ENVIRONMENTAL COMMISSIONER OF ONTARIO

2001–2002

ANNUAL REPORT SUPPLEMENT

DEVELOPING SUSTAINABILITY

E C O

C E O

Table of Contents

Introduction to the Supplement

The Supplement to the 2001/2002 annual report consists of 11 sections. The following summary contains highlights of each section and discusses the role of the Environmental Commissioner of Ontario (ECO) in reporting this information to the public.

Section 1 - Unposted Decisions

Under the *Environmental Bill of Rights* (*EBR)*, 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, staff review those decisions to determine whether the public's participation rights under the *EBR* have been respected.

The ECO's inquiries on "unposted decisions" can lead to one of several outcomes. In some cases, the ministry responsible provides the ECO with a legitimate reason 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 regular notice on the Registry under Section s 15, 16, or 22 of the *EBR*. Finally, in certain cases, the decision may remain unposted, with the ministry taking the position that the particular decision does not meet the posting requirements of the legislation, and with the ECO disagreeing with that position. This section summarizes the ECO's tracking of potential unposted decisions and our findings on ministry responses to our inquiries. While decision-making in all prescribed ministries is reviewed, this year the ECO sent inquiry letters to officials in five ministries concerning potential unposted decisions, and we report on those matters in Section 1 of this Supplement.

Section 2 - Ministries' Use of Information Notices

Significant differences exist between the requirements ministries must meet for regular proposal notices posted on the Environmental Registry under Sections 15, 16 or 22 of the *EBR* and information notices created under Section 6 of the *EBR.*

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

However, in cases where provincial ministries are not required to post a regular proposal notice, they can still provide a public service by posting an information notice. These notices keep Ontario's residents informed of important environmental developments. As presented in this

section, six ministries posted information notices during the 2001/2002 reporting year.

Section 3 - Ministries' Use of Exception Notices

The *Environmental Bill of Rights* relieves the ministries of their obligation to post proposals for public comment in certain situations.

There are two main instances in which ministries can post exception notices instead of regular notices. An exception notice informs the public of a decision and explains why it was not posted for public comment.

Ministries are able to post an exception notice under Section 29 of the *EBR* when the delay in giving public notice would result in danger to public health or safety, harm or serious risk to the environment, or injury or damage to property (emergency exception). Ministries can also post 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* (equivalent public participation exception).

This section summarizes the ECO's review of the ministries' exception notices posted during 2001/2002.

Section 4 - Decision Reviews

Each year the ECO reviews a sampling of the environmentally significant decisions made by the provincial ministries prescribed under the *EBR*. During the 2001/2002 reporting year, more than 3,000 decision notices were posted on the Environmental Registry by Ontario ministries, most of them for site-specific permits or approvals. The extent to which the ECO reviews a ministry decision depends on its environmental significance and the public's interest in the decision.

This section of the annual report consists of detailed reviews undertaken by the ECO for 27 selected ministry decisions posted during 2001/2002.

Section 5 - Application Reviews

Under the *EBR*, Ontario residents can ask government ministries to review an existing policy, law, regulation or instrument if they feel the environment is not being protected, and/or they can request ministries to review the need for new law, regulation or policy. The public can also ask ministries to investigate alleged contraventions of environmental laws, regulations and instruments.

The ECO is responsible for reviewing applications for completeness, and for forwarding them to the appropriate ministry. Each reporting year the ECO reviews and reports on the handling and disposition of applications by ministries. This section provides a summary of all the applications for review and applications for investigation which were reviewed by the ECO in 2001/2002.

Section 6 - *EBR* Leave to Appeal Applications

Ontario residents have the right under the *EBR* to seek leave to appeal with respect to a decision on certain instruments of environmental significance within 15 days of a ministry's placing a decision on the Environmental Registry. The ECO is responsible for posting notice of a leave to appeal on the Registry and for updating the notice to report the decision of the appropriate appeal tribunal.

This section provides a summary of the leave to appeal applications under the *EBR* that were received within the 2001/2002 reporting year.

Section 7 - *EBR* Court Actions

Under Section 84 of the *EBR*, residents of Ontario have the right to bring a legal action against someone who is violating or is about to violate an environmental Act, regulation or instrument, and is harming, or about to harm, a public resource. In addition, anyone who suffers, or who may suffer, a direct economic loss or personal injury as a result of a public nuisance that caused harm to the environment may bring a legal action under Section 103 of the *EBR.* The ECO is responsible for posting notices of court actions on the Registry for information purposes only.

This section provides a summary of court action activities that took place during the 2001/2002 reporting year. There were no whistle-blower actions during the reporting year.

Section 8 - The History of the *Fisheries Act* in Ontario

This section contains a description of the history of the *Fisheries Act*, and a discussion of the roles and interaction of the federal and provincial governments in the implementation of the *Fisheries Act* in Ontario.

Section 9 – ECO Reviews of Applications for Investigation Alleging *Fisheries Act* Contraventions

This year the ECO prepared a summary of applications for investigation made under the *EBR* for alleged contraventions of the *Fisheries Act* between April 1, 1996, and March 31, 2001. This table is intended to support the analysis of *Fisheries Act* enforcement presented on pages 57-63 (*Fisheries Act* Enforcement in Ontario) of the ECO 200/-2002 annual report.

Section 10 – Summary Charts and Environmental Assessment Information

Pages 34-41 of the ECO 2001/2002 annual report discuss "gaps in the system" of public consultation on some types of environmentally significant projects. These gaps reduce opportunities for public input and transparent government decision-making, contrary to the goals of the *EBR*. This section of the Supplement provides charts and definitions of terms to assist

readers in understanding the various Environmental Assessment processes studied by the ECO and variations among them in terms of public consultation and involvement.

Section 11 - Undecided Proposals

The ECO is required under Section 58(c) of the *EBR* to report annually on all proposals posted on the Environmental Registry within the reporting period (April 1, 2001 to March 31, 2002) that have not had a decision notice posted. This section provides a summary of all such undecided policy, Act, regulation and instrument proposals by ministry.

SECTION 1

ECO REVIEW: UNPOSTED DECISIONS IN 2001/2002

Section 1
ECO REVIEW: UNPOSTED DECISIONS IN 2001/2002

Ministry of Agriculture and Food (OMAF) - Legislation

Bill 87*, Food Safety and Quality Act, 2001*

Description
- On June 25, 2001, the Minister of Agriculture and Food introduced Bill 87, which would allow regulation of the safety and quality of food, agricultural or aquatic commodities, and agricultural inputs.
- The Act authorizes the making of potentially environmentally significant regulations relating to standards with respect to agricultural inputs including fertilizers, pesticides, manure, other biosolids and soil conditioners, as well as dead animal disposal.
- On September 27, 2001, the ECO wrote OMAF, urging the ministry to post Bill 87 as a proposed Act on the Registry due to its potential environmental significance.

Ministry Rationale
- In correspondence to the ECO dated July 22, 2002, OMAF claimed it had no record of receiving a letter or any other request from the ECO regarding Bill 87, although it did receive a copy of this letter with correspondence dated June 25, 2002 and was preparing a response.
- OMAF has informed the ECO that it did not consider Bill 87 to have a significant impact on the environment, as the primary purpose of the Act is to provide for the quality and safety of food and the agricultural and aquatic commodities that become food. OMAF stated that: any regulatory requirements developed under the *Food Safety and Quality Act* would be regarding the use of inputs as they relate to chemical residues and microbial contamination of food, not environmental impacts; regulations regarding deadstock disposal will be split between the *Food Safety and Quality Act* and the *Nutrient Management Act*; on-farm disposal, which has direct environmental impacts, will be addressed under the *Nutrient Management Act* and thus posted on the *EBR* Registry; the deadstock collection and processing industry will be addressed under the *Food Safety and Quality Act* regulations; and the environmental impacts from this sector are minimal and disposal options would be addressed under appropriate waste management legislation.
- On December 5, 2001, Bill 87 received Third Reading in the Legislature.

ECO Comment
- The ECO is concerned that OMAF did not recognize the potential environmentally significant impacts of this legislation, or clarify for the public through a Registry notice how deadstock disposal regulations would be divided between the *Food Safety and Quality Act* and the *Nutrient Management Act*.

Ministry of Environment and Energy (MOEE) – Policy

Best Practices for Assessing Permits to Take Water

Description
- During this reporting year the ECO was pleased to learn that MOEE was developing a set of best practices for assessing water taking permits (PTTW). The ECO wrote MOEE about its work in this area in late February 2002, requesting that MOEE post a notice on the Registry as soon as possible.

- MOEE's policy development work on this issue is environmentally significant and relates to an area of high public interest. According to the ECO's Guidance Document, Registry Notice and Comment Procedures (1996), ministries should strive to post policy proposals with high public interest and complexity on the Registry on at least two occasions – the initial policy proposal stage

and the preferred policy option stage. This approach allows the public to become involved in decision-making before the issue is resolved and allows the ministry to benefit fully from public input.

Ministry Rationale

- On July 31, 2002, MOEE replied to the ECO, advising that the ministry has retained a professional consultant to research the best practices used in other jurisdictions to review water taking proposals. The Manager of the EBRO stated that "this research will provide background information on scientific methods for assessing water takings. A second stage of this research is to field test specific methods for their applicability to Ontario. MOEE also remains committed to seek public input through the Environmental Registry on all Ministry proposals to improve the current PTTW program."

ECO Comment

- There is intense public interest in water takings in many parts of Ontario. The ECO urges the ministry to post a policy proposal on the Registry in the near future, and prior to the commencement of the second stage of this project.

Ministry of Municipal Affairs and Housing (MAH) – Regulation

O. Reg. 4/02 under the *Planning Act*

Description

- This regulation, published in the February 4, 2002 Ontario Gazette, amends a base regulation relating to zoning areas in the District of Nipissing.
- Such zoning orders are not required to be posted for comment on the Registry, but MAH normally posts an exception notice.
- On February 8, 2002, the ECO contacted MAH by e-mail to ask whether it planned to post an exception notice.

Ministry Rationale

- On February 12, 2002, MAH responded that it had considered posting this but decided against it as it is administrative in nature.
- This regulation represents the first amendment under its base regulation, O. Reg. 580/96, which was prepared in 1988 as a separate schedule instead of through amendment of the base regulation as subsequent amendments were made.
- Legislative counsel wanted this aberration corrected, so O. Reg. 4/02 was passed.

ECO Comment

- The ECO agrees that this regulation is administrative in nature.

Ministry of Municipal Affairs and Housing (MAH) – Policy

Smart Growth

Description

- In January 2001, the Premier announced that the government and MAH were developing a broad policy framework in Ontario that links environmental health, strong communities and a strong economy.
- Ongoing Smart Growth consultations, including a consultation paper on the development of Smart Growth Management Councils, Management Plans and Management Zones, were not posted on the Registry.

- It is likely that MAH and other prescribed ministries will propose specific Smart Growth initiatives that will have environmental implications. These, too, should be posted on the Registry to ensure the public's rights under the *EBR* are protected.

Ministry Rationale
- In November 2001, several weeks after an ECO 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.
- Refer to Appendix A of the annual report for a further MMAH response.

ECO Comment
- 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, and over the past year, the government has made decisions about some aspects of Smart Growth implementation.
- 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.

Ministry of Natural Resources (MNR) - Policies

Mining Exploration within Ontario Living Legacy (OLL) Sites

Description
- In March 2002, the Ministers of Northern Development and Mines (MNDM) and Natural Resources announced that there would be no new mining exploration on untenured land within the 378 OLL sites.
- This is a significant 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 page 117 of this report.)
- 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.

Ministry Rationale
- MNR responded on behalf of both itself and MNDM regarding mineral exploration in protected areas and noted that MNDM would provide the ECO with a response regarding the proposed Provincially Significant Mineral Potential Manual.
- The March 15, 2002 decision regarding mineral exploration in protected areas was the culmination of public dialogue that occurred during the OLL process that began in 1997 and continued through 1999. Several notices related to the OLL were posted on the Registry.
- Between 1999 and March 2002, the government held discussions and heard divergent views about how to implement the new policy on mineral exploration in protected areas.

- The government concluded that it was time to make a decision to eliminate continuing uncertainty and will communicate its position to the public "in a number of ways."
- MNR will process a "housekeeping amendment to the OLL Land Use Strategy that will reflect this direction" and post an information notice on the Registry.
- 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*.

ECO Comment

- Given the environmental significance and high level of public interest associated with this change in broad policy direction, the ministries should have posted a policy proposal on the Registry for public comment.
- The ECO has also urged these ministries to post a policy proposal on the Registry as soon as possible related to the development of options to address existing mineral tenure on or within the OLL sites. Such a notice is needed to facilitate public dialogue and involvement before further environmentally significant decisions are made.
- Also refer to further comments on this issue under MNDM below.

Northeastern Lake Trout Enhancement Project (NELTEP)

Description

- According to MNR, NELTEP is a "five-year project to protect and restore northeastern Ontario's lakes and enhance the globally significant lake trout resource."
- NELTEP funding comes, in part, through Ontario's Living Legacy (OLL).
- The project will: evaluate the health of 1,000 northeastern Ontario lake trout waters; plan for the long-term sustainability of the lake trout resource; and enhance recreational and tourism opportunities by restoring damaged lakes and lost or degraded lake trout populations.

Ministry Rationale

- MNR noted in its response to the ECO that many NELTEP activities relate to research, monitoring and assessment of natural resources and natural resource users, routine and ongoing activities within MNR's mandate.
- MNR states that it issued a news release and fact sheet on NELTEP, and the media throughout the ministry's northeast region broadly covered the announcement of this project. MNR notes that it has been very open about its work through the involvement of many partners and the public education component of this project.
- The ministry does not regard the individual activities or the project as a whole as meeting the definition of policy under the *EBR*. NELTEP activities will involve gathering information to support policy development. Should new or revised policies be developed, MNR will fulfill its *EBR* obligations for specific proposals.
- MNR also noted that the requirements of Ontario's *Environmental Assessment Act* covered some NELTEP activities.
- MNR asserts that NELTEP is consistent with its Statement of Environmental Values, the purposes of the *EBR* and MNR's Strategic Plan for Ontario Fisheries released in 1992.

