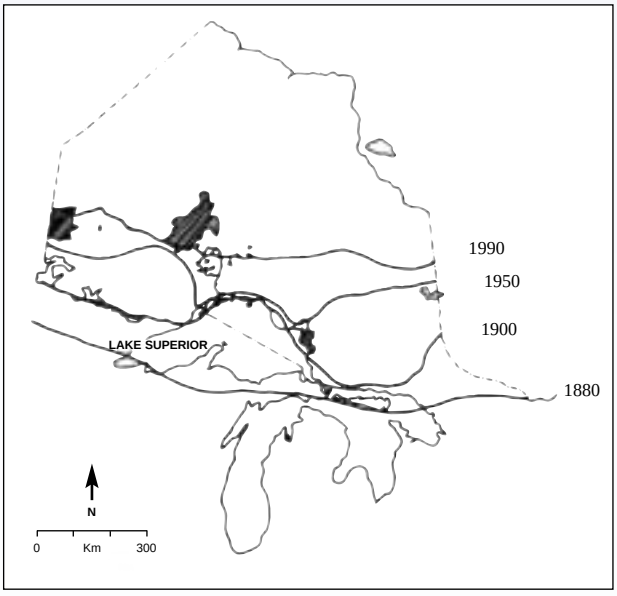

Figure 1. Range recession of woodland caribou in boreal Ontario (adapted from Darby *et al.* 1989).

The guide recommends forest landscape planning and management practices to decrease the likelihood of further declines in caribou populations. Because caribou prefer large areas of mature forest, the guide calls for clearcuts in the order of 10,000 ha or greater, and maintaining 10,000 ha or greater tracts of older forest. The hope is that the large cut areas will become suitable caribou habitat again when they reach maturity in 80 or more years, and that some suitable habitat will be available at all times. MNR acknowledges that there is "uncertainty about the long-term effectiveness of these guidelines for both caribou and the forest industry."

The policy is to be applied in concert with MNR's Natural Disturbance Pattern Emulation Guide (NDPE). MNR explains that the NDPE is intended to serve as a "coarse filter," while the caribou guidelines serve as one of the "fine filters" for forest management planning. The guideline recommends a number of practices, including managing caribou on a very large land base over 80 years or more; protecting winter habitat and calving areas; providing refuge from predators and human disturbance; discouraging conversion to hardwoods; and regenerating harvested areas to restore the composition and structure of the mature forests.

Pursuant to the *Crown Forest Sustainability Act* and the Forest Management Planning Manual, measurable indicators for biodiversity must be used in the determination of forest sustainability. MNR recognizes that the boreal population of woodland caribou could be considered an indicator of long-term forest health due to their disproportionately large ecological role and intolerance of human disturbance. Determining the impacts of forestry operations on the boreal population of woodland caribou is dependent on effective monitoring. ECO encourages MNR to conduct a rigorous scientific monitoring program of the boreal population of woodland caribou. The ECO also encourages MNR to use the boreal population of woodland caribou as a measurable indicator of forest sustainability. The ECO will monitor the implementation of this decision and any subsequent revisions to the guidelines.

(For ministry comments, see page 175.)

Other commenters objected to MNR's suggestion that the NDPE Guide and the new caribou guidelines would benefit wildlife (see "Can Forestry and Woodland Caribou Coexist?" page 53, and the decision review in the Supplement on pages 184–189). Conservation interests are concerned that the NDPE Guide places primacy on the large-scale disturbances over individual species' habitat requirements. Forestry companies on the other hand asked for a clear and unequivocal statement in the NDPE Guide that the other guidelines would not have to be used in addition to this Guide. The relationship between the NDPE Guide and existing wildlife habitat guidelines for caribou, marten, moose and other species remains somewhat unclear.

The ministry is currently reviewing all of its forest management guides with the intention of consolidating them into six guides (see pages 149–157 in the Supplement). The plan is to replace the many existing wildlife guides and the NDPE with three guides that would be applied hierarchically. The first would provide guidance on landscape management goals, the second would provide stand-level guidance, and the third would provide site-specific guidance for values such as raptor nests. The ministry describes this as a "coarse filter / fine filter" approach. The NDPE Guide says it will act as the coarse filter by focusing on the emulation of natural disturbance patterns and the maintenance of a broad array of forest conditions, and that established fine filter guidelines could be used to identify site-specific habitat needs. The authors of the Guide wisely observe that because it has not been tested, formal, rigorous monitoring of the Guide's effects on the habitat for featured species is required before the established guidelines are relaxed. But it also says that the allocation of the available harvest area according to the natural disturbance pattern should be adjusted to meet the needs of individual species only "if *absolutely necessary* to prevent *significant* habitat losses" (emphasis added). The ECO urges MNR to clarify that habitats of vulnerable, threatened and endangered species must always be protected, and to move quickly to implement the promised rigorous monitoring of the effects of the Guide on the featured species.

The NDPE Guide also acknowledges that, because fires still do occur, the harvest must be designed to complement, not replace, the historical natural fire size frequency distribution. The caribou guidelines say that fires of 40,000 to 60,000 ha still occur in the northwestern portion of the commercial forest area. Currently, the combined area of burned and harvested land is greater than the historical area burned, and Ontario's boreal forests will continue to experience large fires. MNR's consultants said that "if one excludes fire from planning the harvest levels may not be sustainable in the long run, since large fires will undoubtedly occur," and that "when significant catastrophic fire occurs a new plan should be developed with harvest levels reduced accordingly." MNR will need to ensure that the total amount of forest burned and harvested stays within a reasonable range of natural variation.

MNR says that fire suppression, combined with forest harvesting, has altered the species composition of the forests. In the boreal forest, stands of softwood species such as spruce and jack pine, which thrive after fire, are being replaced with hardwoods such as trembling aspen and balsam poplar, which are intolerant of both shade and fire. This shift has been well documented, and many credible audits and studies have suggested that clearcutting with inadequate regeneration efforts is the main cause of this species conversion in Ontario's boreal forest. The ECO has seen no evidence that the ministry desires either to encourage or to curb this trend in boreal forest conversion. Indeed, the continued commitment to clearcutting large areas of the original forest seems to run a great risk that conversion will continue. MNR should address this issue immediately and incorporate any needed direction into the new Guide as standards. MNR needs to be much clearer about its long-term provincial and landscape-level targets for the forests, including tree species composition, age classes and wildlife species populations.

Most research and mapping of historical natural fire patterns have been carried out on a very large ecoregional scale. Ontario has been divided into site regions, based on climate, landform and vegetation pattern variation across the province. MNR's analysis of forest fire history is classified by site region, also referred to in the Guide as ecoregions, providing templates for fire disturbance for each of the 10 site regions that fall within the area of commercial forestry. However, the Guide will be implemented instead at the local level during the development of forest management plans for each of the 55 forest management units, based on administrative units. The authors of MNR's commissioned report concluded, in fact, that they did not feel "that fire and other catastrophic events can be adequately addressed within a management unit allocation process."

Many observers are concerned that this broad landscape approach is hard to reconcile with the allocation of allowable cut for each individual management unit. Commenters expressed some apprehension about allowing industry foresters to plan clearcut size in the interests of conserving biodiversity in the long term, since they have an incentive to maximize timber production. While every plan must be approved by MNR, considerable discretion is given to the forest industry on how they apply the NDPE Guide and other guidelines – for example, to set goals for the future forest conditions on each forest management unit. The ministry must ensure that the planned harvest, future forest composition and wildlife habitat availability for each unit is compatible with ecoregional goals. This kind of planning must happen on a very large spatial and temporal scale, spanning more than one forest management unit over more than one cycle of harvest and regrowth of the forest.

In response to industry's concerns that the NDPE Guide had not been sufficiently tested and that implementation should be deferred until spatial planning tools are available, MNR said it "supports the continued development of spatial planning tools to the extent that available funding will allow." The ministry must commit to the development and distribution of spatial planning tools capable of applying the landscape-level direction within the guidelines. MNR must also be adequately funded to collect data and develop the necessary spatially based modelling and decision support tools.

The ECO urges MNR to oversee the Guide's implementation closely – to provide industry with the tools that will allow them to estimate the historical disturbance regime and to plan the new harvest patterns, and at the same time, be able to take into account the long-term and landscape-scale impacts on wildlife, on other users of the forest, and on future forest composition. MNR says that if monitoring or feedback from those using the Guide suggests that there are significant and unmanageable economic, ecological or social impacts, consideration will be given to a review and possible revision of the Guide before the normal five-year review. This is a good example of adaptive management. The ECO is concerned, however, that the Guide does not provide any detail on who will be responsible for the research and rigorous monitoring, nor how it will be carried out.

Ontario is one of the first jurisdictions to attempt to implement this new approach, although many other jurisdictions are moving in the same direction. Emulating natural disturbances appears to be a progressive approach to forest management, but it is a massive experiment on public lands. It is imperative that MNR be able to demonstrate to the public that this approach is scientifically sound and effective in conserving biodiversity.

This will continue to be a controversial issue. An application for investigation of this Guide and the size of recent clearcuts was received after the end of our reporting year. We will report on it in next year's annual report. *(For ministry comments, see page 174.)*

Recommendation 6

The ECO recommends that the Ministry of Natural Resources immediately develop a rigorous monitoring and research program and the necessary computer-based mapping and decision-support tools for planning forest harvesting.

Fisheries Act Enforcement in Ontario

Ontario ministries appear to be undermining the power and viability of the *Fisheries Act* by squabbling about enforcement responsibilities under the legislation. As a result, Ontario residents are being deceived about the extent of their rights under the *EBR*, and the legislation is not being effectively used to address water pollution threats and promote sustainable aquatic ecosystems.

Background

The *Fisheries Act* is one of the most valuable pieces of environmental legislation in Canada. One of its provisions is particularly significant: subsection 36(3), which prohibits the discharge of a deleterious substance into water frequented by fish unless the deposits are of a type and concentration authorized by regulation. Section 36(3) can be a very effective tool for prosecuting polluters because the courts have ruled that it is sufficient to prove that a substance is of a kind that *can* harm fish, regardless of proof that the substance actually harmed fish.

Although the *Fisheries Act* is federal legislation, in a 1989 agreement with federal agencies, the Ministry of Natural Resources was established as the lead enforcer of the Act in Ontario. However, the agreement failed to clarify how s. 36(3) would be enforced in relation to discharges of chemical pollutants, given MNR's lack of capacity to monitor and abate chemical pollution. Nevertheless, in signing the agreement, MNR took on responsibility for enforcing s. 36(3), and undertook enforcement of the Act. (See pages 301–302 of the Supplement to this report for a full discussion of the history of the *Fisheries Act* in Ontario.)

The Fisheries Act *Proves to be a Popular Tool under the EBR*

When the *EBR* was proclaimed in 1994, Cabinet decided that the *Fisheries Act* should be prescribed for the purposes of applications for investigation because MNR was the lead agency responsible for enforcing it. Initially, the *Fisheries Act* proved to be one of the most popular and effective tools for Ontarians filing applications for investigation regarding water pollution issues. More than 16 applications for investigation were filed between 1996 and 2000. (A summary of these investigation applications and the outcomes is provided in the Supplement to this report on pages 273–276.)

As a general rule, however, MNR investigations of alleged s. 36(3) contraventions related to chemical discharges were very disappointing. Most were not undertaken by MNR despite clear, *prima facie* evidence of contraventions. In other cases, the investigative work was inadequate or reached disturbing conclusions. (For example, see the Ontario Hydro investigation reviewed in the ECO's 2000/2001 annual report on pages 144-145.)

The Fisheries Act *and the* Ontario Water Resources Commission Act: *Understanding the Different Legal Regimes*

The *Ontario Water Resources Commission Act (OWRCA)*, now the *OWRA*, was enacted in 1956, in response to rapid post-war industrial and population growth, which had put enormous pressure on municipal sewage treatment plants, many of which were seriously inadequate. In 1955, two property owners downstream from sewage treatment plants (STPs) in Woodstock and Richmond Hill that were releasing partially untreated sewage sued on the basis that their common law riparian and nuisance rights had been violated. Lawyers for both Woodstock and Richmond Hill argued that approval by the Department of Health, which approved STPs at the time, gave them "statutory authority" to pollute. The judges in both cases disagreed and granted injunctions, but stayed them temporarily to provide the municipalities time to upgrade their facilities. The Ontario Legislature responded by passing the *OWRCA*, which limited the common law rights of downstream users and established the Ontario Water Resources Commission, an organization that provided the basis for the establishment of MOEE in the early 1970s.

There are some similarities in how water polluters are controlled under the two legal regimes. Section 36(3) of the *Fisheries Act* prohibits discharges of deleterious substances into waters, and Section 30(1) of the *OWRA* prohibits the discharge of any material that may impair water quality in any well, lake, river or watercourse. Contraventions of both statutes are strict liability offence, meaning that once the Crown has proven that the alleged offence took place, the defendant must show that he acted with due diligence to prevent the offence from happening. While the *OWRA* is Ontario's principal law for controlling water pollution, several sections of the *Environmental Protection Act (EPA)* also can be invoked by MOEE prosecutors. Section 14(1) of the *EPA* contains a general prohibition against the discharge of contaminants that cause adverse effects into the natural environment.

There are considerable differences, however, in how the *OWRA* and the *Fisheries Act* are interpreted, administered and enforced. As noted above, under s. 36(3) of the *Fisheries Act*, it is sufficient to show that a deleterious substance has been discharged into waters inhabited by fish. In contrast, a prosecutor wishing to obtain a conviction under the general prohibition in s. 30(1) of the *OWRA* must show some likelihood of impairment or toxicity. This higher standard was confirmed in a June 2001 decision of the Ontario Court of Appeal, *R. v. Inco Limited.* In its decision, the Court of Appeal ruled that s. 30(1) of the *OWRA* requires that MOEE show a capacity to impair as a result either of the inherent toxicity of the substance, or the conditions of its discharge – that is, the quantity and concentration of the discharge as well as the time frame over which it took place. This increases significantly the evidentiary burden on the

Crown with respect to prosecuting alleged contraventions of s. 30(1) of the *OWRA*. Many experts believe that this difference makes s. 36(3) of the *Fisheries Act* a far superior tool when compared with s. 30(1) of the *OWRA*.

Moreover, MOEE has developed policies, guidelines and objectives under the *OWRA* to regulate surface and groundwater pollution. In issuing certificates of approval to municipalities and industries, MOEE employs the "mixing zone" concept to determine acceptable effluent levels. A mixing zone is defined as "an area of water contiguous to a point source . . . where the water quality does not comply with one or more of the Provincial Water Quality Objectives [PWQOs]." The use of mixing zones is limited to conventional pollutants, and conditions within a mixing zone are not permitted to be lethal to aquatic organisms. Thus, so long as a discharging sewage treatment plant is constructed and operated in keeping with the terms and conditions set out in its certificate of approval, MOEE generally does not prosecute its operators (or owners) for impairing water quality under the *OWRA*.

Confusion about Enforcement Obligations

In October 2000, the ECO received an application for investigation alleging contraventions of s. 14(1) of the *EPA* and s. 36(3) of the *Fisheries Act*. The ECO forwarded the application to the MOEE, which is responsible for enforcing the *EPA*, and to MNR, responsible for the *Fisheries Act*. MNR responded in November 2000, advising the ECO that it was no longer responsible for the enforcement of the *Fisheries Act* when alleged pollutants were chemical in nature. MNR attached a document entitled *Fish Habitat in Ontario: Compliance Protocol – Federal and Provincial Roles and Responsibilities*. According to this new Protocol, which had been ratified by the various agencies in February 2000, "Environment Canada is the lead enforcement agency for s. 36(3) on federal lands or federally regulated industries… For all other cases Environment Canada defers to MOEE as the lead agency responding to potential violations, unless the deleterious substance is silt, in which case MNR is the lead agency."

To learn more about the Compliance Protocol, ECO staff contacted MNR and MOEE staff. We were advised that the Protocol was developed in part because MNR did not have the staff, equipment or expertise to investigate chemical discharges and determine whether they constituted violations of the *Fisheries Act*. We also were assured that MOEE Operations staff were part of the Fish Habitat Advisory Group's (FHAG) Compliance working group, the multi-agency committee that developed the Protocol in 1999, and that MOEE supported the Protocol.

Since the October 2000 application for investigation alleged a chemical discharge, the ECO followed the Protocol and forwarded it to MOEE. MOEE denied the application, citing the applicants' failure to provide information about any adverse effect.

Although s. 14 of the *EPA* does require that adverse effects be demonstrated beyond a reasonable doubt, the same standard of proof does not apply to the *Fisheries Act*. It is the ECO's opinion that, in respect to this alleged *Fisheries Act* contravention, MOEE misinterpreted s. 36(3).

In April 2001, the ECO received another application for investigation alleging the ongoing discharge of deleterious substances that were likely to be causing damage to fish habitat. The applicants submitted that these discharges were in contravention of ss. 35(1) and 36(3) of the *Fisheries Act*, s. 14(1) of the *EPA*, and s. 30(1) of the *OWRA*. In July 2001, MOEE denied the application for investigation. In considering the alleged contraventions of the *EPA* and the *OWRA*, MOEE stated that the applicants had failed to provide evidence of actual impairment of water quality, or of adverse effects on aquatic organisms. (A summary of this investigation is provided in the Supplement to this report on pages 273–276.) MOEE did not consider the alleged contraventions of s. 36(3), claiming that the *Fisheries Act* was administered by the federal Department of Fisheries and Oceans (DFO).

The Environmental Commissioner immediately wrote to MOEE's Deputy Minister seeking clarification and pointing out that MNR had advised the ECO that under the Compliance Protocol, MOEE was now responsible for investigations involving chemical discharges. In July 2001, the Deputy Minister advised the ECO that the Compliance Protocol was incorrect in suggesting that MOEE was the lead enforcement agency for s. 36(3). According to MOEE, the Protocol was based on the "First on the Scene" Decision Matrix, which identifies MOEE as the agency responsible for *investigating* chemical pollutants in water originating from land-based sources but not for *enforcing* s. 36(3). MOEE's Deputy Minister also stated that staff had advised DFO of the need for clarification, and had requested that DFO either amend the Protocol or issue an erratum.

After receiving MOEE's response to this application, the ECO also began to contact various government agencies seeking clarification of MOEE's roles and responsibilities with regard to s. 36(3) of the *Fisheries Act*. Environment Canada agreed with MOEE, stating that the ministry was not responsible for enforcing s. 36(3) of the *Fisheries Act*, and that when its staff becomes aware of a potential violation involving a substance of a chemical nature, it discusses the enforcement approach with MOEE. If MOEE decides to address the issue through the *EPA* or the *OWRA*, then Environment Canada takes no action other than monitoring how the case proceeds. If MOEE decides not to pursue the matter, then Environment Canada undertakes enforcement action. Although MOEE is not responsible for enforcing s. 36(3) of the *Fisheries Act*, it may use its authority in prosecutions.

ECO Research Project

In September 2001, the ECO undertook a research project to examine *Fisheries Act* compliance issues and to try and sort out how the public's rights under the *EBR* are being affected by disagreements about *Fisheries Act* enforcement responsibilities. Federal and provincial agency staff and other experts familiar with the work of the Fish Habitat Advisory Group's Compliance working group were contacted and interviewed.

When the ECO's research project was launched, there was a great deal of confusion surrounding the status of the Compliance Protocol and MOEE's obligations under it. Many federal and provincial officials, as well as many other stakeholders, believe that the *OWRA* and the *Fisheries Act* contain similar, if not identical, provisions with respect to water pollution, and do not realize that many activities that are permitted under the *OWRA* allow discharges that could be prosecuted as contraventions of the *Fisheries Act*. In fact, several experts, including some federal officials, advised the ECO that dozens of sewage treatment plants in Ontario are probably not in compliance with s. 36(3) of the *Fisheries Act*, even though these operations are statutorily authorized under the *OWRA*.

The ECO also found that many federal and provincial officials and other stakeholders were unaware of the June 2001 decision of the Ontario Court of Appeal on s. 30(1) of the *OWRA, R. v. Inco.* This lack of awareness is troubling because many experts believe that while this decision limits the scope of the *OWRA* with respect to prosecuting water pollution offences, it elevates the importance of s. 36(3) of the *Fisheries Act*.

Some experts told the ECO that enforcement of the *Fisheries Act* in Ontario is lagging behind other provinces. Ontario is a large province, with a substantial portion of Canada's water polluters and a large population base. Between April 1996 and March 2001, MNR conservation officers laid 87 charges for alleged contraventions of s. 36(3), and almost all of these related to discharges of silt and sediment. While 47 of these charges were later withdrawn for a range of different reasons, as of July 2002 MNR had successfully prosecuted 26 of them, with the courts levying fines totalling more than $50,000.

MOEE has also not enforced the *OWRA* with vigour in the past six years. Indeed, one 2001 report indicated that MOEE launched only 11 prosecutions for alleged contraventions of the *OWRA* between 1995 and 1999, despite evidence – contained in more than 10,000 MOEE exceedance reports issued during this four-year period – of thousands of potential contraventions of the Act, its regulations and facility approvals. (In the wake of the Walkerton tragedy, MOEE did significantly increase its rate of *OWRA* prosecutions for contraventions described in MOEE exceedance reports.)

It would also appear that MOEE discourages the use of the *Fisheries Act* by federal agencies. Several experts and staff working for federal agencies and conservation authorities in eastern Ontario and southwestern Ontario told the ECO that MOEE management and staff actively discourage federal staff from prosecuting dischargers normally regulated under *OWRA,* even when evidence of s.36(3) contraventions was substantial, because federal enforcement makes MOEE "look bad" and "MOEE staff prefer to use the *OWRA*." Lawyers for MOEE, for example, prefer to use the OWRA because they are more familiar with conducting prosecutions using the *Provincial Offences Act,* under which *OWRA* violations fall. Contraventions of the *Fisheries Act* must be prosecuted under the *Criminal Code*.

Status of Compliance Protocol as of March 31, 2002

While the ECO research project was under way, officials from various agencies involved with the FHAG Compliance Protocol working group held several meetings and conference calls about the Protocol, trying to resolve outstanding concerns about how to apply it and the role of MOEE.

In February 2002, MNR updated the ECO on various developments in *Fisheries Act* enforcement. We were advised that MOEE's concerns were discussed at a meeting of the FHAG Compliance Protocol working group in November 2001, and the group agreed to revise the Protocol to clarify roles and responsibilities. The revised Protocol will affirm that while MOEE does not have lead enforcement responsibility for the *Fisheries Act*, it does have a lead role in responding to chemical discharges affecting water. MOEE will be the "first on the scene" to investigate alleged discharges and collect evidence. If more than one statute has been contravened, MOEE and Environment Canada will identify the "most appropriate legislation" under which to proceed based on the Protocol. Moreover, Environment Canada has agreed its staff will not take action if MOEE chooses to address potential violations of s. 36(3) using the *OWRA*. MNR also suggested that since MOEE will continue to have a significant investigative role, the ECO should continue to forward applications for investigation that allege chemical pollution in water to MOEE. Presumably, these applications would be forwarded on an "information only" basis since MOEE denies any legal responsibility to conduct investigations under s. 36(3).

ECO Comment

Enforcement of the *Fisheries Act* has been inconsistent in Ontario for more than three decades, and this has compromised the sustainability of Ontario's fisheries and undermined the viability of many aquatic ecosystems. This problem has been exacerbated by the lack of monitoring of surface water quality, as described on pages 42-48 of this report and weak enforcement of the *OWRA* by MOEE.

According to MNR, MOEE's "first on the scene" lead role in responding to incidents of chemical pollution of water will be emphasized in the revised Compliance Protocol. But even under a revised Protocol, MOEE would still be responsible for investigating alleged *Fisheries Act* offences. Since MNR remains the lead enforcement agency for s. 36(3) contraventions, the ECO believes that the Ontario government should also clarify its obligations for enforcement regarding discharges of chemicals to waters frequented by fish. It would be logical and appropriate for MOEE to ensure that s. 36(3), a powerful tool for promoting pollution prevention, be made available through a formal agreement for use by MOEE's Investigations and Enforcement Branch and the SWAT Team the ministry created in 2000.

Whether or not MOEE was responsible for enforcing s. 36(3) of the *Fisheries Act* when the ECO forwarded the *EBR* applications for investigations to the ministry in 2000 and 2001, alleging water pollution offences, is debatable. However, MOEE was responsible for responding to and investigating chemical discharges to water. Accordingly, the ECO believes that MOEE should have considered the alleged *Fisheries Act* violations and contraventions of MOEE laws in reviewing these applications for investigation.

If MOEE is unwilling to prosecute contraventions of s. 36(3) of the *Fisheries Act*, and MNR is unable to conduct investigations of alleged chemical spills because of a lack of technical expertise, then it is essential that MOEE amend the *OWRA* (or create a new provision in water legislation developed in response to the Walkerton Inquiry recommendations) so that a level of protection equivalent to that found in s. 36(6) of the *Fisheries Act* is contained in Ontario water protection legislation. In addition, MOEE should amend the *EBR*'s O. Reg. 73/94 to reflect the fact that Ontario residents are unable to submit these types of applications for investigation. Otherwise, residents are being deceived about the extent of their rights under the *Environmental Bill of Rights* and misled about which agencies are responsible for protecting public resources from pollution threats. *(For ministry comments, see page 174.)*

Recommendation 7

The ECO recommends that the Ministry of Environment and Energy amend the Ontario Water Resources Act *so that a level of protection equivalent to that found in Section 36(3) of the* Fisheries Act *is contained in Ontario water protection legislation.*

Update: Air Issues

In the 2000/2001 annual report, the ECO provided a detailed review of Ontario's air quality issues (pages 65-72). This current update is intended, in part, to refer readers to air-related issues of interest in this year's annual report.

Air quality concerns remain a high priority both for the Ontario public and for the Ministry of Environment and Energy. This is clearly demonstrated by the flurry of air-related notices MOEE has posted on the Registry during the reporting period, as well as the volume, passion and high quality of public comments responding to MOEE's proposals. Evidence of public concern with air quality is also found in the applications that Ontario residents have submitted to the ECO in this past year.

Many Decisions Posted on the Registry

During this reporting period, MOEE finalized a number of important new regulatory mechanisms intended to reduce air emissions from industries and vehicles. The ECO has reviewed several of these decisions, and readers are encouraged to refer to the following pages for detailed analyses:

- Emissions Trading and NO_x and SO_2 Emission Limits for the Electricity Sector, pages 84-87.
- Emission Limits: The Lakeview Thermal Generating Station, page 88.
- Environmental Assessment Requirements for Electricity Sector Projects, pages 89-91.
- Monitoring and Reporting on Emissions of Airborne Contaminants, pages 91-94.
- Changes in the Drive Clean Program, pages 97-99.
- Control Orders For Sudbury Smelters, pages 108-110.
- Managing Ozone Depleting Substances, pages 160-165.

Most observers expect that the impacts of these decisions on Ontario's air quality will become evident over the next decade, and in some cases may be rather subtle and indirect. For example, this is the first year that large and mid-sized industries in Ontario (an estimated 3,000-4,000 facilities) are being required to report their total annual air emissions to MOEE. On its own, this reporting requirement will not reduce industrial emissions. However, it could have important implications if the ministry uses the data to compile more accurate emission inventories. For example, more accurate emission inventories would help the ministry follow through on its November 2001 proposal for developing emission caps to control the emissions of a wide range of

industrial sectors. Similarly, MOEE's new searchable public database (accessible on the Internet) will provide an incentive for companies to avoid public criticism by reducing emissions.

Many Proposals Still In Development

Many important air-related policy proposals remain undecided at the time of writing (May 2002). The ECO will continue to monitor the following MOEE initiatives, and will review them in future annual reports.

- Discussion paper for a risk management framework (PA01E0002), posted April 6, 2001
- Discussion paper: updating air dispersion models (PA01E0003), posted April 6, 2001
- Rules for reporting sulphur levels in gasoline (RA01E0018), posted August 23, 2001
- Emission caps on other industry sectors (PA01E0026), posted October 24, 2001
- Accelerating target date for cuts to NO_x and SO_2 (PA01E0025), posted October 24, 2001
- Phase-out proposal for hospital incinerators (RA01E0023), posted Dec. 18, 2001
- Several air standards currently at proposal stage

Public Concerns About Local Industrial Air Emissions

In this reporting period, MOEE responded to two *EBR* applications from Ontario residents with complaints about air emissions from specific local industrial facilities. The two responses, prepared by two different district offices of the ministry, contrasted sharply in quality. MOEE's West Central Region Office prepared a very good response to an application for review of an aging municipal waste incinerator, the SWARU incinerator in Hamilton (see pages 123-126 of this report). In this case, MOEE carried out a thorough and wide-ranging review, drawing in ministry staff with a variety of expertise. Ministry reviewers prepared a detailed set of recommended improvements to the operation of SWARU, although amendments to the incinerator's certificate of approval were still being negotiated in May 2002.

The second example related to emissions from two manufacturers of kitchen cabinets north of Toronto (see pages 126-129 of this report). In this case, MOEE denied a request to investigate complaints of strong odours and alleged contraventions of certificates of approval by the facilities. MOEE stated that investigations were already ongoing, but described activities that appear to be components of routine

abatement. In this instance MOEE failed to take a fresh look at a chronic local problem, which has involved numerous odour complaints and abatement activities over a number of years.

Weak Support for Energy Conservation, Cleaner Fuels

In this reporting period, the ECO also reviewed two *EBR* applications concerned with the environmental policy implications of Ontario's electricity market reform (see the Supplement, pages 212–217). This issue has important air quality implications, because almost 30 per cent of electricity generated in Ontario is currently produced by burning coal or oil. The applications, submitted in March 2001, raised concerns about inadequate encouragement for either energy efficiency initiatives or for cleaner energy sources under the policies guiding Ontario's electricity market reform. Both MOEE and MEST denied the requests for review, stating that policies were still under development, that there would be opportunities for public consultation, and that some measures to address these issues had already been implemented.

At the end of the reporting period, MOEE/MEST was still developing its policies relating to energy efficiency and support for renewable energy, even though the electricity market opened to competition on May 1, 2002. For example, MOEE/MEST is still working on an environmental labelling program intended to help consumers make informed choices about their electricity sources. MOEE/MEST has committed to posting a proposal for Phase II of this program on the Registry once it is ready, but the time frame is unclear. With regard to energy conservation programs, the Ontario Energy Board is expected to begin stakeholder consultations in late 2002 on a range of issues, including demand-side management programs, and how electricity retailers and local utilities might promote energy efficiency. Any resulting MOEE/MEST and Ontario Energy Board regulatory initiatives would not be implemented before 2004. Finally, recommendations on alternative fuels are expected in May 2002, in the final report of a legislative committee established to examine alternatives to fossil fuels. The ECO will continue to monitor the development of policies to encourage energy conservation and to promote the use of less polluting fuels. *(For ministry comments, see page 175.)*

Developing Sustainability

Will COA Help to Restore the Great Lakes?

The Great Lakes are among the earth's greatest natural treasures, containing about 20 per cent of its surface freshwater. They deserve long-term stewardship and protection for the benefit of future generations. Yet the presence of industrial development and heavy urbanization within the Great Lakes Basin has contributed to serious and long-term damage of this important ecological feature. Because less than 1 per cent of water in the Great Lakes Basin is renewed annually by precipitation and run-off, pollutants tend to stay in the system and can become more concentrated over time.

Progress has been made in restoring the Great Lakes. Some harmful pollutant discharges have decreased and water quality has improved. Small but growing and healthy populations of osprey, bald eagle and lake trout demonstrate ecosystem improvements. One of the contributing factors has been a framework for action entitled the Canada-Ontario Agreement on the Great Lakes (COA). First signed by the Ontario and Canadian governments in 1971, the Agreement has had various iterations, providing an overall program for various provincial ministries and federal departments to follow in tackling environmental and land use matters. But serious and persistent issues still plague the Lakes, including contaminated sediments, non-native invasive species, habitat loss, bioaccumulative toxic substances and hormone-mimicking chemicals.

The ECO's 1999/2000 annual report explained that the 1994 version of the Agreement failed to meet many of its targets for restoring degraded areas, preventing and controlling pollution, and conserving and protecting human and ecosystem health. The ECO concluded that this lack of progress was caused by several factors, including inadequate funding, lack of accountability, vaguely worded targets, and inadequate project management and control. The ECO also expressed concern about the lack of a replacement COA, since the 1994 version was set to expire.

Momentum to implement a new COA is beginning to build again. On September 28, 2001, the federal and Ontario governments released a new draft COA for a 60-day public comment period. Notices of the opportunity were provided on both Environment Canada's Web site and the Environmental Registry. The ECO commends both governments for keeping their commitment to consider public views prior to signing a renewed Agreement.

(For ministry comments, see page 175.)

The draft COA establishes 12 principles to guide the Agreement's vision of a "healthy, prosperous and sustainable Great Lakes Basin ecosystem for present and future generations." The principles include accountability to citizens, conservation, pollution reduction, public and stakeholder participation, and science-based Great Lakes management. The governments propose to provide citizens with COA progress reports and State of the Lakes reports every two years that are meaningful, timely and written in plain language. Other commitments include regular ongoing public consultation as COA is implemented, and a comprehensive review of COA's effectiveness conducted in the fifth year of the Agreement and subject to public consultation.

Four Annexes included with the draft COA ("Areas of Concern," lakewide management, harmful pollutants, and monitoring and information management) set "five-year societal goals" for the Great Lakes Basin ecosystem that are "reasonable and desirable to achieve." Staff representing both levels of government are charged with developing and coordinating implementation of multi-year workplans that will further guide the actions described in the Annexes.

The ECO is encouraged by some of the accountability, reporting and consultation features contained within the draft COA. After release of the final Agreement, the ECO looks forward to discussing with ministry staff how the Environmental Registry can best be used in concert with other consultation exercises. The provincial government's April 2002 announcement of its five-year $50-million commitment to Great Lakes cleanup also gives reason for optimism. However, because of the problems that plagued implementation of the 1994 Agreement, the ECO will keep a close watch over Great Lakes developments and will review the 2002 COA, signed on June 12, 2002.