ECO Comment

- Clearly, NELTEP has many environmental implications related to fish stocking and ecosystem rehabilitation, and could also encourage MOEE to implement measures on lake acidification. It is too early to ascertain the extent to which NELTEP may cause positive and/or negative impacts.
- MNR's OLL press releases reference the provision of OLL money for fish and wildlife projects that are similar to the components of NELTEP, but without reference to specific projects.
- In January 2002, MNR posted a related policy proposal on the Registry for a 45-day comment period (Technical Guidelines for Stocking Fish in Inland Waters of Ontario). The two guidelines that were electronically linked to that Registry notice both reference Lake Trout.
- The *EBR* states: "policy means a program, plan or objective..." Accordingly, the ECO maintains that NELTEP is an environmentally significant policy that should have been posted on the Registry to provide province-wide opportunity for public comment.

Use of Pesticides in Forest Management

Description

- In February 2000, MNR updated an earlier information notice on the Registry stating the ministry would post for public comment on the Registry any environmentally significant policy revisions captured by its Forest Management Program.
- The ministry has developed an interim procedure and directives relating to experimental use of pesticides and aerial application of pesticides in forest management. These interim documents appear in additions to the ministry's Forest Management Directives and Procedures Handbook, issued in February 2002.
- The Handbook states that new directives and procedures added to the Handbook are in effect as "interim direction" until revised and approved after the sunset date on each document.
- In the Supplement to the ECO's 2000/2001 annual report, we expressed concern about MNR's addition to the Handbook of 15 procedures relating to forest resource process facility licence requirements.

Ministry Rationale

- MNR states that: the directives have been part of MNR's policies and procedures binders for many years, that the re-issue of these documents is part of MNR's comprehensive effort to review and update forest direction following recent developments in foresty and that no changes have been made to the directives that would warrant an Environmental Registry posting.
- MNR indicates that the directives are labelled "interim" to coincide with their reissue and to give staff time to review the directives.
- The ministry notes that in July 1999 and February 2000, it posted an information notice on the Environmental Registry that describes the procedure review and update initiative.
- MNR does not regard procedures as being policy under the *EBR* but has committed to consult if any changes are proposed that may have significant impacts on the environment.

ECO Comment

- As noted in the Supplement to the ECO's 2000/2001 annual report, calling the interim documents guidelines, procedures and directives does not mean they are not policies for the purposes of the *EBR*.
- Given the potential environmental significance and the public sensitivity regarding pesticide used, the ECO maintains that it would have been appropriate for MNR to err on the side of caution by posting any revocations, revisions and new policies on the Registry for public comment.

Ministry of Northern Development and Mines (MNDM) - Policy

Mining Exploration within Ontario Living Legacy (OLL) Sites

Description

- In March 2002, the Ministers of Northern Development and Mines) and Natural Resources announced that there would be no new mining exploration on untenured land within the 378 OLL sites.
- This is a significant 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 page 117 of this year's annual report.)
- 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.

Ministry Rationale

- MNR responded on behalf of both itself and MNDM regarding mineral exploration in protected areas and noted that MNDM would provide the ECO with a response regarding the proposed Provincially Significant Mineral Potential Manual. As of May 2002, the ECO had not received any information from MNDM.
- The March 15, 2002 decision regarding mineral exploration in protected areas was the culmination of public dialogue that occurred during the OLL process that began in 1997 and continued through 1999. Several notices related to the OLL were posted on the Registry.
- Between 1999 and March 2002, the government held discussions and heard divergent views about how to implement the new policy on mineral exploration in protected areas.
- The government concluded that it was time to make a decision to eliminate continuing uncertainty and will communicate its position to the public "in a number of ways."
- MNR will process a "housekeeping amendment to the OLL Land Use Strategy that will reflect this direction" and post an information notice on the Registry.
- 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*.

ECO Comment

- Given the environmental significance and high level of public interest associated with the change in broad policy direction, the ministries should have posted a policy proposal on the Registry for public comment.
- The ECO has also urged these ministries to post a policy proposal on the Registry as soon as possible related to the development of options to address existing mineral tenure on or within the OLL sites. Such a notice is needed to facilitate public dialogue and involvement before further environmentally significant decisions are made.
- Also refer to further comments on this issue under MNR above.

Ministry of Environment and Energy (MOEE) - Instruments

Ontario Power Generation (OPG) - New Water Treatment System

Description

- An October 2, 2001 news release described OPG's order for a new water treatment system for Pickering nuclear system.
- On October 9, 2001, the ECO contacted MOEE by e-mail to ask why this was not posted on the Registry.

Ministry Rationale

- On October 9, 2001, MOEE responded that OPG falls under the *Environmental Assessment Act* and is therefore exempt from posting requirements.

ECO Comment

- While MOEE is technically correct that this decision was exempt from posting, the ECO believes that an information notice would be appropriate to let the public know about OPG decisions.

Inco Limited - Permit To Take Water (PTTW) Amendment

Description

- On January 9, 2002, the ECO received from the Environmental Review Tribunal a copy of an appeal notice from Inco Ltd., relating to an amended PTTW issued to its Port Colborne facility.
- On January 14, 2002, the ECO asked MOEE why the PTTW in question was not posted on the Registry.

Ministry Rationale

- On January 14, 2002, MOEE responded that the PTTW was not posted because it was not considered to be environmentally significant.
- The PTTW required monitoring and reporting and was amended to reflect the requirement to file these reports with MOEE.
- Inco appealed but subsequently settled with MOEE, and a new, larger report was to be filed as of Feb. 28, 2002, when the agreement was to take effect.

ECO Comment

- The ECO believes that this PTTW should have been posted, if only as an information notice, to keep the public and the citizens of Port Colborne informed of MOEE's actions with respect to this problematic site.

SECTION 2

ECO REVIEW: MINISTRIES' USE OF INFORMATION NOTICES

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ECO REVIEW: MINISTRIES' USE OF INFORMATION NOTICES

Management Board Secretariat (MBS) - Policy

Government Business Plans
EBR Registry #: PN01E0001

Description
- MBS posted the notice to inform the public that Ontario government ministries released their 2001/2002 Business Plans that outline the ministries' core businesses, the government's goals for the 2001/2002 fiscal year and strategies to meet those goals.

ECO Comment
- Acceptable use of an information notice.
- Ministries are not required to post government Business Plans on the Environmental Registry for comment.
- The business planning process is an ongoing one, and although the posted plans are final, public comments are considered by ministries as part of the annual Business Plan revision process.
- MBS provided a 77-day comment period. Please refer to pages 23 -25 of this year's annual report regarding ministries' use of information notices to seek public comment.

Ministry of Municipal Affairs and Housing (MAH) - Act

***Oak Ridges Moraine Protection Act,* 2001**
EBR Registry #: AF01E0001

Description
- In May 2001, MAH posted this notice to advise the public that Bill 55, *Oak Ridges Moraine Protection Act, 2001* received third reading on May 17, 2001. The legislation froze development on the Oak Ridges Moraine for six months while a long-term action plan to protect the Moraine was developed through extensive consultation.
- The notice also provided a basic outline of the legislation and committed to posting notice on the Registry to seek public comment on the Moraine's protection. MAH posted a policy proposal notice in August 2001. After completing public consultation, the ministry posted a proposal for Bill 122, *Oak Ridges Moraine Conservation Act, 2001,* on the Registry in November 2001. For more information please refer to pages 72 - 79 in the 2001/2002 annual report.

ECO Comment
- The ECO accepts the minister's use of discretion under Section 15 of the *EBR*.

Ministry of Municipal Affairs and Housing (MAH) – Policy

MAH 2000/2001 Report to the ECO
EBR Registry #: PF01E0001

Description
- MAH posted this notice in June 2001 to inform the public that on February 28, 2001 MAH submitted its 2000/2001 Report to the ECO.
- Section 58 of the *EBR* requires the ECO to prepare an annual report to the Legislature to document *EBR* activities across the government. To assist with report preparation, the ECO requests that prescribed ministries provide the Commissioner reports describing progress on compliance with the *EBR* during the past fiscal year.

ECO Comment
- Acceptable use of an information notice. This document is not subject to the requirements of the *EBR*.

Ministry of Municipal Affairs and Housing (MAH) – Regulations

Ontario Regulation 281/01 Made Under the *Oak Ridges Moraine Protection Act,* 2001
EBR Registry #: RF01E0006

Description
- This notice informs the public that O.Reg. 281/01 made under the *Oak Ridges Moraine Protection Act, 2001* (*ORMPA*) was approved and filed on July 19, 2001, and was published in the Ontario Gazette on August 4, 2001
- The regulation identifies the indicators used in determining which projects on the Oak Ridges Moraine may continue to be processed under the *Planning Act*.
- *ORMPA* was repealed in November 2001 when the *Oak Ridges Moraine Conservation Act, 2001* was proclaimed. (See pages 72 - 79 of the 2001/2002 annual report.)

ECO Comment
- Acceptable use of an information notice. The *ORMPA* was not prescribed under the *EBR*.
- The notice provided a public service by providing important information regarding implementation of the *Act*.

Minister's Zoning Orders
***EBR Registry #'s*:**

RF01E0003 - O. Reg. 71/01 amending Ont. Reg. 102/72 made under the *Planning Act* – City of Pickering

RF01E0004 - O. Reg. 690/00 amending Ont. Reg. 102/72 made under the *Planning Act* – City of Pickering

RF01E0005 - O. Reg. 147/01 amending Ont. Reg. 102/72 made under the *Planning Act* – City of Pickering

RF01E0007 - O. Reg. 63/01 amending O. Reg. 482/73 made under the *Planning Act* – City of Burlington

RF01E0008 - O. Reg. 178/01 amending O. Reg. 482/73 made under the *Planning Act* – Regional Municipality of Halton

RF01E2001 - O. Reg. 146/01 amending O. Reg. 834/81, made under the *Planning Act* – District of Sudbury

RF01E2002 - O. Reg. 148/01 amending O. Reg. 3/01made under the *Planning Act* - District of Parry Sound

RF01E2003 - O. Reg. 205/01 amending O. Reg. 580/86 made under the *Planning Act* – District of Nipissing
RF01E2004 - O. Reg. 304/01 amending O. Reg. 834/81 made under the *Planning Act* – District of Sudbury
RF01E2005 - O. Reg. 307/01 amending O. Reg. 580/86 made under the *Planning Act* – District of Nipissing
RF02E0001 - O. Reg. 516/01 made under the *Planning Act* – Town of Markham

Description
- Minister's zoning orders are regulations that allow the minister to control land use in areas without municipal organization or in areas where the provincial government has an interest.

ECO Comment
- Acceptable use of an information notice.
- Minister's Zoning Orders are not prescribed under the *EBR*

Ministry of Northern Development and Mines (MNDM) – Policy

The Phase "A" Rehabilitation of the Kam Kotia Mine Site
EBR Registry #: PD01E1041

Description:
- This notice updates the public on Phase "A" rehabilitation work for the abandoned Kam Kotia mine near Timmins, Ontario. The government has committed $14 million over the next two years to conduct the first two of the proposed 5-phase rehabilitation plan.
- Phase "A" involves several components including the construction of a new lime treatment plant, that will treat contaminated groundwater that would otherwise exist on the site. Other work involves construction of a new tailings impoundment structure in the northeast area of the site. Once the structure is complete, unimpounded tailings from other areas of the site will be re-located inside this structure, where they will be properly contained.
- According to the ministry, the first tailings to be placed within the new impoundment structure will be the South Unimpounded Tailings, which are to be moved during the subsequent Phase "B" part of the project.
- MNDM notes that Phase "A" will be complete by July 15, 2002, and Phase "B" work will occur during 2002 and 2003.
- For more information about contamination at the Kam Kotia site, please refer to pages 89 - 91 of the ECO's 2000/2001 annual report.

ECO Comment:
- Acceptable use of an information notice.
- The ECO commends MNDM for keeping its commitment to use information notices on the Registry as a method of informing the public about ongoing remediation work at the Kam Kotia site.
- The first page of the notice indicates that the ministry was accepting comments on this notice. However, no comment period was provided. When the ECO followed up, ministry staff indicated they weren't seeking comments through this notice and that they erred by including the phrase "with comments."

Ministry of Natural Resources (MNR) – Policy

Size and Catch Limits for Walleye, Sauger and Northern Pike in Ontario Fishery Regulations (OFR) in Divisions 14, 18, 19, 25 and 28
EBR Registry #: PB01E1007

Description
- MNR posted this notice to advise the public that, in accordance with the OFR, the ministry was proposing changes in catch and possession and size limits for walleye/sauger and northern pike in five northeastern Ontario divisions.

ECO Comment
- Acceptable use of an information notice.
- The federal *Fisheries Act* and its regulations are not prescribed under the *EBR* for the purpose of giving notice of proposals on the Registry.
- MNR provided a 21-day comment period through this information notice. As noted on pages 23 - 25 of this year's annual report, ministries can inform the public in the text of the notice about consultation opportunities, instead of formally seeking comments through an information notice.

Northern Boreal Initiative - Developing New, Sustainable Forest Management Opportunities with First Nations Communities in the Far North of Ontario
EBR Registry #: PB01E1008

Description
- MNR first published an information notice about the Northern Boreal Initiative in 2000. At that time the ministry advised that it had commenced discussions with several First Nations communities about possibilities for sustainable commercial forest management opportunities in portions of Ontario's far north.
- This year the ministry updated the notice to inform the public that a regular policy proposal was posted on the Registry. That notice sought public input regarding a community-based land use planning approach for the Northern Boreal region.

ECO Comment
- Acceptable use of an information notice.
- In keeping with ECO's comment on page 24 of the Supplement to the 2000/2001 annual report, we are pleased that the ministry upheld its commitment to follow up with a regular notice for public comment.

Fines for Fisheries Offences - Amendment to Contraventions Regulations, SOR/96-313, Made Under the *Federal Contraventions Acts*: Move of Schedule of Offences and Fines under the Ontario Fishery Regulations (OFR) to Contraventions Regulations, and Increases to Fines for Offences
EBR Registry #: PB01E5001

Description
- A Schedule under the OFR establishes offences for which a prosecution can be initiated as well as listing the violations. Violations relate to angling, bait, fishing season and limits, fishing equipment, commercial fishing and the possession and transport of fish within Ontario. The schedule also sets out maximum fines.

ECO Comment
- Acceptable use of an information notice.
- Neither federal *Fisheries Act* nor the federal *Contraventions Act* are prescribed under the *EBR* for the purpose of giving notice of proposal on the Registry.
- MNR provided a 30-day comment period. As noted on pages 23 - 25 of this year's annual report, ministries can inform the public in the text of the notice about consultation opportunities, instead of formally seeking comments through an information notice.

Season and Catch Possession Limits for Walleye, Northern Pike, Bass and Yellow Perch in Ontario Fishery Regulations (OFR) in Divisions 16 and 17
EBR Registry #: PB01E6003

Description

- MNR posted this notice to advise the public that, in accordance with the provisions of the OFR and subject to certain conditions, the ministry was proposing changes in season, catch and possession limits for walleye, northern pike, bass and yellow perch in Divisions 16 and 17, Georgian Bay and the North Channel, and Lake Huron.

ECO Comment

- Acceptable use of an information notice.
- The federal *Fisheries Act* and its regulations are not prescribed under the *EBR* for the purpose of giving notice of proposal on the Registry.

Bay of Quinte Walleye Fisheries Management
EBR Registry #: PB01E6007

Description

- During October 2001, MNR issued a news release stating that the ministry had begun talks with stakeholders on whether or not to close the Bay of Quinte to all walleye fishing.
- In November 2001, the ECO contacted MNR to inquire whether this proposal would be posted on the Registry.
- MNR responded later that month that it was drafting an information notice for the Registry and wanted to conduct broader consultation on this proposal.
- In December 2001, MNR posted an information notice on the Registry advising of public consultation opportunities.
- Following consultation meetings in February 2002, MNR announced conservation measures to sustain the Bay of Quinte walleye population on April 4, 2002. These measures include changes to recreational fishing regulations and commercial fishing licence conditions for 2002.

ECO Comment

- The ECO commends MNR for conducting broader public consultation on this initiative. As noted on pages 23 - 25 of this year's annual report, ministries can inform the public in the text of the notice about consultation opportunities, instead of formally seeking comments through an information notice.
- The ECO urges the ministry to update the information notice to keep the public informed of changes to MNR's approach that were made subsequent to the completion of its consultations in February 2002.

A Paper for Public Review Concerning the Extension and Amendment of the *Environmental Assessment Act* Approval for Forest Management on Crown Lands in Ontario ("Timber Class Environmental Assessment" (EA))
EBR Registry #: PB01E7004

Description

- MNR posted this notice to inform the public on its draft proposal to extend and amend its current *EA Act* approval for forest management activities on Crown Land. The amendments focus on four general themes:
  - enabling continuous improvement;
  - improving the planning process;
  - updating the approval to address the current responsibilities of the forest industry;
  - providing for continuing programs while simplifying the approval.

ECO Comment

- The notice did not adequately explain why the ministry posted an information notice on the Registry instead of a regular policy proposal notice or an equivalent public participation notice.
- The ministry provided a 59-day comment period. Please refer to page 23 – 25 of this year's annual report regarding ministries' use of information notices to seek public comment.

Ministry of Natural Resources (MNR) – Regulations

Rescind Sanctuary on Lac Des Mille Lacs and Cushing Lake; Varying Close Time on Savanne and Little Savanne Rivers: Ontario Fishery Regulations (OFR) Division 21
EBR Registry #: RB01E1001

Description

- MNR posted this notice to inform the public of several fisheries-related proposals. Specifically, MNR proposed to:
  - rescind the fish sanctuary on Lac Des Milles Lac and Cushing Lake;
  - vary the northern pike season to the same as the Division 21 walleye season; and,
  - vary the time of the sanctuary on the Savanne and Little Savanne Rivers to better reflect the spawning season
- In 1999, MNR posted an information notice regarding its proposal to lengthen the fishing season and increase the size of fish permitted to be taken from Lac Des Mille Lacs.

ECO Comment

- Acceptable use of an information notice.
- The federal *Fisheries Act* and its regulations are not prescribed under the *EBR* for the purpose of giving notice of proposal on the Registry.
- MNR provided a 69-day comment period through this information notice. As noted on pages 23 - 25 of this year's annual report, ministries can inform the public in the text of the notice about consultation opportunities, instead of formally seeking comments through an information notice.

Ministry of Environment and Energy (MOEE) – Instruments

City of Quinte West - Direction on a Report Respecting Sewage Works or Water Works for Municipalities - OWRA s. 62(1)
EBR Registry #: IA01E0048

Description

- The notice informed the public that a report of the Director was re-issued on March 4, 2002 to the City of Quinte West to take all steps necessary to operate and maintain the water works servicing the Trenton Mobile Trailer Park in accordance with provincial law and regulations.
- MOEE indicated that the notice was necessary because the current owner had not complied with the legislation and was in non-compliance with a Provincial Officer's Order for operation of the water works.
- This is a re-issuance of an order issued by the Director on March 16, 2001 (subject of an earlier version of the information notice posted on the Registry in March 2001).

ECO Comment

- Acceptable use of an information notice provided that this was an instrument issued in accordance with other statutory decisions including those made under the *Environmental Assessment Act*.

- In keeping with the ECO's comment on page 21 of the 2000/2001 Supplement to the annual report, MOEE should have provided clearer information on the *EAA* approval or exemption being referred to so that the reader could understand whether or not an approval under the *EAA* had been granted for this water works.

Direction on a Report Respecting Sewage Works or Water Works for Municipalities - The Town of Lincoln - OWRA s. 62(1)
EBR Registry #: IA01E0375

Description
- The ministry posted this notice in April 2001 to inform the public that the ministry had issued an Order to the Town of Lincoln to require the municipality to install and operate a sanitary sewage collection system and pumping station in the Hamlet of Campden. The ministry first posted an information notice about the proposed order in March 2001 and sought public input.
- As a result of comments received, the ministry decided to extend the deadline for the completion of the work from September 30, 2001, to October 31, 2001, to allow the town more time to address "unexpected contractual difficulties."

ECO Comment
- Acceptable use of an information notice.
- The notice states that the Town of Lincoln is subject to the requirements of the *Environmental Assessment Act* (Municipal Class EA), and as such there is no Registry notice requirement for this instrument.
- The ministry should not have indicated that comments were being sought through this information notice, as that comment seemed to apply only to the previous version of the notice.
- For further information see page 21 of the ECO's Supplement to the 2000/2001 annual report.

Direction on a Report Respecting Sewage Works or Water Works for Municipalities - The Township of North Grenville - OWRA s. 62(1)
EBR Registry #: IA02E0213

Description
- The ministry posted this notice in February 2002 to inform the public that MOEE was ordering the Township of North Grenville to assume the operation and control of the Fetherston Park sewage works in order to conduct an assessment of the sewage works to comply with several pieces of provincial legislation.
- The notice stated that the Order was necessary because the current owner was in non-compliance with a Provincial Officer's Order with respect to the sewage works.
- MOEE noted that a formal Notice of Intent was issued on February 13, 2002 and that the ministry would follow up with the actual direction when the final report was issued.

ECO Comment
- Acceptable use of an information notice provided that this was an instrument issued in accordance with other statutory decisions including the *Environmental Assessment Act*.
- MOEE should have provided clearer information on the *EAA* approval or exemption being referred to so that the reader could understand whether or not an approval under the *EAA* had been granted for this sewage works.

Ministry of Environment and Energy (MOEE) – Regulations

Administrative Change to Pesticide Classification Approval Process - O. Reg. 118/01
***EBR Registry #*:** RA01E0006

Description

- In May 2001, MOEE posted this notice to inform the public that an amendment was made to a regulation under the *Pesticides Act*. The amendment was an administrative change that delegates the Director of MOEE's Standards Development Branch as the final decision-maker on pesticide classification. The Ontario Pesticides Advisory Committee (OPAC) formerly made this decision.
- MOEE will continue to post prescribed instruments related to pesticide classification on the Registry for public comment.
- This change reverses O. Reg. 110/99. That regulation gave OPAC the sole authority to make these decisions. O. Reg. 110/99 is reviewed in the ECO's 1999/2000 Annual Report Supplement on page S4-30.

ECO Comment

- Acceptable use of an information notice.

Amendments to Regulation 334 Under the *Environmental Assessment Act* (*EAA*)
EBR Registry #: RA01E0024

Description

- Regulation 334 under the *EAA* sets out the general application of that Act and defines what is and what is not subject to it. The regulation used to refer to several documents, including the Class Environmental Assessment for Municipal Road Projects and the Municipal Class EA for Water and Wastewater Projects. But, because those two documents were merged into one (entitled "Municipal Class Environmental Assessment"), an administrative amendment to Regulation 334 was necessary to reflect the correct title.
- The information notice also noted this regulatory amendment also included changing the names of several Ontario Government ministries that were incorrect.

ECO Comment

- Acceptable use of an information notice.

Amendments to Regulation 345/93 Under the *EAA*
EBR Registry #: RA01E0025

Description

- MOEE posted the notice to inform the public that it updated the regulation to reflect the new name of a Class Environmental Assessment (Class EA) document under Ontario's *EAA* – specifically the Municipal Class EA. The Municipal Class EA replaces two former documents entitled the Class EA for Municipal Roads Projects and the Class EA for Municipal Water and Wastewater Projects.
- For more information about this Class EA, please refer to Pages 34 - 41 in this annual report and Section 10 in this Supplement.

ECO Comment

- Acceptable use of an information notice.

A Regulatory Amendment Under the *Consolidated Hearings Act (CHA)* to Allow for a Joint Board Hearing that Includes an Application Under the *Aggregate Resources Act* for the Dufferin Aggregates Milton Quarry Expansion
EBR Registry #: RA02E0003

Description

- In February 2002, MOEE posted this notice to inform the public that Dufferin Aggregates applied for various approvals required to expand its operations at the Milton Quarry. Dufferin Aggregates requested that the application under the *Aggregate Resources Act* (*ARA*) be included at a hearing (held by the "Joint Board" under the *CHA*, along with applications under the *Planning Act* and the *Niagara Escarpment Planning and Development Act*. Including the *ARA* application at a "Joint Board" hearing requires an amendment to the *CHA*. Maximizing the number of applications being heard by the Joint Board would eliminate cost and effort associated with multiple hearings.
- No decision on the matter had been made at the time MOEE posted the information notice. But the ministry committed to updating the notice subsequent to the decision being issued.

ECO Comment

- Acceptable use of an information notice.
- The *CHA* is not prescribed under the *EBR* for the purpose of giving notice of proposals on the Registry.
- The ECO commends MOEE for posting this notice as the quarry application has attracted considerable public interest and concern.

Ministry of Environment and Energy (MOEE) – Special Announcement

File Review Regarding the Posting of Late Decision Notices on the Environmental Registry
***EBR Registry #*: "Special"**

Description

- During a file review, MOEE staff discovered that over 1,200 instrument proposal notices were posted on the Registry without the accompanying decision notice.
- The notice informed the public that, beginning on August 2, 2001, the ministry would begin to clear up the backlog by posting decision notices on the Registry in batches. MOEE committed to identifying the decision notices as clearly being related to an old file.

ECO Comment

- Acceptable use of an information notice. The notice provided an important public service to Registry users.
- MOEE stated in the notice that the initiative would take until September 13, 2001 to complete, and committed to updating the notice to advise of the conclusion of the project. The ECO supports this proposal. However, as of May 2002, the ministry had provided no such update.

Ministry of Transportation (MTO) - Policies

Transportation Needs Assessment Studies
EBR Registry #: PE01E4502 - Niagara Peninsula
PE01E4503 - Highway 427

Description
- These MTO notices informed the public about the availability of documents related to its Transportation Needs Assessments. The ministry noted that the studies are a component of MTO's "strategic long-range transportation planning program to improve transportation through Ontario's major international gateways and key highway corridors."

ECO Comment
- Unacceptable use of information notices.
- In spring 2001, MTO was informed of the ECO's opinion that the public should have the opportunity to provide input into MTO's decision-making at the Needs Assessment stage, in keeping with the intent and posting requirements of the *EBR*.
- For more information please refer to page 60 of the ECO's 2000/2001 annual report and page 16 of the ECO's 2000/2001 supplement.
- For more information about the consultation benefits afforded the public by the posting of a regular notice, please refer to pages 23 - 25 of this year's annual report.

Draft Strategic Transportation Directions
EBR Registry #'s: PE02E4504 - Northern Ontario
PE02E4505 - Eastern Ontario
PE02E4506 - Southwestern Ontario
PE02E4507 - Central Ontario

Description
- MTO's Strategic Transportation Directions documents contain "strategies that 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."

ECO Comment
- Unacceptable use of information notices.
- For further information please refer to pages 23 - 25 of this year's annual report.
- For MTO's comment, please refer to Appendix A of the ECO annual report.

SECTION 3

ECO REVIEW: MINISTRIES' USE OF EXCEPTION NOTICES

SECTION 3

ECO REVIEW: MINISTRIES' USE OF EXCEPTION NOTICES

Emergency Exceptions Under Section 29(1) of the *EBR*

Ministry of Northern Development and Mines (MNDM) – Instruments

Director Orders Proponent to File a Certified Closure Plan to Rehabilitate a Mine Hazard
***Mining Act* Section 147(1)**
Buffalo Ankerite Mine Site, City of Timmins
EBR Registry #: ID01E1035

Description

- MNDM issued the Order because it felt that mine hazards on the property posed a risk to health and safety, and required prompt attention. The order was issued after MNDM staff undertook an on-site inspection.
- The notice explains that the ordered work included rehabilitation of all openings to ground surface, provision of site security, and investigation of the ground stability near the sink holes within the perimeter of the security fence.

ECO Comment

- MNDM issued this Order in September 2000, but due to an oversight within the ministry the exception notice was not posted on the Registry until December 2001. This does not appear to be a systematic problem because the ministry posted notices for the other two emergency orders issued in the past reporting year almost immediately.
- MNDM's use of an emergency exception notice appears reasonable. The ministry had made several requests to the proponent to take corrective action regarding the "significant mine hazards on the property."

Certified Amendments as Filed by a Proponent or Ordered by a Director
***Mining Act* Section 143(2)**
Hislop Beatty Project (Glimmer Mine), District of Cochrane, East of Matheson
EBR Registry #: ID01E1036

Description

- MNDM issued this Order to address outstanding rehabilitation and closure requirements of the *Mining Act* and Regulation 240/00. The order was issued after MNDM staff undertook two site inspections.
- The company's presence at the site had been scaled back and the company was not in compliance with the 1997 Closure Plan filed for the project. In issuing the Order, MNDM sought corrective actions to deal with several concerns including the potential for site instability and contamination from on-site waste rock.
- The Order gave the company two months to file the certified amendments and include any required increase in financial assurance.