Land Use Planning, Smart Growth, and Ontario's Natural Heritage

Past ECO reports have raised concerns about the ability of Ontario's existing planning system to protect natural heritage, and about transportation planning and sprawl in southern Ontario and especially in the Greater Toronto Area. During this reporting period, the ECO has been closely following two Ontario government initiatives that address these significant issues: the government's five-year review of the Provincial Policy Statement and the development of a "Smart Growth Strategy." Both were initiated in 2001, and no decision notices had been posted by the end of the reporting year.

Review of the Provincial Policy Statement

The government is reviewing its land use planning policies to determine how well they are working and whether they need to be revised. The policies are set out in the Provincial Policy Statement (PPS) issued under the *Planning Act (PA)* in 1996. The PA requires that municipalities, the Ontario Municipal Board (OMB), and other planning authorities "have regard to" these provincial policies in making land use decisions. The PPS sets out policies on matters such as economic development; land use patterns; infrastructure such as roads, sewers and transit; and protection of agricultural lands and natural heritage. Section 2.3 of the PPS states that natural heritage features and areas, including wetlands, woodlands, wildlife habitat, and areas of natural and scientific interest, will be protected from incompatible development.

The *Planning Act* requires a review of the PPS every five years. In July 2001, the Ministry of Municipal Affairs and Housing formally launched its review. MAH provided a 60-day comment period and held meetings with various stakeholders. The ministry posed several questions, asking whether the existing policies are appropriate, clear, and of the correct scope and detail; how effective they have been; and whether they are being implemented successfully at the local level. The ministry did not provide background material such as ministries' analyses or data, however, to inform the public comments. Several stakeholders observed that the review appears to be based on anecdotal evidence and opinion, because the province does not have data on performance measurement indicators or analysis of land use changes that took place between mid-1996 and mid-2001. The ECO and others have noted in the past that the province did not have data adequate for reviewing PPS policies related to natural heritage — for example, to measure the loss and fragmentation of southern Ontario woodlands. Although MAH and MNR have informed the ECO several times over the past few years that they were developing performance indicators for natural heritage protection, no details had been provided to the ECO by April 2002.

The review of the Provincial Policy Statement must also examine how the policies have been implemented. A few studies and anecdotal evidence indicate that there is great variability in the way PPS policies have been incorporated into Official Plans, considered during review of development applications, and applied in decisions by the OMB. In 2001, the ECO reviewed a sample of recent OMB decisions involving the natural heritage policies. We found the outcomes varied significantly according to the presiding OMB member, although most members applied the natural heritage policies in a thoughtful and effective manner. We also found that the OMB was more likely to recognize the value of natural heritage when government agencies provided testimony or evidence. Ministry staff were rarely involved in the decisions the OMB reviewed, however, and their lack of direct participation in the planning process contributed to rulings against natural heritage protection. Information created by the Ministry of Natural Resources (for example, wetlands mapping) was recognized by the OMB as critical evidence in support of the policies. Conversely, where MNR had not previously inventoried or identified an area as significant, it was more difficult for parties to provide qualified evidence to support the policies.

Comments from the public submitted during the PPS review have identified policy gaps and problems with implementation. Remedies suggested by members of the public include amending the natural heritage policies to make them stronger and more explicit; re-establishing the role of MNR to inventory, identify and map natural heritage features and support the natural heritage policies; amending the *Planning Act* to make application of the PPS policies mandatory; or applying the ecosystem-based approach of the new *Oak Ridges Moraine Conservation Act* and Plan more widely.

MAH also asked the public to comment on whether the policies of the Provincial Policy Statement support the government's new Smart Growth objectives. Some parties said they fundamentally disagree with the government's use of the term "Smart Growth," so they could not evaluate the PPS policies against Ontario's Smart Growth objectives in a meaningful way. Others said that the PPS review is the perfect opportunity to put policies in place to reduce urban sprawl, if that is truly the intent of the Smart Growth strategy.

MAH informed the ECO in April 2002 that the ministry expected to post a decision notice on the PPS review in the near future. The ECO anticipates the decision notice will include a description of the information the review was based on and the analysis undertaken, as well as notice of the opportunity to comment on any proposed revisions to the PPS.

Smart Growth

The term "smart growth" has been used for a number of years in the U.S. to describe a new approach to land use planning. It is premised on recognition that current development patterns are unsustainable. Current approaches to municipal development tend to create lower-density housing, commercial development such as industrial parks and strip-malls, and highways. This pattern of urban sprawl has caused increased air pollution, loss of farmlands and natural areas, gridlock, and increased infrastructure costs. Common smart growth policies include encouraging growth in existing urban areas, promoting public transit, protecting agricultural and natural areas, and designing high-density integrated communities with a mix of land uses.

In January 2001, the Ontario Premier announced the government had adopted a smart growth vision for promoting and managing growth in the province, based on three principles: a strong economy, strong communities, and a healthy environment. He said that the government had identified the need to address and link decisions on issues such as transportation, infrastructure, land use, housing and the environment. The initiative is led and coordinated by MAH and supported by a Smart Growth Secretariat within the ministry, but involves eight other provincial ministries and agencies. Involvement of multiple ministries is a positive move and may signal a significant change in how decisions affecting the environment are made.

While there is broad support for a "Smart Growth" strategy, the government heard differing opinions on what the strategy should entail. Some stakeholders maintain that Smart Growth should stop urban sprawl, halt the building of low-density subdivisions, and transfer resources from highways to public transit. However, the stated vision of the Ontario Government is to expand choices in transportation and housing, without restricting anyone's lifestyle choice. The Minister of Municipal Affairs and Housing said the Smart Growth goals were based on choice — the idea that individuals can choose where they want to live, and have the flexibility to live in the way they choose. The government calls this a "made-in-Ontario" Smart Growth strategy. In areas like the GTA and Ottawa, emphasis will be on managing the anticipated growth and its associated problems, such as gridlock. In smaller rural communities, and particularly in northern Ontario, the primary goal is to promote and maintain economic growth.

The ECO has monitored progress on Smart Growth since it was first announced. Our view is that the initiative is vague and remains somewhat amorphous. It was still unclear at the time of writing whether the government was developing an

actual Smart Growth strategy document. Smart Growth does seem to have been used over this reporting year as a catch-all term for a number of distinct activities or programs. Under the rubric of Smart Growth, prescribed ministries have announced a number of initiatives, including brownfields legislation (reviewed on page 83); a development permit system (reviewed in the Supplement on pages 119–122); the five-year review of the PPS; introduction of a new *Municipal Act* (reviewed on pages 79-82); a Transit Investment Plan; a decision to take back responsibility for GO Transit and wind down the Greater Toronto Services Board; and improvements to highways.

The government held extensive consultations on Smart Growth in the spring of 2001 and released a summary of the consultations. In September the Premier announced that five regional Smart Growth Management Councils would develop Smart Growth Management Plans for each geographic zone. A second round of consultations was held in the fall, and in February 2002, the first of the Smart Growth Panels was established. The multi-stakeholder panels will work with the province to develop Smart Growth Plans for each zone. They will also provide advice to the province on priority issues such as gridlock and waste disposal in the GTA and job creation in the north. They will produce an annual report, with the first due in December 2002.

Public consultation was not well timed, as the government made decisions on a number of initiatives, including the Smart Growth principles and objectives, before consulting. (Discussion of the *EBR* posting for this ongoing project is described on pages 21–22 of this report.) The ECO will continue to monitor the development of the Smart Growth initiative. *(For ministry comments, see page 175.)*

Recommendation 8

The ECO recommends that the Ministries of Municipal Affairs and Housing and Natural Resources develop performance indicators for natural heritage protection under the Provincial Policy Statement and provide their findings to the public.

PART 4:

Ministry Environmental Decisions

Each year the Environmental Commissioner of Ontario reviews a sample of the environmentally significant decisions made by the provincial ministries prescribed under the *Environmental Bill of Rights*. During the 2001/2002 reporting year, 3,134 decision notices were posted on the Environmental Registry by Ontario ministries. Decision notices were posted for the following:

- 33 Policies
- 7 Acts
- 24 Regulations
- 3,070 Instruments

The number of instrument decisions during this reporting period is approximately double that of 2000/2001 fiscal year. This resulted from the cleanup during the year by MOEE of a large number of postings for which instruments had been issued without decisions' being posted.

The extent to which the ECO reviews a ministry decision depends on its environmental significance and the public's interest in the decision. The ECO undertook detailed reviews of the 27 decisions that appear in Section 4 of the Supplement to this annual report. The ECO has also summarized and highlighted 14 of these decisions in the following pages of this report.

Oak Ridges Moraine Conservation Act

The Oak Ridges Moraine (ORM) is a unique ecological and hydro-geological feature, spanning more than 160km in southern Ontario. Its diverse natural habitats are home to a wide range of plant and

animal species, including many species at risk. The Moraine also supports substantial surface water resources and holds significant groundwater resources. With the exception of the Niagara Escarpment, land use planning laws and policies have historically not protected environmentally significant and sensitive landforms, including the Moraine. This unique landform faces enormous development pressures that threaten to further fragment and degrade it. The *Oak Ridges Moraine Conservation Act (ORMCA)* is the culmination of a long process of public advocacy to protect the ORM.

In May 2001, the Ontario Government enacted the *Oak Ridges Moraine Protection Act* in order to place a six-month moratorium on planning instruments and stay development applications before the Ontario Municipal Board involving lands on the ORM. During this six-month period, the government carried out public consultations through the Environmental Registry, advisory panels and stakeholder meetings. A consultation paper, "Share Your Vision for the Oak Ridges Moraine," was released in August 2001 and used as the basis for consultation. A consultation notice was placed on the Registry and four public open houses/hearings and six stakeholder sessions were held across the ORM in late August and early September 2001. In December 2001, the *ORMCA* was enacted by the Ontario Legislature. A provision in the Act deems it to have come into force on November 16, 2001, making it retroactive.

The Act allows the establishment by regulation of the Oak Ridges Moraine Conservation Plan, which was finalized on April 22, 2002. The Act says that the objectives of the Plan are to:

- Protect, improve and restore the ecological and hydrological integrity and functions of the Moraine.
- Ensure that the Moraine is maintained as a continuous natural landform and environment for present and future generations.
- Provide for land and resource uses and development compatible with the other objectives of the Plan.
- Provide for a continuous recreational trail through the Moraine.

A review of the Plan must be carried out every 10 years to determine whether it should be revised, but such a review is prohibited from considering removing land from the natural core areas or natural linkage areas. In addition, the minister may make amendments to the Plan, but they must conform to the objectives of the Plan. All decisions made under the *Planning Act* or the *Condominium Act* relating to lands on the Moraine must comply with the Plan, and the Plan will prevail if it conflicts with an Official Plan, zoning by-law or Provincial Policy Statement.

The *ORMCA* requires public participation for any decisions made under the Act. In the 10-year review of the Plan, the minister must consult with affected ministries and public bodies and with the council of each municipality or municipal planning authority with jurisdiction in the Moraine area, and ensure that the public is given an opportunity to participate in the review. A more limited consultation requirement applies to proposed amendments to the Plan.

MAH has also informed the ECO that it is committed to prescribing the *ORMCA* under the *EBR*, so that the public receives notice and has the opportunity to comment on regulations and instruments related to the *ORMCA*, and is able to make applications for review in relation to the Act.

Key Features of the Plan

The Oak Ridges Moraine Conservation Plan sets out conditions for future land use, development, site alteration and the use of buildings. In general, it does not affect existing uses or prevent the expansion of existing buildings as long as there is no change in use. The Plan sets out four land use designations and the permitted uses for each, with fewer activities allowed in each more protective designation. Accompanying the Plan is a map showing how the Plan Area has been divided into the four land use designations.

Natural Core Areas, which cover 38 per cent of the Plan Area, are intended to protect areas with a high concentration of key natural heritage and hydrologically sensitive features. The only new uses permitted in Natural Core Areas are resource management activities, agricultural uses, home businesses and industries, low-intensity recreational uses and new transportation, infrastructure and utilities. These land uses are permitted in all designations. **Natural Linkage Areas** cover 24 per cent of the Moraine and protect linkages between the Natural Core Areas and along rivers and streams. New aggregate operations are the only additional permitted use. **Countryside Areas** cover 30 per cent of the Plan Area and are intended to provide an agricultural and rural buffer. Additional permitted uses in Countryside Areas include rural settlements or hamlets; new small-scale commercial, industrial and institutional uses; major recreational uses such as golf courses or ski hills; and some residential development in the eastern portions of the Plan Area. **Settlement Areas** comprise only 8 per cent of the Plan Area and are intended to focus and contain growth. All uses allowed in applicable official plans are permitted, subject to the additional provisions of this Plan.

Fully 62 per cent of the Plan Area is designated as core protected areas and corridors, and there will be little new residential development except in the settlement areas. The public will have non-motorized recreational access to a trail running the length

of the Plan Area, and a 550-hectare public park will be established in Richmond Hill through donations and exchanges for provincially owned lands off the Moraine.

The Plan contains provisions to protect ecological and hydrological features and functions, regardless of land use designation. The Plan identifies key natural heritage, hydrological and landform features and describes restrictions and requirements for development in and around these features. All development within a key natural heritage or hydrologically sensitive feature or its minimum protection zone is prohibited, except for new transportation, infrastructure and utilities, and low-intensity recreational uses.

Specific land use provisions provide the details and conditions of permitted uses. Municipalities may enact more restrictive policies than those in the Plan, except regarding agricultural uses or pits or quarries. New pits and quarries are permitted in all designations other than Natural Core Areas, but applications must meet *ORMCA* Plan criteria in addition to the requirements of the *Aggregate Resources Act*. While golf courses, serviced playing fields, serviced campgrounds and ski hills are allowed in Countryside Areas, applications must demonstrate that water use and application of fertilizers and pesticides will be kept to a minimum.

Transportation, infrastructure and utilities are permitted throughout the Plan Area, including public highways, transit lines, railways, gas and oil pipelines, sewage and water service systems, and power transmission and telecommunications lines. Applications for these uses must demonstrate the need for the project, as well as allowing for wildlife movement and keeping any adverse effects on the ecological integrity of the Plan Area to a minimum. However, the Plan does not include criteria or review and approval procedures for determining whether the need has been demonstrated. MTO reported to the ECO in April 2002 that through their participation in the ORM initiative, "MTO has taken a leadership role in the development of policies and approaches that are designed to support a best practices approach to mitigating the impact of transportation infrastructure on the natural environment. As the government puts in place the mechanisms to implement the Oak Ridges Moraine legislation, MTO will continue to play a leadership role in helping to ensure that the principles involved in the plan are achieved."

Most members of the public who commented on the proposed Plan said that no new aggregate operations or pits and quarries should be allowed in the Natural Linkage Areas or ever considered for the Natural Core Areas. The ECO believes that these concerns of the public are ecologically justified. In the final Plan, pits and quarries are allowed in all but Natural Core Areas. Further, the implementation

document attached to the Plan says the 10-year review may consider whether to change the provisions of the Plan to permit establishing new mineral aggregate operations and wayside pits and expanding existing ones in Natural Core Areas. Municipalities, in fact, are encouraged to enact more restrictive policies than those in the Plan, except regarding agricultural uses or pits or quarries.

The Plan is similar to the Niagara Escarpment Plan in its ecological basis. First, it attempts to identify the ecological forms and functions, including their connections, which must be protected. Second, it seeks to create a buffer between these areas and urban centres. This approach represents progressive environmental planning. While the Plan does not affect existing land uses, it adds new restrictions and planning requirements on future development, depending on the land use designation and proximity to any natural heritage features, hydrological features, wellhead protection areas and areas of high aquifer vulnerability. All of these features of the Plan, depending on how well they are implemented, should ensure that the key woodlands, wildlife habitat, landforms, wetlands, kettle lakes, headwaters and groundwater resources are preserved.

The Plan's provisions for protecting natural heritage and hydrological features and functions are mandatory and not just policies that decision-makers must "have regard to," and they take precedence over other Acts and plans. For example, the Plan lists more types of natural heritage features, including rare species and kettle lakes, than does the Provincial Policy Statement, and does not require them to be identified as "provincially significant" in order to be protected. Setting out the areas of influence and minimum vegetation protection zones in metres for each type of feature provides clearer and more defensible rules. Previously in the Oak Ridges Moraine Area (and to this day, elsewhere in the province), the application of the natural heritage policies was variable, because ministry guidance documents are vague and their use optional.

It is not known at this time what effect the Act and Plan will have on development patterns in the areas adjacent to the boundaries of the Plan Area. MAH maintains that the Act and Plan are key elements of its Smart Growth strategy, in steering development toward existing settlement areas and away from protected areas. Development interests have claimed that the result will be "leap-frog" development north and east of the Plan Area. Environmental groups, municipalities and others praised the government for stopping sprawl on the Moraine, but urged the government to prepare a Smart Growth strategy for the rest of south-central Ontario to avoid redirecting development to the prime farmlands and natural areas adjacent to the Moraine.

Implementation

When the Plan was finalized in April 2002, the implementation provisions had been moved into a separate document. It says that the Plan provides direction to provincial ministers, ministries and agencies, municipalities, municipal planning authorities, landowners and other stakeholders. Ministries of the provincial government will "make available to users of the Plan" maps and technical information on the Key Natural Heritage Features, where available, as well as criteria for the identification and mapping of these features, hydrological features and landform conservation areas and areas highly vulnerable to groundwater contamination. Ministries will also update or create new technical guidelines to help the users of the Plan to understand, interpret and implement the provisions of the Plan. These will include manuals on natural heritage, landform conservation, stormwater planning, water budget and water conservation plan preparation, and watershed and subwatershed plan preparation.

Also, Ontario Government ministries — in partnership and in consultation with various stakeholders — will establish a data management system, including a database, performance indicators and a monitoring network, in order to assess changes to the ecological integrity of the Moraine and monitor the effectiveness of Plan implementation. The indicators will attempt to measure ecological change, assess the effectiveness of the Plan in achieving its objectives, and help identify improvements needed to address problems. Unfortunately, there are no timelines and no clear indication of responsibility and accountability for the government's plan to establish these tools. The ECO urges MAH, MNR and MOE to take responsibility, set targets and timelines, and begin planning these monitoring, indicator and evaluation systems immediately.

There will undoubtedly be economic and social impacts on municipalities and the private sector. Municipalities must now carry out additional studies of natural heritage and hydrological features, revise their Official Plans, prepare watershed and subwatershed plans, water budgets and conservation plans. Municipalities must establish well-head protection areas and policies in their Official Plans. They must also apply an additional set of rules when evaluating development applications. Applicants will have to carry out additional studies and minimize adverse impacts as required by the Plan. Developers, farmers and small landowners may lose anticipated income or profits.

Concerns were expressed in public comments about how effectively the Act and Plan would be implemented. Most commenters urged the province to carry out the necessary resource inventories and take a greater role in administering the Plan, either through establishment of a commission like the Niagara Escarpment Commission, or by strengthening the roles of MNR and MOEE. Municipalities agreed with the idea that they implement the Plan, but asked the province to map all the areas with

ecological constraints to development and to allow municipal policies to be more restrictive than the Plan. They also asked that the province either exempt development controls from appeal to the OMB or else be responsible for defending the Plan before the OMB and courts.

The implementation material attached to the Plan indicates that the province anticipates a minor role for itself in implementation. Most of the upper tier municipalities, which have demonstrated their commitment to the Act and Plan, have specialized technical and environmental planners. But it is less likely that all of the lower tier municipalities have the resources or expertise to carry out the studies and evaluations set out in the Plan.

ECO Comment

The *ORMCA* and the Plan are important steps forward in environmental land use planning in Ontario. If the Plan is successfully implemented, the natural features and functions of the Moraine are likely to be maintained, and the public will have access to a large public park and recreational trail. The ECO commends the government for enacting the *ORMCA* and the Plan, and recognizes the work of the staff of the various ministries involved, the members of the external advisory panel, municipalities and environmental groups, and the thousands of Ontarians who made submissions. The ECO acknowledges the difficulty of doing this work so quickly. Developing and finalizing the Plan within a year was a remarkable achievement. Overall, MAH did an excellent job of balancing the competing interests and submissions. The ECO also commends MAH for its commitment to comply with its *EBR* obligations by prescribing the *ORMCA* under the *EBR*.

In the ECO's opinion, the Plan's provisions for protecting natural heritage features and hydrological features and functions are far superior to those of the *Planning Act* and the Provincial Policy Statement. MAH should consider using this model to improve land use planning and decision-making throughout southern Ontario.

However, allowing transportation and utilities in the entire Plan Area, even in Natural Core Areas and in natural heritage or hydrologically sensitive features, seems contrary to the objectives of the Plan. Since there are no mitigation measures nor criteria for interpreting the transportation provisions in the Plan, the ECO anticipates that new policies to clarify this point will be developed and shared with the public on the Registry for comment.

The ECO is concerned about implementation of the Plan. The ECO urges the provincial government to assist municipalities by providing baseline information and mapping to describe fully the "ecological and hydrological integrity of the Moraine" and

identify the areas subject to ecological constraints to development. The ECO also encourages ministries to update existing technical guidelines or develop new ones, and to post those new or revised policies and guidelines on the Environmental Registry for public comment. Among the strong prohibitions and explicit provisions in the Plan, there are some weaker conditions open to interpretation, and compliance with these may be difficult to measure.

The *ORMCA* and the Plan are a promising beginning to the task of protecting the Oak Ridges Moraine. The ECO will monitor and report on their implementation in future reports. *(For ministry comments, see page 176.)*

Recommendation 9

The ECO recommends that the Ministries of Municipal Affairs and Housing, Natural Resources, and Environment and Energy begin planning and implementing the promised systems for monitoring and evaluating the Oak Ridges Moraine Conservation Plan.

Municipal Act, 2001

The *Municipal Act, 2001*, represents the culmination of a lengthy consultation process by the government. Introduced to the Ontario Legislature on October 18, 2001, Bill 111, *An Act to Amend the Municipal Act and to Amend or Repeal other Acts in Relation to Municipalities*, comes into force on January 1, 2003.

The new *Municipal Act* is an important initiative, the end result of a process begun in 1996 to overhaul the delivery and funding of many government services. In January 1997, the Ministry of Municipal Affairs and Housing released a study paper to outline the need for a new *Municipal Act*. The study paper suggested that municipalities be granted "natural person powers" — for instance, the power to enter into contracts — and be provided with power to pass by-laws in 12 broad areas of authority. They include the health, safety, protection and well-being of people; protection of property; waste management; the natural environment; and nuisances (noise, odour, vibration and dust). These powers would enable municipalities to respond to issues in their communities without express authorization from the province. A draft Act was released for consultation purposes in 1998, but was not introduced as a bill to the legislature.

The *Municipal Act, 2001*, incorporates aspects of the 1998 draft Act and results of the 1997 and 1998 consultations. It does not provide municipalities with the power to act autonomously from the province, but it does allow them greater flexibility in

certain areas and is generally less prescriptive in nature. Municipalities are provided with natural person powers and are given broad jurisdiction to act in 10 different spheres of jurisdiction.

Missing from these broad spheres of jurisdiction are areas included earlier in the 1998 draft Act, such as control over nuisances (noise, vibration, odour, dust), health and safety, and the natural environment. However, the new Act gives municipalities certain restricted powers over these nuisances.

Other key components of the *Municipal Act* include the ability of a municipality to designate a road as a toll highway, and to exercise licensing powers in the areas of health, safety, nuisance control and consumer protection.

The legislation also provides for a mandatory five-year review of the Act to ensure that it remains current and is addressing the needs of the municipalities. The Act also enshrines the principle of consultation between the province and the municipalities on matters that will affect them. To develop a framework for the provincial/municipal consultation, a two-year Memorandum of Understanding between the Association of Municipalities of Ontario and the Province of Ontario was signed in December 2001.

Municipalities will now have greater power to act within their 10 spheres of jurisdiction without having to be specifically authorized by the province to do so. This greater jurisdiction, combined with the new natural person powers, significantly increases the ability of municipalities to govern themselves and to meet local residents' concerns. However, municipalities will not be able to pass by-laws that are in conflict with provincial or federal Acts or regulations, or that conflict with federal or provincial orders, licences or approvals.

Noise, Odour, Dust Nuisances

The *Municipal Act, 2001*, contains a specific section allowing municipalities certain powers in prohibiting and regulating noise, odour, dust, vibration, and outdoor illumination. The new Act also concurrently amends the *Environmental Protection Act* (*EPA*) by repealing s. 178, which required municipalities to have approval of the Minister of Environment and Energy when passing by-laws regulating noise and vibration.

Over the last several years, the ECO has observed that MOEE has effectively down-loaded the responsibility for dealing with noise, dust and odour nuisances to municipalities. An MOEE policy directs ministry staff not to investigate complaints about these matters, and to refer them instead to municipalities. The new *Municipal Act* reinforces this direction, by removing the need for ministerial approval of

municipal by-laws regarding noise and vibration. Although s.14 of the *EPA* still contains the general provision prohibiting the discharge of a contaminant, and contaminants are defined by the Act to include noise, odour and vibration, it seems increasingly unlikely that MOEE will put much enforcement effort into this area even if there are contraventions of s.14. Lack of enforcement by MOEE may curtail the public's rights under the *Environmental Bill of Rights*, since any actions or inactions by municipalities with regard to noise, odour and dust would not be subject to *EBR* review. Moreover, many smaller municipalities may lack the resources and expertise to investigate noise and odour problems properly, or to establish effective by-laws, which may lead to variable, patchy enforcement.

Pesticides

In June 2001, the Supreme Court of Canada released its decision in the *Spraytech v. Hudson* case ("the Hudson decision"), upholding the authority of the Town of Hudson, Quebec, to enact a by-law prohibiting the applications of pesticides within town boundaries. Since then, there has been a great deal of public debate in Ontario regarding the ability of Ontario municipalities to prohibit or regulate pesticides.

The *Municipal Act, 2001*, does not specifically address the future ability of municipalities to respond to environmental concerns, including those related to the use of lawn care pesticides.

The *Hudson* Decision

In 1992, Spraytech was charged with violating the pesticides by-law of the Town of Hudson, Quebec. Spraytech brought a motion before the Supreme Court of Quebec for a declaration that the by-law was not within the town's jurisdiction. The motion was denied both at the Quebec Supreme Court and the Quebec Court of Appeal. The Supreme Court of Canada held that the Hudson by-law was validly enacted, pursuant to a general welfare provision of Quebec's *Cities and Towns Act*, equivalent to Ontario's *Municipal Act,* that allows municipalities to enact by-laws "–to secure peace, order, good government, health and general welfare." The by-law was not in conflict with either the federal *Pest Control Products Act* or Quebec's *Pesticides Act*. In affirming the town's ability to enact the by-law, the Supreme Court of Canada endorsed the precautionary principle, stating: "In the context of the precautionary principle's tenets, the Town's concerns about pesticides fit well under the rubric of preventative action."

The *Municipal Act, 2001*, contains a general welfare provision (s.130) which states:

> A municipality may regulate matters not specifically provided for by this Act or any other Act for purposes related to the health, safety and well-being of the inhabitants of the municipality.

The wording of s. 130 is almost identical to that of the former *Municipal Act*, with the exception of the addition of "or any other Act." The additional wording in the general welfare provision, coupled with the withdrawal of nuisance and natural environment matters from the broad spheres of municipal jurisdiction, has led some stakeholders to describe the changes as "Hudson proofing" the *Municipal Act* — meaning that the new provision would disallow municipalities from passing by-laws controlling pesticide use because they are already specifically regulated by Acts at the provincial and federal levels.

How the courts will interpret the Act remains to be seen, but it does not appear the *Municipal Act, 2001*, will prevent municipalities from regulating pesticides if they do so to protect the health, safety and well-being of their inhabitants. The courts interpret legislation as having a broad and purposive approach, and one of the purposes of the new Act is to foster "the current and future . . . environmental well-being of the municipality."

ECO Comment

The lack of certainty about enforcement of noise, odours and dust has concerned the ECO for several years. Municipalities may now pass by-laws to regulate noise, odours, and dust, but they are not required to do so. Because municipalities are not required to undertake *EBR* investigations regarding noise, odour or dust by-laws, this change reinforces the continued erosion of *EBR* rights in this area.

Much of the implementation of the *Municipal Act, 2001*, will depend on regulations that are yet to be released. The ECO believes the regulation-making power of the Act should be prescribed under the *EBR*, so that environmentally significant regulations, such as any dealing with the ability of municipalities to pass by-laws regulating pesticide use or noise, odour, dust or outdoor lighting, will be posted on the Environmental Registry for public comment and review. This will require that the Ministry of Municipal Affairs and Housing make appropriate amendments to the regulations to prescribe certain sections of the new *Municipal Act, 2001*, under the *Environmental Bill of Rights*. *(For ministry comments, see page 176.)*

Recommendation 10

The ECO recommends that the regulation-making power of the Municipal Act, 2001*, be prescribed so that proposals for environmentally significant regulations are posted to the Environmental Registry for public comment and review.*

Developing Sustainability

Reusing Brownfields/Saving Greenfields

Brownfields are lands that are abandoned, idle or underused, and difficult to develop because of real or perceived environmental contamination. The purpose of the *Brownfields Statute Law Amendment Act (BSLAA)*, enacted in November 2001, is to provide clear rules for cleanup and environmental liability, mechanisms to ensure quality cleanup, and planning and financing tools to enable the process. (More detail on this decision is found on pages 100–106 of the Supplement.)

Before the *BSLAA* was enacted, the cleanup of brownfield sites was governed by the 1996 Guideline for Use at Contaminated Sites in Ontario, administered by the Ministry of Environment and Energy. Despite the guideline, potential developers continued to raise concerns about uncertain regulatory requirements and liability. As a consequence, many developers were unable to find financing to develop brownfield sites. One result has been the abandonment of sites on contaminated lands, often in urban centers. The goal of the *BSLAA* is to promote more efficient use of existing urban infrastructure and to provide an alternative to the development of greenfields and farmland.

The *BSLAA* amends a number of Acts, including the *Environmental Protection Act (EPA)*. The changes made to the *EPA* include mandatory site assessment and cleanup according to varying standards, depending on the future use of the site. Clear and binding rules are now established as to how a site assessment is to be conducted, who may conduct the assessment, and the standards of cleanup required. A Record of Site Condition (RSC), describing the remediation work completed and the condition of the property, provides a "snap shot" of the state of the property at the time of filing of the RSC. The RSC is placed on an Environmental Site Registry, which will be created to provide public notice of brownfield sites. Filing the RSC grants immunity from environmental orders for the owner of the site for any contamination that occurred prior to the date of acceptance of the RSC. The immunity extends to municipalities, secured creditors, receivers and trustees in bankruptcy who acquire sites as a result of tax sales or enter onto a site to conduct investigations. The *BSLAA* makes analogous amendments to the *Ontario Water Resources Act* and to the *Pesticides Act*, by protecting certain parties from environmental orders if they have complied with the site assessment and RSC requirements.

The ECO believes the *BSLAA* is a good first effort at addressing a significant problem. The Act is expected to provide more certainty to owners, developers and financiers and more transparency for the public through the Environmental Site Registry. However, the effectiveness of the *BSLAA* will very much depend on the details contained in regulations, which have yet to be brought forward. Although the Act provides for some tax relief for developers of brownfields, tax relief alone may do little to spur the cleanup of heavily contaminated sites in areas where there is low development pressure.

The ECO believes that greater protection from both orders and prosecution should be extended to truly innocent parties who have not been responsible for causing, permitting, or aggravating environmental contamination and who wish to remediate a contaminated property. A "time-out" period should be considered to suspend temporarily civil and regulatory liability for a person or corporation which takes the initiative to begin cleanup measures.

(For ministry comments, see page 177.)

Emissions Reduction Trading and NO_x and SO_2 Emission Limits for the Electricity Sector

Almost 30 per cent of electricity produced in Ontario is presently created by burning coal or oil, which contributes significantly to Ontario's air quality problems. The electricity sector was responsible for almost 15 per cent of Ontario's nitrogen oxides (NO_x) emissions and 24 per cent of sulphur dioxide (SO_2) emissions in 1999. In October 2001, MOEE finalized a regulation (O. Reg. 397/01) that sets new sector-wide caps on airborne emissions of NO_x and SO_2 from the electricity sector. The reductions will occur in two steps: the first at the end of 2001, followed by a larger reduction in 2007. MOEE states that the reductions required by 2007 will cut this sector's emissions of NO_x by 53 per cent and SO_2 by 25 per cent from 2000 levels.

The new regulation also sets out rules for a system of emissions reduction trading, giving power plants the option either to cut their own emissions directly or to buy emission reduction credits (ERCs) to help meet their new emission limits. The power plants can trade allowances among themselves, but they can also buy ERCs from other uncapped industries or organizations that have demonstrated emission reductions.

ERCs are intended to encourage emission reduction projects that might otherwise not be economical. They can also spur technological innovations, which may then be more widely adopted. Emissions trading systems are often considered best suited for pollutants that have region-wide environmental effects (like NO_x and SO_2), since it is argued that "the environment doesn't care" exactly which smokestacks are emitting less of these pollutants, as long as overall emissions are reduced in the region.

This is one of the first regulated emissions reduction trading system in Ontario and, in fact, in Canada, designed to help industry meet legally mandated reduction targets. A previous pilot-scale program, Pilot Emissions Reduction Trading (PERT), was established in 1996 and was used by Ontario Hydro (now by its successor company, Ontario Power Generation) to meet voluntary NO_x reduction targets in 2000 and 2001.

MOEE also made several closely related announcements in October 2001 that helped to flesh out the ministry's next steps on controlling industrial sources of air pollution. First, the ministry proposed imposing NO_x and SO_2 emission limits on other industry sectors, such as iron and steel, petroleum refineries, chemicals and non-iron metal smelters. Second, MOEE proposed moving up the province-wide targets for reductions of NO_x and SO_2 emissions from the year 2015 to the year 2010. Third, MOEE finalized the regulation requiring the Lakeview Generating Station in Mississauga to convert from burning coal to natural gas. (See page 88 of this report and pages 71–75 of the Supplement.)

The emissions reduction trading scheme is complicated by the fact that Ontario's electricity sector is also currently being restructured from a near monopoly to an industry with more players and more competition. By the year 2008, all electricity generators emitting NO_x will be competing for emission allowances based on their electricity production, rather than on their historical emissions of NO_x and SO_2. MOEE expects that this feature will encourage cleaner electricity production.

One important variable in future emissions from electrical generation in Ontario is the extent of nuclear generation capacity expected to come on-line in the next few years from refurbished nuclear units. If nuclear power is priced lower than coal-fired generation, it may displace coal-fired plants in the market place, reducing fossil fuel output. If this scenario materializes, actual emissions may fall, although not as a result of Regulation 397/01.

MOEE states that the new caps and trading system will reduce NO_x and SO_2 emissions from the electricity sector, and will provide incentives to other sectors to reduce emissions. The new regulation should also provide more regulatory certainty for this industry through to the year 2010. The regulation also has many critics, however, who have a range of concerns about new regulatory burdens, unfair treatment of Ontario Power Generator's competitors, and environmental weaknesses.

Trading with Uncapped Sectors

In effect, the trading system will allow the electricity sector to reduce its own gross emissions by far less than the above-stated targets. Through buying credits, OPG is permitted to exceed its NO_x cap by up to 33 per cent and its SO_2 cap by up to 10 per cent. MOEE has decided to allow capped power plants to purchase these credits from uncapped industry sectors. These uncapped sectors may be increasing their overall emissions (e.g., through increased production) while at the same time selling credits for site-specific emission reductions. Since the emissions of uncapped sectors can continue to grow, the net effect is that overall emissions are free to rise. In summer 2001, both Environment Canada and the U.S. Environmental Protection Agency stated that the ministry's design does not protect the environment and is not compatible with the Canada/U.S. Ozone Annex (see below).

MOEE has countered that Ontario's fossil fuel power sector cannot support an effective trading market on its own right now, since it consists of just six plants, all owned by the same corporation. A fluid market in ERCs, and the fexibility this provides to capped emitters, can develop only among a group of players that have a wide range of capacities to reduce their emissions. In contrast, it is expected that the U.S. system will allow more than 200 coal-fired stations, as well as several industrial facilities, to trade allowances.

Ontario and Canada's Obligations under the Ozone Annex

Under the Canada-U.S. Ozone Annex signed in December 2000, the fossil fuel power sector in southern Ontario will be required to cut nitrogen oxide emissions (measured as NO_2) to 39,000 tonnes by the year 2007. Environment Canada has stated that MOEE's cap would be able to meet the Ozone Annex, as long as MOEE did not allow trades between capped and uncapped sectors.

Weak SO_2 Cap

Because the cap is very lenient, a number of commenters raised concerns that Regulation 397/01 will not result in any real reductions in SO_2 emissions, at least until 2007. Until the year 2007, the regulation sets an overall SO_2 cap of 157.5 kilotonnes per year. This is more SO_2 than OPG's six fossil fuel power plants have actually been emitting in most recent years.

Emissions of other Toxic Pollutants from Power Plants

Ontario's fossil fuel power plants produce significant air emissions of mercury, lead and a range of other contaminants. For example, in 1999 this sector emitted 22 per cent of Ontario's total mercury emissions. Ontario Regulation 397/01 will not reduce these emissions, since its focus is strictly on NO_x and SO_2. Environmentalists have argued that OPG should instead invest in converting more of its coal-fired power plants to natural gas, since this would not only dramatically cut emissions of NO_x and SO_2, but would also eliminate emissions of mercury, lead and a number of carcinogens. So far, only the Lakeview Generating Station must cease burning coal by April 2005.

Finalizing this regulation has been an important step for MOEE and the outcome of much painstaking negotiation. MOEE staff also carried out very high-quality public consultation on this regulation, described in more detail on page 20. The two central concepts embodied in the regulation — sector-specific emission caps and an emissions trading scheme to help ease compliance costs — are both supported in principle by many industry and environmental organizations. But the many complex details are hotly debated. Some informed observers take the view that a badly designed trading system may be worse than no system at all, because it will give the illusion of progress and reduce the urgency to take other measures to cut air emissions. Others have concluded that Ontario needs to "lock in" the policy gains it has made so far, and that this regulation is a reasonable, though imperfect, first step. MOEE itself seems to have taken this latter view, and has indicated that it is willing to adjust its trading program over time — for example, to harmonize it with the U.S. trading program.

Stakeholder comments certainly had an effect on the outcome of this consultation, since the final regulation included several key changes from earlier versions. (More detail is provided on pages 76–85 of the Supplement.) Commenters have highlighted some significant weaknesses in this regulation, particularly the weak SO_2 cap and the fact that emissions of other contaminants such as mercury remain unaddressed. A critical feature of O. Reg 397/01 is that it permits the electricity sector to purchase ERCs from uncapped sectors. In the short term, any real reductions in emission loadings will depend on the quality of the ERCs approved, which will in turn depend on how carefully MOEE oversees this approval function.

To its credit, MOEE has signaled its intention to cap other industrial sectors, and this will do much to strengthen the integrity of the trading system. However, these other sectors have only just begun to monitor and report their NO_x and SO_2 emissions under Ontario Regulation 127/01 (see pages 91-94). Until now, MOEE has not had reliable emission inventories for either NO_x or SO_2. It is not clear how soon (or whether) MOEE will be able to assemble accurate emission inventories from the newly required emission reports, or by what process sector-specific caps will be allocated. Early indications are that negotiations on capping emissions of Ontario's other industries will be complicated and protracted. However, it is clear that MOEE is developing this regulatory framework for the medium and long term, and that immediate air quality improvements should not be expected. *(For ministry comments, see page 177.)*

Recommendation 11

The ECO recommends that the Ministry of Environment and Energy strengthen its emissions reduction trading system by quickly expanding NO_x and SO_2 emission caps to other industrial sectors.

Emission Limits: The Lakeview Thermal Generating Station

Lakeview Generating Station is a very large coal-fired power plant in Mississauga, on the shore of Lake Ontario. Built in the 1960s, it is the oldest of Ontario's fossil fuel power plants and a significant source of air pollution. Lakeview's current emissions are considerable: the plant accounts for about 26 per cent of overall SO_2 emissions in the Greater Toronto Area and 8 per cent of overall NO_x emissions. Lakeview is also among the top emitters of mercury in the GTA, emitting 83 kilograms in 1999.

Lakeview was built and operated for many years by Ontario Hydro, and is now owned by its successor company, Ontario Power Generation (OPG). With the restructuring of Ontario's electricity market, however, OPG will be required to sell or give up control of many of its electricity-generating assets. In February 2000, OPG announced that Lakeview was one of its first candidates for sale. Closing the Lakeview plant altogether was not an option, since it provides a reliable electricity supply for the nearby Toronto area during peak periods. Later in 2000, to reduce air emissions, the province made a commitment that the Lakeview plant would have to be converted to natural gas before being sold.

To formalize this requirement, in October 2001, MOEE finalized a regulation that states that after April 30, 2005, Lakeview must meet emission limits of a gas-fired generating station and, in effect, must cease burning coal. There are also new rules for the short term: between now and April 2005, the NO_x emissions of the facility will be capped 40 per cent below 2000 emission levels, and the cap can be exceeded only under special circumstances.

MOEE's decision has important positive environmental aspects. In the long term, Lakeview's emission rates will improve. Switching to natural gas — even using the existing old boilers — will cut the NO_x emission rate from the Lakeview plant by an estimated 75 per cent after April 2005. At the same time, this will eliminate the facility's emissions of mercury and SO_2. The energy efficiency of the plant will also improve, and the carbon dioxide (CO_2) emission rate is predicted to drop by an estimated 38 per cent.

While the new regulation will improve Lakeview's emission *rates* by 2005 (measured in kg of NO_x/Megawatt-hour), there is, however, no certainty that *total* emissions will be reduced. This is because Lakeview has been operating far below its production capacity in recent years, and once it is converted to gas, it might increase its production, thus partially or completely offsetting the improvements in emission rates.

Unfortunately, MOEE retreated from its earlier March 2001 proposal that the facility should be equipped with efficient gas technology by 2005. The final regulation requires conversion to gas, but allows the facility to use its existing inefficient boilers and, in effect, to emit more air pollutants per unit of energy produced. If MOEE had maintained its earlier position, the NO_x emission rate of the facility would have been cut by 95 per cent by 2005. CO_2 emission rates would also have improved by over 60 per cent. CO_2 emissions are important, since OPG's fossil fuel power plants were responsible for about 14 per cent of Ontario's greenhouse gas emissions in 1997, and their emissions have risen since that time.

Some groups are now urging the Ontario government to take the next step by also requiring that OPG or successor owners convert the Nanticoke power plant to natural gas. Nanticoke is the largest coal-fired power plant in North America, and in 1999, its NO_x emissions were almost as much as Ontario's other five coal-fired plants combined.

(For ministry comments, see page 177.)

Environmental Assessment Requirements for Electricity Sector Projects: Ontario Regulation 116/01

With the introduction of competition into Ontario's electricity marketplace, many new electricity projects will need approvals from MOEE and other ministries in the coming years. But, as the Environmental Commissioner of Ontario noted earlier, without new regulations, new private sector electricity projects would not be subject to the *Environmental Assessment Act (EAA)*. Then, in 2001, MOEE made a new regulation that changes the way in which the *EAA* would apply to electricity generating and distribution projects. Ontario Regulation 116/01 sets out what kinds of projects are subject to the *EAA*. (An accompanying regulation, O.Reg. 117/01, is an administrative regulation, needed to change references to Ontario Hydro in other regulations.)

The key effect of O.Reg. 116 is to put in place a new kind of environmental assessment process under the *EAA* for screening certain proposed electricity projects. The process is to be carried out by proponents and will apply to projects that are expected to have significant environmental impacts due to their technology or size (see table next page). Assessments or screenings under the *EAA* will now be triggered by thresholds that approximate the environmental significance of electricity projects rather than by whether the proponent is from the public sector or from the private sector.

The new process exempts proponents from the requirement of carrying out formal environmental assessments as long as the screening process is followed. If the old process had been maintained, proponents not captured by the *EAA* might have proceeded to develop a project on the understanding that the *EAA* did not apply, only to find their project halted later because of a request from the public to make the project subject to the Act. (The Minister of Environment and Energy can still make a project subject to the *EAA*, based on concerns about the project's size, environmental impact, or the public's concern over the project.)

A primary effect of O.Reg.116/01 is to ensure electricity projects can proceed with minimal delay, assisting with the development of electricity market competition by providing more regulatory and process certainty. This enhanced regulatory certainty, combined with opening the market to competition, will bring many changes to Ontario's electricity generating sector. The new EA process will influence the size and type of projects that get built in the new "deregulated market." For example, new coal-fired generation will not be encouraged by the new system, partly because it would still require a full environmental assessment.

To proceed with a project, a proponent determines the category of the proposed project, using the thresholds. Based on this, the proponent will have a relatively clear idea about the depth of review and level of public and agency consultation to be undertaken.

Thresholds and categories include:

Thresholds

Electricity Project Type	Category A: No EAA Requirements	Category B: Environmental Screening 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	–
Oil	< 1 MW	1 to < 5 MW	> 5 MW
Coal	–	–	All

Note: This table includes only select examples of thresholds and project types. See source for complete listing.
Source: Guide to Environmental Assessment Requirements for Electricity Projects, MOEE

Categories

(A) No *EAA* Requirements: projects with relatively benign environmental effects would not require approval under the *EAA* unless designated by the Minister of Environment and Energy (these projects would not be listed in the regulation). MOEE indicates that proposals for these projects will be posted on the Registry for comment.

(B) Environmental Screening: projects/activities with potentially mitigable environmental effects, which would be screened to confirm minimal effects or appropriate mitigation measures. Depending on the results of the screening, these projects may be subject to an individual environmental assessment.

(C) Individual Environmental Assessment: projects/activities that, because of their known significant environmental effects, warrant an individual environmental assessment under the *EAA*.

Many proposed projects are likely to be slotted into Category B, which will entail the use of the new screening process. In short, the proponent of a project will screen the project against a set of criteria in order to identify its environmental impact, which in turn will assist in the resolution of any resulting issues. In terms of environmental assessment requirements, O.Reg.116/01 tends to favour smaller and more environmentally benign projects and demand much more scrutiny of larger projects, as well as those involving coal, oil, hydroelectricity and nuclear power.

Commenters raised a wide array of issues during the two comment periods for this proposal when it appeared on the Environmental Registry. These include issues about process, technology, threshold levels and interaction with other regulatory and legislative processes. (For a fuller description, see the review of this decision in the Supplement.) MOEE deserves credit for attempting to balance the objectives of proponents with the views of the public and the imperative of protecting the environment, and its approach to designing the new regime displayed adaptability and sensitivity to a range of concerns.

However, MOEE's objectives of making the new process "efficient and fair" and of meeting the related stakeholder preference for a streamlined approvals process were not totally realized. For example, MOEE decided to keep separate approval processes for the successor companies of Ontario Hydro, while applying the screening process to the same types of projects brought forward by other proponents.

Finally, the ECO remains concerned about certain aspects of the Category B environmental screening, which is expected to be the most frequently exercised process of the three, capturing most of the significant electricity projects proposed in the years ahead. The permits for such projects will not be subject to the public notice, comment and appeal provisions of the *EBR*. This gap may curtail public appeal rights on future electricity project decisions. *(For ministry comments, see page 177.)*

Monitoring and Reporting of Emissions of Airborne Contaminants

Facilities in the electricity generation, industrial, municipal and institutional sectors will be required to monitor and report their emissions of airborne contaminants under a new regulation (O.Reg. 127/01) of the *Environmental Protection Act*. The reports must be submitted to the Ministry of Environment and Energy and be made available to the public, either on a Web site or at the facility or company head office. The ministry says that the new regulation will lead to reductions in airborne contaminants, since the public's right-to-know will be an incentive for companies to reduce their emissions. MOEE also says that the regulation will provide a means of tracking progress in ministry programs for reducing smog, acid rain, air toxics and climate change, and will give MOEE an information base for developing policies in the future.

Under the regulation, facilities meeting certain criteria must report annually on their annual and smog season emissions of a number of contaminants. Facilities with significant emissions of SO_2 and NO_x must also submit quarterly reports.

Electricity generators and facilities MOEE classifies as "large sources" (such as iron and steel mills, pulp and paper mills and chemical manufacturing facilities) became subject to the requirements of the regulation on May 1, 2001. The first quarterly reports for SO_2 and NO_x were due by August 29, 2001, and the first annual reports by June 1, 2002. Facilities classified as "small sources" (such as auto body repair shops, dry cleaning services, mines, quarries and many types of manufacturing plants) became subject to the regulation on January 1, 2002, and their first annual reports are due by June 1, 2003.

O.Reg. 127/01 sets out screening criteria for determining what monitoring and reporting each facility must undertake. Details of the program, such as the lists of contaminants, the reporting thresholds and the reporting methods, are set out in a separate guideline, which may change from time to time without requiring amendment of the regulation. The program is rather complicated because the contaminants, 358 in all, are grouped under three separate tables, each listing different contaminants and each with a different set of criteria. (Facilities will monitor and report only on the contaminants that apply to them.)

One of the tables lists the 268 contaminants that Ontario facilities must report on to Environment Canada under the National Pollutant Release Inventory (NPRI). Under the new regulation, facilities must now report this same information to the Ministry of Environment and Energy. MOEE also introduced two other tables of contaminants not already covered by the NPRI. One of the tables lists seven smog-related contaminants MOEE calls "criteria air contaminants" and four greenhouse gases. The ministry says it is the first jurisdiction in the world to require monitoring and public reporting of this "full suite of key greenhouse gases and the key contributors to smog and acid rain." In December 2001, Environment Canada added these same criteria air contaminants to the NPRI, beginning with the 2002 reporting year. A third table lists 79 contaminants — not included in the NPRI — that MOEE refers to as toxics.

MOEE began consulting on the broad concepts of the proposed program in January 2000, but the complex draft regulation and 600+-page guideline were not released until November 2000. The notice on the Environmental Registry provided a 30-day comment period and a planned implementation date of January 1, 2001. This phase of the consultation was rushed, with too little time for review and comment on the proposal and only seven weeks for industry to prepare to meet the new requirements. The ministry received 41 comments on the Registry posting. The comments included a number of significant concerns and almost unanimously requested an extension of the comment period and implementation date. As a result of public and stakeholder comments, MOEE made a few changes to the regulation and guideline and delayed the proposed implementation date by four months.

After the regulation was finalized, the ministry continued to meet with industry groups and held over 40 workshops, and MOEE and Environment Canada began working to integrate their two programs, held joint workshops and set up a telephone help line. MOEE has also established a multi-stakeholder committee to provide advice on improving the program, including future revisions to the substance list and reporting thresholds contained in the guideline. MOEE has made a good effort to assist companies in understanding the requirements, and staff have made efforts to refine the program based on industry input. Nevertheless, the regulation has significant cost and resource implications for industry.

Each facility must submit its reports electronically to the ministry within 60 days after the end of the reporting period, and the reports are concurrently made available to the public. In May 2002, MOEE created a Web site where the public may access the posted reports by searching for a specific facility or for all facilities within a municipality. With an estimated 3,000–4,000 facilities reporting, however, it will not be easy for a member of the public to use the database for regional or provincial-level analysis. The ECO encourages MOEE to provide a summary or analysis of the data to the public, as the ECO has recommended in the past. MOEE will need to prepare such a summary in any case, since the ministry will compile and analyse the data to provide the province-wide information it needs to develop ministry programs and track progress.

Some concern has been raised by industry, regulators and other stakeholders about the quality of the data that will be produced, since any of a number of estimation or measurement methods may be used. In response to those concerns, MOEE says that the data will be of sufficient accuracy to meet Ontario's objectives without being unduly burdensome on industry, and that direct measurement is not necessary since many common estimation methods provide reliable data. MOEE also says that facilities are responsible for the quality and accuracy of their data. However, MOEE says it will occasionally review the estimation techniques and audit air emissions data. The ministry will need to rely on the data to regulate industry, set emission caps, oversee emissions trading and discuss emission reduction agreements with other jurisdictions. The ECO encourages the ministry to review and audit facility reports and records periodically in order to verify the data, assess compliance with the regulation, and evaluate whether the data being generated are comparable, reliable and sufficient for the ministry's stated purposes.

The ECO agrees with MOEE that creation of an information base and a means of tracking progress in ministry air programs is an important step toward improving air quality. The ministry has goals to reduce emissions under its Anti-Smog Action Plan and other programs and to help the province meet Canada's emission-reduction

commitments under the Ozone Annex with the U.S. But until now MOEE has had no inventory or measurement of actual emissions and no reliable means to measure progress. The ECO has expressed concern in the past that MOEE's progress reports on the Anti-Smog Action Plan did not clearly quantify actual smog reduction achievements and compare them to stated targets. This new regulation will provide an information base to track emission trends and develop new programs if these are needed to achieve emission reductions. However, the ministry will have to compile and analyze the data to verify whether real emission reductions are being achieved.

With this regulation, MOEE has attempted to balance several competing policy goals — answering the need for high quality data while minimizing the regulatory burden on industry. The ministry has indicated it will consider refining the program. The ECO urges the ministry to ensure there is broad public consultation, including notice on the Environmental Registry, on any major reforms to the guideline that might be suggested by the multi-stakeholder committee. Depending on how MOEE employs the information, this monitoring and reporting program could lead to environmental benefits. The ECO commends MOEE for developing the program. *(For ministry comments, see page 177.)*

Recommendation 12

The ECO recommends that the Ministry of Environment and Energy provide analysis of the reported emissions of airborne contaminants and any tracking of emission reduction programs in an annual summary report to the public.

Hazardous Waste Update: New Fees and Improvements in Information

The regulation of hazardous waste in Ontario has been the subject of considerable media attention since the mid-1990s. Over this period, environmental groups, industry and the public have provided numerous suggestions for MOEE's hazardous waste program. The main regulatory basis for the ministry's program is Ontario Regulation 347 (General Waste Management) under the *Environmental Protection Act*, which sets out requirements for handling, storage, management and disposal of liquid industrial and hazardous waste. In December 2001, MOEE amended O.Reg. 347 to institute a new Hazardous Waste Charge. These charges (see New Fees... below) will recover costs from generators for the hazardous waste services that MOEE provides. MOEE's initiative involved more than just cost recovery, as amendments were included to improve the nature of MOEE's information-gathering on hazardous waste in the province.

New Fees at a Glance

Base Fee: All generators will be charged $50 for each registered site at the time of registration

Manifest Component: A fee of $5 will be charged for each manifest used to ship waste off-site.

Tonnage Component: A fee of $10 per tonne of hazardous waste will apply to its *first* movement in Ontario.

Through O.Reg. 501/01 (which amended O.Reg 347), MOEE can require annual re-registration of generators of liquid industrial and hazardous waste and implement electronic re-registration and manifesting (a manifest is a document used to track hazardous waste as it moves from a generator to an off-site disposal facility).

The services for which MOEE will be recovering costs from industry include:

- A Hazardous Waste Information System
- Abatement and enforcement activities for hazardous waste management
- The development of policies and regulations governing hazardous waste
- The operation of the Spills Action Centre
- Public education, awareness, and communication.

Until now, generators have not been charged directly for MOEE services for managing hazardous wastes, which have been paid for out of general provincial revenues.

The new provisions require that generators annually register their wastes with the ministry by February 15 each year. In the past, generator registration was a one-time requirement unless there was a significant change, such as a change in company name or an addition of registerable wastes. These annual registration requirements took effect January 1, 2002.

Meeting the objectives outlined above will ease some of the Environmental Commissioner's concerns about hazardous waste regulation and information-gathering in the province. For example, the ECO's 2000/2001 annual report noted that the "Ontario Waste Generator Database, which is supposed to document the amount of waste produced in the province, has not been fully kept up to date." Because of this, and because only some of the waste is tracked, "it is difficult to estimate the total amount of hazardous waste produced in the province." Further, the ECO recommended that the ministry "carry out a broad and transparent review of its overall approach to hazardous waste management." The new regulation, O.Reg. 501/01, responds in part to the ECO's concerns.

Despite the improvements, the ECO remains concerned about the way MOEE designed the information-gathering component of this initiative. First, the new requirements may provide only marginally clearer information on quantities and types of hazardous waste. This is because MOEE's manual on the reporting of waste quantities continues to rely on quantities *expected* to be generated rather than *actual* waste quantities generated. Further, it is not clear how reconciliation between the estimates provided by generators and the actual quantities would be undertaken in many cases.

The second major concern about MOEE's information gathering system is whether the ministry's data will be compatible and comparable with the data generated in the U.S. Large amounts of hazardous waste cross the Canada-U.S. border for treatment and disposal, and using compatible terms and categories would be beneficial for tracking purposes. Several reporting differences exist between MOEE and U.S. EPA systems — for example, the U.S. EPA uses actual waste quantities, not projected.

A third concern is the quality of information on wastes disposed of on-site and for wastes that are recycled. On-site disposal could involve incineration or discharge to sewers in some cases. Recycling could involve treatments that make the waste material non-hazardous and able to be used again. MOEE's manifest system does not track on-site disposal nor most recycled hazardous waste, so there may not be any check against estimated quantities. MOEE's registration system still exempts most wastes that are recycled, so the ministry and the public will not get a complete annual provincial tally of all hazardous waste generated and its fate. (For more information on these issues, see the Supplement for a full review of this decision.)

The design of MOEE's Hazardous Waste Charge moves the ministry's hazardous waste management program closer to a user-pay system, i.e., those who generate the costs are charged for doing so — a more responsible approach than before. An improvement to the design would be a regular comparison of revenues generated by the charges with the expenditures for the five services MOEE has designated

for the revenues. This would assure users of the system (generators) and the public that MOEE's accounting of costs and estimation of revenues were accurate, and that revenues were being dedicated to the purpose for which they were collected.

Despite the limitations noted above, the registration and reporting system is an improvement over what existed previously. Finally, the ECO recognizes that MOEE is planning further improvements to hazardous waste management in the province, and looks forward to further information about these developments. *(For ministry comments, see page 178.)*

Changes in the Drive Clean Program

Air quality is a critical and ongoing issue for all residents of Ontario, especially those living in southern Ontario. In our 1998 annual report, the ECO suggested that the Drive Clean program would contribute to reducing only a small fraction of the smog-causing agents emitted by vehicles. The ECO also observed that Drive Clean would make these modest contributions only if identified weaknesses in the program were corrected.

In the summer of 2001, the Ministry of Environment and Energy made a number of important changes to the Drive Clean program and its regulations that should improve the transparency of the program as well as implementing policy changes that will help the ministry achieve its goal of reducing smog pollution. Regulation 628, R.R.O. 1990, under the *Highway Traffic Act (HTA),* and Ontario Regulation 361/98, under the *Environmental Protection Act (EPA),* were amended by three new regulations: O. Reg. 343/01, O. Reg. 353/01 and O. Reg. 237/01.

The amendments included:

- Expansion of the Drive Clean program to include Ontario's entire smog zone
- Increase of the Ongoing Repair Cost Limit (RCL) from $200 to $450
- Extension of the validity of a pass report for vehicles tested to 12 months
- Exemption of "kit cars" from Drive Clean testing
- Empowerment of the director of the Drive Clean office to suspend or decertify emissions inspectors and repair technicians for improper activities. (Prior to this change, only Drive Clean facilities could be suspended or terminated.)

In addition to the regulatory amendments described above, MOEE made the following policy changes to the Drive Clean program:

- Allowing the use of a vehicle's on-board diagnostics in Drive Clean testing
- Allowing light-duty diesel vehicles to be tested at heavy-duty vehicle testing facilities

- Exploring options to begin evaluation of program performance measures and goals
- Exploring options for a partnership with municipalities for annual emissions tests for taxis.

By expanding the program area, MOEE has reduced confusion about which communities are involved in the Drive Clean program and has ensured that most residents living in southwestern Ontario are treated in a similar manner. Effective July 1, 2002, the program will include car owners resident in counties in southern Ontario who were not already covered. Ottawa and the Kawartha Lakes region, along with all eastern Ontario counties to the Quebec boundary, will be covered as well. This change will make approximately 5.7 million vehicles in southern Ontario subject to the program's testing requirements.

MOEE says the new increased repair cost limit (RCL) more accurately reflects the cost of required emissions-related repairs, assisting those vehicle owners who cannot pass the emission test without repairs. According to MOEE data, about 4 per cent of vehicles tested between 1999 and early 2001 used the $200 RCL to obtain a conditional pass without being fully repaired. With the $450 RCL, MOEE projects that the number of car owners who will seek to obtain a conditional pass will drop sharply, since the ministry has estimated that most vehicles can be fully repaired for that amount or less.

The ECO commends MOEE for proposing that the Drive Clean office work with municipalities to implement an annual test for taxis — a good first step toward ensuring clean operation of high-mileage taxis. Requiring retraining and recertification for emissions inspectors and repair technicians when there are significant program changes is also a logical change, as is clarifying and creating consistency in terminology between Drive Clean regulations under the *HTA* and the *EPA*. The ECO also commends MOEE for proposing additional performance measures for Drive Clean so that its results in reducing vehicle emissions can be assessed in terms of the Ontario Government's overall air quality strategy. The credibility of the program will be enhanced if MOEE can objectively quantify the reductions of pollutants resulting from Drive Clean, including greenhouse gases. MOEE should clarify how and when it intends to implement these new performance measures. As noted in the ECO's 2000/2001 annual report, MOEE should also give the public full access to the underlying assumptions that are being used to calculate the reductions in pollutants attributed to the Drive Clean program (see the 2000/2001 ECO annual report, page 67).

MOEE provided a 60-day comment period, which allowed the public an adequate amount of time to research and comment on the issues. MOEE posed seven questions to the public for comment. Each question had a short explanatory note about current

Drive Clean Program practices. MOEE received 236 comments on the Registry proposal. In addition, MOEE held six public consultation meetings in Ottawa, Cornwall, Kingston, Oakville, Waterloo and Chatham. MOEE also consulted its Multi-Stakeholder Committee on the program. In sum, the ECO believes that MOEE did a good job in its consultations on Drive Clean program changes, and commends MOEE for holding public meetings about the proposed changes.

Finally, there are many implementation issues that arise in relation to these program changes. Vehicle emissions testing is extremely technical and complex. The ECO will be monitoring the application of the revisions to O. Reg. 361/98 to see how MOEE handles these implementation issues.

The recent expansion of the Drive Clean program is a positive move, but on its own, it will not be sufficient to control Ontario vehicle emissions. Although MOEE says that Drive Clean, when fully deployed, will be equivalent to taking 23,000 vehicles off the road permanently, the ministry acknowledges that the transportation sector "is experiencing significant growth — characterized by increases in total number of vehicles, typical vehicle size and total number of vehicle kilometers per year." Indeed, MOEE's *Air Quality in Ontario, 2000*, released in early 2002, states that the number of vehicle-kilometres travelled went up by 20 per cent in the decade from 1991 to 2000. Ontarians experience this first-hand through ever-worsening traffic congestion in most urban areas. In effect, emission reductions achieved by the Drive Clean program are being counteracted by the growing number of new drivers and vehicles on Ontario's highways and roads. A much more comprehensive provincial strategy is still needed to address this problem. Needed measures include strong provincial support for public transit and cleaner fuels, effective transportation demand management programs, and a provincial land use planning system that discourages urban sprawl. The ECO will continue to monitor provincial initiatives to determine whether these types of measures are being developed. *(For ministry comments, see page 178.)*

Additions to Ontario's Regulated Endangered Species

An amendment to a regulation under the *Endangered Species Act (ESA)* — Regulation 328, R.R.O. 1990 — added three plants to the list of Ontario's endangered species in 2001. The few-flowered club-rush (*Trichophorum planifolium*), the horsetail spike-rush (*Eleocharis equisetoides*), and the slender bush clover (*Lespedeza virginica*) are at high risk of extirpation due to habitat loss and urbanization. This amendment raises the number of regulated endangered species to 29 in Ontario. All three species were federally listed as endangered by the Committee on the Status of Endangered Wildlife in Canada (COSEWIC) in 2000.

The Ministry of Natural Resources states that the purpose of regulating these three rare plants is to increase their protection as well as raise public awareness. However, regulation alone cannot protect these species. Their recovery depends on developing and implementing recovery plans for each species, although such plans are not required by the *ESA* nor its regulations. The recovery of these species at risk is also related to the broader issues of urban sprawl and natural heritage protection in southern Ontario.

These plants are legally protected only in their known locations as described by the regulation. Amendments to the regulation would be required if subsequent populations are discovered or restored at other sites and deemed to be in need of protection. The purpose of these geographic limitations, says MNR, is to prevent the transplantation of flora without the ministry's knowledge, ensuring that planned efforts are capable of tracking and monitoring the species at risk.

In preparing the proposal, MNR identified and contacted affected landowners about the intent to regulate the species as provincially endangered, and follow-up interviews were conducted. MNR reported that no major concerns were raised by any of the contacted landowners.

The proposal was posted on the Registry for 30 days, receiving two comments. Both commenters expressed their support for the regulation. One group commented that MNR should have more powers to promote the conservation of species at risk than those described in Section 5 of the *ESA*, which states that no person shall wilfully "destroy or interfere with or attempt to destroy or interfere with the habitat of any species of flora or fauna." However, neither the statute nor the regulation provide a definition of "habitat." MNR currently decides the particular scope of "habitat" to be protected under the *ESA* on a case-by-case basis.

In January 2002, MNR proposed adding several other species to Regulation 328, including the blunt-lobed woodsia (*Woodsia obtusa*), the drooping trillium

(*Trillium flexipes*), the juniper sedge (*Carex juniperorum*), the nodding pogonia (*Triphora trianthophora*), the pink milkwort (*Polygala incarnata*), the spotted wintergreen (*Chilmaphila maculata*), and the northern dusky salamander (*Desmognathus fuscus*).

ECO Comment

Species at risk require a broad definition of habitat so as to include potential areas of recovery. Habitat loss is consistently among the greatest threats to species at risk. Ontario has committed to the Canadian Biodiversity Strategy, and in order for MNR to implement the strategy, it should protect and restore "viable populations across their natural historical range." (For further discussion of biodiversity, see pages 153-156 of this report.)

The ECO reported in its 1999/2000 annual report that species at risk are inadequately protected in Ontario because of a confusing blend of generally outmoded and ineffective laws and policies. The legislative, regulatory and policy frameworks remain relatively unchanged since that time. The ECO encourages MNR to initiate the necessary public debate to assess options to prevent the effective loss of species and their habitat in Ontario, including options to improve recovery planning and implementation.

The ECO also noted in its 1999/2000 annual report the discrepancy between the number of endangered species in Ontario listed by COSEWIC and those regulated by MNR. The ECO commends MNR's progress in listing additional endangered species, but we note that the discrepancy still exists. The ECO encourages MNR to ensure there are sufficient funds and staff to identify species at risk in Ontario and to implement recovery planning. *(For ministry comments, see page 178.)*

The Wolves of Algonquin Provincial Park

Algonquin Provincial Park is the largest protected area for the eastern wolf in North America. In the last several years, concern has been expressed about the likelihood of a decline in the population of the wolves of the park. Although wolves were historically hunted in the park, they currently receive protection within its boundaries. However, an issue central to the viability of this population is human-caused mortality outside the park. These wolves frequently travel beyond the park boundaries, resulting in high mortality rates due to hunting and trapping. With a few notable exceptions, the Ministry of Natural Resources continues to allow a year-round open season on wolves with no bag-limits across the rest of the province. In fact, the Province of Ontario had offered a bounty on wolves up until 1972.

Scientists believe that the eastern wolf is found mainly in the Great Lakes and St. Lawrence regions of Quebec and Ontario. The Committee on the Status of Endangered Wildlife in Canada (COSEWIC) estimates the number of eastern wolves is 2,000 individuals spread among approximately 500 packs. The highest population densities are reportedly found in southwestern Quebec and southeastern Ontario, particularly in Algonquin Provincial Park. The eastern wolf has been extirpated from the more populated southern portions of its range due to the loss of habitat.