ECO Comment

- MNDM's use of an emergency exception notice appears reasonable.
- The information contained in the Registry notice was insufficient and could have been improved by including a summary of site concerns/required action as set out in the Order -- similar to that found in notice ID01E1035 referenced above and in Emergency Exception notice ID9E1013 posted on the Registry in 1999.

Director Orders Proponent to File a Certified Closure Plan to Rehabilitate a Mine Hazard
***Mining Act* Section 147(1)**
Moneta Mine, City of Timmins
EBR Registry #: ID01E1037

Description
- MNDM issued this Order to require the company to file a certified closure plan by March 2002 for the rehabilitation of a significant mine hazard. The Order was issued after obtaining an independent professional Report.
- The report contained the opinion that the property's mine hazard could result in rapid subsidence (caving in of the ground) without warning, causing potential loss of public safety and damage or loss of buildings.
- MNDM had made previous attempts to resolve issues with the company.

ECO Comment
- MNDM's use of an emergency exception notice appears reasonable.
- The information contained in the Registry notice was insufficient and could have been improved by including a summary of site concerns/required action as set out in the Order -- similar to that found in notice ID01E1035 referenced above and in Emergency Exception notice ID9E1013 posted on the Registry in 1999.

Ministry of Environment and Energy (MOEE) – Instruments

Emergency Certificates of Approval for a Waste Disposal Site
***Environmental Protection Act* (*EPA*) Section 31**
EBR Registry #: IA01E1344

Description
- The notice explained that on September 11, 2001 the Ministry of Environment and Energy temporarily amended the service area requirements of certificates of approvals for solid non-hazardous waste ("solid waste") landfilling sites in "close proximity to the Canada/U.S.A. border crossings. This allowed haulers to dispose of solid waste at certain landfills in southwestern Ontario.
- The ministry took this action to alleviate an emergency situation regarding solid waste export at border crossings in Ontario, which began on September 11, 2001 due to the terrorist attacks in the U.S.A. Strict conditions were imposed on trucks transporting goods, and truckers faced long delays at the border.
- The ministry revoked the decision on September 12, 2001, because it invoked an alternative process (summarized in the notice) to deal with continuing concerns and delays at some border crossings.
- In the notice, the ministry committed to notifying the public on a regular basis via the Environmental Registry, as the Director of the ministry's Environmental Assessment and Approvals Branch issues approvals under s. 31 of the *EPA* related to this matter.

ECO Comment
- Acceptable use of an emergency exception notice.
- When the ECO followed up on this matter, MOEE staff noted that the ministry has not issued any Section 31 approvals related to this issue since the notice was published.

Air Discharge Approval
***Environmental Protection Act* Section 9**
Former A.R. Clarke Tannery, City of Toronto
Environmental Registry #: IA01E1349

Description

- In September 2001, the ministry issued an emergency approval to stabilize the content of a sodium hydrosulphide tank located on-site prior to its removal and off-site destruction. The notice indicated that a scrubber would be installed as a precautionary measure to prevent release of odours.
- The notice indicated other public consultation included ongoing public meetings and newsletters.
- The ministry also issued another emergency order related to this site in March 2001. See page 33 of the ECO's 2000/2001 Supplement.

ECO Comment

- MOEE's use of an emergency exception notice appears reasonable.

Direction on a Report Respecting Sewage Works or Water Works for Municipalities and Direction for Maintaining Water Works
Ontario Water Resources Act Sections 62(1) and 52(6) respectively
Elroy Acres, Breslau, Region of Waterloo
EBR Registry #: IA01E1386

Description

- In June 2000, MOEE issued a Boil Water Advisory to a private water supplier known as Elroy Acres. MOEE issued a Field Order to require the water supply operator to take corrective action.
- O. Reg. 459/00 (the province's new drinking water regulation) came into effect in August 2000, and in October 2000 the water system operator notified residents it intended to discontinue its service in September 2001. The operator cited a lack of resources to comply with O. Reg. 459/00. However, MOEE informed the ECO that it did not learn of this situation until the summer of 2001.
- The MOEE Director determined that it was in the public interest to order the Township of Woolwich and the Regional Municipality of Waterloo to operate the water works and provide a long-term plant to bring supply into compliance with O.Reg. 459/00 or connect it to the municipal water supply.

ECO Comment

- In response to an ECO inquiry, MOEE staff noted that the ministry became involved at the request of residents and issued the Orders promptly once staff were aware of the need to take action.
- MOEE's use of an emergency exception notice appears reasonable based on the ministry's explanation.

Equivalent Public Participation Exception Under Section 30(1) of the *EBR*

Ministry of Natural Resources (MNR) – Regulations

Establishing/Modifying Parks, Conservation Reserves, Nature Reserves Under Ontario's Living Legacy (OLL) Land Use Strategy (LUS)

EBR #/Description

- RB9E6011 -- Establishing 51 Conservation Reserves
- RB9E6012 – Establishing 8 Provincial Parks and Making Additions to 5 Existing Provincial Parks
- RB00E1001 -- Establish 26 Conservation Reserves and Making 1 Addition to an Existing Conservation Reserve
- RB00E1002 -- Establishing 4 Provincial Parks and Making Additions to 4 Provincial Parks
- RB00E2001 – Establishing 76 Conservation Reserves (68 first identified in the OLL and 8 previously identified in the 1997 Temagami Land Use Plan)
- RB00E2002 – Establishing 16 Provincial Parks, Making Additions to 13 Existing Provincial Parks, and Re-configuring and Re-classifying an Existing Provincial Park
- RB00E3002 -- Establishing 5 Provincial Parks and Making Additions to 2 Existing Provincial Parks
- RB00E3003 -- Establishing 16 Conservation Reserves
- RB00E3004 -- Establishing 1 Nature Reserve Park
- RB01E1002 -- Establish 28 Conservation Reserves
- RB01E1003 -- Establishing 1 Provincial Park and Making Additions to 3 Existing Provincial Parks
- RB01E2001 -- Establishing 8 New Provincial Parks and Making Additions to 3 Existing Provincial Parks
- RB01E2002 -- Establishing 20 new Conservation Reserves (19 first identified in the OLL and 1 previously identified in the 1997 Temagami Land Use Plan); (one of the sites (Cache Bay Wetland Conservation Reserve) is undergoing a second public consultation due to the addition of Ontario Realty Corporation land parcels)
- RB01E3004 – Making Additions to 2 Existing Provincial Parks
- RB01E3005 -- Establishing 15 New Conservation Reserves
- RB01E3006 – Establishing 4 New Conservation Reserves
- RB01E3007 – Establishing 1 New Conservation Reserve

ECO Comment

- Several of these notices are updates. In some cases, the notices' text provide information regarding permitted and prohibited land uses (such as hunting) and/or park re-classification (such as changing a park from a waterway class to a historical class). Readers should refer to the notices themselves should they wish further detail.
- In keeping with the discussion on pages 41 and 42 of the 2000/2001 annual report and page 36 of the 2000/2001 Supplement, the ECO remains concerned with MNR's handling of boundary changes related to implementing Ontario's Living Legacy.

Ministry of Environment and Energy (MOEE) – Regulations

Repair Cost Limits Under the Drive Clean Program
Amendment to O.Reg. 361/98
EBR Registry #: RA01E0015

- As a result of consultation under Registry # PA01E0005, Options for Continuous Improvement of the Drive Clean Program, MOEE made regulatory amendments to the repair cost limits.
- The amendment allows for an ongoing repair cost limit of $450 under the Drive Clean Program for vehicles registered in the Greater Toronto Area and Hamilton-Wentworth Region, and in all other program areas, a repair cost limit of $200 for the first two years, increasing to $450 after two years.
- The notice states that public comments support the need for an ongoing repair cost limit. MOEE asserts that the $450 repair cost limit balances environmental protection with the economic interests of vehicle owners who cannot afford expensive repairs or vehicle replacement.

ECO Comment

- The ECO accepts this use of an exception notice given the ministry's ongoing consultation on the Drive Clean Program.
- Additional background information on recent changes to Drive Clean is contained on pages 97 - 99 of this year's annual report and pages in a decision review found on pages 34 - 42 of this supplement.

Inclusion of New or Revised Point of Impingement (1/2 hour) Air Standards
Amendment, by O. Reg. 342/01, to Schedule 1, O. Reg. 346 – General – Air Pollution
EBR Registry #: RA01E0021

Description

- MOEE made this regulatory amendment based on public consultation carried out under other Registry Consultation periods for Point of Impingement air standards for 18 high priority substances such as Ammonia, Chlorine, Hydrogen Chloride, and Toluene. MOEE had previously posted separate proposal notices (most with 90-day comment periods) and decision notices for each new standard.
- 11/18 air standards were set at interim levels, pending risk management, to consider issues related to implementing the final standard. MOEE notes that most interim standards are more stringent than current levels.
- In March 2001, MOEE updated an earlier information notice (PA9E0002) to summarize and explain the links between the ministry's decision notices for the 18 new air standards and the two policy proposals relating to air standard implementation and management. The ECO accepted this use of an information notice, noting that it provided a useful public service in terms of linking many notices together. Page 69 of the ECO's 2000/2001 annual report provides more information.

ECO Comment

- The ECO accepts this use of the exception notice, given the ministry's ongoing consultation on air standards.

SECTION 4

REVIEWS OF SELECTED DECISIONS ON POLICIES, ACTS, REGULATIONS AND INSTRUMENTS

(Arranged alphabetically by ministry)

SECTION 4

REVIEWS OF SELECTED DECISIONS ON POLICIES, ACTS, REGULATIONS AND INSTRUMENTS

MINISTRY OF ENVIRONMENT AND ENERGY

Review of Posted Decision:
Proposed Amendments to Ontario's Refrigerants Regulation (O.Reg. 189/94)

Decision Information:

Registry Number: RA01E0011	Comment Period: 30 days
Proposal Posted: 2001/04/30	Number of Comments: 28
Decision Posted: 2001//07/25	Regulation filed: June 22, 2001

Description:
This regulatory amendment made changes to the way in which certain types of ozone depleting substances (ODSs) and their handling are regulated in Ontario. Ozone depleting substances such as chlorofluorocarbons (CFCs) lead to the thinning of the earth's stratospheric ozone layer if these substances are released to the atmosphere. Ozone layer thinning has been linked to higher levels of ultraviolet radiation reaching the earth's surface, which in turn leads to greater health risks for humans, ecosystems, plants and animals.

O.Reg 238/01 amended Ontario's Refrigerants Regulation (O.Reg. 189/94) in three key areas:

1) *Certification and Training*. MOEE reaffirmed the requirement that anyone who works with refrigerants take a training course known as the Ozone Depletion Prevention (ODP) Course and introduced the requirement of re-examination every three years to maintain certification. The course is designed to ensure that refrigerant handlers have an appropriate level of training about the proper environmental handling of refrigerants and knowledge of provincial regulations that govern their use. Upon successful course completion, an "ODP Card" is issued to the refrigerant handlers, which permits them to purchase certain ozone depleting substances.
2) *Compliance and enforcement*. MOEE introduced three new provisions that would: (i) require technicians to maintain detailed records of ODS-handling jobs; (ii) reference an environmental code of practice in the regulation; (iii) require the reporting of releases of 100 kilograms or greater of refrigerant to the ministry's Spills Action Centre.
3) *CFC Phase-Out*. MOEE banned the refill of all mobile air conditioning systems with CFC-based refrigerants after January 1, 2002.

Implications of the Decision:
MOEE's Regulatory Impact Statement. MOEE's RIS includes a brief statement of the objectives of the proposal but does not include a preliminary assessment of the environmental, social and economic consequences of implementing the proposal nor an explanation of why the environmental objectives would be appropriately achieved by amending O. Reg. 189/94. Some of the environmental, social and economic consequences were addressed, however, in the other parts of the decision notice.

The implications of this decision are primarily administrative in the short term, but should be environmentally beneficial in the longer term. The social and economic implications of this decision are minimal for the most part, however, some businesses that handle CFC products indicated that the loss from the investment in CFC-handling equipment will be significant and that new administrative procedures, particularly periodic re-testing of ODP cardholders, would have a negative impact on

their livelihood (See "Public Participation and *EBR* Process below).

Administrative. First, new record-keeping requirements for refrigerant technicians will mean that technicians will need to record for each job: the date the work was done, company name, technician name, amount and type of refrigerant purchased, recaptured, used or discharged. Records will need to be held for a minimum of two years and must be made available to ministry staff upon request. Second, the term "wholesaler" was clarified to be "any person who acquires the refrigerant for the purpose of resale." Last, outdated and expired exemption provisions that applied to ODSs in non-recyclable and non-refillable containers were removed from the regulation.

Environmental. In the regulation, MOEE referenced an Environment Canada code of practice (the Environmental Code of Practice for the Elimination of Fluorocarbon Emissions from Refrigeration and Air-Conditioning Systems) to define leak testing and other standards of practice to avoid release of ODSs. Advancing the use of this code of practice may lead to environmental benefits.

The amended regulation also requires refrigerant handlers to immediately report releases of 100 kg or greater to the ministry's Spills Action Centre. This measure could have a deterrent effect on the careless handling of ODSs, since penalties arise from not reporting a spill, and since spills which are reported can be further investigated and prosecuted.

Finally, the regulation bans the refilling of mobile air conditioning systems with CFC-based refrigerants after January 1, 2002. This represents a positive development for environmental protection as the CFC group of refrigerants are among the most powerful ozone depleting substances. MOEE estimates that "34% of CFCs in Canada are used in the mobile air conditioning sector (approximately 7,700 tonnes) and this equipment loses approximately 10% of its refrigerant charge to the atmosphere each year (up to 160% of the total refrigerant charge over the lifetime of the equipment). If no action is taken in this area, it is anticipated that all stocks will eventually be emitted to the atmosphere." The products which are likely to replace CFC products are not entirely free of environmental effect – some of these substances also have the capacity to deplete the ozone layer but at a significantly reduced rate, some are powerful greenhouse gases and some break down to contribute to acid rain.

Social and economic. The economic implications of the phase-out of CFC products should not be significant for industry as replacement substances for CFCs are currently available. The loss of investment in CFC-handling equipment could be significant for some small businesses. At a consumer level, replacement coolants and systems are available at a cost considered to be approximately the cost of repairing the systems. Therefore, consumers should not be inordinately burdened by the ban. MOEE noted in its decision notice that "stakeholders (including vehicle dealerships) have been consulted on numerous occasions since 1997 and are generally aware of the upcoming ban." At a technician level, it could be argued that additional administrative procedures add to costs, though there were no estimates or substantiation of this presented. Some ODP cardholders argued that periodic examinations, coupled with the need to study or refresh for examinations, was burdensome – particularly if their line of business changes little over time. MOEE countered that future product and technology changes in this area will be significant.