COSEWIC classifies the eastern wolf as a subspecies (*Canis lupus lycaon*) of grey wolf. It also has designated the eastern wolf as being of "special concern." However, in its own system of listing species at risk, MNR describes the status of the eastern wolf as "indeterminate," and the ministry also considers it to be a subspecies of grey wolf.

In 1998, MNR established the Algonquin Wolf Advisory Group (AWAG) to assess the status of wolves in Algonquin Provincial Park. The purpose of the group was "to provide recommendations to the Minister of Natural Resources on an Adaptive Management Plan to ensure the long-term conservation of the eastern (Algonquin) grey wolves of Algonquin Provincial Park and surrounding areas." AWAG included representatives from local communities, government, hunting and trapping organizations, environmental organizations, and the academic community.

In February 2000, AWAG hosted a Population and Habitat Viability Assessment (PHVA) workshop to provide an independent review of the available scientific data on the wolves of Algonquin. Sixty participants attended the workshop, providing extensive input. The PHVA report was received by AWAG for consideration on August 10, 2000. This report recommended that further scientific evaluation is needed to determine the taxonomic classification of the eastern wolf. The report also recommended that the full range of the eastern wolf, beyond the boundaries of Algonquin, should be assessed.

The taxonomic classification of the eastern wolf, particularly whether it is a distinct species, has significant implications for its conservation measures. In following COSEWIC's classification of the eastern wolf as subspecies of grey wolf, MNR is not obliged to modify its statutory and regulatory frameworks extensively. However, the PHVA report concludes that the available scientific information suggests that the eastern wolf "should not be considered a subspecies of the Grey Wolf," implying that it should instead be a distinct species. This conclusion has also been reflected in the greater scientific community.

On December 5, 2000, AWAG submitted a report, The Wolves of Algonquin Provincial Park, to the ministry, summarizing their findings and providing 24 recommendations. The report was posted on the Environmental Registry as an information notice, and comments were invited from January 15 to March 15, 2001. The purpose of this posting was "to invite public response to the 24 recommendations made by the Advisory Group, and as information to assist MNR in the development of future policy proposals." This posting received comments from 1,708 individuals and 34 organizations. Four petitions were also received with a total of 1,880 signatures. MNR states that "seventy-six percent of respondents indicated support for the protection of park wolves going beyond that recommended in the report, either through a year-round prohibition on the hunting and trapping of wolves in the townships around the park or through prohibition of these activities within 10km of the park boundary."

Almost a year later, in November 2001, MNR placed a proposal notice on the Environmental Registry for a 30-day public comment period. The ministry sought to implement all 24 recommendations from AWAG's report, and expanded the recommendation to place a 30-month moratorium on the regulated hunting and trapping of wolves to include the 39 townships surrounding the park.

On December 20, 2001, MNR made the decision to amend Ontario Regulation 670/98 (Open Seasons — Wildlife) under the *Fish and Wildlife Conservation Act*, putting into effect the 30-month moratorium. On February 21, 2002, MNR posted the decision notice on the Registry. The ECO received a complaint from the public with regard to the two-month delay in posting the decision notice.

MNR received 1,041 comments on its proposal notice. Thirty of these responses were petitions, totalling 1,188 signatures. The majority of commenters stated that MNR did not go far enough in its proposal and most commenters sought a longer or permanent moratorium. In contrast, much of the dissenting opinion sought a return to AWAG's recommendations and its more limited protection of the wolves. MNR did follow general public sentiment on this issue, but failed to explain in the decision notice how it incorporated any of the public comments.

As was also recommended in AWAG's report, MNR committed to developing a "science strategy" to monitor the status of the wolves. MNR asserted that the ministry "intends to monitor park wolves during the 30-month moratorium to assess its effect and the effect of other management actions on these wolves." A decision on whether or not to extend the moratorium will be based on the results of a "before and after" evaluation of the moratorium.

ECO Comment

The ECO believes that the 30 months provided for the monitoring program is insufficient. It is unlikely that there will be any detectable changes in the wolf population size before the decision on whether or not to renew the moratorium must be made in the spring of 2004. These concerns were also reflected in the public comments. MNR's science strategy was not formally approved until the end of March 2002. Further, monitoring did not occur during the two-month strike by the Ontario Public Service Employees Union. Even without these delays, 30 months does not allow for sufficient time to conduct such an ambitious and important monitoring program. Because of its environmental significance, the ECO also encourages MNR to post its final assessment of the monitoring program and the ministry's proposed direction on the future of the moratorium on the Registry for public comment.

It is difficult to distinguish visually between eastern wolves and coyotes. Therefore, not protecting both species from hunting and trapping risks the accidental deaths of eastern wolves. It is for this reason that MNR has established a closed season for both wolves and coyotes in the geographic townships of Hagarty, Richards, and Burns since 1993. ECO agrees with the many commenters who suggested that the 30-month moratorium should have also included a year-round closed season on the hunting and trapping of coyotes in all 39 affected townships.

The ECO encourages MNR to maintain the moratorium on the hunting and trapping of eastern wolves in the townships surrounding Algonquin Provincial Park until such time as the population is scientifically demonstrated to be viable. Such action would be consistent with MNR's Statement of Environmental Values and its use of the precautionary principle. It would also be consistent with the minister's original terms of reference to undertake an adaptive management approach with regard to this issue. Given the high level of public interest in the eastern wolf, MNR should also periodically inform the public as to the progress of the monitoring program.

The ECO is concerned that MNR did not follow the spirit of the *EBR* with regard to this issue. MNR received more than a thousand public comments on the Environmental Registry proposal notice. However, as the decision was implemented the day after the comment period ended, it seems unlikely that MNR properly considered all the public comments. MNR did follow general public sentiment on this issue, but it did not explain in the decision notice how it incorporated any of the public comments. Further, given that the amendment to the regulation included a sun-setting clause for the 30-month moratorium, the public may not have a formal opportunity to comment in 2004 when it ends. ECO encourages MNR to post any new directions with regard to this issue on the Registry for public comment, including any decision not to extend the moratorium. *(For ministry comments, see page 178.)*

Recommendation 13

The ECO recommends that the Ministry of Natural Resources maintain the moratorium on the hunting and trapping of eastern wolves in the townships surrounding Algonquin Provincial Park until such time as the population is scientifically demonstrated to be viable.

Drinking Water Protection for Schools, Day Nurseries and Social and Health Care Facilities On Smaller Water Systems

In December 2001, the Drinking Water Protection Regulation for Smaller Water Works Serving Designated Facilities (Ontario Regulation 505/01) came into effect under the *Ontario Water Resources Act*. This new regulation sets out water testing and treatment requirements for smaller water works that serve public-sector facilities such as schools, day nurseries, and social and health care facilities, and equivalent facilities in the private sector that are not on a municipal water supply. The regulation applies to owners of water systems supplying water to institutions that serve susceptible populations such as seniors and children, since they are typically less resistant to contaminants and face a higher health risk.

This regulation is intended to complement O. Reg. 459/00, Drinking Water Protection — Larger Water Works, which came into effect in August 2000 (and was reviewed in the ECO's 2000/2001 report). Prior to the introduction of these two regulations, drinking water quality in Ontario was governed by procedural guidelines and voluntary standards under the Ontario Drinking Water Objectives. Both regulations are part of the Operation Clean Water initiative that the Ministry of Environment and Energy launched in response to the May 2000 tragedy in Walkerton. (See the discussion of the proposed *Nutrient Management Act*, page 49, which is also part of Operation Clean Water.)

O. Reg. 505/01 applies to water treatment or distribution systems:

- to which O. Reg. 459/00 does not apply, unless the system obtains all of its water from another water treatment or distribution system to which O. Reg. 459/00 does apply; and
- where water from the water treatment or distribution system is used to provide water for human consumption (including water to washbasins, bathtubs, showers, kitchens or food preparation areas) at a designated facility.

The regulation sets out a minimum level of treatment for water treatment or distribution systems. Owners must ensure that any well used as a water source is constructed and maintained to prevent surface water and other foreign materials from entering the well. Owners must also make sure that all water treatment equipment – and its operation – meet the requirements set out in the regulation.

O. Reg. 505/01 sets out the standards required for disinfection, chlorination and filtration equipment according to whether a water treatment or distribution system obtains water from a groundwater source, a surface water source, or another source such as a well near surface water. Water systems using a ground water source must have adequate disinfection equipment, and systems using a surface water source must have adequate filtration and disinfection equipment. The regulation also requires:

- a professional engineer's report certifying that a water treatment or distribution system using groundwater complies with the regulation.
- weekly flushing of plumbing in systems serving schools, private schools or day nurseries.
- periodic checks of all water treatment equipment to confirm proper functioning, including daily checks for chlorine residuals where chlorination is used.
- sampling and analysis for microbiological and chemical parameters by an accredited laboratory.
- immediate notice by the laboratory to the local medical officer of health, the ministry, the owner of the system, and the operator of each designated facility served by the system when problems with the water are observed.
- corrective action when adverse water quality is detected, and posting of a warning notice at facilities until problems have been corrected.
- public access to information such as reports of water sample analysis.

While the regulation establishes a thorough regime of water testing and treatment to protect the health of vulnerable groups, the cost and complexity of meeting its requirements may prove quite difficult for the owners of some of these smaller water systems. The government has made some attempts to address the problem of financial resources: the Ministry of Education will invest nearly $13 million to help affected school boards to meet the water treatment requirements, and the Ministries of Community and Social Services and Health and Long Term Care are also working with their stakeholders on implementing the regulation. MOEE has also produced substantial new public education materials to support its implementation.

MOEE appears to be open to the use of alternative technologies in disinfecting water and monitoring facilities. Its guide for owners does not limit methods of disinfection to chlorination, but also includes information about chlorine dioxide, chloramination, ultraviolet irradiation, ozonation and distillation. The regulation itself does not require that chlorination be used, but instead stipulates standards of disinfection that must be met whether by chlorination or other disinfection equipment. The regulation also permits the use of automated sampling and testing equipment connected to an alarm at a location where a trained person is available to respond to a problem. New technology such as this allows for remote monitoring and control of suitable small water treatment systems.

Concerns about Implementation of the Regulation

MOEE has received many inquiries from affected schools and care facilities requiring further clarification about various aspects of the regulation. They include: the extent to which plumbing must be flushed; whether both domestic hot water and cold water plumbing must be flushed; the application of the regulation to residences associated with residential schools; and whether wells that are more than 15 metres deep, but have casings that are less than 15 metres deep, are considered to be groundwater sources, or subject to surface water infiltration.

Other concerns were raised in public comments in response to the proposal on the Environmental Registry. These include the financial and technical difficulties of complying with the regulation, and the difficulty of providing social care in rural areas if this regulation makes water treatment financially prohibitive. Other commenters asked whether MOEE has adequate staff to enforce the new regulation. Still others said that a comprehensive source water protection strategy is still needed in the province, pointing to the failure to regulate the many small non-institutional water systems used by establishments such as restaurants, lodges, camps and motels that are sometimes subject to neglect and have problems.

ECO Comment

Improved drinking water protection for smaller water works in Ontario is necessary and important, and O. Reg. 505/01 is an essential first step toward this objective. MOEE should be commended for developing this regulation to help protect the health of populations most vulnerable to health risks from contaminants. The ECO would also encourage MOEE to consider options for regulating smaller water works owned and operated by other establishments such as restaurants, hotels, marinas, camps and lodges, as part of a comprehensive source water protection strategy.

While MOEE has made useful background materials available to support the implementation of O. Reg. 505/01, more must be done to provide clarification and assistance to the owners of water systems serving institutions subject to the regulation. The regulation is complex, and it will be difficult for owners of many water works, particularly small systems in rural areas, to comply without assistance.
(For ministry comments, see page 179.)

Control Orders for Sudbury Smelters

In February 2002, the Ministry of Environment and Energy finalized two new orders requiring Sudbury's two large smelters to reduce both their total annual loadings and their ground-level concentrations of sulphur dioxide (SO_2). MOEE's new orders include requirements for Inco Ltd. and Falconbridge Ltd. to:

- reduce allowable ground-level concentrations of SO_2 from 0.5 parts per million (ppm) to 0.34 ppm (averaged over one hour) by April 1, 2002
- reduce allowable limits of annual SO_2 emissions by 34 per cent by December 31, 2006

(More detail on this decision can be found in the Supplement on pages 67–70.)

The companies will have to provide annual progress report updates and trends regarding reductions of short-term peaks of SO_2. The companies will also have to submit a final report by December 31, 2010. This final report must include a plan to reduce SO_2 emissions further to meet the provincial standard for ground-level concentration of SO_2 that will be in effect by then. The companies will then have a further five years (until 2015) to meet the provincial standard. The exact numerical concentration is not stipulated, since MOEE expects that the Ontario standards for ground-level SO_2 will be reviewed and updated over the next several years.

MOEE notes that these orders are the first significant steps taken to address local ground-level SO_2 peaks in Sudbury in over 20 years. Past acid rain control efforts for these smelters focused on regional ecosystem protection, by reducing total annual emissions of SO_2. Very substantial SO_2 emission reductions (between 57 and 70 per cent) were achieved by the smelters between 1980 and 1996. There has been some ecosystem recovery as a result of these emission reductions: for example, pH levels have improved in many lakes in the area, to the extent that lake trout are being experimentally stocked. (See pages 157-160 for a description of lake trout management.)

Ground-level Peak Concentrations to be Cut

For Sudbury residents, these new control orders represent a significant reduction (from 0.5 ppm to 0.34 ppm) in allowable short-term peaks of ground-level SO_2. Since 1983, the two smelters have been allowed to emit SO_2 off-property at a ground-level concentration of 0.5 ppm, or double the limit allowable elsewhere in Ontario.

Short-term concentration peaks of SO_2 can impact human health and damage vegetation. Since at least 1991, MOEE's annual air quality reports have noted that SO_2 concentrations as low as 0.26 ppm are injurious to sensitive vegetation, and that concentrations of 0.34 ppm are odourous and cause increasing vegetation damage. Exposure to high concentrations of SO_2 can cause breathing discomfort, respiratory illness, and the aggravation of existing lung and heart disease. The new control orders give the two smelters until the year 2015 to comply with the SO_2 concentration limit that is applicable everywhere else in Ontario.

SO_2 Emissions to be Reduced by 34 per cent by End of 2006

Total annual emissions of SO_2 also have a damaging impact on ecosystems far downwind of the Sudbury region. Acidic deposition continues to impact Ontario lakes and forests (see "Central Ontario Forests: Under Stress from Acid Precipitation," on page 111, on nutrient depletion in forest ecosystems). The new control orders require Inco and Falconbridge to reduce their total annual emissions of SO_2 by 34 per cent (from current regulated limits) by the beginning of 2007. Until then, SO_2 emission caps remain at 265,000 tonnes per year for Inco, and 100,000 tonnes per year for Falconbridge.

Ontario has proposed reducing the province's total emissions of SO_2 by 50 per cent (from 1990 levels) by the year 2010, under the Canada-Wide Acid Rain Strategy for Post-2000. According to MOEE, research indicates that this scale of reduction will protect 95 per cent of the province's lakes. Since SO_2 emissions from smelters represent by far the largest single source (an estimated 42 per cent) of Ontario's total SO_2 emissions, significant reductions from this one sector will clearly be needed to meet the province-wide target. Without major improvements from Ontario's smelters, other sectors would have to be willing to cut their emissions by a disproportionately greater amount — an unlikely scenario.

MOEE announced a new soil sampling program in the Sudbury area in the same week as it posted proposals for the new control orders on the Registry. The sampling program focuses on arsenic and metals such as nickel, copper and cobalt in local

soils, garden vegetables and berries. Arsenic and metals are known to be elevated in the Sudbury area due to historical industrial activity, and the ministry has been sampling in the area periodically since 1971. The highest metal concentrations are typically found in the upper soil layers, indicating air emissions as the source. MOEE also announced that, with the local Medical Officer of Health, it was requiring the two Sudbury smelters to conduct a human health risk assessment.

ECO Comment

These orders represent important environmental improvements, since they require significant reductions in both long-term SO_2 emissions in eastern Canada as well as in local short-term SO_2 concentration peaks in Sudbury. The reductions in total emissions should go some way toward alleviating the continuing negative impacts of acidic deposition on forest ecosystems in the region. Nevertheless, the orders also mean that for the next 13 years, Sudbury residents and vegetation in the Sudbury area may be exposed to short-term SO_2 concentration peaks that are over 30 per cent higher than levels permitted elsewhere in Ontario.

MOEE carried out good quality public consultation on the proposed control orders, providing 60 days for public comment, releasing relevant background information and hosting several open houses. MOEE's new metal sampling program and health assessment study in the Sudbury area are also prudent decisions, and are in keeping with the ministry's commitment in its Statement of Environmental Values to consider cumulative effects on the environment and the interdependence of air, land, water and living organisms. At a minimum, the study's results will form an important baseline for comparison with future monitoring, to check whether metal and arsenic deposition levels decline, as predicted by MOEE. Nevertheless, MOEE should reveal its plans for updating air quality standards for nickel and arsenic.

MOEE should also ensure that Sudbury residents and other Ontarians are kept updated about the progress of emission reductions at these smelters, and, more generally, about the status of impacts of acid deposition on the ecosystem and the activities Ontario is taking to control it. *(For ministry comments, see page 179.)*

Developing Sustainability

Central Ontario Forests — Under Stress from Acid Precipitation

Central Ontario, encompassing areas such as the Muskoka Lakes and Algonquin Provincial Park, is exposed to high loadings of sulphate (SO_4) and nitrate (NO_3) — two key pollutants in acid precipitation. A great deal of the acidifying agents falling here originates hundreds and even thousands of kilometers to the south and west. Major sources include power plants, transportation and industries fueled by coal and oil.

The geology of Central Ontario is predominately Precambrian Shield, which means the soil tends to have a low ability to neutralize acids. The trees of this area are species of the Great Lakes-St. Lawrence Lowland forest type — white pine, eastern hemlock, red oak, red maple, aspen and white cedar — which have adapted over time to the rugged, hard rock terrain, shallow soil depths, and sometimes poor drainage of this environment.

While deposition rates for SO_4 and NO_3 have generally decreased over the past two decades, some of the ecosystems affected by acid precipitation are not recovering as expected. Recent research in Ontario has shown that continued acid loadings, although reduced relative to the past, are still leading to a critical loss of key soil nutrients such as calcium and magnesium. These nutrients are needed to sustain tree growth, and trees and other vegetation become storehouses of these nutrients as they grow. In some impacted forests, most of the supply of nutrients is now found in the trees and very little is left in the soil. One study conducted in Haliburton County concluded that soil nutrient loss in the test area may soon be so severe that the forest in these areas would not regenerate if the existing trees were cut down (harvesting trees also removes nutrients from the forest ecosystem, since the nutrients stored in the wood and bark are taken off-site). The study also determined that calcium depletion appears to be altering the composition of the forest ecosystem, causing a shift from red maple and red oak to white pine and eastern hemlock. This type of ecological damage is not limited to the area under study, but may also be occurring in other parts of Central Ontario with similar forest and soil conditions.

(For ministry comments, see page 179.)

Mobilization of aluminum is another concern for forest health because of continued exposure to acidifying agents. Aluminum can be toxic to many plants and animals and is a contributing factor to a complex of stresses imposed on trees by acid precipitation. The mobilization of aluminum in forest soils can lead to fine root dysfunction, impairing water and nutrient uptake. This damage is caused in part by the breakdown of a symbiotic association, called *mycorrhizae*, formed between roots and certain fungi. Under normal conditions, this association helps a tree to absorb nutrients and survive drought. But the presence of aluminum can cause this association to deteriorate. Specifically, research has shown that:

- In sugar maples and red oaks, aluminum-related *mycorrhizae* breakdown has contributed to nutrient-depleted leaves, poor drought tolerance and reduced tree vigor. Sugar maple seedlings die when planted in soils where calcium is depleted and aluminum levels are elevated.
- In red spruce, aluminum blocks the uptake of calcium — an essential nutrient.
- White ash and basswood are experiencing disturbances, caused by nutrient imbalances, similar to those of sugar maple.
- The toxicity threshold for aluminum in certain poplar seedlings, like that for sugar maple, is very low.

This complex of stresses — acid deposition causing soil nutrient loss and the mobilization of aluminum — is leading to the withering of branches and leaves and premature mortality in trees. This is referred to as "dieback" or "forest decline," and has been observed in Europe and the northeastern United States. According to various studies, forests affected by dieback may not be able to regenerate themselves in the near future. These concerns underscore the importance of continuing efforts to reduce acid gas emissions and the need for sustainable forest practices to ensure healthy forest ecosystems.

PART 5:

Reviews and Investigations

Members of the public can use the application process provided by the *Environmental Bill of Rights* to urge ministry action that they believe is needed to protect the environment. Under the *EBR*, Ontario residents can ask government ministries to review an existing policy, law, regulation or instrument (such as a certificate of approval or permit) if they feel that the environment is not being protected. Residents can also request ministries to review the need for a new law, regulation or policy. Such requests are called applications for review.

Ontario residents can also ask ministries to investigate alleged contraventions of environmental laws, regulations and instruments. These are called applications for investigation.

The ECO's Role in Applications

Applications for review or investigation are first submitted to the Environmental Commissioner of Ontario, where they are reviewed for completeness. Once ECO staff have decided that a particular application meets the requirements of the *EBR*, the ECO forwards it to the appropriate ministry or ministries. The ministries then decide whether they will conduct the requested review or investigation or whether they will deny it. The ECO reviews and reports on the handling and disposition of applications by ministries.

Four ministries are required to respond to both applications for review and applications for investigation. They are:

- Environment and Energy
- Natural Resources
- Northern Development and Mines
- Consumer and Business Services (Technical Standards and Safety Authority)

Two ministries are required to respond to applications for review only:

- Agriculture and Food
- Municipal Affairs and Housing

ECO Review of Receipt and Handling of Applications

In the 2001/2002 reporting year, the ECO received 15 applications for review and eight applications for investigation. The number of applications for review and investigation represents a marginal increase compared to the number received in the previous reporting year. Individual applications for review and investigation may be sent by the ECO to more than one ministry if the subject matter is relevant to multiple ministries, or if the applicants allege that Acts, regulations or instruments administered by multiple ministries have been contravened.

The following table provides a breakdown of the disposition of the 15 applications for review by ministry:

Ministry	Reviews Denied	Reviews Completed	Undecided (as of March 31, 2002)
MOEE	7	–	2
MNR	5	–	–
MAH	2	–	–
MCBS	1	–	–
MNDM	1	–	–

The eight applications for investigation were dealt with as follows:

Ministry	Investigations Denied	Investigations Completed	Decision Pending (as of March 31, 2002)
MOEE	3	1	4
MNR	–	–	2

The majority of applications for review and investigation were denied. In many cases, the ECO did not accept the ministries' rationales for denying these applications. Often, a ministry's response to an application failed to take into account all of the concerns expressed by the applicants. (See Section 5 of the Supplement to this annual report.)

Provincial Parks Act

Three environmental organizations submitted two separate applications this year requesting a review of the *Provincial Parks Act (PPA)*. Environmental Defence Canada (formerly known as the Canadian Environmental Defence Fund), the Algonquin Wildlands League, and the Federation of Ontario Naturalists said a

review was needed for several reasons: the Act has not been significantly amended since it was enacted in 1954, even though our understanding of ecology and environmental management has evolved; the parks system has increased from eight parks to several hundred; and the Ontario Government has made commitments under federal-provincial agreements to protect parks and biodiversity.

The applicants also attached several published critiques of the *PPA*, as well as comparisons to the recently amended *Canada National Parks Act*, as evidence in support of their applications for review. The supporting material included recommendations from many sources that the *PPA* be reviewed and revised. The applicants also pointed out that the government has explicitly committed to reforming the Act, but has failed to do so. The *PPA* is out of date and severely flawed, the applicants said, because it places no onus on maintaining and restoring the ecological integrity or biodiversity of parks; fails to require adequate public consultation or park management planning; and fails to prohibit incompatible activities such as logging, mining, sport hunting and hydroelectric development. (More detailed summaries of these applications can be found on pages 240–243 and 248–249 in the Supplement.)

The applicants recommended the Act be reformed to include strong ecological principles, clear guidance for management, strict prohibitions/restrictions on development and incompatible uses, and a commitment to landscape level planning. In order to get the review started, one set of applicants requested that the Ministry of Natural Resources establish a process to decide how to do it, and suggested a consultative, stakeholder committee approach. In summary, the applicants said that if Ontario's parks are to act as ecological benchmarks and protect species and ecosystems, they must be protected in perpetuity from incompatible industrial, recreational, and commercial activities. Protection, in their opinion, requires reform of the *PPA* to include legal obligations on the Crown to maintain and restore ecological integrity and biodiversity over the long term.

In its response to the applications, the ministry said "the Government has accepted in principle that a review of the *Provincial Parks Act* will be undertaken," but that it would not initiate the review now because staff and funds are currently engaged in implementation of the Ontario's Living Legacy Land Use Strategy (OLL). "Allocation of staff and funding to a review of the *PPA* may be considered, in the context of other commitments and priorities," the ministry said, "when the current OLL implementation plan is completed in 2003/2004 . . . . deferral of the review of the *PPA* reflects MNR's view that, while the need to review the *PPA* is accepted, the Act — together with other provincial legislation, MNR policies, and Ontario's Crown land planning and management regime — provides a high level of protection to provincial parks and contributes to the sustainable management of the

province's resources." The ministry assured the applicants that the information they had provided, and the process suggested, would be considered during any review and that a review would involve extensive public consultation.

Part of the ministry's rationale was that the matter was already subject to periodic review, which is one of the factors the *EBR* says a minister may consider when deciding whether or not to carry out a review. MNR said that the Lands for Life Round Tables had recommended the ministry carry out a broad review of the Act and its policies, and the government had accepted the recommendation in principle at the same time that it released the Ontario's Living Legacy Land Use Strategy. However, that was more than three years ago, in March 1999. The ministry's statement that allocation of staff and funding to a review of the Act "may be considered" in 2003/2004 is not a commitment, nor is it a reasonable interpretation of "periodic review."

It is noteworthy that the ministry accepted a review was needed, but denied the applications because its staff and funds were dedicated to implementing OLL. That is a legitimate response: the *EBR* says the minister may consider the resources required to undertake a review. But according to s. 69(2) of the *EBR*, a ministry is not required to undertake an immediate review. While the ECO acknowledges that implementation of OLL is important, accepting the applications under the *EBR* might have led to earlier consideration of a review of the *Provincial Parks Act*, and perhaps a decision that this review was a higher priority than some aspects of the OLL or other ministry programs. Instead of turning down the application, the ministry could have developed a plan for the review with a long timeline, perhaps carrying out some parts of the review concurrently with OLL implementation.

The ministry also said that MNR's wider array of legislation and policy support the sustainable management of public lands in Ontario, and that the *PPA* should be considered in this larger context. MNR's point that lands outside parks are sustainably managed is open to debate — they are not managed primarily to conserve biodiversity, and, except for conservation reserves regulated under the *Public Lands Act*, they are not intended to fulfil any of the goals or objectives of provincial parks. (A more detailed discussion of MNR's inadequate attention to biodiversity is found on pages 153-156 of this annual report.)

With regard to parks themselves, the ministry said that "the existing legislative and policy framework for provincial parks provides a high degree of protection." However, this did not address the applicants' point that the legislative framework — the *PPA* itself – is inadequate. The "purpose" section of the *PPA* emphasizes "healthful enjoyment," not conservation. Further, many decisions regarding park management and public consultation are made on a case-by-case basis by MNR staff who have discretion on how to interpret policy. For example, the Act states that Park Superintendents "may" prepare management plans. According to the

applicants, only about one-third of existing parks have management plans because they are not required under the Act. While the ECO acknowledges that many aspects of the existing parks policies and procedures are admirable, we share the applicants' concerns that the policy framework is not binding and may be changed relatively easily.

One of the reasons the applicants requested that the Act be reviewed and strengthened was because most management direction, prohibitions and allowed uses are set out in the park management policies, which do not have any regulatory authority, and which may be amended by ministry staff. The "Blue Book" — in which park management policies are set out — was approved in 1978 and updated in 1992. Since then there have been numerous changes to the policies.

Even the overarching protected areas framework and tools have been changed, with the ministry creating new categories of "protected areas" in the 1990s. "Conservation reserves" legislated under the *Public Lands Act,* prohibit mining and logging, but permit other uses not allowed in parks. In 1997 the ministry released the conservation reserves policy and "Nature's Best: Ontario's Parks & Protected Areas: The Framework & Action Plan," both without public consultation. There has been criticism of this two-tier framework for Ontario's protected areas. (For discussion of conservation reserves issues, see pages 117-120.)

OLL resulted in an unprecedented expansion of the parks and protected areas system, contributing significantly to Ontario's conservation and protection goals. But a number of controversial changes to parks policies were also made, including allowing sport hunting and mineral exploration in the new parks. Although the public was permitted to comment on those changes, many parties raised concerns about the lack of adequate public participation in the decision to allow hunting in existing wilderness parks. Similarly, the March 2002 reversal of the OLL decision allowing mineral exploration in new parks is described as an "unposted decision" on page 22 of this report. MNR says that over time the Blue Book will be revised to incorporate policy direction arising from the OLL Strategy and subsequent policy decisions. But in the meantime, policies are set out in a number of different documents and a comparison chart for MNR staff. Overall, Ontario's parks policy has become more complicated, reinforcing the need for an overhaul of the legislation to establish clear policies that are reflected in a revised and strengthened Act.

The ECO agrees with the applicants that a review of the *Provincial Parks Act* is needed. A request to review 50-year old legislation is an excellent use of the *EBR*'s application for review provisions. There is a consensus among the leading experts on parks policy in Canada that an overhaul of Ontario's legislation is long overdue.

The Act clearly needs to be revised to incorporate the goals of biodiversity conservation, and to put in place a strong regulatory framework to guide policy, permitted uses, management planning, public participation and other matters raised in these applications. We are encouraged that MNR has committed to carrying out a review, and that the review would involve extensive public consultation as well as consider the information provided by the applicants. The ECO urges MNR to begin planning sooner than 2003/2004 how this review will be undertaken, and to make a firmer commitment than the "agreement in principle" and "may be considered" language provided to the applicants. *(For ministry comments, see page 180.)*

Ontario's Half-Parks? Conservation Reserves and Mining

In 2001, the ECO received an application submitted by three environmental organizations requesting that the Ministries of Natural Resources and Northern Development and Mines conduct a review of the necessary statutory, regulatory and policy changes that would permanently protect McLaren Forest Conservation Reserve. At issue was the conflict between new protected areas in Ontario and existing mining claims, new mining claims, and new mineral exploration.

McLaren Forest, north of Sturgeon Falls, was listed as a candidate conservation reserve in October 1998. In July 1999, MNR publicly announced that the area was a conservation reserve under Ontario's Living Legacy Strategy. However, as of May 2002, no regulation has yet been filed under the *Public Lands Act* to give legal effect to that decision. Subsequent to its proposed designation as a conservation reserve, five mining claims were staked on the site in the summer of 2001. The *EBR* applicants asserted that this conflict between protected area designations and new mining activities is a province-wide problem. The applicants also highlighted threats in at least seven other sites, including the existence of about 700 mining claims in Lake Superior Highlands Conservation Reserve.

MNR and MNDM both denied the application for review. The ministries stated that a review was not in the public interest, based on the recent Living Legacy planning processes. MNDM replied that "the Government accepted the Lands for Life Round Tables' recommendation that existing mining tenure not be included in the protected areas." However, MNDM did acknowledge that the applicants have "some legitimate concerns regarding interim protection," but stated that any problems are simply administrative in nature. MNR also stated that the applicants' concerns were "primarily administrative in nature," but the ministry did acknowledge that "some lands that had been recommended to form part of the conservation reserve did

not receive interim protection." MNR also stated that "the actual likelihood of any significant impact is minimal, since it is extremely rare that a mining claim actually becomes a mine." However, assessment work conducted following the staking of a mining claim can involve the removal of vegetation and other disturbances. Such impacts are of importance as the sites in question were to be given protection based on their environmental significance.

MNDM stated that, in an earlier effort to expand Ontario's protected areas, withdrawal orders had been issued under the *Mining Act* in 1996 for parts of McLaren Forest Conservation Reserve. However, MNDM explained that MNR did not provide it with a new request to withdraw the site based on Ontario's Living Legacy process. As the original 1996 withdrawal orders did not cover the entire site, McLaren Forest Conservation Reserve remained partially open for staking. MNDM has since adjusted the withdrawal orders "to encompass the entire area recommended under Ontario's Living Legacy land use strategy, but the claims staked in the interim remain in good standing because they were legally staked."

MNR's and MNDM's reasons for denying the application do not appear to be valid. In 1997, MNDM and MNR signed a Memorandum of Understanding that provincially significant natural heritage areas would be withdrawn from staking under the *Mining Act* before the areas were identified by MNR to the Lands for Life Round Tables or their locations were made public. The purpose of this memorandum was to provide interim protection during the planning process. MNR identified McLaren Forest as a provincially significant natural heritage area and recommended it to the Round Tables for protection in 1997. MNR also adopted a policy that "once a candidate natural heritage area is proposed as a conservation reserve, the Ministry is to request that the surface and mining rights for the area be withdrawn from staking."

McLaren Forest Conservation Reserve should have been withdrawn from staking and should have received interim protection with other such protected areas as part of the Land Use Strategy. In June 2001, MNR stated on its Web site that McLaren Forest Conservation Reserve "had been withdrawn and protected from resource extraction activities such as new mineral exploration." But on June 26, 2001, several claims were staked within the proposed boundaries of McLaren Forest Conservation Reserve, and, coincidentally, only two days later, MNR placed a notice on the Environmental Registry stating its intent to regulate McLaren Forest Conservation Reserve.

The ECO discovered that MNR did not request that MNDM withdraw the area from staking until November 9, 2001. The claims in question were legally staked, since MNDM did not issue an order to withdraw the area from staking until November 21, 2001. The applicants, and the public at large, would have held

the perception that this area was receiving interim protection until its regulation. However, the possibility now exists that these areas will not be incorporated into the regulated conservation reserve.

Chronology: McLaren Forest Conservation Reserve and Mining

1994 – MNR proposes to protect McLaren Forest in its Keep It Wild program.

1996 – MNDM withdraws part of the site from future mining activities.

1997 – MNR recommends the site to the Lands for Life Roundtables.

1999 – MNDM withdraws another part of the site from future mining activities.

1999 – MNR includes McLaren Forest as a site in its Living Legacy program.

2001 – In June, MNR states on its Web site that the site is protected from mining.

2001 – On June 26, mining claims are staked on the site.

2001 – On June 28, MNR proposes the official regulation of the site and its boundaries.

2001 – On November 9, MNR requests that MNDM withdraw the entire site.

2001 – On November 21, MNDM withdraws the entire site.

2002 – As of May, the existing mining claims remain in good standing and the site remains unregulated.

2003 – As of June, the claims in question may lapse, but they may be subsequently renewed. Thus, this is the earliest possible date by which McLaren Forest may officially be regulated.

In 2000, the ECO received a similar application for review centering on the issue of mining and protected areas, specifically dealing with Mellon Lake Conservation Reserve. This application for review was also denied by MNR and MNDM. The ECO disagreed with their rationale for denying the application, reporting in its 2000/2001 annual report that "without government clarification of the public policy contradictions, the Mellon Lake conflict will probably be repeated across the vast area covered by the OLL Strategy, as each proposed protected area is regulated, or as the public becomes aware of mining activities in areas they thought were protected."

MNDM did not provide a response to the application for review related to McLaren Forest Conservation Reserve within the 60 days required by s. 70 of the *EBR*. MNDM received the application on December 3, 2001, and did not provide its decision to the applicants until February 14, 2002. MNDM stated that the delay was caused as a result of "extensive review with multiple revisions," including the involvement of the minister's office. It should be noted that, earlier, MNDM also did not meet the minimum requirements of the *EBR* for handling the application for review regarding Mellon Lake Conservation Reserve.

The ECO believes that MNR should reassess the statutory, regulatory and policy framework governing protected areas in Ontario (see also pages 113-117 of this annual report). Clearly, areas such as McLaren Forest Conservation Reserve are not being protected, despite commitments by MNR and MNDM to do so. Based on the strong case presented by the applicants, the ECO believes that a review by the ministries was in the public interest.

Slightly more than a month after denying this application for review, MNR and MNDM announced a major shift in policy (see pages 231-239 in the Supplement for further discussion). In a letter to the Ontario Prospectors Association, the ministers of both ministries stated that "the status quo is unacceptable." Both ministers also made a commitment that there will be no new exploration on untenured land within Ontario Living Legacy sites, since the "general consensus among stakeholders is that the concept of 'half-parks' and the uncertainty about where and how mineral activity can take place is untenable." Additionally, the ministers stated that a process will be developed to examine options to address existing mineral tenure in such sites. MNDM has also committed to developing a provincially significant mineral potential manual to be adopted in all future planning initiatives. However, as of May 2002, no other details of this change in policy had been released and a proposal notice had not been placed on the Environmental Registry.

Based on this public reversal of policy, it appears that MNR and MNDM should not have denied this application for review under the *EBR*. While it is difficult to assert that the *EBR* application caused the reversal in policy, it seems likely that it contributed to the policy change. It would have been appropriate for the ministries to acknowledge this contribution in their reviews of the application. By denying the application, but subsequently altering policy, the ministries are not operating in a transparent fashion. Such behaviour may be seen as an attempt to discourage the public from exercising their rights under the *EBR* in future situations. *(For ministry comments, see page 179.)*

Recommendation 14

The ECO recommends that the Ministry of Natural Resources create a new legislative framework for provincial parks and protected areas, including conservation reserves, with the mandate of conserving biodiversity.

Toronto's Waste Disposal Plan: Making Sure It's Environmentally Sound

In December 2001, the ECO received an application requesting a review of the need for a new regulation under the *Environmental Assessment Act (EAA)*. This regulation would require that the City of Toronto's current waste disposal plan to export its garbage to a landfill site in the State of Michigan be subject to the *EAA*. If such a regulation were passed, Toronto would have to conduct an environmental assessment to examine the environmental, technical, social and economic impacts of its current plan, and either the Minister of the Environment and Energy or a hearing board would then have to decide whether or not to approve the plan.

The *EAA* applies to undertakings — "an enterprise or activity or a proposal, plan or program" — by or on behalf of the Government of Ontario, a public body, or a municipality. While the definition of undertaking is very broad, there are a number of exemptions that remove certain undertakings from under the Act.

Some of the exemptions are found in *EAA* Regulation 334. For example, an undertaking by a municipality is exempt if it has an estimated cost of not more than $3.5 million. Also, the cost of acquiring land or operating the undertaking is excluded from the estimated cost.

If a municipality were planning to operate a new landfill or incinerator for waste directly, it would be required under the *EAA* to conduct an environmental assessment of its proposed undertaking. However if the municipality decided to contract with a third party for waste disposal at a private landfill or incinerator, it would normally be exempt from the *EAA* because under Regulation 334, only the cost of the planning process that led to the decision to contract with a third party would be considered — and that would almost always be less than $3.5 million.

In 1995, the provincial government implemented a new policy stating it would no longer become involved in municipal waste planning. However, MOEE never posted a proposal notice for this policy change on the Environmental Registry. Subsequently, in 1996, Cabinet added s. 17.1 as an amendment to the *EAA*. Section 17.1 allows Cabinet to pass a regulation that would require a municipality to conduct an environmental assessment if it were entering into a contract for waste disposal or incineration that would otherwise be exempt from the requirements under the Act. While the amendment appears to be an obvious contradiction of the government's policy to withdraw from municipal waste planning, it is clear from the legislative debates that s. 17.1 was to be used primarily if a municipality intended to contract for the long-distance transportation of waste to a facility that had not undergone an environmental assessment. The power for Cabinet to pass a regulation is discretionary, and each situation is decided on a case-by-case basis. To date, Cabinet has not passed any regulations under Section 17.1 of the *EAA*.

According to evidence provided in 1996 during committee hearings on the *EAA* amendments by then Director of MOEE's Environmental Assessment Branch, the *EAA* was amended to include s. 17.1 to require a municipality . . .

> . . . to comply with the content requirements of the [Act] for an environmental assessment. That municipality would consider the alternatives involved in selecting the preferred disposal technique, whether it's through a contract to a third party, incineration or disposal at another facility. They would also consider the effects to the environment, as broadly defined by the Act, associated with the transportation of the waste to the final disposal location. In general, that would mean an assessment of rail versus road transportation if the final disposal site already has an approval under the *Environmental Assessment Act* and has a valid certificate of approval to accept [waste] from the municipality that is proposing to enter into the contract.

MOEE denied the *EBR* application requesting a review of the need for a new regulation under the *EAA*, stating that Toronto's municipal waste planning process is exempt from the *EAA* because it had an estimated cost of less than $3.5 million. MOEE also stated that planning processes for waste management are municipal responsibilities, implying the *EAA* process does not apply to municipal planning processes.

The ECO believes the undertaking to ship waste to Michigan is equivalent to entering a contract for shipping and disposal. As such, the interpretation by MOEE is contrary to the intent of the legislation. To say that waste management planning is solely the responsibility of the municipality appears to ignore that numerous municipalities throughout Ontario have planned their recycling and waste disposal facilities according to the requirements of the *EAA* and continue to do so.

Furthermore, municipalities plan for the provision of sewage, water and road services under requirements set out in a document called Municipal Class Environmental Assessment.

It is evident that the purpose of including s. 17.1 in the amended *EAA* was to prescribe under the Act municipalities that were shipping waste long distances by truck or rail. This is precisely what the *EBR* applicants requested in their application. If a regulation were enacted under s.17.1, a municipality would have to ". . . consider the effects to the environment, as broadly defined by the Act, associated with the transportation of the waste to the final disposal location." If s. 17.1 does not apply to Toronto, Ontario's largest municipality, the ECO questions its applicability and the use of that particular section of the *EAA*.

There are currently no policies or guidelines to indicate under what conditions Cabinet may enact a regulation under s. 17.1 or how to reconcile the contradiction between s. 17.1 and current government policy. This absence of an *EAA* interpretive framework means that decisions by municipalities on waste shipping and disposal proposals have become far less predictable. The result may be that private companies will become reluctant to develop proposals for municipal waste management projects or systems because of the costs and uncertainty involved. Reluctance on the part of the private sector to invest in future disposal capacity could limit the choices available to municipalities or reduce the amount of landfill or waste disposal capacity available within Ontario's boundaries to meet the needs of current and future residents.

Instead of shedding light on the MOEE's current position, the ministry's response to the applicants has created even more uncertainty and confusion. To provide greater regulatory certainty for the public, MOEE should develop a policy on implementation of s. 17.1 and post it on the Environmental Registry for public comment. As an alternative, the *EAA* should be amended to allow for a common sense interpretation that will allow for greater certainty in municipal waste planning processes.

(For ministry comments, see page 180.)

Review of the SWARU Incinerator

The SWARU incinerator in Hamilton, Ontario, which has been operating since 1972, burns approximately 40 per cent of the city's municipal waste. Local residents have been raising concerns about this incinerator since the late 1980s, particularly about its dioxin emissions.

In the year 2000, the facility emitted approximately 5.5 grams of dioxins and furans, measured as Toxic Equivalent Quotient (TEQ). Municipal waste incineration, Canada-wide, emits a total of approximately 8.4 grams per year of dioxins and furans,

according to an estimate by the Canadian Council of Ministers of the Environment. This suggests that SWARU's emissions contribute over 60 per cent of the total dioxin and furan emissions from municipal waste incinerators across Canada.

Two applicants applied for a review under the *Environmental Bill of Rights* of the SWARU incinerator's three certificates of approval (Cs of A), covering waste disposal, ash solidification and air emissions. The applicants were concerned that increasing tonnages of waste were being incinerated over time, that fly ash was not properly managed, and that air emissions, noise and odour were excessive.

The applicants stated that SWARU's waste disposal C of A was originally issued in 1972, with no restrictive conditions attached. The applicants were also concerned that the ash solidification C of A allows SWARU to mix hazardous fly-ash with cement kiln dust to stabilize it, and then dispose of it in a municipal landfill.

However, the applicants' main concern was with the air emissions C of A, issued in 1996. The applicants stated that SWARU emits exceedingly high levels of dioxins, furans and other toxic substances that pose significant health risks to the community. They also had a general concern about ongoing noise and odour problems, and believed that the Cs of A for waste disposal and air emissions needed new conditions attached that would address these concerns.

The Ministry of Environment and Energy informed the applicants in August 2000 that the ministry would, over the coming year, undertake a "focused review." MOEE's review team included staff from three separate parts of the ministry: the West-Central Regional office, the Standards Development Branch and the Environmental Assessment and Approvals Branch. This review team carried out a more comprehensive review than originally anticipated, looking into most aspects of SWARU's operations. MOEE completed the *EBR* review in August 2001, and released a detailed list of recommended changes to the incinerator's three Cs of A, responding to almost all of the concerns of the applicants. The ministry also noted that it had identified the potential for fugitive dust emissions from ash handling and the existence of questionable analytical data for processed ash. The latter issue has been referred to the police for further investigation. The ministry also found that the operator/municipality failed to submit reports semiannually on its ash treatment, as required by the C of A. The ministry's Investigations and Enforcement Branch investigated and chose not to recommend charges.

MOEE staff reviewers recommended numerous changes to the Cs of A. In July 2002, MOEE proposed comprehensive amendments to the approvals for SWARU, and committed to posting them on the Environmental Registry for public comment.

Depending on what kinds of changes are eventually made to the Cs of A for SWARU, the results of this *EBR* review may become a modest environmental success story. In this case, the applicants resorted to using the *EBR* after finding that other mechanisms were not effective in addressing their environmental concerns. The applicants provided detailed evidence for their concerns, as well as a clear rationale for their requested changes to the Cs of A for SWARU.

The ministry, for its part, made a good decision in agreeing to carry out a review under the *EBR*. MOEE staff completed a thorough review of SWARU operations, and should be commended for their detailed recommendations to strengthen the Cs of A for the incinerator. The fact that MOEE decided to involve staff with a range of specialties and backgrounds probably helped to improve the quality of the review that was undertaken.

If the changes recommended by ministry staff are eventually incorporated into SWARU's approval documents, the operation of this facility will undoubtedly improve significantly, and its environmental impacts on both local residents and the broader region of southern Ontario are expected to be reduced. However, the amendments for SWARU's Cs of A had not been finalized by August 2002. Although MOEE can impose the terms and conditions of a new C of A, proponents of facilities have the right to appeal such amendments to the Environmental Review Tribunal if they consider them too onerous or otherwise problematic. Since hearings before the Environmental Review Tribunal can be time-consuming and costly, there can be advantages to both parties to avoid such a hearing. If negotiations become too protracted, however, both local residents and the environment will suffer. The ECO will continue to monitor MOEE's progress on amending these instruments.

In late 2001, the City of Hamilton re-evaluated the future of this aging incinerator, especially in light of the fact that without changes to its air pollution control systems, the facility will not be able to meet the new Canada-Wide Standards for Dioxins and Furans, which will come into effect in 2006. Hamilton City Council endorsed a Waste Management Master Plan, which includes plans to close the incinerator.

The SWARU incinerator is just one example of a facility operating under certificates of approval that no longer reflect current standards of environmental protection. The fact that many facilities in the province have outdated approvals for air emission controls has been a long-standing concern for the ECO and was the subject of a recommendation in the ECO's 1996 annual report. The Provincial Auditor's 2000 annual report similarly noted that MOEE needed to update many outdated Cs of A, and that the ministry did not have an adequate system in place to review the terms and conditions of the existing Cs of A to ensure they met current environmental

standards. MOEE formally agreed with the Auditor's finding and committed to improvements through a new Integrated Divisional System. It would be useful for MOEE to provide a public update on the progress of these ministry-wide improvements. *(For ministry comments, see page 180.)*

Recommendation 15

The ECO recommends that the Ministry of Environment and Energy strengthen the certificates of approval for the SWARU incinerator by implementing the recommendations of ministry staff.

Air Emissions and Odours from Cabinet Manufacturing

Two companies, Canac Kitchens and Raywal Ltd., manufacture kitchen cabinets in Thornhill, north of Toronto. The local office of the Ministry of Environment and Energy has received complaints about odours as far back as 1995 from local residents concerned about fumes from spray-paint booths at these operations.

Both facilities are required to report their annual total emissions of certain pollutants to the National Pollutant Release Inventory (NPRI) administered by Environment Canada. Excerpts of the NPRI release data for the two facilities are listed in the tables below.

The NPRI data indicate that both facilities are gradually increasing their total annual emissions of toxic substances like toluene and xylene, which are both easily absorbed through inhalation. MOEE's new Air Quality Standard for Toluene notes that chronic exposure has been observed to cause headaches, dizziness, intoxication and eye irritation. MOEE's new xylene standard notes that chronic inhalation exposure produces irritation of the eyes and respiratory system, headaches, disorientation and the loss of full control of bodily movements.

Canac Kitchens Ltd.

NPRI data: On-site Releases (emissions) in tonnes

Year	Toluene	Xylene (mixed isomers)	Methyl ethyl ketone	Ethyl-benzene	Isopropyl alcohol	Methanol
2000	44.28	37.46	24.9	11.33	16.19	13.79
1999	32.37	29.57	16.15	----	11.38	10.61
1998	32.13	----	20.4	----	11.08	11.83
1997	26.07	----	18.01	----	----	11.48

Raywal Ltd., Thornhill Ontario

NPRI data: On-site Releases (emissions) in tonnes

Year	Toluene	Isopropyl alcohol	Xylene (mixed isomers)
2000	10.77	2.91	3.62
1999	7.92	2.90	---
1998	6.54	---	---
1997	8.55	---	---

Over the years, MOEE has taken several steps to address the odour problems. MOEE issued a Control Order in 1996 to Canac Kitchens, requiring odour control technology. At the time, the company invited local residents to two meetings to discuss concerns, installed more efficient spray guns, and outsourced certain production activities. In the summer of 2000, Canac Kitchens applied to amend its certificate of approval (C of A) for air discharges in order to install a new paint spray booth. MOEE added conditions to this C of A requiring annual odour-source testing. Nevertheless, local residents continued to complain about odours.

In September 2001, a request for an investigation under the *EBR* was submitted, alleging that the two companies had contravened several sections of the *Environmental Protection Act*, and were emitting toxic chemicals beyond the levels permitted in their Cs of A. The *EBR* applicants noted that strong chemical odours were present several times a week in the vicinity of the plants, and that the odours had gradually been increasing in strength and frequency over the past three years. They alleged that the odours were unpleasant, caused coughing, and were being emitted into a densely populated residential area that included four daycare facilities and several old age homes and schools.

The applicants noted that they had already tried other avenues to resolve their concerns, including speaking directly to the management of both facilities, contacting the local MOEE office frequently with complaints, and raising the matter with two previous Ministers of Environment and Energy, without being able to trigger a thorough investigation of actual discharge levels.

In response to the applicants' request, MOEE stated that no *EBR* investigation would be conducted because investigations of both companies were already ongoing. The ministry provided a brief update: In the case of Canac Kitchens, annual source testing was being required under an amended C of A, but results for the first annual cycle were not yet available. In the case of Raywal Ltd., the ministry had issued a Provincial Officer's Order following an inspection in May 2001.

The ministry also noted that Raywal Ltd. had applied for two amendments to its C of A for Air, which were posted on the Registry in late summer 2001, and were still under review. The company was planning to install two dust collectors and add two spray booths.

The ministry provided a very weak response to this *EBR* application for an investigation. In addition to stating that investigations were already ongoing, the ministry described activities that appear to be components of routine abatement, without the commitments that come with an *EBR* investigation — which would at least have guaranteed the concerned residents both a clear deadline and a final report from the ministry. The ECO is concerned that MOEE appears to have opted for a continuing abatement approach, despite acknowledging that the facilities have been the subject of numerous odour complaints and abatement activities over a number of years. MOEE's Compliance Guideline (1995) suggests, in fact, that MOEE may require mandatory compliance where non-compliance will have adverse effects on humans and where previous abatement efforts have failed.

Although MOEE states that odour incidents have decreased, the NPRI data indicate that total annual emissions of several toxic (and odourous) pollutants have been increasing since 1997. However, according to MOEE, ministry staff have not reviewed the NPRI data for these facilities. The fact that the companies are adding spray-paint booths also suggests that emissions may be gradually increasing. In two site visits, on March 1 and 25, 2002, ECO staff encountered strong chemical odours in the vicinity of the companies. More recently, MOEE informed the ECO that Canac Kitchens emissions of *n* butyl acetate exceed the odour threshold marginally, and that while emissions of other substances meet odour criteria, they may still be causing odours, since it is hard to model dispersion of emissions accurately from very short emission stacks.

The ministry's decision to deny an *EBR* investigation was made by the District Manager of the same local MOEE office that has for years been overseeing the abatement activities. It would have been preferable if the ministry had assigned the decision to staff from another region, who might have reviewed the history of this case with greater independence and a fresh viewpoint.

MOEE provided very poor customer service to the *EBR* applicants in this case. Several follow-up actions would have been appropriate. At a minimum, the ministry could have promised that results of source testing at Canac Kitchens would be available to the applicants and to the public at large. When the applicants complained that they were unable to access a certain certificate of approval without paying a fee, the ministry should have clarified that Cs of A are public documents that can be viewed without charge at the local MOEE office. The ministry could also have made the applicants aware of their rights under the *EBR* to seek leave to appeal decisions on Cs of A.

MOEE could also have considered the establishment of a citizens' liaison committee to allow ongoing three-way discussions between proponents, residents and the ministry. Another alternative would have been for the ministry to use the enhanced public participation provisions under the *EBR*, including oral deputations, public meetings and mediation. These sections of the *EBR* have only rarely been used by MOEE, despite recommendations in the ECO's 1998 annual report that they be better publicized and that ministry staff be trained in their use. *(For ministry comments, see page 180.)*

Recommendation 16

The ECO recommends that the Ministry of Environment and Energy evaluate options for reducing toxic and odorous emissions from two manufacturing facilities in Thornhill, work with proponents to ensure that effective solutions are implemented, and find ways to involve the public in the process.

Sound-Sorb

A number of gun clubs across southern Ontario are beginning to build high berms on their properties to comply with new federal regulations to reduce noise and dangers from bullets. A hauling company is encouraging gun clubs to build berms using a mixture of approximately 30 per cent sand and 70 per cent paper mill sludge from a newsprint recycling plant. The hauling company supplies this material free of charge, and at trucking costs that are a small fraction of the normal charge.

The mixture of paper mill sludge and sand, called Sound-Sorb, is considered a product rather than a waste by MOEE. Therefore, the ministry does not regulate this material nor control how it is placed on land. Instead, if this material were deemed to be a waste, it would be subject to controls to protect the environment.

Local residents have raised the concern that the impact of these paper mill sludge berms on surface water and groundwater has not been examined. They note that high levels of *E. coli* have been found in some samples of the paper mill sludge.

In December 2001 the ECO received an application for review concerning Sound-Sorb. This application under the *EBR* requested a review of MOEE's policy exempting Sound-Sorb from the *Environmental Protection Act (EPA)* and Section 3 of Ontario Regulation 347. The applicants noted that Sound-Sorb is being applied directly to land without any leachate control. They also stated that the paper mill sludge is not being stabilized or changed in any way by adding sand, and that it continues to undergo decomposition in the high berms. In addition, they pointed out that in 1997, an MOEE district office determined that this material was a waste and ordered it removed from a race track in Peterborough, where it had been placed as a noise barrier. They also noted that tests of liquid at the base of a Sound-Sorb berm, carried out for the Durham Region Health Department in 2001, found high levels of both fecal coliform bacteria and *E. coli.* The source of these bacteria remains uncertain.

MOEE has agreed to undertake a review of the issues raised by the applicants, and has informed the applicants that the review will be completed by November 2002. The ECO will report on the outcome of MOEE's review in the next annual report.
(For ministry comments, see page 180.)

Rural Developments and Communal Servicing Policies

In early 2002, the Environmental Commissioner of Ontario received a detailed *EBR* application for review that raised troubling questions about Ontario Government policies on communal servicing of rural developments. The application requested that the Ministries of Environment and Energy, Municipal Affairs and Housing, and Consumer and Business Services undertake the review, contending that, contrary to the intention of the Provincial Policy Statement (PPS), current ministry policies give municipalities the opportunity to veto rural developments that could be serviced by communal water and sewer systems. This tips the balance in favour of individual septic systems, the applicants contend, and consequently, municipalities can frustrate the rights of landowners, driving them to develop individual lots that are serviced by private septic systems. (Additional background on this application can be found on pages 261–264 in the Supplement to this report.)

Background

The applicants, a development company based in southern Ontario and its owner, planned to develop a "lifestyle community" on a 237-acre property in the Township of Puslinch, County of Wellington. The community would consist of an 18-hole golf course and golf facilities as well as 210 single-family retirement homes. The development would include a communal sewer system and a sewage treatment plant (STP), since there was no municipal system available.

The Township of Puslinch Zoning By-law designates approximately 62 per cent of the property as Specialized Resort Commercial, which would permit use of the property for the proposed golf course use. Thirty per cent of the property is zoned agricultural and 8 per cent is zoned hazard land. The County of Wellington Official Plan, which also acts as the local Official Plan (OP), designates the majority of the subject property as recreational and secondary agricultural. These designations in the County Official Plan allow development of a lifestyle community at the site if the criteria in the OP are met. The remainder of the property is designated under the County OP as Core Greenlands and Greenlands. There also is an Earth Science Provincial ANSI on a portion of the property.

In order to implement the proposed development, the developer required an OP Amendment to the County of Wellington Official Plan, a change to the Township of Puslinch Zoning By-law, and a county planning approval for a Draft Plan for the condominium project.

The developer spent a considerable sum of money on his development plan and related engineering work, and tried to address concerns about the impact of the development on the Mill Creek watershed. The site, which lies near the headwaters for environmentally sensitive wetlands that are important to Mill Creek, had remained undeveloped for decades. In 1999, the Grand River Conservation Authority hired a consultant to prepare a Mill Creek Watershed study, which recognized the importance of protecting this area. Many local residents and a majority of the local municipal councillors have stated publicly they want to protect the natural features of this site.

For the development to proceed, the county's OP requires the township and the developer to enter into a Responsibility Agreement (RA) to ensure, in the event that the owner (such as a condominium association) fails to operate and maintain the communal sewage system, that the township will assume responsibility. According to an MOEE guideline, the ministry will not issue a certificate of approval for a communal system serving a multi-lot freehold residential development unless it is owned, operated and maintained by a municipality. In most other cases, MOEE will not issue a C of A for sewage or waterworks without an executed RA between the developer and the municipality.

In this case, the township passed a resolution that it would not sign an RA with the developer because it believed it was too risky, and the township did not want to become liable for the communal system in question. While the township had entered into several RAs in the past, it believed it had the power to refuse to enter into this particular RA.

The developer brought his case to the Ontario Municipal Board (OMB), as he felt that the township was being arbitrary in its decision to not sign an RA. The OMB explored the availability of options beyond an RA between the township and the developer, and found that MOEE cannot and will not enter into an RA as a party with the owner and does not have the authority to require the OMB to ask a municipality to sign an RA. The OMB also found that case law suggests that municipalities have discretion to refuse to enter into an RA, and that it is not within the OMB's jurisdiction to overturn the municipality's decision. Therefore, the OMB refused the appeal by the developer without a full hearing. The developer appealed to Superior Court, but the motion was dismissed, as the judge found the OMB made no error of law.

Ontario Addressed a Growing Septic Problem in the 1990s

The ECO has written about the problems caused by malfunctioning septic systems in several annual reports. Septic systems are a potential source of nitrate and bacterial contamination in many parts of the province. There are more than one million private septic systems in Ontario and many of these are now 25 to 35 years old and reaching an age when they will be more likely to malfunction. According to MOEE's 1992 Status Report on the State of the Environment, malfunctioning septic systems accounted for approximately 8 per cent of groundwater complaints that staff in MOEE's southeastern region investigated in 1991/1992.

In its final report released in 1993, the Commission on Planning and Development Reform in Ontario ("the Sewell Commission") focused attention on sewage treatment and septic systems in Ontario, reporting there was increasing evidence of contamination of both ground and surface water as a result of their use. Within two years of release of the Commission's final report, MOEE and MAH had developed the basic policy framework on sewage and septic systems that remains in place today. According to Section 1.3 of the 1996 PPS, "planning for sewage and water systems will recognize that communal services are the preferred means of servicing multiple lots/units in areas where full municipal sewage and water services are not or cannot be provided, where site conditions are suitable over the long term."

The Ministries' Response to the Application for Review

Ministry of Municipal Affairs and Housing

In their application to MAH, the applicants requested that the definition of "Communal Services," defined in the 1997 edition of the PPS, which provides "for municipal/public body assumption of the communal services in the event of default by the owner," should be revised, in particular the reference to Section 51 of the *Planning Act*. The applicants contend that this definition requires revision because the intent of the PPS to encourage communal services for rural developments in Ontario is being frustrated and the environmental and public health benefits of communal systems are not being realized. Since a municipality cannot be forced to enter into such an agreement, the applicants believe that the current policy regime effectively grants a veto to municipalities over rural developments that are intended to be serviced by communal water or sewage works.

MAH decided a review of the policy was not warranted because the PPS is currently under review, including a review of servicing policies and the definitions related to sewage and water systems. The ministry went on to note that the input from the applicants to the PPS five-year review would be considered as part of the review, and that any additional submissions that the applicants want to make would be considered as part of the review.

Ministry of Environment and Energy

The applicants also requested a review of two MOEE guidelines relating to land use planning and water and sewage servicing and one guideline relating to financial assistance, contending current MOEE policies as reflected in these guidelines can result in a favouring of individual on-site services in rural Ontario, contrary to the intention of the PPS. The applicants provided evidence that individual on-site services are not maintained or monitored in a systematic manner and are more harmful to the environment, and that developments serviced by communal systems achieve a higher effluent quality and are maintained by a licensed operator. The applicants also pointed out that current MOEE policies mean that viable options for ensuring proper maintenance and operation of privately owned communal systems are unavailable. For example, owners of vacant land condominiums serviced by privately owned communal systems usually appear to be unable to enter into operation and maintenance agreements with the Ontario Clean Water Agency or financial assurance agreements with MOEE.

MOEE decided a review of the policy was not warranted because the MOEE guidelines "are intended to assist approval authorities with the interpretation and implementation of related policies in the PPS." MOEE also stated that there are a number of reviews already under way relating to land use planning and sewage and water servicing in Ontario, including the PPS review, Smart Growth Strategy Implementation, and Bill 155, the proposed *Sustainable Water and Sewage Systems Act* and drinking water initiatives. MOEE also stated that once the PPS review has been completed, staff will "undertake a review of related policies."

Ministry of Consumer and Business Services

The applicants requested a review of the current MCBS policies with respect to the development of condominium projects in rural areas, alleging that current MAH and MOEE policies mean that safeguards in the *Condominium Act, 1998*, cannot be invoked to ensure proper maintenance and operation of privately owned communal systems for rural condominium projects. Moreover, according to the definition of Communal Services in the PPS and other MOEE policies, condominium corporations are not permitted to enter into agreements with the Ontario Clean Water Agency.

The ministry, saying that it wanted "to avoid regulatory duplication," denied the application, stating that the issues were not under the jurisdiction of MCBS. The ministry also explained in its response that while an applicant is entitled to register a condominium if the requirements of the *Condominium Act* are met, the *Condominium Act* and its regulations do not outline what services must be in place or whether they must be communally or individually owned in vacant land condominiums.

ECO Comment

The ECO finds the ministries' reasons for denying the application for review were reasonable, given that the issues raised in the application are already being considered as part of the five-year review of the PPS. The ECO will monitor how ministries respond to this application, and will provide updates on this issue in future annual reports. To this end, the ECO was disappointed that the issue was not identified as requiring attention, in a document summarizing consultations on the PPS, released by MAH in mid-May 2002.

The Environmental Commissioner noted in the 2000/2001 annual report how difficult it can be for municipalities to protect remnant natural areas, even when local councils and local residents clearly want their land use decisions to align with the natural heritage policies of the PPS. At the same time, however, planning decisions that indirectly favour septic systems over communal systems are inconsistent with

another section of the PPS. This example of conflicting policy directions is further evidence that the PPS is in need of significant reform. The Environmental Commissioner recommended in the 2000/2001 annual report that: "MAH and other ministries consider, as part of the five-year review of the Provincial Policy Statements, the need for clearer provincial requirements for municipalities regarding the protection of environmentally significant lands."

Despite the ECO's support for the ministries' handling of this application, the concerns raised by the applicants are valid and must eventually be addressed by MOEE and MAH. The ECO submits that the preferred hierarchy for servicing of development in Ontario is sound and its implementation should be supported by provincial policy. Considerable evidence shows that communal sewage systems should be preferred over individual septic systems.

The ECO is concerned that municipalities appear to have latitude to ignore provincial policies favouring communal systems that are contained in OPs and the PPS. The ECO agrees with the applicants that alternatives are available to ensure that communal services are operated and maintained appropriately by condominium corporations. The benefits of communal systems can be realized, while ensuring that legitimate concerns regarding long-term security of such systems are met. Thus, the ECO urges the ministries to review the issues raised by this application and make appropriate amendments to the PPS and related policies.

PART 6:

Appeals, Lawsuits and Whistleblowers

Ontarians have the right to comment on government proposals, ask for a review of current laws, or request an investigation if they think someone is breaking a significant environmental law. But they also have other opportunities for using the *Environmental Bill of Rights*. They include:

- The right to appeal certain ministry decisions.
- The right to sue for damages for direct economic or personal loss because of a public nuisance that has harmed the environment.
- The right to sue if someone is breaking, or is about to break, an environmental law that has caused, or will cause, harm to a public resource.
- The right to employee protection against reprisals for reporting environmental violations in the workplace and for using the rights available to them under the *EBR*.

Appeals

The *EBR* gives Ontarians the right to apply for leave to appeal ministry decisions to issue certain instruments, such as the permits, licences or certificates of approval granted to companies or individuals. The person seeking leave to appeal must apply to the proper appeal body, such as the Environmental Review Tribunal (ERT), within 15 days of the decision's being posted on the Environmental Registry. They must show they have an "interest" in the decision, that no "reasonable" person could have made the decision, and that it could result in significant harm to the environment.

During this past reporting period, concerned residents and environmental groups filed several leave to appeal applications on a range of approvals issued by the Ministry of Environment and Energy.

The approvals include permits to take water (PTTWs) and orders for preventative or remedial measures made by MOEE. Discussion of one of these leave to appeal applications is set out below. (Further details on these applications are found in Section 6 of the Supplement to this report.)

Status of Appeals

During this reporting period, seven new applications for leave to appeal were initiated, none of which were granted by the ERT. One set of applications for leave to appeal was filed in error after MOEE posted an incorrect and confusing decision notice (see description below). One application was received at the end of the reporting period, and the ERT has yet to make a decision on whether or not to grant leave to appeal. The other applications for leave to appeal were denied because the ERT determined that the applicants did not meet the test for seeking leave to appeal.

Leave to Appeal Applications Summary	Result
ERT determines it has no jurisdiction	1
Leave Granted	0
Leave Denied	5
Leave Applications Pending	1

MOEE Instruments

Twelve "instrument holder" notices of appeal for MOEE instruments were posted on the Environmental Registry during the reporting period. The *EBR* requires the ECO to post notices of these appeals, which are launched by companies or individuals who were denied an instrument or were unsatisfied with its terms and conditions. The notices alert members of the public, who may then decide to become involved with an appeal.