Public Participation & *EBR* Process:
All of the 28 commenters were, or represented, refrigerant handlers. Concerns about re-testing and views on the need for record-keeping were the most frequently made comments. Many different views were expressed about how training should be undertaken (see Table 1 for specific issues raised in the consultation). Comments involving matters with environmental consequences included concerns about bad actors/practices, poor municipal practices and the fate of CFCs.

Re-Testing. The most consistently raised issue among the commenters was re-testing. Twenty-one of 28 commenters either opposed or expressed concerns about the need for retesting to renew their ODP cards. The primary reason was the burden of retesting, i.e., the need to book a day off, to travel to an examination centre, the cost involved, and the disproportionate burden on elderly workers. Several countered that ample re-training opportunities are already available through manufacturers and trade bodies and that they understood that the original testing was a one-time only necessity. Some of these issues could be recognized as legitimate grievances if ODS phase-out requirements and product substitutions do not advance over time as MOEE has suggested. The concept of ODP certification was not as contentious as was retesting to maintain it (three commenters in favour versus six with concerns or opposed).

Several commenters expressed concerns about the frequency of retesting. For example, one questioned whether technology and circumstances were changing so much that re-testing of technicians would be required every three years and whether regulatory developments could in fact keep abreast with these changes. MOEE's response as reflected in its decision notice, was essentially that they would, but the ministry did not provide any details.

Need for Record-Keeping. Five commenters expressed views about record-keeping – one was firmly opposed, two were in support of the provision, and two suggested amendments. Two commenters from large organizations expressed the concern that a team of technicians might collect or use refrigerants, in which case the individuals do not have access to records of refrigerants purchased and therefore could not report purchased quantities individually. MOEE responded that it made amendments to address this concern. MOEE also amended its regulation to allow estimation of quantities of recovered CFC and thereby enable some service operations to avoid the purchase of measurement equipment.

Bad Actors / Practices. Commenters claimed that too much regulation could lead to unintended and undesirable effects. For example, it could drive ODS-handling and repairs underground. It was also suggested that some repair shops will try dangerous substitutes or blended replacements to keep CFC-based equipment working. Further, a commenter raised the issue that the new regulatory environment needs to avoid perpetuating an alleged flaw of the old regulatory environment – that a less-than-qualified service agent (i.e., a person without trade certification) could obtain an ODP card from MOEE's 1-day course and present themselves as refrigerant technicians to unsuspecting customers. MOEE did not clearly address whether these issues are significant or how its enforcement efforts would deal with bad actors or bad practices.

Range of Issues from Commenters on Amendments to Ontario's Refrigerants Regulation

Cards and Registration

One or more commenters:

- asked whether the expiry dates of cards would be extended;
- stated the understanding that ODP cards were a temporary measure;
- stated that the fee for re-registration was considered acceptable, but not re-testing;
- raised concern that the ODP card expiry dates were extended four years in a row;
- claimed the proposal maintained the status quo;
- expressed concern that ODP cardholders could pass as licensed technicians;
- urged government to leave regulation as it was originally proposed;
- asserted that other provinces don't use ODP cards;
- questioned the cost and the relationship to trade certification;
- indicated that expiry dates have caused confusion;
- suggested the ODP Card be held by the CFC-handling equipment operator as opposed to all refrigerant technicians.

Effectiveness of the Initiative

One or more commenters:

- asserted that they didn't feel re-testing would ensure competency;
- stated that there are no destruction facilities in Canada, that CFC export is banned, and asked how the ministry will deal with captured CFCs;
- proposed long-term, gradual phase out of CFCs;
- asserted that the Montreal Protocol is not being well served by this regulation;
- claimed that many technicians seem to do ODS jobs whether properly trained or not;
- indicated that the high cost of refrigerant virtually demands safe use, recharge, recycling;

Education /Training issues

One or more commenters:

- objected to MOEE doing the training: college/trade system should;
- suggested that trade bodies should deal with these issues;
- asked about the availability of study guides and materials and resented their cost;
- asked whether other professions have to re-write;
- suggested that MOEE train the manufacturers rather than the technicians;
- clarified the definition of a 3rd class stationary engineer;
- offered assistance to MOEE for training and consultation.

Technical Issues

One or more commenters:

- informed MOEE of leakage issue from on-board coolant in certain buses. Potential health hazard from coolant leaking into a bus;
- suggested that in certain instances (e.g. engine removal), CFCs that came out should be allowed to go back in;
- remarked that dealers have invested a lot in CFC equipment and that this will go to waste; some air conditioning needs to be repaired using CFC; and that there are problems with container definition.

Poor Municipal Practices. A commenter asserted that it is *municipalities* that need re-education and monitoring regarding CFC-handling and cited an example. The claim was made that staff working at a municipal waste management department have been known to release CFCs freely into the atmosphere from refrigerators brought to the landfill. MOEE did not respond to this concern in the decision notice.

Fate of CFCs. The Canadian Vehicle Manufacturing Association (CVMA) asserted that there are no CFC destruction facilities in Canada and that CFC export is banned – this appears to be a serious shortcoming of the phase-out effort. MOEE never addressed this point in its decision notice. The CVMA also noted that members have unused stocks of CFCs and CFC-using equipment; they proposed that the phase-out deadline be delayed to allow more time for consumer advisories and to make product and equipment adjustments. MOEE declined this proposal on the grounds that it would

lead to more releases of ozone depleting substances and that stakeholders have generally been notified of the impending phase-out since 1997.

EBR Process . Overall, the public participation process was adequate. The proposal notice was clear and informative and included several means of obtaining more detail about ozone depleting substances and their regulation – an MOEE telephone number for recorded information on ODSs, as well as an electronic link to MOEE's ODS web page. The comment period was 30 days. The entire process was rather speedy, just 66 days from proposal to decision. MOEE responded to most issues raised by commenters,but demonstrated limited flexibility in terms of changes to the proposal.

One concern for the ECO was the use of somewhat imprecise language about periodic testing and need for retraining – especially given the many comments about these elements. In its proposal, MOEE spoke of working with "training delivery agents to develop supplementary training materials that will provide detailed information on amendments to the regulations and any new requirements, and will provide 'refresher' training on other aspects of the regulation." Such mechanisms were never defined or articulated more precisely. The language in the decision notice was virtually identical to the language in the proposal notice, noting only that MOEE had decided it would proceed with the proposal, and that "the Ministry of the Environment is examining methods to reduce the burden of retesting (e.g. workplace or institutionally supervised)." MOEE could have articulated the proposed refresher and retesting arrangements more precisely for the benefit of stakeholders.

The ECO notes that many of the weaknesses that MOEE demonstrated in this *EBR* process also occurred in previous processes involving revisions to Ontario's Refrigerant and Solvent Regulations (see Supplement to "Changing Perspectives" annual report of the ECO 1999/2000, page S4: 25-29)

Finally, this phase-out effort appears to be linked to a national initiative under way through a body known as the Canadian Council of Ministers of the Environment. MOEE should specify whether its regulatory processes are part of a national or international policy-setting framework to provide process transparency.

SEV:
MOEE's SEV consideration was reasonably thorough and complete. The decision to ban certain CFC-products is consistent with current scientific knowledge on ODSs and therefore consistent with MOEE's commitment to "use science that meets the demanding standards of the scientific community." MOEE's SEV cited "decreased agricultural productivity" as an ecosystem impact from elevated ultraviolet radiation levels. An example of the risk posed to a *natural* ecosystem from increased levels could have been provided. Certain freshwater plants and biota are known to be sensitive to UV-B. As well, the toxicity of certain contaminants can increase in aquatic environments exposed to high levels of ultraviolet radiation.

Other Information:
A second and related decision (RA01E0012) was posted on the same day as the decision notice for *EBR* Registry Number RA01E0011. The related decision, titled "Amendments to Ontario's Solvents

Regulation (O.Reg. 717/94)," resulted in the deferral of the date for phasing out an ozone depleting substance known as AK 225, a solvent used in industrial processes. This decision effectively extended the industrial use of the ozone depleting solvent by almost eight years.

ECO Comment:
The ECO commends MOEE for forging ahead with a ban on the refilling of mobile air conditioners with CFC-based refrigerants, despite the calls of some industry players to delay the phase-out. The ministry also persisted with its plan for periodic technician training and re-examination, despite resistance from some commenters, because MOEE is of the view that "continual technical innovation and regulatory changes are occurring and are expected to accelerate." Given the various environmental, health and safety impacts that can occur from the inappropriate handling and use of refrigerants, MOEE's persistence is prudent.

The process of amending O.Reg. 189/94 was adequate. The consultation and decision-making process could have been improved with better descriptions in the Registry notices of the planned arrangements for the Ozone Depletion Prevention Course, retraining and re-certification. Otherwise, MOEE's discussion in its decision notice about its decision, and rationale for it, was quite thorough.

Several points may limit the benefits of MOEE's plan for phasing out CFCs in mobile applications. First, the benefits from this regulatory amendment will not appear for quite some time – it will require several years, perhaps a decade, starting in January 2002 for the stock of existing CFCs in mobile air conditioning units to be captured. In that time, some portion will continue to escape, as mobile air conditioning units leak about 10 per cent of their coolant to the atmosphere each year. The refrigerants that are likely to replace CFCs have adverse environmental effects of their own if they escape to the natural environment; for example, one is a powerful greenhouse gas. However, the most significant concern for the ECO is the continuing absence of a viable disposal option for large quantities of CFCs in either Ontario or Canada. Some commenters noted that they are holding unused CFCs and may be capturing more in the future – these substances will continue to pose a threat to the environment, if they are not properly disposed of.

The ECO notes that phasing out ozone depleting substances is a very important undertaking given the seriousness of their environmental impact. ECO is aware that further developments are likely to occur in this area of regulation in the years ahead and looks forward to receiving information about these developments.

Review of Posted Decision:
Canada-Wide Standards for Waste Dental Amalgam and Fluorescent Lamps

Decision Information:

Registry number: PA00E0024
Proposal Posted: October 12, 2000
Decision Posted: November 9, 2001

Comment period: 45 days
Number of Comments: 1

Description:
The Ontario government has signed two Canada-Wide Standards (CWSs) that aim to reduce mercury emissions from two products: waste dental fillings and fluorescent lamps. Waste dental fillings are an amalgam of mercury, silver and trace quantities of other metals. Particles of this waste are rinsed into sewers from dentists' offices and can enter the environment through contaminated sewage sludge, which is often spread onto farmland. Fluorescent tubes contain small quantities of mercury, which are released to the environment when the tubes are broken or crushed during disposal.

These new CWSs set material-specific targets for cutting mercury emissions from waste dental amalgams and fluorescent lamps. For waste dental amalgams, the CWS target is to achieve a 95 per cent national reduction in mercury releases from dental amalgam wastes by the year 2005, from a base year of 2000. For fluorescent lamps, the CWS target is a 70 per cent reduction from a 1990 baseline by 2005 and an 80 per cent reduction by 2010 in the average content of mercury in all mercury-containing lamps sold in Canada.

The Canadian Council of Ministers of the Environment (CCME) has been developing CWSs for certain contaminants with the intent to harmonize environmental quality and human health across Canada. The CWSs are being developed by federal, provincial and territorial governments, with input from stakeholders such as environmental, health, industrial and aboriginal groups. The CWSs typically include not only numerical targets for emission reductions, but also timelines, action plans and reporting protocols for all participating governments.

MOEE had previously signed a related CWS for mercury, which focused on controlling the largest source of mercury emissions in Canada: base metal smelting and waste incineration. The ECO reviewed this CWS in the Supplement of the 2000/2001 annual report.

Implications of the Decision
Mercury is a persistent toxic metal, and is unusual because it is liquid at room temperature and readily vaporizes. As a consequence, it is very mobile in the environment, and a significant environmental concern. The mercury contamination observed in Ontario fish and other wildlife is derived from both natural and anthropogenic sources. Although scientists are not able to quantify exactly what proportion of mercury impact is due to human sources, sediment records from remote

lakes indicate that there has been a two-to-three-fold increase in mercury deposition rates over natural levels. Mercury contamination is responsible for 20-40% of the consumption restrictions placed on fish in Ontario's Great Lakes and 99% of all consumption restrictions placed on fish in Ontario's inland lakes. Due to the risks, MOEE established special consumption advisories for Ontario women of childbearing age and children under the age of 15. High mercury levels in fish have resulted in fish consumption advisories in eight provinces.

Waste dental amalgams

Waste dental amalgams are a significant source of mercury emissions to the environment. The single largest anthropogenic source Canada-wide is the base metal smelting industry, which emitted 2.8 tonnes in the year 2000. By comparison, a report prepared for Environment Canada estimated that about two tonnes per year of mercury is generated from the old dental fillings removed from the mouths of Canadians. Some of this waste is collected and recycled or properly disposed of, while some other portions are rinsed into municipal sewers, where they contaminate the municipal sewage sludges or are discharged to lakes and rivers. The CCME has suggested that more than one third of the mercury loading to sewage systems may be derived from dental practices. Since municipal sewage sludges are in some cases incinerated and in other cases applied to agricultural lands, these are also pathways for mercury to enter the environment.

There is wide agreement that the mercury in dental amalgam is quite inert while in place in the mouths of patients. The final version of the CWS notes that dental amalgam remains a well-suited material for dental fillings, and is important to the health of Canadians. But much less is known about the properties of fine particles of waste dental amalgam once they are exposed to sewage treatment systems and the environment. The CWS points out that the precautionary approach suggests limiting environmental releases in the absence of conclusive proof that amalgam particles are inert.

The CWS relies largely on a voluntary approach to meet its 95 per cent reduction target. Governments are requesting commitments from dental professional associations that their members follow good management practices for mercury containing materials, and very specifically, that their members install amalgam traps in their sewer lines that are ISO certified to capture 95 per cent of amalgam waste. These amalgam sewer traps cost about $1,200 - $3,000 per year to install and maintain. The federal government has recently signed a memorandum of understanding on Best Management Practices with the Canadian Dental Association, and most of the provincial governments plan to establish similar agreements with their provincial dental associations.