MAH Instruments

During the reporting period there were 12 notices of appeal for Ministry of Municipal Affairs and Housing instruments. Residents, companies, or municipalities launched these appeals in relation to decisions made by MAH under the *Planning Act* to approve a municipality's Official Plan or an Official Plan amendment, and in relation to other approvals in areas of Ontario where no Official Plan is in place. It should be noted that there are hundreds of appeals to the Ontario Municipal Board every year regarding Official Plans, but under the *Planning Act* only a small number of approvals are granted by the Minister of Municipal Affairs and Housing. It is only these approvals that are prescribed as instruments under the *EBR* and for which notices of appeal are placed on the Registry.

MNR Instruments

On September 1, 2001 the Ministry of Natural Resources instrument classification regulation took effect, which resulted in certain MNR instruments becoming subject to the *EBR* appeal provisions. There were no instrument holder appeals or leave to appeal applications with respect to prescribed MNR instruments in 2001/2002.

Tay River Update

Last year the ECO reported that several individuals and groups were granted leave to appeal a two-phased permit to take water (PTTW) issued to OMYA (Canada Inc.) to take water from the Tay River in eastern Ontario. The first phase of the permit allowed for a taking of a maximum of 1,483 cubic metres of water a day until 2004. The second phase allowed for a maximum of 4,500 cubic metres a day until 2010. The leave was granted because the ERT found it was not reasonable for MOEE to issue the PTTW without first obtaining the relevant stream flow data. Such data would not be available for several years, and this created uncertainty about the ultimate impacts of the water taking.

After a lengthy hearing in the summer and fall of 2001, the ERT released its decision on the appeal in February 2002, granting the first phase of the PTTW. However, the Tribunal was not satisfied that MOEE had undertaken sufficient evaluation to assure that the Tay River watershed would not be harmed by taking 4,500 cubic metres per day, the amount granted initially in the PTTW for water taking from 2004 to 2010. The Tribunal decided that OMYA would be required to submit a new application for a PTTW under the *Ontario Water Resources Act (OWRA)* for phase two of the PTTW.

Among other things, the ERT noted the importance of involving the public in consulting on the PTTW, monitoring results, and preparing progress reports on operational aspects of this PTTW. In order to provide an opportunity for the public to be involved in the ongoing implementation of the PTTW, the Tribunal added a number of conditions to ensure environmental auditing and public consultation. The Tribunal also noted that MOEE's Statement of Environmental Values (SEV) indicates on its face that it does not apply to instruments issued by the ministry. However, in the Tribunal's view, this narrow interpretation is inconsistent with the *EBR*. The Tribunal held that the SEV should be considered each time an application for a PTTW is considered by MOEE. The Tribunal also found that the Water Taking and Transfer regulation under *OWRA* has incorporated the ecosystem approach described in the SEV. Unfortunately, MOEE has provided little policy guidance on how its staff should implement an ecosystem approach when analyses of proposed PTTWs are conducted and the impacts of water takings are evaluated.

Keele Valley Landfill Public Nuisance Case – Decision by the Supreme Court of Canada

As reported in last year's annual report, the Keele Valley Landfill class action lawsuit alleging public nuisance, started in 1997 by John Hollick on behalf of 30,000 residents who live in a defined area surrounding the landfill site, was appealed to the Supreme Court of Canada (SCC) from the Ontario Court of Appeal. The issue being appealed was whether or not the plaintiffs met the definition of a "class" under the *Class Proceedings Act, 1992*. The Environmental Commissioner of Ontario was granted intervener status at the appeal hearing by the SCC in March 2001. At the June 2001 hearing, the ECO took no position on the merits of the case, but intervened because the findings of the Ontario Court of Appeal related to the interpretation of the *EBR*, and specifically, the *EBR*'s public nuisance cause of action.

In October 2001, the SCC released its decision. Before a class action is allowed to proceed, the plaintiffs must first be certified as a class. Like the Ontario Court of Appeal and the Ontario Divisional Court, the SCC refused to certify the class in this case. As a result, the action was not able to proceed.

The Supreme Court of Canada held that there was an identifiable class and there were common issues among members of the class, but that the preferred route for bringing the action was not by class action. Instead, the plaintiffs could pursue their individual claims through the Small Claims Trust Fund established by the City of Toronto to compensate people who live close to the landfill. By the end of the reporting period, the ECO had learned that two residents had applied to the Small Claims Trust Fund, which is administered by MOEE. The outcome of these applications is unknown.

While the court made no comment on the *EBR*'s public nuisance cause of action specifically, the Supreme Court endorsed the power and significance of the public's rights under the *EBR* to apply for an application for review or investigation. The court stated that if the plaintiffs wanted to ensure the defendant took full account of its actions, they could apply for a review or an investigation under parts IV or V of the *EBR*. During the 2001/2002 reporting period, no application for review or investigation regarding the Keele Valley Landfill was submitted.

Registry Error Leads to Appeal Application

In August 1998, Lafarge Construction Materials applied for an amendment to its existing certificate of approval (C of A) to change the hours of operation of a portable rock crushing plant at its Dundas quarry to operate 24 hours per day. As is required under the *EBR*, a proposal notice for the amendment was placed on the Registry.

In October 1998, Lafarge withdrew its application, but notice of this decision was not placed on the Registry. Instead, the 1998 proposal notice remained, unchanged, on the Registry until August 2001, when MOEE began an effort to update the many outstanding proposal notices posted on the Registry. The decision notice placed on the Registry in August 2001 erroneously indicated the amendment to the C of A had been granted.

Twenty-four applicants, including a local environmental group, sought leave to appeal the decision to grant Lafarge permission to operate its rock crushing plant 24 hours per day. It was only after the applications for leave to appeal were received that MOEE realized the decision notice had been posted in error. Since LaFarge had withdrawn its application and MOEE had not amended the C of A, the ERT had no jurisdiction to hear the application and leave to appeal was denied.

This example demonstrates that ministries must make every effort to ensure accurate information is contained in Registry notices. Relying on the accuracy of the decision notice, some of the applicants retained a lawyer and incurred costs for which they were not reimbursed. Subsequent to fall 2001, MOEE has instituted a policy of monitoring proposal notices that have been on the Registry without a decision notice for more than 120 days. Hopefully this problem will be avoided in the future.

Public Nuisance Cases

Prior to 1994, when the *EBR* was brought into force, claims for public nuisances had to be brought by the Attorney General or with leave of the Attorney General. Under s. 103 of the *EBR*, someone who has suffered direct economic loss or personal injury as a result of a public nuisance can bring forward a claim and no longer needs the approval of the Attorney General.

There were new cases commenced during the reporting period that included public nuisance as a cause of action. One was a class action started by Suzanne Lewis and Kacy Weeke on behalf of residents of Corunna against Shell Canada for damages sustained as a result of gases released from the Shell Canada refinery when a release flare was extinguished on March 16, 2000. The action was certified by the Ontario courts as a class action and subsequently was settled. In addition, a related group of court actions was filed that did not rely on the *Class Proceedings Act, 1992.* The group of actions was commenced as a result of a leaking gasoline underground storage tank that allegedly led to contamination of the local groundwater.

The Right to Sue for Harm to a Public Resource

The *EBR* gives Ontarians the right to sue if someone is violating, or is about to violate, an environmentally significant Act, regulation or instrument, and has harmed, or will harm, a public resource. To date, the only court action brought under the Harm to a Public Resource provisions of the *EBR* has been the proceeding started in 1998 by the Braeker family against the Ministry of Environment and Energy and Max Karge, an owner of an illegal tire dump. Unfortunately, civil actions often take a long time to be resolved if there is no settlement, and the Braeker action is ongoing. The ECO will continue to monitor this case and will report on its ultimate conclusion.

Whistleblower Rights

The *EBR* protects employees from reprisals by employers if they report unsafe environmental practices of their employers or otherwise use their rights under the *EBR*. There were no whistleblower cases in this reporting period. Since the *EBR* was established, no complainants to the Ontario Labour Relations Board have invoked this right.

Ontario Bar Association and Environmental Groups EBR *Workshops*

In October 2001, the Ontario Bar Association hosted a workshop on the *Environmental Bill of Rights* conducted by the office of the Environmental Commissioner of Ontario. ECO staff lawyers outlined the key rights available to lawyers and their clients under the *EBR* — commenting on proposals on the Environmental Registry; third party appeal rights; applications for review and investigation; harm to public resource civil actions; and public nuisance actions. The workshop was repeated in January 2002 for environmental non-governmental groups. Precedents were provided to all workshop participants. Additional copies of the precedent material are available by contacting the ECO.

PART 7:

Ministry Progress

The ECO follows up annually on the progress made by ministries prescribed under the *EBR* in implementing recommendations made in previous years. ECO staff have corresponded with ministries to request progress reports on recommendations made in the last three annual reports that are considered still unresolved. These included the list of 14 recommendations made in our 2000/2001 annual report.

While progress is often slow, a few ministries have succeeded in implementing some past ECO recommendations, as described below.

Ministry Responses to 2000/2001 ECO Recommendations

Use of the Environmental Registry

The Environmental Registry usually provides the first point of contact for Ontario residents who want to participate in environmental decision-making. Recommendations contained in previous annual reports to improve the quality of information on the Registry will help to ensure that the public is able to participate fully in Ontario's environmental decision-making process.

For several years, the ECO has been requesting that MOEE develop a stand-alone "template" for the format of information notices posted on the Registry (see page 25 of this report).

The ECO is pleased to note that MOEE has removed from the Registry an extensive list of over 1,000 outdated instrument proposal postings for which instruments had been issued. The ministry also advises that it is developing business processes to minimize delays in decision postings and to provide updates on proposal notices while it is continuing to review a file, or is awaiting additional information from a third party.

In previous annual reports, the ECO noted concerns about MNR's delay in finalizing its instrument classification regulation. The regulation was passed in July 2001 (see pages 12-13).

Aggregate Resource Compliance Monitoring

The operators of sand and gravel pits provide raw materials for Ontario's construction industry, and are regulated by MNR under the *Aggregate Resources Act (ARA)*. A range of environmental problems can be associated with this industry, including impacts on groundwater levels, wetlands and streams, as well as noise and dust emissions. The ECO recommended in its 1999/2000 annual report that MNR review the effectiveness of its Aggregates Resources Compliance Program. MNR agreed with this ECO recommendation, and had its aggregates staff carry out a comprehensive review, the results of which were shared with the ECO in April 2002.

In Ontario, there are approximately 2,800 licences and 2,600 aggregate permits administered by MNR, and an additional 500 aggregate permits administered by the Ministry of Transportation. They are issued to a variety of users, including the construction and forest industries, municipalities and farm operations. Under the *ARA*, all holders of licences and permits must submit an annual Compliance Assessment Report (CAR). MNR's internal review examined approximately 11,000 CARs for adherence to deadlines, completeness, quality of information and industry understanding of the report. The review revealed some significant weaknesses in compliance.

MNR found that, generally, the quality of CARs was lacking. Deficient reports commonly omitted information such as excavation depth, rehabilitation information, site sketches or information regarding consultation with municipalities. The review also revealed that some licensees continually submitted incomplete and/or inaccurate reports that did not truly reflect the conditions of the site. MNR noted that "this is a major concern and results in a major workload for ministry staff in seeking compliance. It also emphasizes the need for MNR to complete field audits, to provide additional training to industry on how to properly report on their compliances, and to reiterate the possible consequences should industry fail to comply."

MNR had previously committed its district offices to detailed field audits of a certain percentage of CARs each year (varying from 10 to 20 per cent). MNR's review found that while some district offices of the ministry were able to carry out the targeted number of field audits, others could not, especially in northern Ontario. Field audits are important, since MNR noted that "field audits are frequently identifying additional violations not previously identified in the industry-prepared CARs. A concerted effort is required by inspectors/technicians to follow up with appropriate enforcement measures."

MNR listed 16 administrative changes that the ministry is either implementing or at least considering, including returning incomplete reports to licensees/permittees and advising that they are automatically suspended until the reports are correctly completed. MNR is also considering moving up the annual CAR submission deadline to July 31 to allow inspectors more time for field audits before winter. As well, MNR committed to holding 14 training sessions during April/May 2002. MNR is also considering instant penalties for violations such as non-submission of the CAR. In addition, MNR will be seeking a legislative amendment to allow for a "stop work order" for any violation of the *Aggregate Resources Act*. The ECO commends MNR for carrying out this important review.

Mining Act: Part VII Regulation and the Mine Rehabilitation Code

Recommendation 10 of the ECO's 2000/2001 annual report asked that the Ministry of Northern Development and Mines reintroduce an annual reporting requirement in relation to mine rehabilitation. MNDM reported that it had elected not to reintroduce the annual reporting requirement at this time. MNDM stated that the existing material change notice requirement remains in effect. According to MNDM, this requirement captures more items than the previous annual reporting requirements and is required whenever any material change is planned. This is in contrast to the previous reporting requirement, which was required only on the anniversary date of the closure plan.

MNDM also reported that since filing the regulation, the majority of operating sites have filed closure plans with financial assurance. MNDM reported that it continues to audit closure plan proposals and circulate them to partner ministries and agencies.

Protecting Ontario's Groundwater

Last year's annual report highlighted the need for regulations and guidelines on sewage and sludge spreading and on the need to regulate large livestock operations in a manner similar to other large industries. The proposed *Nutrient Management Act (NMA)* was introduced in June 2001, in part to respond to these concerns.

The proposed *NMA* is relevant to groundwater protection because it is intended to update Ontario's regulatory framework for land application of manures, sewage sludges and other kinds of organic waste that can potentially contaminate groundwater. The Ministry of Agriculture and Food has advised that as of March 15, 2002, the proposed *NMA* was awaiting second reading in the legislature, and that the government remains committed to the passage of the Act.

The ministry also noted that the minister has posted a proposal notice for a directive under the *Farming and Food Production Protection Act* on the Registry that would prevent challenges to good municipal by-laws that regulate livestock operations. The ECO commends this initiative by the ministry, which appears to recognize that until the *NMA* is in place, many municipalities urgently need interim solutions to local conflicts about the siting of intensive livestock operations.

The Technical Standards and Safety Act

The ECO's 2000/2001 annual report recommended that the *Technical Standards and Safety Act (TSS Act)* be formally prescribed under the *EBR*. In March 2002, the Ministry of Consumer and Business Services assured the ECO that it was working with MOEE to draft an amendment to the regulations under the *EBR* to prescribe certain sections of the *TSS Act*, the Liquid Fuels Handling Regulation and the Liquid Fuels Handling Code. To date, the *EBR* regulations have not been amended. However, in the interim, both MCBS and the Technical Standards and Safety Authority have continued to fulfil their *EBR* requirements pursuant to s. 42 of the *TSS Act*, which provides for the continuation of *EBR* requirements to matters formerly prescribed by the *Gasoline Handling Act,* had it not been repealed.

Species at Risk

In its 1999/2000 annual report, the ECO encouraged MNR to initiate the necessary public debate into policy options that will effectively prevent species loss and adequately identify and protect species at risk. MNR reports that in 2002/2003 it plans to develop a Species at Risk strategy for Ontario that will provide strategic direction for the provincial program through the identification of principles, goals and corresponding strategies. MNR also plans an Environmental Registry posting of draft guidelines for species recovery planning, listing, regulating and landowner contact. (See the discussion of species at risk on pages 100–101.)

MNR staff are working on a proposal to develop a new List of Species at Risk in Ontario, which would replace the existing List of Ontario's Vulnerable, Threatened, Endangered, Extirpated and Extinct Species. The new list is intended to harmonize the Ontario list with the list of the Committee on the Status of Endangered Wildlife (COSEWIC) to reduce confusion regarding the two lists. In our 1999/2000 annual report, the ECO pointed out the discrepancy between the number of endangered species listed at that time for Ontario by COSEWIC (43), and the number of regulated endangered species listed by MNR under the *Endangered Species Act* (24). As of June 2002, MNR had increased the number of species listed under the *ESA* to 29 and the ministry further proposes to add another seven species while progressing toward the number of species currently identified by COSEWIC (52). The ECO commends MNR for this progress.

Forest Operations Compliance Review

Last year, MNR reported that it would be acting on the findings of its June 1999 Forest Operations Compliance Program Review, and would be undertaking a follow-up review of forest compliance and enforcement programs, to be completed by the end of fiscal 2001/2002. The ECO requested an update on these initiatives. The ministry indicates that a review team is visiting seven MNR district offices and approximately 15 Sustainable Forest License holders to assess the compliance inspection recording and reporting system. A final report on the review is scheduled for September 2002, with implementation of recommendations during 2002/2003.

Ecological Land Acquisition Program

Last year, the ECO discussed the challenges of protecting ecologically important lands in southern Ontario and described a number of land acquisition programs operated by the province. Our recommendation was that MNR create a cohesive framework for land acquisition programs in order to clarify how these programs will help to protect the most significant ecosystem and natural heritage features of the southern Ontario landscape. MNR reports that it is developing the Ecological Lands Acquisition Program (ELAP) and anticipates that program details will be available to the public in the near future. The ECO will monitor this initiative.

Ecosystem Fragmentation and Environmentally Significant Lands

Recommendation 20 in the 1999/2000 annual report of the ECO suggested that MNR, MAH and MOEE research the scope of ecosystem fragmentation in Ontario and select management options to slow down or even reverse this trend. Recommendation 21 stated that the ministries should assist municipalities to ensure that ecosystem fragmentation is adequately considered in land use planning decisions and that provincial interests in protecting natural heritage and functioning forest ecosystems are safeguarded.

In response to these recommendations, MNR advised the ECO that it has developed models for use in selected areas for the evaluation of natural heritage features, including woodland and water resources, using satellite imagery, GIS applications and data transfer techniques.

Last year's annual report recommended that MAH and other ministries consider, as part of the five-year review of the Provincial Policy Statement, the need for clearer provincial requirements for municipalities regarding the protection of environmentally significant lands.

The most significant advance in conserving environmentally significant land in southern Ontario this past year has been the enactment of the *Oak Ridges Moraine Conservation Act (ORMCA)*. The Act and the accompanying Oak Ridges Moraine

Conservation Plan represent a significant step forward in environmental land use planning in Ontario. Overall, MAH did an excellent job of managing the process and balancing the competing interests and submissions. (A full review of the *ORMCA* and Plan is provided on pages 72–79 of this report.)

In the ECO's opinion, the Oak Ridges Moraine Conservation Plan's provisions for protecting natural heritage features and hydrological features and functions are far superior to the *Planning Act* and Provincial Policy Statement provisions that must be applied to developments proposed in municipalities. MAH, MOEE and MNR should consider how this approach to improved land use planning and decision-making might be more broadly applied throughout southern Ontario.

Energy Efficiency and Renewability

Recommendations in both the 1998 report and the 2000/2001 ECO report encouraged the Ministry of Energy, Science and Technology (now part of MOEE) to develop improved minimum energy efficiency standards, set targets for increased production of renewable energy, and lead programs to reduce consumer energy demand.

At the time of writing (May 2002), Ontario's policies relating to energy efficiency and support for renewable energy continue to be in development, even though the electricity market has already opened to competition. For example, MOEE/MEST is still developing Phase II of an environmental labeling program intended to help consumers make informed choices about their electricity sources.

In February 2002, MOEE/MEST finalized a regulation under the *Energy Efficiency Act* that sets minimum energy efficiency levels for three products and updates the referenced national standards for 11 other products. The final regulation postponed for more than two years the compliance date for swimming pool heaters and clothes dryers in order to help harmonize Ontario's standard with a similar federal regulation and to give manufacturers more time to prepare.

With regard to energy conservation programs, the Ontario Energy Board will be examining the role electricity distribution utilities may play in this area. The OEB is expected to begin stakeholder consultations in late 2002, but any resulting programs would not be implemented before 2004. Finally, recommendations on alternative fuels are expected in May 2002, in the final report of a legislative committee established to examine this issue. The ECO will continue to monitor the development of policies to encourage energy conservation and to promote the use of less polluting fuels.

Cooperation from Ontario Ministries

The Environmental Commissioner and staff rely upon cooperation from staff in Ontario's provincial ministries to carry out the ECO's mandate. ECO staff are in constant contact with staff from the prescribed ministries with requests for information. Clear, prompt responses allow ECO reviews of the ministries' environmentally significant decisions to be conducted in an efficient and straightforward manner.

Section 58 of the *Environmental Bill of Rights* requires the ECO to include a statement in the annual report to the Ontario Legislature on whether or not prescribed ministries have cooperated on requests by the ECO for information.

Staff at the prescribed ministries are generally cooperative in providing information when it is requested. The 12 prescribed ministries and two agencies (the Technical Standards and Safety Authority and the Ontario Realty Corporation) each have one staff person who is designated as an *EBR* Coordinator or contact. Most of the day-to-day interaction between the ECO and the ministries occurs via these coordinators, which are very important positions with respect to effective *EBR* implementation. The ECO urges ministries to notify our office immediately of any changes in the *EBR* Coordinator/contact position to ensure optimum communication and cooperation between the ECO and the prescribed ministries. The ECO also directly contacts ministry staff responsible for program delivery with specific, detailed information requests related to ministry programs.

The ECO makes monthly requests for information to the Ministry of Environment and Energy's *EBR* Office (EBRO) through the manager, which saves time for staff at both ends. In 2001/2002, the EBRO staff have been consistently cooperative, and responses to ECO requests were thorough and informative. Occasional delays resulted this year from a lengthy labour dispute between OPSEU and the Ontario Government at the end of the reporting period, but were generally managed well by MOEE.

Cooperation with the ECO by MOEE staff at offices other than the EBRO has been mixed this year. For example, several requests for information from the Environmental Monitoring and Reporting Branch and the Standards Development Branch were responded to quickly. Requests to the Environmental Assessment and Approvals Branch for basic information on the status of branch projects were processed in an organized manner. However, on several occasions there were delays in processing requests, and these seemed to be related to internal communications and data-gathering bottlenecks. One request for certificate of approval information was met with the requirement that the ECO put its request in writing.

It is very important for ECO staff in the course of their review work to have direct telephone access to front-line ministry staff with specific technical expertise. When telephone contact between ECO and ministry staff is discouraged or prevented, it becomes much harder for the ECO to provide the Ontario Legislature and the public with accurate, balanced and timely information in its annual report. Telephone interviews are much quicker, more efficient for both parties, and often more effective in clarifying complex issues than written correspondence. Ministry staff always have the opportunity to choose a mutually acceptable time for a telephone interview, to provide additional information in writing, and to refer ECO inquiries elsewhere if the need arises.

The ECO reported last year that management at the Ministry of Transportation had required that all research inquiries from ECO be directed through that ministry's *EBR* Coordinator. That process resulted in excessive response times to inquiries. This year, in its conduct of a research project on instruments issued to projects approved under the *Environmental Assessment Act* (see pages 34-41 of this report), ECO staff requested information from MTO. Two communications were not acknowledged, and ministry staff did not follow through on their offer to meet with ECO staff to provide the requested information. We do note a positive sign of cooperation, however. Ministry staff provided a useful information session on road salting programs for ECO staff in February 2002.

The ECO's ongoing work on compliance with the *EBR* often raises issues related to ministry cooperation. Under the rubric of the ECO's unposted decision project (see pages 21-22 of this report), we may send formal written inquiries requesting information on how the ministry determined the environmental significance of a proposal and whether it considered its Statement of Environmental Values. One such request was made to the Ministry of Agriculture and Food in September 2001 concerning the *Food Safety and Quality Act, 2001*. OMAF had still not responded to this formal request as of May 2002.

The ECO reported in 2000/2001 that a long-standing commitment by the Management Board Secretariat to the ECO remained unfulfilled. MBS has informed the ECO that it is now up to date on its reporting obligations under its Class Environmental Assessment for Realty Activities.

ECO staff have experienced considerable delay in obtaining necessary *EBR* documentation needed for our review of decisions posted on the Environmental Registry by the Technical Standards and Safety Authority. The TSSA should endeavour to provide the ECO with the information requested within a reasonable time frame.

Each year the ECO corresponds with prescribed ministries informing them of our intended research issues for the next annual report and telling them that their staff will be contacted by ECO researchers. All ministries were cooperative in providing written responses, and both MOEE and MNR staff were cooperative in providing verbal updates on the subject programs to ECO staff. MNR staff were cooperative in providing reference materials and information concerning lake trout management in Ontario (see pages 157-160 of this report). MNR staff were also helpful in fulfilling several requests for information during our review of the ministry's new Forest Management Guide for Natural Disturbance Pattern Emulation (reviewed on pages 50-56 of this report). *(For ministry comments, see page 181.)*

ECO Recognition Award

Every year, the Environmental Commissioner of Ontario recognizes formally those ministry programs and projects that best meet the goals of the *EBR* or are considered best internal *EBR* practices. The ECO asks the ministries prescribed under the *EBR* to submit programs and projects that met either of these criteria. This past year, seven ministries responded to our request, with a total of 16 projects for the ECO to consider. The submissions varied considerably in their scope and content, which made them a challenge to compare. An arm's-length panel reviewed a short list of the submissions and provided advice on the selections for our 2001/2002 ECO Recognition Award.

Of the many worthwhile projects submitted to the ECO this year, three have been singled out as particularly noteworthy. Two runner-up projects deserve honourable mention. The Ministry of Environment and Energy submitted the Drive Clean program, which is aimed at reducing smog-causing emissions from vehicles as part of Ontario's air quality improvement strategy. The Ministry of Northern Development and Mines submitted the Rehabilitation of the Kam Kotia Mine Site, a program to address contamination of rivers and groundwater from acid mine drainage from an abandoned mine site near Timmins.

The recipient of this year's Recognition Award is the Ministry of Municipal Affairs and Housing. The ECO is pleased to recognize the work of MAH officials and staff in the development of the Oak Ridges Moraine (ORM) strategy. The ECO also recognizes the involvement of officials and staff from other ministries, especially the Ministries of Natural Resources, Environment and Energy, Agriculture and Food, Transportation, and Finance.

The ORM strategy, announced on November 1, 2001, included the *Oak Ridges Moraine Conservation Act*, the Oak Ridges Moraine Conservation Plan, a land exchange proposal and the establishment of the interim board of directors for the Oak Ridges Moraine Foundation. Once implemented, this comprehensive provincial strategy for the protection of the ORM has the potential to achieve key *EBR* goals: the protection, conservation and restoration of the integrity of the environment; the wise management of natural resources; and the protection of ecologically sensitive areas and processes. (For more information on ORM, see pages 72-79.)

The ORM strategy was the culmination of a consultation process using the Environmental Registry established under the *EBR*, as well as other methods to allow the public and stakeholders the opportunity to participate and build consensus in developing the strategy. The process involved extensive public participation supported by inter-ministry and multi-stakeholder teams. MAH staff promoted the use of the Registry as a way of informing the public about the consultation and soliciting involvement. In addition, public open houses and stakeholder sessions were held as part of the consultation process. More than 2,000 people attended these forums, and almost 600 written submissions were received by MAH.

PART 8:

Developing Issues

Introduction

Each year, the ECO draws attention to a handful of issues that deserve stronger and more focused attention from Ontario ministries. The ECO's concern is that while ministries may be working away at fragments of issues, they too often fail to grasp a wider ecosystem perspective related to a given environmental problem. This failure to see the bigger picture has very practical consequences, since it can result in government policies and programs that are inadequate, misdirected, or even counter-productive.

This year the ECO has again highlighted three such areas of concern. We note that Ontario has failed to develop a biodiversity strategy for the province, despite having committed in 1996 to implement the Canadian Biodiversity Strategy. Although a number of Ontario's laws deal peripherally with biodiversity issues, a cohesive strategy to coordinate policy and action does not exist.

Similarly, MNR lacks a coherent strategy to protect one particular species that symbolizes wilderness to many Ontarians: the lake trout. Management of the lake trout fishery is occurring in bits and pieces in parts of the province, but does not adequately respond to the diversity of threats to the species, ranging from over-fishing to deterioration of water quality to introductions of exotic species.

In another policy area, the ECO notes that although MOEE has measures to control ozone depleting substances (ODSs), their continued use in numerous applications is nevertheless allowed, and MOEE has no strategy to ensure destruction of old stockpiled ODSs that have been taken out of use.

CONSERVING BIODIVERSITY IN ONTARIO

Ontario is an ecologically diverse region of Canada, stretching from the northern Arctic tundra on the shores of Hudson Bay to the remnants of Carolinian forest bordering the southern Great Lakes. This extensive range of landforms and climates has created habitat for more than 2,900 species of vascular plants, 160 species of fish, 80 species of amphibians and reptiles, 400 species of birds and 85 species of mammals. This rich tapestry of life, including the diverse ecosystems and landscapes that support these species, forms the biological diversity of Ontario.

Biological diversity, also called biodiversity, can be understood as the variety of native species, the genetic variability of each species, and the variety of different ecosystems they form. It is the result of billions of years of evolution, creating ecological systems so complex that humans are only now beginning to understand their dynamics.

What is biodiversity?

The Convention on Biological Diversity defines biological diversity as "the variability among living organisms from all sources, including terrestrial, marine, and other aquatic ecosystems and the ecological complexes of which they are a part; this includes diversity within species, between species and of ecosystems."

Scales of biodiversity:

Genetic Diversity – variability in the genetic composition of individuals within or among species and their populations.

Species Diversity – the number and variety of species found in a given area.

Ecosystem Diversity – the variety of ecosystems found within a region, where ecosystem means a dynamic complex of plant, animal and microbial communities and their non-living environment interacting as a functional unit.

Landscape Diversity – the mosaic of interacting ecosystems. All of the above levels of biological diversity are integrated into landscapes. Ecosystems may be characterized by vertical relationships among organisms, air, water, soil and nutrients and ecological processes within a relatively homogeneous spatial unit; landscape diversity represents the relationship among such spatial units.

Humans are part of the natural environment, but we — as a species — are also causing significant damage to it. The loss of biodiversity is a global problem and it is acknowledged as one of the most critical environmental issues facing the planet. Among the most significant threats to biodiversity are the cumulative impacts of industry, farming, forestry, mining, fishing, urban sprawl, transportation corridors and high levels of material consumption. Biodiversity may also be seriously affected by pollution, climate change, and the introduction of exotic species.

The rapid expansion of human populations and unsustainable forms of development have caused what has been called the sixth extinction episode of the Earth. Species are disappearing at rates estimated to be 1,000 to 10,000 times higher than in the past. More than 11,000 species of plants and animals across the planet risk extinction in the near future. Three-fourths of the planet's bird species are in decline and amphibian species are mysteriously disappearing. Within North America, more than 30 per cent of freshwater fish species are rare, threatened or endangered. Less than 8 per cent of wild ungulate populations, such as caribou or elk, have survived since European colonization. Populations of large carnivores have rapidly declined, with large protected areas becoming their last refuges.

In no small measure, this loss of biodiversity is due to the transformation of the physical landscape and the destruction of habitat. The integrity of vast landscapes is ecologically deteriorating, be it from the logging of old-growth forests or the melting of polar ice in the Canadian Arctic as a result of climate change. Almost one-fifth of ecosystem types in North America have been reduced to critical levels, risking their entire loss. More than half of North American wetlands have been lost in the last 200 years.

Ontario is not isolated from this environmental issue. The diversity of species and natural areas is heavily impacted by Ontario's 12 million citizens, the majority of whom live in the southern and highly urbanized portion of the province. Regions such as southwestern Ontario have been virtually stripped of their pre-settlement forests, with only an estimated 5 per cent of their original woodlands intact. Such a dramatic loss of habitat places enormous pressures on the species that remain. Other species have been extirpated from the province and cannot be recovered, as sufficient habitat no longer exists — such as the loss of Ontario's tallgrass prairie ecosystems. Aquatic systems face similar pressures. For example, as dams were erected on the major rivers flowing into the lower Great Lakes, the spawning areas were cut off for species such as the Atlantic salmon, causing their extirpation. With each year that passes, the number of threatened and endangered species increases in Ontario.

Conserving biodiversity requires a re-thinking of current approaches to environmental issues. First, the determination of the root causes of the biodiversity crisis should be understood, stressing the importance of environmental education. Second, current government approaches should be assessed to determine areas in which to strengthen conservation efforts. Third, a coordinated strategy should guide the implementation of reforms.

In the early 1990s, approaches to environmental issues began to change. In Ontario, the *Environmental Bill of Rights* was drafted and then enacted in 1993. Its authors were clearly aware of biodiversity concerns. One of the central purposes of the *EBR* is "the protection and conservation of biological, ecological and genetic diversity."

Ministries prescribed by the *EBR* are also required to pursue these objectives in their Statements of Environmental Values and in any subsequent decision-making that affects the environment. Indeed, the Ministry of Natural Resources' own Statement of Environmental Values requires that "the variety of life — biological diversity – will be conserved."

Biodiversity was propelled into the international spotlight at approximately the same time. The United Nations Conference on Environment and Development, more commonly known as the Rio "Earth Summit," was held in 1992. The Convention on Biological Diversity was presented to the nations participating in the Rio Earth Summit as a framework for conserving natural areas and species.

Under this agreement, countries are obliged to conserve their sovereign biological diversity and respect that of other nations. The Convention was intended to assist countries in developing their own biodiversity strategies. The Government of Canada is a signatory of the Convention on Biological Diversity, along with 181 other nations. The federal government formally ratified the Convention in 1993, making Canada the first industrialized country to do so.

In 1995, Environment Canada released the Canadian Biodiversity Strategy, which outlined a series of principles and strategic directions that were to serve as a guide to implement Canada's commitment to conserving biodiversity. It also recognized the constitutional responsibilities for biodiversity, emphasizing the role of the provinces and territories and encouraging them to develop their own comprehensive strategies. The purpose of such initiatives, as reflected in the Canadian Biodiversity Strategy, is a vision for Canada as

> . . . a society that lives and develops as part of nature, values diversity of life, takes no more than can be replenished and leaves to future generations a nurturing and dynamic world, rich in biodiversity.

Goals of the Canadian Biodiversity Strategy (1995):

To conserve biodiversity and use biological resources in a sustainable manner.

To improve our understanding of ecosystems and increase our resource management capability.

To promote an understanding of the need to conserve biodiversity and use biological resources in a sustainable manner.

To maintain or develop incentives and legislation that support the conservation of biodiversity and the sustainable use of biological resources.