If voluntary measures should prove to be inadequate, the federal government is exploring instruments under the *Canadian Environmental Protection Act* that would achieve equivalent results. Ontario, for its part, is pursuing a voluntary approach with the Ontario Dental Association, but is also discussing back-up regulatory options with the Royal College of Dental Surgeons of Ontario, which is the self-regulating body for the Ontario dental profession. One option would be to require the installation of sewer traps for

waste amalgam as a pre-condition for dentists periodically renewing their licenses to practice dentistry in Ontario.

Environment Canada has noted that a critical component of this CWS will be the need for tracking and evaluation of progress, and that appropriate methods for data collection and reporting will have to be developed. At the Ontario level, MOEE is discussing with the Ontario Dental Association ways to track the number of dental offices that have installed ISO certified amalgam separators. MOEE's information is that during 2000/2001, only four of Ontario's estimated 5,500 dentists had installed this equipment, although more recently, many Toronto-area dentists have done so.

Fluorescent lamps

Mercury-containing lamps are a smaller source of mercury emissions than waste dental amalgams. It is estimated that Canada-wide, about 1,150 kg/year of mercury are deposited in landfills, bound to the glass of waste lamps. As well, about 40 kilograms per year of mercury vapour are emitted during lamp manufacturing, transport, landfilling and incineration.

The CWS for mercury-containing lamps also relies largely on a voluntary approach. The major lamp manufacturers have committed to reduce their use of mercury in lamps. Since 1985, they have already achieved significant reductions in mercury content, with the average content declining from 48 mg/lamp to 12 mg/lamp over a 15-year period. Environment Canada has promised to report to Canadians in 2004 and 2007 on progress made by lamp manufacturers. The CWS also aims to encourage the recycling of waste fluorescent tubes, which is a process that can recover the mercury. An early draft of the CWS for mercury-containing lamps contained a quantitative target for recycling, but this was removed from the final version.

Ontario has also made a number of formal commitments toward improving recycling and disposal of waste lamps. Specifically, Ontario will:

> -work with the lamp recycling and disposal industry, along with municipalities, to ensure they follow the current waste management regulation.
>
> -work with the industrial, commercial and institutional sector in Ontario, particularly building managers, to consider how to accelerate energy efficient lighting retrofits and also to ensure recycling or proper disposal of waste lamps.
>
> -work with the new "Waste Diversion Organization" to consider lamp recycling available to homeowners through the household hazardous waste centres at local landfills.

Under Ontario's current hazardous waste rules, if more than 25 fluorescent tubes are disposed of at one time, they must be treated as hazardous waste, and must be either sent to a hazardous waste facility or recycled. Despite these rules, it is likely that many waste tubes are still ending up at municipal landfill sites. Fluorescent tube recycling is not yet

wide-spread in Ontario: by some estimates, only about 7 per cent of waste fluorescent tubes are currently recycled, although there is a tube crushing/recycling facility in Cambridge which is able to capture mercury vapour through carbon filtration.

MOEE is discussing ways to encourage tube recycling with the Ontario Realty Corporation, which oversees most activities in Ontario government buildings. MOEE is also hoping to encourage building-focused energy efficiency programs to include tube recycling into their contracts with lighting contractors. MOEE has also begun discussions with the Ontario Waste Diversion Organization on ways to establish a collection infrastructure for waste fluorescent tubes, to divert more of them to recycling and mercury recovery.

Public Participation and *EBR* Process
The consultation on the dental amalgam standards took place primarily with the dental profession and among the federal and provincial governments, through a committee of the Canada Wide Standards process. Two national workshops were held, and industry, universities, government, non-governmental organizations and native organizations were invited to participate. Environment Canada also published these agreements in the Canada Gazette in July 2000 for a 60-day comment period, and summarized comments received in the April 2001 edition of the Canada Gazette.

There has been considerable division within the dental profession as to the appropriateness of this CWS. Although the Canadian Dental Association worked with Environment Canada to develop the CWS, the self-regulating bodies for dentists and dental surgeons across Canada in March 2001 decided to decline support for the approach, stating they lacked confidence in the underlying scientific data. Because Environment Canada led this initiative, Ontario's Environmental Registry did not play a major role in this consultation. Several draft versions of the CWS were produced over time, but the actual reduction target and implementation date was not changed. MOEE received one very brief comment directly in response to its 45-day Registry proposal notice. The comment recommended that controls on dental amalgam be implemented before implementing incinerator mercury standards for sewage sludge.

SEV:
MOEE referenced several of its SEV commitments that are relevant to this Canada Wide Standard on mercury, noting that the ministry uses a precautionary approach when it sets standards, and that standards are used to help protect and conserve the quality of air, soil and water. MOEE also noted that the ministry takes into account economic and technical considerations either in the development of standards, or in their site-specific application.

Other Information:
Many Ontario dentists are now installing amalgam separators, mainly in response to new municipal Sewer Use Bylaws that go beyond the CWS and have recently been implemented in cities like Toronto and Kingston. Halton, Peel, York and Durham are all considering similar bylaws. These municipal bylaws require that dentists meet a sewer discharge limit for mercury – in the case of Toronto, 0.01mg/litre. Some dental offices

may be able to meet this limit, but if discharge exceeds the limit, then an amalgam separator needs to be installed. Toronto's bylaw also required dentists to submit pollution prevention plans by December 31, 2001, allowing the city to estimate that approximately 800 amalgam separators have been installed so far, out of a total of 1,400 pollution prevention plans submitted. The separators appear to work: the City of Toronto has done a preliminary check of its sewage sludge produced by its four sewage treatment plants, and has found substantial drops (over 60 per cent) in mercury content of January 2002 sludges when compared to 2001 sludges.

ECO Comment:
These CWSs seem to have provided a practical way to focus the attention of federal and provincial regulators and the regulated industry onto very specific problems, to share information and to develop workable targets, timelines and reporting frameworks.

Mercury contamination of Ontario's wildlife and ecosystems is a problem that Ontario needs to continue to focus on. Unfortunately, little can be done about the significant historical loadings of mercury to the environment from human activities the world over. Like all metals, mercury does not degrade, and it will continue to circulate and bioaccumulate in vulnerable species. However, a great deal can be done to reduce current and future loadings to the environment from numerous sources, and these CWSs provide a reasonable mechanism to develop solutions.

Both contamination pathways covered under these CWSs involve the annual release of significant quantities of mercury to the environment. Technical solutions have been available for some time, and the barriers appear to be largely administrative and economic. In the case of waste dental amalgam, some jurisdictions such as Sweden have made amalgam separators mandatory for dental offices since at least 1992. Despite the relatively modest cost of the amalgam separators, they do not appear to have been much used in Ontario until last year.

The immediate impetus for change in mercury waste management by Ontario dentists appears to be innovative municipal sewer use by-laws rather than the CWS per se. When large municipalities can demonstrate dramatic improvements in sewage sludge quality over a short period of time, other municipalities are bound to follow suit. In this case, MOEE has adopted a softer back-up role, helping to draft voluntary codes of practice, supporting education of dental practitioners and their staff, and providing input into technical research. This division of regulatory responsibilities can be a successful arrangement, especially in cases where the regulated industry is largely based in municipalities with municipal sewers and sewage treatment systems.

It will be important for MOEE to continue to allow municipalities the option of taking extra regulatory steps in initiatives such as this. MOEE will also need to monitor to ensure that such environmental protection measures are implemented province-wide over planned time frames.

Review of Posted Decision:

Options for Continuous Improvement Of The Drive Clean Program While Achieving Our Reduction Target Of 22% By December, 2004.
(O.Reg. 237/01, 343/01 & 353/01)

Decision Information:

Registry Number: PA01E0005
Proposal Posted: 2001/04/09
Decision Posted: 2001/09/28

Comment Period: 60 day(s)
Number of Comments: 236
Regulations Filed:
O.Reg 343/01 & 353/01: Sept. 4, 2001
O.Reg 237/01: June 22, 2001

Description:

In the summer of 2001, theMinistry of Environment and Energy (MOEE) made a number of important
changes to the Drive Clean Program and its regulations. The decision to proceed with the proposed changes was based on advice and comments provided by the public at consultation meetings conducted by MOEE in the spring of 2001, comments made in response to a proposal notice on the Registry posted in April 2001 and advice provided to the minister by the Multi-Stakeholder Advisory Council on Drive Clean.

The following regulatory changes were made as part of this initiative:

1. Expanding the Drive Clean Program to include Ontario's entire smog zone

The Drive Clean Program will be expanded to include Ontario's entire smog zone starting July 1, 2002. This area is known as the Phase 3 area under the program. To accomplish this, O. Reg. 361/98 under the *Environmental Protection Act* (*EPA*) was amended by O. Reg. 343/01 and R.R.O. 1998, Reg. 628 under the *Highway Traffic Act (HTA)* was amended by O. Reg. 353/01.

2. Increasing the Ongoing Repair Cost Limit (RCL) to $450

The Repair Cost Limit (RCL) was increased to $450 and will apply in Drive Clean program areas after the first two years. During the first two years, owners of light-duty vehicles can take advantage of a $200 RCL limit on emissions-related repairs at a Drive Clean facility in order to receive a conditional pass for licence renewal. Any repairs beyond the RCL may be deferred. This was done by amending O. Reg. 361/98 by O. Reg. 237/01.

3. Extending the validity of a pass report for vehicles tested to 12 months

The validity of a pass report was extended for vehicles tested under the program to 12 months starting January 1, 2002. Now a Drive Clean pass is valid for one year from its date of issue for registration transactions. This means that licences can be renewed or ownerships transferred anytime during the 12 months following the date of issue of the certificate. O. Reg. 361/98 was

amended by O. Reg. 343/01 and Regulation 628 were amended by O. Reg. 353/01 to implement this change.

4. Exempting "kit cars" from Drive Clean testing

Kit cars (customized cars of hobbyists) will be exempted from Drive Clean testing, starting January 1, 2002. To make this change, Regulation 628 under the *HTA* was amended by O. Reg. 353/01.

5. Improving administrative aspects of the Drive Clean program

Improvements were made to administrative aspects of the Drive Clean program including: changes to retraining, re-certification, and decertification for Drive Clean inspectors and repair technicians. This was accomplished by amending O. Reg. 361/98 by O. Reg. 343/01.

In addition to the regulatory amendments described above, policy decisions were made to amend various aspects of the Drive Clean program. These changes did not require regulatory amendments. The ministry will be exploring options for a partnership with municipalities for annual emissions tests for taxis. The ministry will also be exploring options to begin evaluation of program performance measures and goals. As well, the decision was made to explore ways to incorporate data available through on-board diagnostic testing.

Background:
In 1999 registered Drive Clean testing centres began to test cars in the GTA and Hamilton. The main goal of the program is to reduce smog-causing emissions from southern Ontario vehicles by up to 22 per cent annually. Drive Clean works toward this goal by requiring emissions testing for light duty vehicles every two years, heavy duty vehicles every year and both at transfer of ownership. Moreover, the program requires that failing vehicles undergo repairs to their emission control systems. An initial cap of $200 was put in place as a repair cost limit for light duty vehicles. MOEE launched the Light Duty Vehicle portion of program in phases, targeting the largest communities first.

Phase 2 of Drive Clean came into effect January 1, 2001, covering urban centres and their commuting zones from Peterborough to Windsor.

As of February 2002, Drive Clean had about 1,500 facilities offering testing services to light vehicles in the existing program area, and about 600 facilities providing heavy-duty vehicle tests. Between 200 and 300 new facilities will be added in the Phase 3 expansion area.

As of January 23, 2001, MOEE estimates that 2.25 million vehicles had undergone emissions testing, with over 325,000 having failed the Drive Clean test. MOEE states that repairs made to failing vehicles have reduced pollutants from vehicle emissions. In February 2002, MOEE estimated that Drive Clean facilities had performed more than 3.5 million emissions tests.

In June 2001, the minister announced that "Drive Clean has proven to be a success in the Toronto and Hamilton areas where it reduced smog-causing vehicle emissions by 11.5 per cent in its first two years."

MOEE stated in its proposal notice that consultations were necessary to continue improving the program. Drive Clean can continue to succeed only if it is evaluated, by MOEE as well as by the public, and is revised to reflect both the needs of the environment and the Ontario public.

Implications of the Decision:
The decision to proceed with the proposed policy changes is a positive one. The changes made to the Drive Clean program will provide clarity to the program, as well as implement policy changes that will help the ministry achieve its goals of reductions in smog pollution.

By expanding the program area, MOEE has reduced confusion about which communities are involved with the Drive Clean program. It also ensures that most residents living in the communities of Southwestern Ontario are treated in a similar and equitable manner, and make contributions to smog reduction. Effective July 1, 2002, the program will include car owners resident in portions of counties not already covered: Haldimand, Norfolk, Dufferin, Elgin, Lambton, Middlesex, Northumberland, Perth, Peterborough and Simcoe. Ottawa, the Kawartha Lakes region and Chatham-Kent, along with all eastern Ontario counties to the Quebec boundary will be covered as well. This will take in urban centres such as Ottawa, Kingston and Cornwall. The only areas of southern Ontario not covered after July 2002 will be municipalities in the counties of Huron, Bruce, Grey, Renfrew, and Haliburton and Muskoka District. These are not considered part of the province's smog zone. However, serious bouts of smog were reported in the Muskoka District in the summers of 2000 and 2001.

The extension to the Drive Clean program's repair cost limit (RCL) to assist vehicle owners who cannot afford to repair or replace vehicles that fail the ministry's emissions test is a reasonable compromise. The RCL was originally intended to be in place only for the first two years of the program in each phase area. This meant that all vehicles would have to be fully repaired to pass the test, or replaced, after the first two years of Drive Clean. With the change, the maximum that vehicle owners will have to spend on emissions-related repairs in order to qualify for a conditional pass is being increased from $200 to $450. The RCL increase came into effect July 1, 2001 and applies henceforth to Drive Clean's Phase 1 area, i.e. the Greater Toronto Area and Hamilton. The $200 RCL will remain in place for the Phase 2 area until December 31, 2002, when it will increase to $450. The Phase 2 area includes cities and their commuting zones extending from Sarnia, Welland and Niagara Falls and northeast of the GTA through to Peterborough.

The proposal to continue limiting repair costs was strongly supported during the public consultations on improvements to the Drive Clean program. The ministry says the new, increased limit more accurately reflects the cost of required emissions-related repairs. According to MOEE data, about 4 per cent of vehicles tested 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.