To work with other countries to conserve biodiversity, use biological resources in a sustainable manner and share equitably the benefits that arise from the utilization of genetic resources.

In 1996, the provinces and territories agreed to implement the Canadian Biodiversity Strategy in a National Statement of Commitment. In Ontario, the Minister of Natural Resources signed on behalf of the province, since MNR is chiefly responsible for the biodiversity of Ontario.

The Canadian Biodiversity Strategy commits the provinces and territories to fulfil a series of obligations. However, at this point, Ontario:

- committed to tabling a report to the federal government by 1997 on its own biodiversity initiatives, but failed to do so.
- has the responsibility to report to the public on its implementation of the federal strategy, but has also failed to do so.
- has not developed a provincial strategy to assist in meeting its obligations, unlike provinces such as Quebec.

Initiatives to implement the Canadian Biodiversity Strategy: the Province of Quebec

1992 – Canada signs the Convention on Biological Diversity at the Rio "Earth Summit" and ratifies it the following year

1995 – Canada introduces its own national strategy

1996 – Provinces and territories commit to the national strategy

1996 – Quebec adopts its own five-year biodiversity strategy and action plan

1997 – Quebec presents an annual report on its biodiversity strategy

1998 – Quebec presents an annual report on its biodiversity strategy

1999 – Quebec presents an annual report on its biodiversity strategy

2000 – Quebec presents an annual report on its biodiversity strategy and renews the original strategy for two more years

2002 – Quebec introduces a new five-year strategy at the World Summit on Sustainable Development in Johannesburg

The Environmental Commissioner of Ontario believes that MNR should undertake a comprehensive assessment of Ontario's current policies, regulations and Acts, and enact appropriate changes to conserve the province's biodiversity. Ontario committed to such an assessment in its endorsement of the Canadian Biodiversity Strategy. The ECO and many other stakeholders have noted that many statutes that deal with biodiversity issues, such as the *Endangered Species Act* or the *Provincial Parks Act*, are outdated and need revisions.

Some advances have been achieved in recent years that partially address biodiversity issues, such as the introduction of the *Crown Forest Sustainability Act* and Ontario's Living Legacy program. However, such actions do not address biodiversity issues across the entire province nor do they make biodiversity a priority. Other changes, such as reforms under the *Planning Act*, have essentially promoted urban sprawl in southern Ontario and have further threatened biodiversity.

A provincial biodiversity strategy would be consistent with the objectives of the *EBR*. Pursuant to its commitment to the Canadian Biodiversity Strategy, the Province of Ontario should take practical steps toward creating an improved legislative and policy framework that supports the conservation of biodiversity and the sustainable use of biological resources. Ontario should also report to the public and the federal government on the state of the province's biodiversity and the measures it is undertaking to conserve it. *(For ministry comments, see page 181.)*

Recommendation 17

The ECO recommends that the Ministry of Natural Resources develop a provincial biodiversity strategy in consultation with affected ministries, municipalities and stakeholders.

Ontario's Lake Trout — In Peril?

Ontario's biodiversity is enhanced by two magnificent legacies of the last glaciation: first, a wealth of as many as 200,000 lakes, ranging from the Arctic to the U.S. border and from Manitoba to Quebec; second, the lake trout *(Salvelinus namaycush),* which inhabit only about 1 per cent of these lakes. The lake trout is indigenous to North America and is a slow-growing, late-to-mature fish, adapted to the deep, cold, well-oxygenated Canadian Shield lakes. Their large size, fighting qualities, and delicious flesh are all factors that make this fish such an avidly sought-after target of the sport fishery. Unfortunately, despite the Ministry of Natural Resources' goal of ensuring the sustainability of this unique and irreplaceable species, there is reason to believe that its future is in jeopardy.

In 1987, the provincial government recognized that inland lake trout populations in many areas of the province were in trouble. It responded by setting up a number of expert working groups to summarize existing knowledge and develop recommended strategies to perpetuate healthy lake trout stocks. The process and the resulting reports became known as the Lake Trout Synthesis. This project reflected broad stakeholder support for protection of lake trout in Ontario. At the conclusion of

their work in 1991, the working groups made 69 recommendations addressing fisheries administration, exploitation, habitat, fish stocking, species interactions and assessment of stocks. Acting within the framework of Ontario's Strategic Plan for Ontario Fisheries, these recommendations were intended to ensure a sustainable future for the inland lake trout and its fishery.

There are four main threats to the sustainability of the lake trout and the sport fishery:

- overfishing
- ecological changes
- environmental/habitat degradation
- loss of genetic diversity.

Threat: Overfishing

There is evidence of serious over-exploitation of lake trout in many lakes. Access to lakes, improvements in fishing technology, and increased numbers of anglers are all contributing to this situation. MNR staff state that it is difficult to manage lake trout sustainably under current harvest regimes. Lake trout lakes, which are deep, cold, and low in nutrients, are also low in productivity, and harvest must be accordingly very restrictive. These lakes should not be looked upon as a source of food, but rather as an opportunity for a wilderness and angling experience that is unique to Ontario.

MNR seeks to regulate angling pressure on the lake trout fishery by restricting gear, open seasons, slot (size) limits, and catch limits. Such measures, however, do not guarantee the long-term sustainability of lake trout lakes. Formal fisheries management plans focusing exclusively on naturally reproducing lake trout lakes exist only for certain parts of the province. Such plans are not available for other areas.

Inadequate fishery management has been working against sustainability of the lake trout for decades. At least two studies, based on a broad range of data from Ontario lake trout lakes, indicate anglers are reaping harvests well in excess of levels that biologists say are sustainable. A recent report by a team of fisheries scientists claims that many of Canada's recreational fisheries, including Ontario's lake trout, are faced with an "invisible collapse," owing in part to the use of inappropriate management models.

Threat: Ecological Change

Rock bass and smallmouth bass have been introduced in lake trout lakes in north-eastern Ontario, perhaps "stocked" by misinformed members of the public seeking to create a different recreational fishery in their lake. The problem is that these

species have a negative impact on the native lake trout. Lake trout growth rates have been observed to decline 30 per cent within 10 years of introduction of rock bass because of competition for food sources. In some lake trout lakes of southcentral Ontario, cisco (lake herring) populations have grown to levels that have negative effects on young lake trout survival. MNR scientists are also concerned about the introduction of exotic species such as the spiny water flea in various parts of Ontario, including lake trout lakes of Haliburton and Muskoka. These examples point out the need for MNR to undertake whole aquatic community assessments as part of provincial monitoring strategies.

Threat: Environment and Habitat Degradation

The lake trout is an indicator species — its sustained presence is indicative of a clean, natural environment. The loss of lake trout in northeastern Ontario lakes because of acidic precipitation effects has been well documented. Fortunately, the physical and chemical conditions in some of these lakes are improving due to acid precipitation emission reductions, and recent efforts to rehabilitate the lake trout fishery in some affected lakes are showing signs of success. Global climate change also raises concerns because changes in physical properties of lakes may change fish community structure.

A major environmental threat to lake trout lakes results from nutrient enrichment and other habitat impacts related to lakeshore cottage and resort development. As a result of provincial downloading to municipalities, the responsibility for lakeshore development planning and approval of development proposals now falls upon many small municipalities with limited resources to deal with the complex issues of the development capacity of lake trout lakes. These municipalities need better support from MOEE and MNR in terms of technical guidance, including habitat management criteria and modeling support.

Threat: Loss of Genetic Diversity

There is a wide variation in genetic strains of naturally reproducing lake trout in Ontario's lakes. It is essential to maintain as much of that diversity as possible. Their genetic variability allows lake trout to adapt to the unique conditions of their local habitat. Evidence has mounted over the years that planting of hatchery-reared lake trout in lakes with naturally reproducing populations can lead to a loss of genetic adaptability to the local environment and the eventual extinction of unique gene pools. A significant number (5 per cent) of previously naturally reproducing lake trout stocks are now extinct.

Perhaps the most striking examples of variety in the lake trout species are the Haliburton strain of lake trout and silver lake trout found in Algonquin Provincial Park. These strains are examples of inland trout populations that have evolved in isolation over the last 10,000 years. They are very distinct from other lake trout populations.

Stocking has been carried out in Ontario as far back as 1880. The majority of lake trout lakes in northern Ontario are entirely "natural" in terms of their native trout gene pool and their self-sustaining nature. However, in southeastern and south-central Ontario, about 60 per cent of the lake trout lakes have been stocked at one time or another with hatchery-raised lake trout. These were mainly lakes that had formerly been naturally self-sustaining lake trout lakes.

Conclusion

The Strategic Plan for Ontario Fisheries (SPOF II) was formally adopted as a provincial policy direction in June 1991. SPOF II identified a goal for Ontario fisheries of "Healthy aquatic ecosystems that provide sustainable benefits, contributing to society's present and future requirements for a high-quality environment, wholesome food, employment and income, recreational activity and cultural heritage." In the time since the 1991 Lake Trout Synthesis report was completed, MNR has experienced reduced financial and staffing resources, making it impossible for a province-wide implementation of that report's recommendations. This reduction in resources has made it more difficult for MNR to achieve its goals for lake trout and the broader goals stated in SPOF II.

Given the recognition in 1991 of the already diminished state of the lake trout fishery and its evident continued decline, it would be advisable for MNR to take a precautionary approach in future. MNR should consider a 10-year review of the recommendations of the Lake Trout Synthesis, involving the public in the development of strategies that will conserve the lake trout resource.

In its 1997 and 1999/2000 annual reports, the ECO recommended that ministries take stock of environmental monitoring programs and ensure they are comprehensive enough to ensure that ministries can fulfil mandates for habitat protection. Lake trout lake assessments and formal management plans do not currently cover all of the province. MNR's Fisheries Assessment Units are carrying out long-term monitoring in 31 of the province's approximately 2,200 lake trout lakes, a sample size that cannot supply accurate indications of the overall status of provincial lake trout populations.

The weight of existing evidence indicates there is cause for serious concern about the sustainability of the lake trout and the fishery, particularly in the southern part of the province. MNR should recognize this situation and respond by devoting an adequate budget and staff to carry out long-term and extensive assessment of the state of this irreplaceable resource. *(For ministry comments, see page 181.)*

Recommendation 18

The ECO recommends that the Ministry of Natural Resources develop a clear policy on the classification and protection of lake trout lakes.

MANAGING OZONE-DEPLETING SUBSTANCES: CHANGES MADE, IMPROVEMENTS NEEDED

It first became known in the mid-1970s, almost three decades ago, that a group of chemical compounds called ozone-depleting substances – for instance, chlorofluorocarbons (CFCs) — could attack the earth's ozone layer. The ozone layer is a thin veil of ozone gas in the upper atmosphere, and one of its key attributes is that it protects life on earth from excessive levels of ultraviolet radiation (UV). High UV levels can cause a variety of adverse ecological and human health impacts, including tissue and reproductive damage in plants and tissue damage in humans and animals, potentially leading to skin cancers and vision and immune system disorders. However, only recently has Ontario acted to ban the consumption of CFCs for the purpose of refilling vehicle and air conditioning systems.

In spring 2001, the Ministry of Environment and Energy made changes to the way in which CFC-based refrigerants will be regulated in Ontario, including new controls on their handling and a ban on their use in refilling air conditioners in cars and trucks (see also the Supplement, pages 23–28). These developments raised questions about the fate and safety of surplus CFC products arising from the ban and about the timing and order of MOEE's recent regulatory initiatives. The ECO undertook a preliminary review of this program area to determine whether the current MOEE approach is likely to lead to effective environmental protection in the near term, and how well coordinated the overall ozone-depleting sustances (ODS) phase-out effort is in the province.

Ozone-depleting Substances — How bad are they?

Ozone depletion is measured relative to one type of specific ozone-depleting substance, CFC-11. One atom of chlorine (CFC-11 has two) can destroy up to 100,000 ozone molecules before it forms a stable compound and diffuses out of the atmosphere. CFC-11 has been assigned an *ozone-depleting potential* (ODP) of 1. Substances with an ODP greater than 1 are more potent than CFC-11; those with an ODP less than 1 are less potent than CFC-11.

The ODP of other ozone-depleting substances are :

Carbon tetrachloride: **1.2** Halons: **4-13**

Methyl Bromide: **0.6** HCFCs: **0.01-0.1**

While the earth's ozone layer has thinned to varying degrees around the globe, it has suffered the most damage in the polar regions. Over the South Pole, thinning of the ozone layer is so severe that a "hole" of 24 million square kilometres existed in September of 2001. In the Arctic, the ozone layer has thinned by up to 30 per cent during springtime, while the depletion over Europe and other high latitude regions has varied between 5 and 30 per cent. Over the mid-latitudes of North America, the ozone layer depleted about 7 per cent in the last quarter of the 20th Century. The Ozone Sectretariat of the United Nations Environment Programme forecasts that the ozone layer should repair itself by the year 2050, provided nations which have committed to take action under the Montreal Protocol (an international agreement dealing with ozone-depleting substances) live up to their commitments. However, the Ozone Secretariat also cautions that concentrations of CFCs in the atmosphere are still rising, since CFCs continue to be used, and that some replacement products have ozone-depleting potential.

Currently, the only known effect in Ontario from ozone thinning is slightly higher UV radiation levels, particularly in spring and summer. For humans, a typical response to warnings about high UV levels is to heighten protection from the sun. Any adverse effect on ecosystems from slightly higher UV levels has been difficult to quantify. Recently, damage to fish in northern Ontario lakes (e.g., reproductive failure), previously thought to be caused by acid rain alone, has been found to be exacerbated by UV radiation. Some experts speculate that this damage could get worse if UV penetration increases because of a thinning ozone layer.

What will replace CFCs?

Currently, there are three major substitutes for CFCs in cooling applications (depending on the sector):

1) Hydrofluorocarbons (HFCs). New mobile refrigeration systems are largely using HFCs, e.g., HFC-134a which is non-ozone-depleting.
2) Hydrochlorofluorocarbons (HCFCs). Commercial air conditioning units are using HCFCs, which are ozone-depleting but less so than CFCs.
3) Other substitutes. Some cooling applications use entirely different substances such as ammonia gas, hydrocarbon gases, and even lake water.

The air conditioning of buildings is one of the largest segments of the cooling applications market in Canada. In Ontario, the Ontario Building Code, administered by the Ministry of Municipal Affairs and Housing, sets standards for heating, ventilation and air conditioning systems. Many of these systems still contain CFCs or HCFCs, which will eventually need to be replaced with systems more benign to the atmosphere.

Toronto's deep lake water cooling project is an example of how conventional refrigerants can be replaced with a system with virtually no harmful impact on the atmosphere. The system will draw water from Lake Ontario to cool buildings in downtown Toronto, and will omit the need for large amounts of CFC- and HCFC-based refrigerants when it is complete.

Recognizing the threat of ozone depletion, governments around the globe have made commitments to act. In 2001, MOEE amended Ontario Regulation 189/94 — Ontario's Refrigerants — in the areas of certification and training and compliance and enforcement, and banned the refilling of mobile air conditioning systems with CFC-based refrigerants, effective January 1, 2002. MOEE estimates that mobile refrigerant accounts for 34 per cent (7,700 tonnes) of all of the CFCs in use in Canada. The most probable replacement refrigerant for mobile cooling (HCF-134a) is not ozone-depleting, but has other effects when released to the atmosphere, including the potential to cause global warming and acid rain.

The ECO notes that banning the refilling of CFC-based refrigerants for mobile applications will not prevent CFC-based products from continuing to be used and potentially leaked to the atmosphere. In fact, significant amounts of CFC-based refrigerants will remain in use in older, existing mobile air conditioners. As well, CFC-based refrigerants continue to be used in stationary air conditioners, fridges and chillers manufactured prior to 1996 — and some of this equipment can still be refilled with CFCs. This distinction between "consumption" and "continued use" of CFCs is important when assessing the progress made in phasing out CFCs. According to the Canadian Council of Ministers of the Environment, Canada and most industrialized nations have substantially reduced their consumption of ODSs. Canada is reported to have reduced its consumption of ODSs by 96 per cent over the period 1986-1996, a figure that applies to the introduction of new products. But a large stock of existing CFCs is still in use. According to Environment Canada,

approximately 40 per cent of the inventory of coolants in use in Canada in 2002 is CFC-based. In 1998 (the last year for which a formal inventory was prepared), it was estimated that there were almost 23,000 tonnes of CFCs in use in Canada in fridges, air conditioners and commercial chillers. These remaining stocks will present a potential threat to the ozone layer until they are destroyed.

Historically, Ontario has been the biggest producer and user of CFCs in Canada. Despite this, Ontario has virtually no capacity to destroy ODSs – the exception being the Clean Harbors facility (formerly Safety-Kleen) near Sarnia, which can destroy certain ozone depleting solvents. The continuing lack of a comprehensive disposal option in Ontario for CFC-based products is a significant concern for the ECO.

During this reporting year, industry and governments were discussing the creation of a Canada-wide, industry-led approach to disposal of CFC-based products. This effort has led to the retrofitting of the Swan Hills Special Waste Treatment Facility in Alberta. The facility was previously capable of destroying only small amounts of CFCs, and destroying larger amounts required investment in new equipment. It appears that the Canadian Council of Ministers of the Environment is the primary agency leading the coordination of this CFC destruction plan.

Currently CFCs in Ontario might be recycled, reclaimed or exported for destruction. Typically, CFC refrigerants captured in Ontario have been recycled into other cooling applications, but increasingly this option will be disappearing. There are other types of recycling that convert CFCs to other products (e.g., CFCs can go into making HCFCs), but it is not clear how much of the existing stock of CFCs could be managed in this way. As well, some of these reclamation processes are said to be expensive. Some portion of surplus CFCs may go on for destruction at U.S. facilities, but this also can be expensive. For these reasons, exporting for processing and destruction may not be a realistic option to some holders of surplus CFC products. MOEE does not publish information about the quantities of ozone-depleting substances remaining in the province, nor has the ministry presented a comprehensive picture of the use and final fate of ODSs in Ontario.

ECO Comment

There are a number of reasons for concern about ozone-depleting substances in the years ahead. Products and applications in addition to coolants — for instance, solvents, lubricants and fire extinguishers — continue to use ozone-depleting substances. (In fact, MOEE deferred the phase-out date and prolonged the use of an ozone-depleting industrial solvent in a decision also made in 2001.) Some of the new refrigerant products (e.g., HCFCs) were meant to be *interim* solutions only and have phase-out dates of their own. Some of the replacement products come with environmental concerns, including ozone-depleting and global warming potential. And when new products replace old products, the old ones may be stored awaiting destruction, and leakage or container breakdown could become an issue if products are stored for too long. Unless a ready means of disposal or destruction exists, sloppy or even illegal practices, like blending and mislabeling banned products to pass them off on unsuspecting customers, might occur. For these reasons, this area of environmental protection requires active vigilance. MOEE should consider how it will actively monitor and enforce this area of environmental protection.

The ECO commends MOEE for forging ahead with a ban on the refilling of mobile air conditioners with certain CFC-based refrigerants, despite the calls of some industry players to delay phase-out. However, MOEE's July 2001 media announcement about progress on CFC phase-out failed to note the lack of a major CFC-destruction facility in the province, or even Canada. The ECO believes that MOEE should clearly articulate:

- Its planned enforcement efforts on ozone-depleting substances.
- How it intends to deal with ozone-depleting substances outside the mobile sector (in particular, whether MOEE and MAH have a plan for encouraging more environmentally benign cooling systems for Ontario's building stock).
- Whether the ministry could make public a reliable database of information on ozone-depleting substances, their quantities and fate.
- Whether the ministry intends to improve its own in-house expertise, given the coming changes in the marketplace.

Such disclosure would greatly improve accountability and transparency and would reassure the public that an important global environmental issue is being given the attention it deserves. *(For ministry comments, see page 181.)*

PART 9:

Financial Statement

Office of the
Provincial Auditor
of Ontario

Bureau du
vérificateur provincial
de l'Ontario

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(416) 327-2381 Fax: (416) 327-9862

Auditor's Report

To the Environmental Commissioner

I have audited the statement of expenditure of the Office of the Environmental Commissioner for the year ended March 31, 2002. This financial statement is the responsibility of that Office. My responsibility is to express an opinion on this financial statement based on my audit.

I conducted my audit in accordance with Canadian generally accepted auditing standards. Those standards require that I plan and perform an audit to obtain reasonable assurance whether the financial statement is free of material misstatement. An audit includes examining, on a test basis, evidence supporting the amounts and disclosures in the financial statement. An audit also includes assessing the accounting principles used and significant estimates made by management, as well as evaluating the overall financial statement presentation.

In my opinion, this financial statement presents fairly, in all material respects, the expenditures of the Office of the Environmental Commissioner for the year ended March 31, 2002, in accordance with the accounting policies described in note 2 to the financial statement.

Toronto, Ontario
July 24, 2002

J.R. McCarter, CA
Assistant Provincial Auditor

OFFICE OF THE ENVIRONMENTAL COMMISSIONER

Statement of Expenditure
For the Year Ended March 31, 2002

	2002 $	2001 $
Salaries and wages	984,626	999,258
Employee benefits (Note 4)	242,239	180,389
Transportation and communication	74,190	65,174
Services	558,919	470,683
Supplies	58,918	104,065
	1,918,892	1,819,569

See accompanying notes to financial statement.

Approved:

Environmental Commissioner

ENVIRONMENTAL COMMISSIONER OF ONTARIO

PUBLIC SECTOR SALARY DISCLOSURE ACT FOR THE CALENDAR YEAR ENDING DECEMBER 31, 2001

Employees paid $100,000 or more in 2001

Surname	Given Name	Position Title	Salary Paid	Taxable Benefits
McRobert	David	Sr.Policy Analyst/Counsel	$101,190.39	$233.69
Miller	Gordon	Environmental Commissioner	$117,336.63	$289.34

Prepared under the Public Sector Salary Disclosure Act

OFFICE OF THE ENVIRONMENTAL COMMISSIONER

Notes to Financial Statement
March 31, 2002

1. BACKGROUND

The Office of the Environmental Commissioner commenced operation May 30, 1994. The Environmental Commissioner is an independent officer of the Legislative Assembly of Ontario, and promotes the values, goals and purposes of the *Environmental Bill of Rights, 1993 (EBR)* to improve the quality of Ontario's natural environment. The Environmental Commissioner also monitors and reports on the application of the *EBR*, participation in the *EBR* and reviews government accountability for environmental decision making.

2. SIGNIFICANT ACCOUNTING POLICIES

(a) Basis of Accounting

The Office uses a modified cash basis of accounting which allows an additional 30 days to pay for expenditures incurred during the year just ended.

(b) Capital Assets

Capital assets are charged to expenditure in the year of acquisition.

3. EXPENDITURES

Expenditures are paid out of monies appropriated by the Legislative Assembly of Ontario.

Certain administrative services are provided by the Office of the Assembly without charge.

4. PENSION PLAN

The Office of the Environmental Commissioner provides pension benefits for its permanent employees (and to non-permanent employees who elect to participate) through participation in the Ontario Public Service Pension Plan (PSPF) which is a multiemployer plan established by the Province of Ontario. This plan is accounted for as a defined contribution plan as the Office has insufficient information to apply defined benefit plan accounting to this pension plan. The Office's contribution to the Plan during the year was $92,645 (2001 – $53,946) which is included in employee benefits.

The cost of post-retirement non-pension benefits were paid by MBS and are not included in the statement of expenditure.

5. LEASE

The Office has a lease agreement with its landlord for its current premises. The lease payments for the next year is $103,969.

PART 10:

Summary of ECO Recommendations, 2001-2002

Recommendation 1
The ECO recommends that the Ministry of Transportation explore the establishment of an ecological monitoring program involving vegetation or aquatic organisms near road salt release reduction areas in order to evaluate the impact of reducing road salt releases over time.

Recommendation 2
The ECO recommends that the Ministry of Environment and Energy explicitly consider its Statement of Environmental Values when making final decisions on the instruments issued by the ministry, and ensure that this is documented.

Recommendation 3
The ECO recommends that the Ministry of Environment and Energy uphold the public's right to view the non-proprietary contents of certificates of approval at local ministry offices, free of charge and without unnecessary delays.

Recommendation 4
The ECO recommends that the Ministry of Environment and Energy clarify its procedures and educate staff with regard to the legal rights provided to the public by the *Environmental Bill of Rights* and the *Freedom of Information and Protection of Privacy Act*.

Recommendation 5
The ECO recommends that the Ministry of Environment and Energy institute an effective long-term provincial water quality monitoring program and make the resulting data readily available to the public.

Recommendation 6
The ECO recommends that the Ministry of Natural Resources immediately develop a rigorous monitoring and research program and the necessary computer-based mapping and decision-support tools for planning forest harvesting.

Recommendation 7
The ECO recommends that the Ministry of Environment and Energy amend the *Ontario Water Resources Act* so that a level of protection equivalent to that found in Section 36(3) of the *Fisheries Act* is contained in Ontario water protection legislation.

Recommendation 8
The ECO recommends that the Ministries of Municipal Affairs and Housing and Natural Resources develop performance indicators for natural heritage protection under the Provincial Policy Statement and provide their findings to the public.

Recommendation 9
The ECO recommends that the Ministries of Municipal Affairs and Housing, Natural Resources, and Environment and Energy begin planning and implementing the promised systems for monitoring and evaluating the Oak Ridges Moraine Conservation Plan.

Recommendation 10
The ECO recommends that the regulation-making power of the *Municipal Act, 2001*, be prescribed so that proposals for environmentally significant regulations are posted to the Environmental Registry for public comment and review.

Recommendation 11
The ECO recommends that the Ministry of Environment and Energy strengthen its emissions reduction trading system by quickly expanding NO_x and SO_2 emission caps to other industrial sectors.

Recommendation 12
The ECO recommends that the Ministry of Environment and Energy provide analysis of the reported emissions of airborne contaminants and any tracking of emission reduction programs in an annual summary report to the public.

Recommendation 13
The ECO recommends that the Ministry of Natural Resources maintain the moratorium on the hunting and trapping of eastern wolves in the townships surrounding Algonquin Provincial Park until such time as the population is scientifically demonstrated to be viable.

Recommendation 14
The ECO recommends that the Ministry of Natural Resources create a new legislative framework for provincial parks and protected areas, including conservation reserves, with the mandate of conserving biodiversity.

Recommendation 15
The ECO recommends that the Ministry of Environment and Energy strengthen the certificate of approval for the SWARU incinerator by implementing the recommendations of ministry staff.

Recommendation 16
The ECO recommends that the Ministry of Environment and Energy evaluate options for reducing toxic and odorous emissions from two manufacturing facilities in Thornhill, work with proponents to ensure that effective solutions are implemented, and find ways to involve the public in the process.

Recommendation 17
The ECO recommends that the Ministry of Natural Resources develop a provincial biodiversity strategy in consultation with affected ministries, municipalities and stakeholders.

Recommendation 18
The ECO recommends that the Ministry of Natural Resources develop a clear policy on the classification and protection of lake trout lakes.

APPENDIX A:

Ministry Comments

Ministry Statements of Environmental Values (SEVs)

MOEE: The values codified in the ministry's SEV have been at the center of ministry decision-making for many years. As a result, ministry Acts, policies, and regulations are consistent with its SEV, even though some may pre-date the EBR. Instruments issued under the polices, Acts and regulations that govern them are, in turn, consistent with the SEV.

MTO: MTO continues to consider its SEV when making decisions that are environmentally significant. MTO will be participating in MOEE's broader cross-ministry review and update of the SEVs to reflect a government-wide vision.

MBS: MBS will be updating its SEV in the near future to reaffirm our commitment to our responsibilities under the *EBR.*

OMAF: SEVs have been the subject of annual review by the ECO, who has expressed concern with their currency, quality and integration into ministry business plans. OMAF is committed to participating in a government-wide review and revision of SEVs in order to update and bring them into alignment with the strategic shifts and the best practices approach to environmental management set out in Managing the Environment, led by MOEE's Associate Deputy Minister and senior executives from across government.

Ministry of Tourism and Recreation/Ministry of Culture: MTR/MCL is participating in the broader inter-ministerial review to ensure both ministries' business plans have SEVs that incorporate the government-wide vision. MTR/MCL are continuing to develop SEVs and are awaiting endorsement of the SEV revision strategy by Deputies to meet the criteria of the government-wide vision. The 2001-02 Business Plan for the former MTCR included a SEV-related commitment to consider options to preserve tender fruit land in the development of a Niagara Region agritourism strategy. MTR is undertaking research and consultation with other ministries on options. The impact of other provincial initiatives with implications for the Niagara region is being taken into consideration.

MOHLTC: MOHLTC will ensure that the SEV is integrated into the next public business plan. MOHLTC has a process in place to review all proposals and pressures in the business planning process for their impact on the ministry's objectives as they relate to its SEV. MOHLTC will examine its SEV to determine whether updating is required.

Developing Sustainability: Evaluating MTO's Commitment to Minimizing Road Salt Releases to the Environment

MTO: MTO has been developing a winter index that would categorize the severity of weather conditions and enable relative comparisons of salt use. With regard to an ecological monitoring program, this is being considered by Environment Canada as part of the salt management strategy, and MTO is playing an active role in Environment Canada's working group.

Instruments

MOEE: See MOEE's Comments under Ministry Statements of Environmental Values above.

MNR: The regulation classifying various MNR instruments gives Ontario residents more ways to comment on the decisions MNR makes which may have a significant effect on the environment. Since September 1, 2001, MNR has been using the Registry to post certain environmentally significant proposals and inviting public comment on these instruments. This regulation provides new opportunities

for the public to become involved in decision-making over and above the opportunities that MNR already had in place through MNR's environmental assessment processes as well as current *EBR* obligations for policies, Acts and regulations.

Quality of Information

TSSA: TSSA will work to provide enough details in the description of proposed instruments so readers may have a clearer understanding as to why a variance is being requested. TSSA has previously made improvements in this area and will endeavor to locate the specifics of the ECO comment. TSSA does not approve variance requests where an environmental impact exists above the applicable MOEE criteria. TSSA will review the language in our instrument proposals to make this clearer to the reader.

Unposted Decisions

(Mining Exploration within Ontario Living Legacy Sites)

MNR: MNR and MNDM have stated that any environmentally significant proposals that emerge from discussions with stakeholders will be subject to public notification and consultation requirements under the *Environmental Bill of Rights*.

MNDM: Ongoing discussions have taken place over a considerable period of time, culminating in a focused meeting of principal stakeholders on January 25, 2002. The OLL policy resides with MNR. As per the request by the Ministers of Northern Development and Mines and Natural Resources in their joint letter of March 15, 2002, to Mr. Garry Clark, Executive Director of the Ontario Prospectors Association, a process is intended involving the two major stakeholders to address potential mitigation options and their application, and make recommendations for the government's consideration regarding existing mining land tenure within OLL sites. Policy proposals arising from these recommendations will be posted by MNR at an appropriate time.

MAH: A made-in-Ontario Smart Growth Strategy is the government's vision to promote and manage growth in ways that sustain a strong economy, build strong communities, and promote a clean and healthy environment. This ministry is committed to complying with its obligations under the *EBR.* It was always this ministry's intention to post a notice on the Registry on the continuing development of a made-in-Ontario Smart Growth Strategy. A Policy Decision notice is being prepared and will appear on the Registry shortly. Further, this ministry will post additional notices on the Registry for Smart Growth as appropriate.

Information Notices

MOEE: In cooperation with government clients, MOEE has completed development of a new stand-alone Information Notice and has started testing the notice's implementation on the Registry system. It is expected that the new Information Notice will be made available for use shortly.

MNR: MNR uses section 6 Information Notices only in circumstances when sections 15, 16 or 22 of the *EBR* do not apply. MNR does not agree with the suggestion to post items as regular notices if, in the opinion of the ministry, the proposal does not meet the definition of a policy, Act, regulation under a prescribed Act, or prescribed instrument and also does not meet the test of environmental significance. MNR uses section 6 Information Notices with a comment period to inform the public that the ministry is consulting on a proposal that would otherwise not require posting on the Registry under sections 15, 16 or 22. MNR believes that, in the interest of transparency and openness, the opportunity to comment should be identified at the top of an information notice rather than within the text of the notice itself.

MTO: The consultations held on the Strategic Transportation Directions Documents in winter 2002 were an initial step in receiving feedback from key transportation stakeholders. MTO intends to post the workshop summaries on the Registry, and expects that further rounds of consultation involving public input will occur, including Registry proposal notices.

Field Audit: Access to Information

MOEE: The ministry agrees that the public should routinely be given free access to information on proposals. Comprehensive ministry-wide training on *EBR* procedures was offered in 1994 and 1998, and is planned for 2002. Standard Environmental Officer training (required for all new Environmental

Officers) includes a module on the *EBR* and the *Freedom of Information and Privacy Act (FIPPA).* Client service representatives at the Environmental Assessment and Approvals Branch are also trained on *EBR* and *FIPPA* requirements and procedures. The 1994 *EBR* procedures manual (currently being revised) offers guidance on staff responsibilities. The ministry must comply with its obligation to protect certain information as required under *FIPPA* when providing information to the public under the *EBR.* Files marked confidential by the proponent are referred to the FOI (Freedom of Information) Office to ensure that proprietary information is protected and that public information from these files is made available in a timely manner. The ministry will work to ensure there is sufficient opportunity for public comment under the *EBR* when confidential files are requested under *FIPPA.*

MNR: MNR is pleased with the ECO's findings as they reflect MNR's commitment to good customer service. MNR encourages members of the public to contact local offices prior to their visit to ensure that information is accessible and someone is available in the office to answer any specific inquiries about a proposal.