MOEE claims that setting a RCL of $450 illustrates its desire to listen to and apply

public suggestions in regard to its policy decisions. In addition, MOEE claims that the new RCL will assist those vehicle owners who cannot pass the emission test without repairs.

The valid life of a Drive Clean pass report was extended from six months to one year, effective January 1, 2002. Prior to this change, pass reports expired six months after they were issued. The extension will give a vehicle owner 12 months after a pass is issued to renew the vehicle registration or change ownership. It also means that a vehicle owner will never have to pass two Drive Clean tests in the same 12-month period.

Other regulatory amendments also were passed into law. In addition to clarifying definitions in the Drive Clean regulations, changes include:

- empowering 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);

- including provisions in the program to allow the use of vehicles' on-board diagnostics in Drive Clean testing; and

- allowing light-duty diesel vehicles to be tested at heavy-duty vehicle testing facilities.

Public Participation & EBR Process:
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 of current Drive Clean Program practices. MOEE received 236 comments on the Registry proposal. The questions and public comments on them were as follows:

1. Should Drive Clean be expanded to other communities?

Public comments: There was strong support for expanding the program area beyond the phase 1 and phase 2 areas. Many of the commenters felt that the program should include all of Ontario. There were concerns raised about requiring that residents of rural areas have their cars tested. These residents expressed the view that because of the lack of public transit and the hardship of finding a licensed emissions test centre, perhaps rural and northern areas should not be subject to Drive Clean. However, the majority of the commenters were in favour of expansion.

2. Should Drive Clean have an ongoing repair cost limit? If so, what should the limit be?

Public comments: There was a strong support for implementing an ongoing Repair Cost Limit (RCL). Most respondents felt this RCL should be in the range of $200 to $500. Most people were under the impression that a RCL would aid in reducing the costs of repairs for fixed-income citizens.

3. Should the valid life of a Drive Clean pass report be extended to 12 months from the current

six months?

MOEE Background: A Drive Clean test is required every two years for registration renewal and at transfer of ownership. However, under the initial program design a Drive Clean pass was only valid for six months for ownership transfer or vehicle registration renewal. This meant that a vehicle had to be retested if it was sold more than six months after the owner re-registered the vehicle. MOEE asked whether this period was too short considering a car not being transferred only requires a test every two years?

Public comments: A very high majority of commenters supported the extension of the validity of a pass report to 12 months. The most common reason for the extension was to save time and costs to car owners by preventing the waste of testing cars too often.

4. Should "kit" cars be exempt from Drive Clean tests?

MOEE Background: There are an estimated 500 "kit" cars in the program area, which are usually hand-built, one-of-a-kind vehicles. Often, the engines predate emissions controls. Some cannot even meet 1980 emissions standards. It has been estimated that most are driven an average of 1,500 kilometres per year.

Public comments: There was a fairly strong support for exempting kit cars from Drive Clean testing. While many of the responses supporting the exemption came from owners of kit cars, there were also many other responses in favour of the exemption. Many of the commenters who supported the proposal also indicated that perhaps the exemption should also pertain to 'show cars' and cars that are used infrequently. However, the question only included kit cars, and that is the kind of car that most respondents referred to.

5. Should Drive Clean implement annual emissions tests for taxis, in partnership with municipalities?

MOEE Background: Taxis are high-mileage vehicles that can contribute significantly to poor air quality. Currently, taxis only require a Drive Clean test every two years, as does any other car or light-duty vehicle. Identification and licensing of taxis is a municipal responsibility. Should the program be changed, so that when a municipality wants more frequent testing, it can be a requirement of the taxi license?

Public comments: There was very strong support for annual emissions tests for taxis, in partnership with the municipalities. The main reason stated for the support was that taxis are heavily used vehicles and therefore need to be tested more often than a regular individually owned car.

6. Administrative improvements

MOEE Background: MOEE also looked at a number of administrative improvements, including:

a) Requiring retraining and re-certification for emissions inspectors and repair technicians when

there are significant program changes. Under the initial design of the program, re-certification requirements only applied to emissions inspectors. MOEE is also planning to explore ways to decertify emissions inspectors and repair technicians who are involved in inappropriate activities.

b) Clarifying and creating consistency in terminology between Drive Clean regulations under the *Highway Traffic Act* and the *Environmental Protection Act*. For instance, MOEE proposed to add definitions for Registered Gross Weight (RGW), Heavy Duty Vehicles, and commercial vehicles to the O.Reg. 361/98.

c) Requiring vehicles that are violating the *Environmental Protection Act* to be repaired. Prior to the changes, the Vehicle Emissions Enforcement Unit ("the Smog Patrol") could ticket vehicles that were smoking or were not complying with the *EPA*. They could even order the vehicles to be tested. However, MOEE could not order the owner to repair the vehicle.

d) Exploring ways to incorporate data collected from on-board diagnostics into Drive Clean tests, since it may make the testing and repair of recent model year vehicles more efficient.

Public comments: This question included four different parts. Most commenters responded to the proposal (as outlined in section a above) to require retraining and re-certification for emissions inspectors and repair technicians. Most respondents agreed strongly with this proposal as they felt it helped to regulate the garages that perform the emissions tests and subsequent repairs. Many of the commenters voiced the concern that fraudulent practices are very common in the automobile repair industry. Therefore, the consensus was that licensed emissions test centres needed to be regulated and held more accountable, explaining the strong support for retraining and re-certification requirements. The remaining parts of question 6 did not receive many comments, and it is apparent that these issues were less known to the public. Many commenters stated they did not know that a “smog patrol” existed. As well, many of the commenters were unaware of the exact implications of allowing testing using on-board diagnostic instruments. Better explanations of these issues in the proposal notice might have encouraged more comments on these issues. After reviewing this draft decision review, MOEE advised the ECO that the Drive Clean Office will improve promotion of the Smog Patrol and provide more information on allowing tests that use on-board diagnostic instruments.

7. Should program performance measures and goals be evaluated?

MOEE Background: Drive Clean stated that it was considering introducing additional performance measures so that its results in reducing vehicle emissions can be assessed in terms of the government's overall air quality strategy. These performance measures would report the reductions of pollutants resulting from Drive Clean, including greenhouse gases, in tonnages. As of early 2001, Drive Clean results are reported only as a percentage reduction of smog-causing emissions from vehicles.

Public comments: There was strong support for evaluating performance measures and goals. In fact, many comments expressed surprise that such an evaluation system was not already in place.

In addition to the questions posed on the Environmental Registry, six public consultation meetings were also held by MOEE. These meetings took place in Ottawa, Cornwall, Kingston, Oakville, Waterloo and Chatham. The meetings were advertised in newspapers in and around the communities involved. MOEE reports that attendance was low, although those in attendance were moderately to strongly supportive of the proposals.

MOEE also consulted its Multi-Stakeholder Advisory Council (MAC), established to provide advice to the minister regarding the Drive Clean Program and including representatives from the following organizations:

- Pollution Probe
- Canadian Vehicle Manufacturers' Association
- Automotive Industries Association of Canada
- Toronto and Ontario Automobile Dealers Association
- Ontario Motor Coach Association
- Ontario Trucking Association
- Drive Clean Facilities
- Ontario Lung Association
- Canadian Automobile Association
- National Association of Fleet Administrators
- the Canadian Federation of Independent Business.

In its decision notice MOEE reported the representatives on MAC were supportive of the proposed changes.

While the public did express strong support for many of the proposed changes, there were also comments that questioned the value of the program and expressed a range of negative opinions on it. These particular negative concerns were not directly addressed by MOEE in the decision notice, as they did not pertain to the questions asked by MOEE. Other commenters sought modifications which would have altered the basic fabric of the program. For example, there were several commenters who suggested that MOEE should use economic incentives to reward owners who maintain their vehicles and continuously pass the emissions test. It is noteworthy that MOEE clearly states in its SEV that the ministry is committed to consider the use of economic incentives and disincentives when developing policy. However, MOEE did not respond to this comment in its decision notice.

SEV:
MOEE stated that by making Drive Clean work better, by building on its success and by listening to the public's comments on how the program can be improved, the ministry was acting in a manner that is consistent with Part IV of its SEV, which outlines MOEE's commitment to public participation. MOEE also explained that by posing questions and holding community meetings, MOEE directly considered its SEV. MOEE also stated that the changes are consistent with its SEV commitment to environmental protection because the changes will help achieve MOEE's goal of reducing harmful emissions from vehicle exhausts.

Other Information:
In 2000/2001, MOEE received an application under the *EBR* requesting a review of the Light Duty Vehicle Drive Clean program to determine whether the program was beneficial. Although MOEE denied the application, several weeks later MOEE announced this consultation on enhancing and expanding the Drive Clean program. Since this consultation process provided a venue for public participation in the form of comments on the Registry and public meetings, the ECO wondered why MOEE could not have accepted the *EBR* application for review submitted just a short time earlier. After reviewing this draft decision review, MOEE advised the ECO that the proposal to proceed with Drive Clean was posted on the Registry in September 1997, and no comments were received on the proposal at the time. MOEE went on to note that if an application for review under the *EBR* is "made within the five-year period following the decision, and if the proposal underwent a public consultation process under the *EBR*, a minister shall not conduct a review," according to Section 68(2).

O. Reg. 78/01,filed with the Registrar of Regulations on April 2, 2001, extended the $200 RCL to June 30, 2001. This enabled MOEE to invite public comment during this period on options regarding program improvements. Therefore, all owners of vehicles registered in the Phase 1 program area with permits that expired between April 1,2001, and June 30,2001, which were required to have a Drive Clean test, had the option of obtaining a Conditional Pass. This extension ensured MOEE enough time to gather public opinion and make its decision on changes to the RCL.

Other initiatives also are contributing to the achievement of Ontario's smog reduction goals. In August 2000, the Clean Air Foundation established a Car Heaven vehicle retirement program. The goal of the Car Heaven program is to reduce smog by making it easy and rewarding for car owners to take their older cars off the road. Through its co-sponsors, the program offers incentives to customers such as free towing, responsible recycling, donations to charities and opportunities to win prizes. It is supported by government, non-profit organizations, and industry concerned about air quality and the proper disposal of old vehicles, and is operated on a day-to-day basis by the Ontario Automotive Recyclers Association.

In June 2002, the Clean Air Foundation claimed the program has removed 52 tons of nitrogen oxide (NOx), 33 tons of volatile organic compounds (VOCs) and 676 tons of carbon monoxide (CO) from Ontario's air in its first year. (All figures are in U.S. tons.) Between August 2000 and June 2002, Car Heaven and its partner programs retired 5,800 vehicles.

ECO Comment:
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 only would make these modest contributions if identified weaknesses in the program are corrected. Moreover, the ECO noted that Ontario ministries need to implement a range of programs – such as support for urban transit systems – to ensure that vehicle emissions are reduced.

The changes to the Drive Clean program made as part of this initiative go part of the way toward meeting the ECO's concerns. The changes will make approximately 5.7 million vehicles in southern Ontario subject to the program's testing requirements. However, MOEE will need to implement further improvements to the program in the future in order to achieve its smog-reduction goals.

The ECO commends MOEE for introducing 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. These performance measures will report the reductions of pollutants resulting from Drive Clean, including greenhouse gases, in tonnages. MOEE should clarify how and when it intends to implement its new performance measures.

MOEE proposal that the Drive Clean office work with municipalities to implement an annual test for taxis is a good first step toward ensuring clean operation of high-mileage taxis.
This could potentially be done through the municipal taxi licensing system, since the provincial vehicle registration database does not record whether a vehicle is being used as a taxi. The ECO believes that annual emissions testing is important to ensure clean operation of high-mileage taxis.

The administrative improvements that were implemented are sensible. Requiring retraining and recertification for emissions inspectors and repair technicians when there are significant program changes is a logical change, and clarifying and creating consistency in terminology between Drive Clean regulations under the *HTA* and the *EPA* is an important improvement. Moreover, requiring vehicles not complying with the *EPA* to be repaired will allow MOEE to ensure that the regulations under Drive Clean are fully enforceable.

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.

The failure by MOEE to acknowledge and address some negative comments about the program may potentially give the authors of these comments and the public the impression that MOEE did not take their concerns and issues into account. At a minimum, MOEE should have acknowledged these negative comments in its decision notice. After reviewing this draft decision review, MOEE advised the ECO that this consultation "was an opportunity to listen to public and stakeholder views of the proposed program improvements." MOEE went on to point out that "[i]n general, comments supportive," all comments were considered, and MOEE "is responsive to public concerns and issues and has committed to ongoing improvements of Drive Clean."

Finally, there are many implementation issues that arise in relation to these program changes. Vehicle emissions testing is extremely technical and complex, and MOEE appears to have considered a range of program design issues sufficiently. Nevertheless the ECO will be monitoring the application of the revisions to O. Reg. 361/98 by MOEE to see how the implementation issues are handled.

Review of Posted Decision:
Aberfoyle Springs Co. Permit to Take Water, Township of Erin

Decision Information:
Registry Number: IA01E0035
Proposal Posted: January 9, 2001
Decision Posted: September 18, 2001
Comment Period: 30 days
Number of Comments: 9
Permit Issued: September 5, 2001

Description:
Aberfoyle Springs Company, a subsidiary of Nestlé Canada Incorporated, was granted a renewal of its permit to take water (PTTW) in the Township of Erin, County of Wellington. The PTTW, which sets a maximum water extraction rate of 773 litres per minute and a maximum amount of 1,113,000 litres per day, 365 days per year, was issued September 5, 2001 and is valid until March 31, 2003. Water taken will be trucked off the property to a nearby bottling site, bottled and sold in 1.5 litre, 1 litre, and 500 millilitre containers.

Implications of the Decision:
Aberfoyle Springs ("the proponent") submitted its first renewal application for this site in August 1999 (Registry Number IA9E1003). When the public expressed considerable opposition, the proponent withdrew its application. The applicant then re-applied and the ministry re-posted the proposal notice in January 2001.

This latest Aberfoyle Springs PTTW is one of several major water taking permits issued to water bottling companies in the Township of Erin. Another bottling company was recently granted a PTTW with a maximum extraction rate of 900 litres per minute and a maximum amount of 225,000 litres per day (Registry Number IA00E0584). Aberfoyle Springs also has a PTTW from the nearby Township of Puslinch (Registry Number IA7E1487), which allows the extraction of 1,818 litres per minute or 2,618,000 litres per day. 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.