Accountability and Transparency: Gaps in the System

MOEE: The level of public consultation and assessment required for a project should match the level of potential environmental effect anticipated. The Class EA approach, and the Environmental Screening Process for electricity projects, are standardized, prescriptive planning and decision-making processes that are applied to classes of projects undertaken regularly. Pre-approved Class EA projects have minimal or no environmental effects. This group includes day-to-day operational and maintenance activities related to existing facilities/infrastructure. Public consultation for these projects is not required because the projects are benign, undertaken frequently, and their impacts are well known. In developing streamlined EA processes, the approach and level of assessment proposed for various types of projects are reviewed by a team of ministries and agencies to ensure projects have been appropriately grouped based on their potential environmental effects and to ensure that the environment will be protected. The public is also provided with an opportunity to comment. Issuing a permit or approval under the *EPA* or *OWRA* following a decision made under the *EAA* is exempt from the requirement to post on the Registry. This balances the emphasis on identifying significant issues early in a project's planning through the Class EA process, and the need to provide as much certainty to proponents as possible once Class EA requirements have been met. While these instruments are not posted on the Registry, they are public documents that can be reviewed by the public as requested. The Report on the Walkerton Inquiry Part II recommends watershed source protection plans should include identification of all significant water withdrawals including municipal water takings. The government is committed to implementing the 93 recommendations in part 2 of the Walkerton report. The ministry believes that emphasis on consultation at the planning stage is the most effective approach to ensuring issues are identified and resolved before decisions are made. The *EBR* legislation recognizes that the *EAA,* and the associated Class EA processes, require a higher level of public scrutiny than do instruments placed on the Registry, due to the specific requirements for public consultation at various stages in the EA decision-making process. MOEE is requiring that all parent Class EAs include monitoring and compliance requirements such as annual reports and five-year reviews. All Class EAs and related information will be made publicly available at MOEE. Annual reports are available now for five of the 10 existing Class EAs. The remaining five Class EAs are expected to be reviewed by 2003 and will require annual reports as a standard condition of approval. Annual reports will also be required for all new Class EAs. The public will be able to monitor and track projects by examining the annual reports and five-year reviews.

MTO: MTO operates with a clear understanding of s. 32 of the *EBR,* which provides that instruments (or permits) that are a step toward implementation of an undertaking or project approved under the *Environmental Assessment Act* are exempt from the *EBR* public notification and consultation requirements.

MNR: Each year, MNR issues a large number of instruments. These range from hunting and fishing licences, park permits, and approvals to use Crown land to work permits. It is important to the people of Ontario that these instruments are processed both carefully and efficiently. MNR's planning processes under the *Environmental Assessment Act* are intended to distinguish between instruments with the least potential environmental effects from those with the most. Those instruments having the highest potential for environmental effects receive the greatest public notice. MNR's planning processes under the *Environmental Assessment Act* reflect good environmental planning principles and include public consultation appropriate to the project being proposed.

Local vs. province-wide public notice: It is MNR's experience that the types of projects addressed under MNR Exemption Order MNR-26/7 and those that will be addressed under its successor the MNR Proposed Class EA for MNR Resource Stewardship and Facility Development Projects, are primarily of local interest, and consequently public notice efforts are tailored to inform and generate responses from the local public. MNR will consider posting an information notice under s.6 of the *EBR* if it is apparent that a project could generate provincial public interest.

Monitoring of Trends in Rural Water Quality in Southern Ontario

OMAF: The Nutrient Management Framework will provide a comprehensive, risk-based approach to managing all land-applied materials containing nutrients in order to enhance environmental protection. Manure is a resource that, when properly managed, has numerous benefits to soils, crops, agroecosystems and by extension to natural ecosystems. The Nutrient Management Legislation complements recent government efforts under Operation Clean Water to improve drinking water quality, to address concerns about the impacts of agriculture including contamination of water by pathogenic bacteria and excess nutrients such as nitrates and phosphorus, to protect public safety and protect groundwater resources through the development of a provincial groundwater management strategy.

MOEE: There are many actions the ministry is undertaking to reduce phosphorus inputs to the Great Lakes. MOEE will continue to monitor phosphorous concentrations as part of its Great Lakes Intakes Program. In April 2002, the Environment Minister announced that Ontario will invest $50 million over 5 years to clean up the Great Lakes. These funds will help implement projects under the Canada-Ontario Agreement Respecting the Great Lakes Basin Ecosystem. Several of these programs will address continuing reductions in phosphorus levels. MOEE is developing a web-based release of information for the Lake Partner Program. Both the 1999/2000 and 2001/2002 Guide to Eating Ontario Sport Fish publications are available to the public on the MOEE website. The draft Canadian Water Quality Guideline for nitrate is currently undergoing technical review by the Water Quality Task Group under the Canadian Council of Ministers of the Environment.

Developing Sustainability: Will the Nutrient Management Act (NMA) Protect Water Quality?

OMAF: OMAF is working closely with MOEE on this matter. Each step to date, including the discussion paper, proposed legislation and proposed minister's directive under the *Farming and Food Production Protection Act* has been posted on the Environmental Registry. The ministry is committed to posting all relevant materials, including draft regulations, on the Registry. The details of the appropriate level of consultation for nutrient management plans, certificates of approval and the relationship of the legislation to the *EBR* will be dealt with as regulations are developed under the *NMA.*

MOEE: The *NMA* provides the legislative framework for developing province-wide standards related to nutrient management. In response to public comments, a purpose section was added to the proposed legislation "to provide for the management of materials containing nutrients in ways that will enhance protection of the natural environment and provide a sustainable future for agricultural operations and rural development." Regulations will be finalized once the Act is passed. Full consultation with stakeholders on the proposed regulations will be conducted as they are developed under the Act. All regulations will be posted on the Registry for public input.

MNR's New Guide for Forest Harvesting

MNR: MNR recognizes the need for ongoing improvements and an adaptive approach with the Natural Disturbance Pattern Guide, acknowledged in the document itself. MNR will work to improve the direction of the guide through the guidelines revision and consolidation initiative noted in the ECO's report.

Developing Sustainability: Can Forestry and Woodland Caribou Coexist?

MNR: Recommendations with respect to caribou guidelines should be largely addressed in the caribou recovery strategy for Ontario currently under development.

Fisheries Act Enforcement in Ontario

MOEE: Federal agencies, primarily the Department of Fisheries and Oceans (DFO) and Environment Canada, are responsible for enforcing the *Fisheries Act.* MOEE has stated that the DFO is responsible for administering the *Fisheries Act;* however, the Compliance Protocol on Fish Habitat in Ontario

(presently under revision) described existing MOEE regulatory compliance protocols. Under the *EBR,* residents have the right to require that alleged contraventions of the *Fisheries Act* be investigated. The *EBR* further provides that such requests can be denied where the alleged contravention is not likely to cause harm to the environment (i.e., does not meet the evidentiary burden of the *OWRA*). Where, based on a review of the information provided in the request for investigation, there are sufficient grounds to conduct an investigation of an alleged chemical discharge in contravention of the *Fisheries Act,* such investigations will continue to be done in accordance with the revised Protocol. If the evidentiary burden of the *OWRA* is met, MOEE will take enforcement action. Where the evidentiary burden of the *OWRA* is not met, enforcement actions may be taken by MOEE, or the file will be forwarded to Environment Canada for their consideration. In any case, the alleged contravention will have been assessed for possible investigation in accordance with the *EBR.*

MNR: MNR's role under the Compliance Protocol on Fish Habitat in Ontario is to lead in investigations and prosecutions of occurrences where the deleterious substance deposited is sediment. Consistent with this role, the ECO should continue to forward to MNR any applications for investigation under the *EBR* that allege incidents where silt or sediment is deposited in waters frequented by fish.

Update: Air Issues

MOEE Energy Division: On May 1, 2002, Ontario's electricity market was opened to competition, which for the first time allows consumers to choose their own supplier of electricity, including from retailers offering renewable energy. Consumer choice and fair access to Ontario's electricity grid will promote the development of cleaner types of energy, such as wind and water power.

Environmental Labeling: The first phase of the Environmental Labeling Program was implemented in March 2002 with the start of retail contracting in Ontario. The purpose of the Program is to assist consumers in evaluating electricity generation sources so that they can support the development of renewable energy. The ministry has been consulting on the design of an environmental information tracking system to calculate and verify the generation source and emissions data to be provided in labels under a second phase of the Program. Stakeholders have indicated support for a centralized administrator to collect and calculate the label data, and emphasized the need for appropriate program oversight. *The Reliable Energy and Consumer Protection Act, 2002*, authorizes Cabinet to make regulations for the establishment and administration of the tracking system, including the powers and duties of the system administrator and auditor. On June 10, 2002, the ministry posted on the Registry an update to a previous proposal (RO01E1001) to include the regulatory authorities related to environmental tracking and labeling in this new Act as legislation subject to *EBR* notice and comment procedures.

Demand Side Management (DSM) by the Ontario Energy Board (OEB): The OEB concentrated on developing basic market structure before considering possible mechanisms for DSM because it believes a reasonable understanding of, and experience with, a restructured market is necessary in order to address the distributor's role in DSM. In the case of natural gas, where utility-delivered DSM is in place, the Board examined and implemented a DSM framework after all interested parties had the benefit of experience with the restructured competitive environment.

Alternative Fuels and Energy Sources: On June 5, 2002, the Select Committee on Alternative Fuel Sources tabled their Final Report in the Legislature. The Report contains 141 recommendations that aim to increase power from renewable energy sources, promoted conservation and energy efficiency, and expand the use of alternative transportation fuels.

Developing Sustainability – Will COA Help to Restore the Great Lakes?

MOEE: On June 12, 2002, the governments of Canada and Ontario announced the signing of the new Canada-Ontario Agreement and posted the Decision Notice on the Registry on June 13, 2002. It recognizes the need to continue to tackle the most pressing issues such as the clean up of Ontario's Great Lakes Areas of Concern, increasing binational cooperation on a lake-by-lake basis and reducing concentrations of critical pollutants, such as PCBs and mercury.

Land Use Planning, Smart Growth, and Ontario's Natural Heritage

MAH: The Provincial Policy Statement (PPS) review includes broad public and stakeholder consultation through such means as the wide distribution of a consultation pamphlet, posting on both the

Registry and the ministry web page, workshops and public open houses held across the province, interviews with stakeholders, and newspaper advertisements. Groups, organizations, municipalities, provincial ministries and other stakeholders consulted often have in-depth knowledge of the interests addressed by the Policy Statement and have provided valuable insight on the performance of the PPS. Municipalities, with first hand knowledge of the PPS and its implementation stemming from their role of approval authority for land use planning applications, provided informed input from that perspective. Other activities that support the review include the Municipal Performance Measurement Project. These yearly reports provide critical information on matters like the extent to which agricultural land is being preserved and new lot creation is being focused in settlement areas. This program may be broadened in the future. The development and refining of performance measures for provincial land use planning interests will provide a basis for on-going and future reviews of the PPS, as will the collection of information from sources such as Statistics Canada, experience of ministries respecting official plans and other municipal activities, and the state of provincial interests. Other initiatives include transportation studies and the Oak Ridges Moraine initiative.

MNR: The Ministry of Natural Resources is working to complete the development of advanced remote sensing methodologies to map southern Ontario ecosystems. This project, known as the Southern Ontario Land Resource Information System (SOLRIS), is based on the Ecological Land Classification system and provides identification and delineation of many key natural heritage features (e.g., wetlands and woodlands). The implementation of SOLRIS will provide comprehensive land cover mapping for southern Ontario and allow the analysis of land cover changes using archival satellite imagery. This will provide vital data and information to support performance indicators and for environmental monitoring and tracking of landscape change.

Oak Ridges Moraine Conservation Act

MAH: Following the finalization of the Plan in April 2002, the province immediately began implementing its education and training strategy for the Moraine. MAH, together with MNR, MOEE, OMAF and MTO, have completed training sessions for provincial staff, municipalities, development and environmental stakeholders on the legislation, the Plan and official plan conformity. The legislation requires that municipalities amend their official plans and zoning by-laws to conform with the ORM plan within 12 to 18 months of the Plan taking effect. The Minister of Municipal Affairs and Housing is the approval authority for these amendments. MAH, in conjunction with the partner ministries, is currently working with the municipalities on the official plan and zoning by-law conformity exercise. It is through these conformity OPA and zoning by-laws that the Plan will be implemented once they are approved by the Minister. Data will be shared with municipalities to facilitate the conformity exercise.

The Plan also requires upper tier and single tier municipalities to prepare watershed plans, water conservation plans and water budgets within 5 years and incorporate them into their official plans. For the York Street Aquifer in York Region, this is to be carried out in 2 years. Technical training on the Plan for municipal staff and technical consultants is scheduled to take place in the Fall 2002 on the technical documents (e.g., water tool kit, natural heritage, aggregates, land form) currently being prepared by the partner Ministries to assist municipalities in the conformity exercise and in the preparation of watershed, water budget and water conservation plans.

The ORM Foundation has been created with an initial provincial contribution of $15 million. The Foundation is responsible for funding such activities as public education, research, monitoring, land securement and the establishment of a continuous trail system for the Moraine. The MAH website has been used to post information on the ORM Plan, legislation, mapping and backgrounders. It is also proposed that the training materials will be shared via the website.

The Municipal Act, 2001

MAH: While the *Municipal Act, 2001,* will indeed be supported by a number of regulations that have yet to be filed, the Act does not provide for any regulations directly related to environmental matters such as those identified by the ECO. Nevertheless, MAH is willing to review the Act to determine whether it provides any regulation-making authority that may potentially have environmental significance. Should any such provisions be identified, the ministry will consider prescribing the related sections under the *EBR.*

Developing Sustainability: Reusing Brownfields/Saving Greenfields

MOEE: The Record of Site Condition can be filed only if the site has been cleaned up to the appropriate standards. This creates an incentive for property owners to be thorough in their cleanup efforts. No other jurisdiction in Canada provides a comparable level of protection from regulatory liability or suspends civil liability in relation to brownfields. The level of protection from liability provided through the Act provides a balance that creates an incentive for brownfield redevelopment and avoids risk to human health and the quality of water supplies posed by any contamination potentially remaining at a site after cleanup.

Emissions Reduction Trading and NO_x and SO_2 Emission Limits for the Electricity Sector

MOEE: A fluid market provides benefits to the electricity sector and the province (lower emissions reduction costs provide incentives and encourage reductions). Ontario has proposed a Clean Air Plan for Industry and has initiated consultations on extending emissions reductions trading and emissions caps for smog and acid-rain causing emissions to cover all major industrial sources. Environment Canada has stated, "Trading of NO_2 emissions within the capped electricity sectors (and potentially other sectors) is consistent with the Ozone Annex, trading between the capped and uncapped Sectors is not," and "the Ontario NO_2 emission cap from the electricity sector province wide appear to be in line with the Ozone Annex to the Canada-United States Air Quality Agreement." Ontario is committed to doing everything needed to meet the Annex. The NO_x cap for the electricity sector will fulfil Ontario's electricity sector obligations under the Annex. The Memorandum of Consultation in the Annex stipulates that "Canada reserves the right to introduce flexibility mechanisms comparable in rigour and effect to those available to the US states and power plants." Ontario's SO_2 emissions are capped at a total load of 157.5 kilotonnes per year even though emissions in 2000 were 164 kilotonnes. New sources must be within the regulated cap.

Emission Limits: The Lakeview Thermal Generating Station

MOEE: The regulation eliminating coal as an option ensures that emissions of mercury and sulphur dioxide from the plant will be eliminated while emissions of nitrogen oxides and carbon dioxide will be drastically reduced. The regulation purposefully does not restrict the type of technology that must be used because new technologies may be available by 2005 and the ministry did not want to interfere with business options.

MOEE (Energy Division): Nanticoke is a large point source of emissions because of its size. It produced more electricity in 2000 than all of the other coal and oil plants in Ontario together, generating 55 per cent of the total electricity from OPG's fossil-fired stations. Nanticoke's SO_2 and NO_x emission rates in 2000 were 3.95 kg/MWh and 1.07 kg/MWh respectively, much lower than the average US coal-fired plants. When the SO2 and NOx emission rates are compared to US plants, Nanticoke ranks 123rd and 162nd respectively out of the 201 coal-fired plants in our airshed.

Environmental Assessment Requirements for Electricity Projects (Ont. Reg. 116/01)

MOEE: The requirements of the Environmental Screening Process and the current Class EAs are comparable and have similar requirements. The Class EA for Minor Transmission Facilities is currently being revised and a new Class EA tailored for the hydroelectric sector will replace the current processes. The Class EAs will be used by all proponents. A proponent must comply with any commitments made in their reports prepared under the Environmental Screening Process. To proceed in breach of such commitments is an offence under the *Environmental Assessment Act.* Permits and approvals for Category B projects may not be posted on the Registry; however, the public is required to be advised of such instruments by the proponent during the environmental screening process. This process requires proponents to document permits and approvals required for the project following the completion of EA requirements, and describe how these permits and approvals will address environmental effects/issues.

Monitoring and Reporting of Emissions of Airborne Contaminants

MOEE: MOEE estimates 3,000-4,000 facilities are subject to O.Reg.127/01. Over 2,000 facilities have submitted their reports under Phase 1. The remaining facilities are anticipated to begin submitting their reports under Phase 2 (i.e, by June 1, 2003). The O.R. 127/01 Stakeholder Workgroup was developed by the ministry to assist in regularly updating and improving the Guideline, including the sub-

stance list and reporting thresholds, and emission estimation methods. Stakeholder feedback will be considered for future changes to the Guideline, and any such changes will be posted on the Registry. These changes will make it easier for the public and reporting facilities to understand the requirements of the regulation, which requires the facility to provide complete and accurate data to MOEE and the public. A facility must use the methods that are appropriate for its activity. MOEE has an established protocol to verify accuracy and completeness of data. MOEE will also conduct audits for data verification, examine the reports and records submitted by facilities, and consider elements such as the facility's processes or unit operations, emission estimation methods and facility quality assurance procedures. MOEE and Environment Canada are also working to harmonize auditing and quality assurance/quality control protocols for programs under Reg. 127/01 and the National Pollutant Release Inventory. The ministry will conduct internal analyses of the reported data.

Hazardous Waste Update: New Fees and Improvements in Information

MOEE: The new annual reporting requirements will provide more current and accurate information on onsite disposal of hazardous or liquid industrial wastes. For 2002, all generators are required to report actual quantities disposed of on-site. Thereafter, by February 15 of each year, all generators will be required to report quantities disposed of on-site in the previous calendar year, as well as an estimate of the quantities for the current calendar year. The ministry has harmonized a number of its rules on hazardous waste mixing/processing, making them similar to those in the U.S. The comprehensive lists of hazardous wastes were updated to be equivalent to those used in the U.S. This has resulted in even more compatible reporting of hazardous wastes between the two jurisdictions. Ontario is the first jurisdiction in North America to electronically track actual waste quantities and their movement. Recycling is only exempted if the waste is transferred directly by a generator to a site where it will be wholly used at the site in a very specific manner. All other types of recycling operations in Ontario require Part V approvals under the *Environmental Protection Act.* Wastes going to these Part V approved facilities must be manifested and the generators must be registered. MOEE will regularly monitor the fees collected to ensure that they do not exceed the cost recovery target. MOEE has publicly indicated that there will be a three to five-year review of the program, including a review of MOEE's expenditures and the services designated for the revenues. All of the information currently made available through the ministry's annual public data-set will also be made available on-line through MOEE's Hazardous Waste Information Network (HWIN tracking system). MOEE is limited in making certain information collected publicly available due to confidential business information and privacy concerns.

Changes in the Drive Clean Program

MOEE: With respect to the ECO's comments on the credibility of this program, MOEE released a report in 2000, entitled Ontario's Drive Clean Program: A Preliminary Review of Year 1 Data (1999), containing the detailed account of how the emission reductions for the Drive Clean program were calculated for 1999. As well, MOEE announced reductions of smog causing pollutants and greenhouse gases from the first two years of testing on June 11, 2001. Results from testing in 2001 are expected to be announced in the summer of 2002. Drive Clean is on target for meeting its smog-reduction goals, is committed to continuous improvement and accountability and to providing the best emission reduction program possible.

Additions to Ontario's Regulated Endangered Species

MNR: MNR agrees that habitat loss is one of the greatest threats to species at risk. Ontario supports the Canadian Biodiversity Strategy and the 1996 Accord for the Protection of Species at Risk in Canada. A suite of provincial acts, regulations and policies protects species at risk in Ontario. The cumulative effect of the *Endangered Species Act, Fish and Wildlife Conservation Act, Crown Forest Sustainability Act, Provincial Parks Act* and *Planning Act* results in some of the strongest protection for species at risk in any Canadian jurisdiction. In addition, Federal legislation also protects species at risk.

The Wolves of Algonquin Provincial Park

MNR: There is no evidence that the current level of wolf harvest poses a threat to wolves at the provincial scale. The ministry will put in place appropriate management measures, such as closed seasons and bag limits, when and where necessary as it has done in the past with respect to the wolves of Algonquin Provincial Park. MNR intends to monitor park wolves during the moratorium to assess the effect of the moratorium and the effect of other management actions on these wolves. Consideration

will be given to extending the moratorium if research and monitoring shows that the moratorium has contributed to the sustainability of park wolves. The ministry will continue to fulfil its requirement to post on the Registry any proposed management actions, such as regulation changes, that have environmental significance. The moratorium was established to enhance the probability that park wolves will be sustainable. Coyote populations in Ontario are considered healthy and, therefore, do not warrant added protection. Local ministry staff will record any incidents of mistaken identification and evaluate them at the end of the moratorium to assess the effectiveness of the regulations. If the moratorium is found to be insufficient to address park wolf sustainability concerns, additional measures may be considered.

Drinking Water Protection – Smaller Water Systems

MOEE: The O'Connor Report – Part 2 of the Walkerton Inquiry makes recommendations similar to the ECO's encouragement that MOEE consider options for regulating smaller water works. Smaller water works not currently regulated will be considered as part of the implementation of the Part 2 recommendations. The government is committed to implementing all 93 recommendations in Part 2 of the Walkerton Report. In addition to an Information Kit for owners/operators of designated facilities, two additional information documents have been prepared. A drinking water treatment guide for owners of private communal works and a guide to drinking water treatment service providers will assist all small water works owners in providing safe drinking water.

Control Orders for Sudbury Smelters

MOEE: The MOEE orders allow for a review period at the end of 2007 for the Director and the Medical Officer of Health to review all company data and new information regarding health and SO_2. Under these orders both INCO and Falconbridge must notify the public of poor air quality days and report annually and publicly on their work to ensure further reductions. The companies have set up a web site providing real time SO_2 emissions information as well as hotline numbers for inquiries, and annual public meetings. INCO and Falconbridge are required to file annual, quarterly and smog season emission reports (which include information on sulphur dioxide emissions) for their smelters in Sudbury as required under the Airborne Contaminant Discharge Monitoring and Reporting Regulation (O. Reg. 127/01). This information is available to the public through the ministry's OnAir website and at their respective facilities. Nickel and arsenic are two of the 70 high priority air standards that are expected to be reviewed over the next two years.

Central Ontario Forests: Under Stress from Acid Precipitation

MOEE: MOEE regularly publishes information on the status of the impacts of acid deposition in technical reports and in the open scientific literature. MOEE and MNR host the annual Sudbury Restoration Workshop at Laurentian University, which is focused on providing information on the impacts of acidic deposition. In addition, MOEE and MNR distribute information brochures and fact sheets to advise the public about these issues.

Provincial Parks Act

MNR: MNR accepts the need to review the *Provincial Parks Act* and policies, including policies on permitted uses. This reflects the government's decision to accept in principle Recommendation No. 10 of the Consolidated Recommendations of the Boreal West, Boreal East and Great Lakes-St. Lawrence Round Tables, that "MNR should carry out a broad public review of the *Provincial Parks Act* and the policies governing provincial parks and, in particular, policies on permitted uses." The review will involve a significant amount of public consultation. At this time MNR considers implementation of Ontario's Living Legacy a higher priority. Until the *Provincial Parks Act* and policies are reviewed, Ontario's provincial parks and conservation reserves will continue to be protected effectively by existing legislation, regulations approved by Cabinet, and policies.

Ontario's Half Parks? Conservation Reserves and Mining

MNR: MNR agrees that the portion of the recommended McLaren Forest conservation reserve that was not included in a 1996 mining withdrawal order should have been withdrawn in 1999. These lands, plus potential replacement lands without mining tenure, are now subject to withdrawal orders. MNR and MNDM have improved their processes to ensure timely and accurate mining

withdrawals. There is clear direction on the topic of existing mining tenure that falls within Ontario's Living Legacy (OLL) protected areas, because the OLL Land Use Strategy states that "existing Mining Act tenure (e.g., claims and leases) will not form part of the new protected areas." This policy is being consistently applied, and thus there is no "public policy contradiction." The March 2002 direction states that mineral exploration will not be permitted in any portions of the new protected areas. This change occurred after discussions with a range of interested parties, and consideration of the previous extensive public input on this topic. The government will also work with a range of parties to identify possible strategies that could mitigate conflicts between the new protected areas and existing mining tenure. Any environmentally significant proposals that result will be subject to public consultation, including posting on the Registry.

MNDM: MNDM believes that the requested legislative regulatory and policy review was not in the public interest, based on the recent and extensive public participation and input from multi-stakeholder groups that took place during the Lands for Life and Ontario's Living Legacy planning processes.

Toronto's Waste Disposal Plan: Making Sure It's Environmentally Sound

MOEE: Cabinet has the power to make a regulation to prescribe municipalities under s. 17.1 of the *EAA,* if deemed necessary. No municipalities have been described under section 17.1 as MOEE recognizes waste management planning as a municipal responsibility. Municipalities are in the best position to make decisions on their waste management practices. Municipal waste planning can proceed without *EAA* approval, but where the planning results in implementing an activity that requires *EAA* approval, that activity must be planned in accordance with *EAA* requirements. The ministry's role is to ensure strict standards are in place to protect the environment and to enforce those standards. The ministry reviewed Toronto's proposal to ensure all of the ministry's regulatory requirements were considered, and the environment was protected. MOEE concluded that the proposal is consistent with all provincial regulatory requirements for protecting the environment.

Review of the SWARU Incinerator

MOEE: MOEE has almost completed the updating process for the SWARU approvals. Comprehensive updated approvals have been drafted which will be shared with the City and the *EBR* requesters and placed on the Registry for public input. All comments submitted will be reviewed prior to making a final decision on the approvals. It is expected that the final updated approvals will be issued by September 2002. On May 30, 2002, MOEE posted a notice of proposal (Registry Number PA02E0007) with respect to protocols for updating Certificates of Approval for: Sewage Works, Water Works; Air Emissions; and Waste Management. The protocols provide a process for how and when existing Cs of A are selected and assessed by the ministry for updating.

Air Emissions and Odours from Cabinet Manufacturing

MOEE: The ministry followed section 78 of the *EBR,* which clearly sets out the responsibilities and the requirements when an application is denied. Complaints have been significantly reduced since 1995. The local office has not received a complaint regarding these facilities to date in 2002. The ministry continues to work with both Canac and Raywal to reduce odour emissions. Mandatory abatement has been used in both cases by the ministry. MOEE has used and will continue to use its compliance tools including mandatory abatement with these companies where necessary. Representatives from Canac Kitchens have recently met with the local office of the ministry. The recent odour panel revealed that there was a slight odour exceedance of n-butyl acetate. The ministry is establishing timelines for the completion of this review. It should be recognized that both Canac and Raywal could be categorized as medium to heavy industrial operations. Local land-use planning decisions have created a situation where, barring total removal of the industrial operations, odours will occur from time to time.

Sound-Sorb

MOEE: A report detailing the results of monitoring conducted at the Oshawa Gun Club is posted on the ministry's Web Site. The ministry is currently undertaking a review on the use of Sound-Sorb material. The review will be completed by November with a final report to be issued in December 2002.

Ministry Cooperation

MTO: With respect to the ECO's request for information regarding Section 32 exemptions under the *EBR* , MTO advises that the OPSEU labour action resulted in delays in responding. MTO is committed to fulfilling all ECO information requests including this one.

Conserving Biodiversity in Ontario

MNR: Ontario participated in the development of the Canadian Biodiversity Strategy (CBS) and remains committed to conserving biodiversity. The CBS and the Statement of Commitment do not specifically encourage or commit Ontario to develop its own strategy. Both specifically state the CBS will be used as a guide. Jurisdictions are to pursue the CBS strategic directions according to their policies, plans, priorities and fiscal capabilities. Implementation mechanisms may vary among jurisdictions, including both existing and new initiatives. Ontario's implementation to date has been, given provincial priorities, to implement the strategy through provincial initiatives rather than prepare a provincial strategy for biodiversity conservation. MNR has delivered, continues to deliver or is engaged in developing programs that contribute to all of the goals, and most of the strategies of the CBS. Ontario reported on its progress by contributing to Federal reports "Caring for Canada's Biodiversity" as part of the national reporting commitment. Recently Ontario contributed to the National reports to COP6 and the upcoming WSSD and produced the State of the Forests report in 2001. MNR is also working with other jurisdictions to develop strategies to address gaps in CBS implementation (biodiversity science and information management, invasive alien species, reporting on biodiversity status and trends and a national stewardship agenda).

Ontario's Lake Trout – In Peril?

MNR: The province recognizes the need to provide technical support to municipalities concerning determination of lakeshore development capacity. MOEE, MNR and MAH are developing guidance for municipalities on this matter. The recommendations of the Lake Trout Synthesis initiative did not receive public review and support and were not approved by MNR for province-wide implementation. The science underlying lake trout management (e.g., harvest control requirements) has evolved considerably over the past decade since the synthesis initiative was concluded. MNR uses new science and available management tools to manage for the long-term sustainability of lake trout fisheries. MNR recognizes the validity of concerns about the sustainability of lake trout fisheries, and is currently evaluating the feasibility of provincial monitoring of the state of the lake trout resource.

Managing Ozone Depleting Substances: Changes Made, Improvements Needed

MOEE: While Ontario does not currently have a permitted destruction site for CFCs, the Swan Hills Special Waste Treatment Facility in Alberta is permitted to destroy halogenated wastes. In 2002, the Ontario government received assurance that Swan Hills is willing and able to accept CFCs for destruction. Refrigerant Management Canada (RMC) is an industry-led initiative to collect and environmentally destroy CFC-based refrigerants from the stationary refrigeration and air conditioning sector (e.g., commercial refrigeration and building air conditioning). This program, which has been in operation since January 1, 2001 and began collecting refrigerants for disposal January 1, 2002, is being financed through a levy on the sale of HCFC refrigerants (having less ozone-depleting potential relative to CFC refrigerants). RMC expects to send the first shipment of CFCs to Swan Hills for destruction in fall 2002. The ministry has expressed their support for this initiative and is encouraging other sectors to develop a similar program.

Abbreviations and Acronyms

Terms & Titles

ANSI Area of natural and scientific interest
AWAG Algonquin Wolf Advisory Group
BOD Biological Oxygen Demand
CAR Compliance Assessment Report
CCME Canadian Council of Ministers of the Environment
CDWG Canadian Drinking Water Guidelines
CEM Continuous emission monitor
CITES Convention on International Trade in Endangered Species of Wild Flora and Fauna
CFCs Chlorofluorocarbons
Class EA Class Environmental Assessment
COA Canada-Ontario Agreement
C of A Certificate of Approval
COSEWIC Committee on the Status of Endangered Wildlife in Canada
CWS Canada-wide Standards
DFO Department of Fisheries and Oceans
ERCs Emissions Reduction Credits
GIS Geographical Information System
GMN Groundwater Monitoring Network
GTA Greater Toronto Area
HCFCs Hydrochlorofluorocarbons
IJC International Joint Committee
IUCN International Union for the Conservation of Nature
MCBS Ministry of Consumer and Business Services
MEOI Ministry of Enterprise, Opportunity and Innovation
MEST Ministry of Energy, Science and Technology
MHLTC Ministry of Health and Long Term Care
MOEE Ministry of Environment and Energy
MOL Ministry of Labour
MOU Memorandum of Understanding
MBS Management Board Secretariat
MNDM Ministry of Northern Development and Mines
MNR Ministry of Natural Resources
MTO Ministry of Transportation
MTR Ministry of Tourism and Recreation
NDPE Forest Management Guide for Natural Disturbance Pattern Emulation
NPRI National Pollutant Release Inventory
ODWS Ontario Drinking Water Standards
ODS Ozone Depleting Substances
OLL Ontario's Living Legacy
OMAF Ontario Ministry of Agriculture and Food
OMB Ontario Municipal Board
ORC Ontario Realty Corporation
OPA Official Plan Amendment
OPGI Ontario Power Generation Incorporated
OPSEU Ontario Public Service Employees Union
ORM Oak Ridges Moraine
OWDC Ontario Water Directors Committee
OWR2000 Ontario Water Response 2000
PCB Polychlorinated Biphenyl
PERT Pilot Emission Reduction Trading
PHVA Population Viability Habitat Assessment
PMP Park Management Plan
PPS Provincial Policy Statement
PTTW Permit to Take Water
PWQO Provincial Water Quality Objectives
RA Responsibility Agreement (communal servicing)
RSC Record of Site Condition
SCC Supreme Court of Canada
SEV Statement of Environmental Values
SPOF Strategic Plan for Ontario's Fisheries
SWAT Soil Water Air Team
TEQ Toxic Equivalent Quotient
TSSA Technical Standards and Safety Authority
USEPA United States Environmental Protection Agency
UV Ultraviolet Radiation
VTEEE Vulnerable, Threatened, Endangered, Extirpated or Extinct

Legislation

ARA *Aggregate Resources Act*
BSLA *Brownfield Statute Law Amendment Act*
CEPA *Canadian Environmental Protection Act*
CFSA *Crown Forest Sustainability Act*
EAA *Environmental Assessment Act*
EBR *Environmental Bill of Rights*
ECA *Energy Competition Act*
ESA *Endangered Species Act*
EEA *Energy Efficiency Act*
EPA *Environmental Protection Act*
FA *Fisheries Act*
FFPPA *Farming and Food Production Protection Act*
FIPPA *Freedom of Information and Protection of Privacy Act*
FWCA *Fish and Wildlife Conservation Act*
NMA *Nutrient Management Act*
ORMCA *Oak Ridges Moraine Conservation Act*
OWRA *Ontario Water Resources Act*
OWRCA *Ontario Water Resources Commission Act*
PA *Planning Act*
PLA *Public Lands Act*
POA *Provincial Offences Act*
PPA *Provincial Parks Act*
TSSA *Technical Standards and Safety Act*

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