Concerns of commenters motivated the Ministry of Environment and Energy (MOEE) to add conditions to the PTTW 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, Aberfoyle must either reduce the rate and amount of the taking, or provide another equivalent supply of water (such as bottled water). Moreover, Aberfoyle must carry out a hydraulic monitoring program and shall maintain a daily record of amounts of water taken, rates and hours of operation. A Ministry of Environment and Energy Director may also issue a notice to suspend or reduce the water taking during times of drought or water shortage.

Public Participation & *EBR* Process:
The proposal was posted on the Registry for a 30-day comment period. The ministry received nine comments, all of which opposed the PTTW. Six of the commenters 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 permitted water taking exceeded the recharge rate of the aquifer and would lead to water shortages in the area. Many of these observed that several bottling operations already had permits to take water from the area, and questioned whether the ministry had sufficient groundwater data to determine the cumulative effects of PTTWs accurately. Residents also objected to increased tanker traffic on local roads. Two commenters expressed concern about potential damage to fish populations and habitat in streams within the township. One commenter asked whether the Ministry of Natural Resources and the Department of Fisheries and Oceans had been consulted.

In its decision notice, MOEE stated that it had requested additional information from the proponent as a result of the comments received. MOEE did not, however, describe the nature of the information requested. MOEE also stated that in response to the comments the ministry imposed additional terms and conditions, but did not identify which conditions resulted from which comments. In its decision notice, MOEE provided an Internet link to a copy of the actual PTTW that was issued.

SEV:
It is the policy of MOEE *not* to consider its SEV in deciding to issue instruments. MOEE has offered two explanations for its policy on SEV consideration. First, in an August 1995 discussion paper on the use of its SEV, MOEE stated: "issuing, review, repeal or amendment of instruments is guided by policies, Acts, or regulations." It maintained that since the SEV is considered in the development of these policies, Acts and regulations, considering it again for the granting of instruments is not necessary. Second, in its 1996 annual report to the ECO, MOEE stated that SEV consideration is not required for instrument proposals because MOEE already considered the SEV when it developed its classification regulation for instruments.

It is the position of the ECO that this policy is at odds with the intent of the *EBR* as the *EBR* provides no exclusions from the SEV consideration requirement for environmentally significant instrument decisions. The ECO believes MOEE should explicitly subject all of its environmentally significant instrument decisions to SEV consideration.

The ministry's SEV states that it will adopt as a guiding principle an "ecosystem approach to environmental protection and resource management." Many of the comments received by the ministry detailed concerns about watershed and ecosystem sustainability. In declining to consider its SEV when granting permits to take water, the ministry failed to address the broader impacts of water taking. The ECO's concerns about SEV consideration were supported in a February 2002 decision made by the Environmental Review Tribunal about a permit sought by a company proposing to extract water from the Tay River watershed near Perth.

Other Information:
Over the past five years, the Township of Erin has become very involved in local groundwater management. In 2001, it applied for leave to appeal a PTTW renewal issued to another bottling company, Aquaterra Corporation, within the municipality's boundaries. The township sought leave to appeal on several grounds, including discrepancies between the decision notice and the permit in the amount of water taking allowed and the fact that the proponent continued to take

water although its earlier permit had expired. Most significantly, the Township of Erin questioned whether MOEE had fully considered the impacts of other water takings in the Township of Erin and the Credit Valley Watershed when deciding to issue the permit. The Environmental Review Tribunal denied the Township of Erin's application. The Tribunal found that the Director had acted reasonably in renewing the proponent's permit because the previous water takings had not resulted in harm to the environment, and there was no prediction of future environmental harm.

The Township of Erin has continued to advocate for improved groundwater inventory and management programs. In its comments on this proposal, the Township of Erin requested that Aberfoyle Springs be required to undertake monitoring programs and provide all resulting data to the town. MOEE made hydraulic monitoring a condition of the permit, and has agreed to make available to the town any data not provided directly by Aberfoyle Springs. This information will contribute to the Groundwater Management and Protection Study that the Township of Erin is currently undertaking in cooperation with the West Credit Subwatershed Study. The goals of the study include: determining the extent of aquifers; assessing existing uses and projecting future needs; implementing groundwater management strategies and protection measures; and developing an education and stewardship program.

ECO Comment:
In its January 2001 proposal notice, MOEE indicated that although water taken under this permit would be trucked off the property it would remain within the watershed. This statement was, as several commenters observed, misleading. While it is true that the water would initially be trucked to a location within the watershed, once bottled, the water can be shipped to and sold in any market. MOEE should endeavour to communicate the implications of proposals more clearly.

In its decision notice, MOEE should have described the nature of the additional information requested from the proponent and identified which additional terms and conditions were imposed, as a result of public comments received.

Several commenters were concerned that the water taking would negatively affect rivers, streams, and fish habitat in the area. In 1999, MOEE promulgated the Water Taking and Transfer Regulation (O. Reg. 285/99), which set out criteria for MOEE staff to consider before issuing a PTTW, including the impact of the proposed taking on the natural functions of the ecosystem, and the impact of the proposed groundwater taking on surface water resources. MOEE did not provide any indication of how these impacts were considered in deciding to issue the PTTW.

Many commenters expressed concern that MOEE did not have adequate groundwater data on which to base its decision. The ECO has repeatedly urged the Ontario government to develop a comprehensive groundwater management strategy. In 1997, the ECO outlined several elements of a groundwater strategy could contain, including a publicly accessible inventory of groundwater resources, long-term monitoring of water levels for major aquifer systems, a program to identify and protect sensitive recharge areas, and an economic assessment of the current and replacement value of groundwater resources. MOEE, in partnership with

conservation authorities and municipalities, has begun monitoring a number of watersheds through the Provincial Groundwater Monitoring Network. Data from this program is not yet available.

In the past two decades, Ontario has seen increased competition for groundwater resources. Concern about groundwater depletion and shortages has grown, as have worries about the commodification and export of water resources. Greater transparency in groundwater management is needed in order to restore public confidence that these resources are being protected effectively.

Review of Posted Decision: Airborne Contaminant Discharge Monitoring and Reporting (MOEE regulation O. Reg. 127/01 under the *Environmental Protection Act*)

Decision Information:

Registry Number: RA00E0016 Comment period: 30 days
Proposal posted: November 10, 2000 Number of comments: 41
Decision posted: May 2, 2001 Decision implemented: May 1, 2001
Reg. filed: April 26, 2001 Reg. Gazetted: May 12, 2001
Reposted: June 15, 2001 to advise the public of an amendment (O. Reg. 196/01)

Description:

O. Reg. 127/01 requires facilities in the electricity generation, industrial, institutional, commercial and municipal sectors to monitor and report their emissions of airborne contaminants. If they meet certain criteria, they must estimate their annual and smog season emissions of a number of contaminants and submit reports annually. Very large facilities with emissions of SO_2 and NO_x above a certain threshold must also submit quarterly reports. All reports must be submitted to MOEE and made available to the public.

The regulation sets out three different sets of screening criteria for determining what monitoring and reporting each facility must undertake. Facilities subject to Ontario's regulation that are also required to report to Environment Canada under the National Pollutant Release Inventory (NPRI) must provide the same air emissions data to MOEE. MOEE also introduced two lists of contaminants not covered by NPRI.

The lists of contaminants, reporting thresholds and acceptable estimation methods are contained in a guideline titled "Step by Step Guideline for Emission Calculation, Record Keeping and Reporting for Airborne Contaminant Discharge" (the Guideline) dated April 2001. Contents of the Guideline, including the lists of contaminants in the tables, may change from time to time.

The 358 contaminants listed in the Guideline are divided into 3 tables:

- Table 2A lists 7 criteria air contaminants that are smog related and 4 that are greenhouse gases. If the facility exceeds the screening criteria for Table 2A substances, then the facility must report emission amounts for substances exceeding the release based thresholds or state that the substance is below threshold. Facilities must also include estimates of their smog-season (May 1 – September 30) emissions of the criteria air contaminants.

- Table 2B lists 79 contaminants not included in the NPRI, which MOEE refers to as toxics. These have graded "MPO thresholds." MOEE says that if a contaminant is manufactured, processed or otherwise (MPO) used at the facility in quantities above the threshold in the table, emissions must be reported.

- Table 2C lists the 268 substances on the NPRI list for the reporting year 2000.

Facilities do not have to report on all 358 substances, just those that apply to their facility. Appendices to the Guideline provide lists of contaminants commonly associated with different

industrial processes and industries to help facilities determine what contaminants might be emitted.

In order to phase in the requirements, MOEE has divided the sectors subject to the regulation into three classes:

Class A – Electricity Generation Sector, including most electric power generation facilities, which was required under O. Reg. 227/00 to begin reporting on 28 substances in 2000 (ECO review in the 2000/2001 annual report, pages 107-109).

Class B – Large Sources, for example: iron and steel mills; metal ore mining; pulp and paper mills; petroleum refining and distribution; chemical manufacturing; plastics and rubber products manufacturing; foundries; and car and truck manufacturing.

Class A and B facilities became subject May 1, 2001 and were required to submit their first smog season (May 1 – September 30, 2001) and annual report (to December 31, 2001) by June 1, 2002. Quarterly reports from electricity generation facilities and the largest industrial facilities meeting reporting thresholds for SO_2 and NO_x were due August 29 and November 29, 2001.

Class C – Small Sources, for example: auto body repair shops; dry cleaning services; oil and gas extraction; coal mining; electric power distribution; and many types of manufacturing.

Class C facilities became subject January 1, 2002 and their first smog season and annual reports will be due on June 1, 2003.

Implications of the Decision:

MOEE's proposal notice said that the regulation would provide the following benefits: emission reductions, since public right-to-know will be an incentive for companies to reduce their emissions; an information base to assist future policy development; a means of tracking progress in ministry air programs; and a level playing field for all sectors with respect to emissions reporting.

Implications for Industry

In its Regulatory Impact Statement (RIS) MOEE said that the health benefit of reducing smog has been estimated at $6 billion in Ontario, and that the proposed program would provide the ministry with data to assist in the prioritization of initiatives to reduce the health and environmental impacts of air pollution. Several commenters questioned the correlation between the $6 billion figure and implementation of this regulation, and said that the costs to industry could outweigh the environmental and health benefits. Most industries said that MOEE underestimated the costs to industry in its RIS.

Industry associations and facilities expressed concern about the complexity of the regulation and 600-page Guideline, and questioned the need for the additional regulatory burden on top of the NPRI. The federal and provincial monitoring programs have some different criteria, definitions and thresholds. Some industries are included in one but not the other, and MOEE has added 90 more contaminants. MOEE and Environment Canada have begun to work, however, toward

integrating the reporting criteria, emission estimation methods and reporting data. They have also set up a joint help line and held joint stakeholder workshops to help industry understand the reporting requirements under each program.

Even with MOEE's efforts to assist companies to understand the requirements, the regulation has significant cost and resource implications for industry, particularly for small companies which have not previously had to do any monitoring or reporting.

Impact on the Environment

MOEE's assertion that the regulation will provide emission reductions through "public right-to-know" is probably overstated. Many industry commenters said the regulation put too much of a burden on the regulated facilities, with no evidence it would actually improve the environment. There is the potential that companies will feel compelled to reduce their emissions voluntarily because of the public pressure associated with disclosure, but that is not a guaranteed result of the regulation. It may depend in part upon how easily the public can access and understand the information.

The first annual and smog season reports for 2001 were due from all electricity generators and large sector facilities by June 1, 2002, and must be submitted electronically to MOEE's online reporting registry, which became operational in May 2002. A member of the public may access all the reports on the ministry's Web site by searching for a specific facility or for all facilities within a municipality. MOEE estimates that approximately 3,000 to 4,000 facilities will be reporting in the first year, however, and MOEE does not plan to provide any analysis or summary of the data.

In contrast, NPRI data are assembled into an electronic database and also a report for the public. The NPRI reports and Web site are enormously beneficial for the public's right-to-know, but industry has complained that the aggregated NPRI data are misinterpreted by the public. MOEE may be trying to address the industry's concern by ensuring that the data in Ontario reports will not be easily aggregated or summarized. MOEE points out that NPRI information is not released to the public for about two years, whereas the Ontario information will be submitted to the ministry and made available to the public concurrently within six months after the end of the reporting year.

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 towards improving air quality. Ontario says it is the first jurisdiction in the world to require monitoring and public reporting of a full suite of key greenhouse gases and the key contributors to smog and acid rain. In December 2001 Environment Canada added the same criteria air contaminants as Ontario's program to the NPRI beginning with the 2002 reporting year. Quantifying emissions of key contaminants and greenhouse gases will help the province determine what policy or regulatory actions are necessary to protect the environment and human health. However, the ministry will have to compile and analyze the data to achieve real emission reductions.

Commenters raised concerns about the quality of the data that will be generated in these reports. The Guideline says "in general, site-specific data that are representative of normal operations at a

facility's site are preferred over industry-average data (such as emission factors)." However, facilities can use any of the methodologies described in the Guideline or get the MOEE director's approval for another method. One company calculated its emissions of one contaminant using several of the estimation methods and got widely varying results. Another said, "we feel the methods of measuring particulate matter 'emissions' are so imprecise that the data generated would be useless, especially when compounded by combining reporting province wide."

MOEE's intent is to reduce the costs and burden of reporting by allowing companies as much flexibility as possible. MOEE says "the monitoring and environmental reporting regulation requires data of sufficient accuracy to meet Ontario's objectives without being unduly burdensome on industry. Direct measurement is not mandatory for the estimation of the annual and smog season emissions, since several other common estimation methods provide reliable data for the calculation of emissions." The onus is on facilities to quality check their data and the ministry will occasionally review the estimation techniques and audit air emissions data. MOEE will need to rely on this information, however, as it negotiates to set emission caps on other sectors. MOEE will need quality monitoring data in order to regulate industry, oversee emission trading and discuss emission reduction agreements with other jurisdictions.

Public Participation & *EBR* Process:

MOEE began its stakeholder consultation on electricity sector emissions reporting in December 1998. In January 2000 MOEE posted a proposal on the Registry for emission reporting from electricity generators beginning in May 2000, and a plan to expand the program to industrial/commercial/municipal sectors by January 1, 2001. The electricity sector regulation (O. Reg. 227/00) was finalized in May 2000 and consultations continued. An early draft of this "all-sector" regulation was posted on the Registry as a proposal in August 2000 but was removed within a week "because the notice was incomplete and to provide for further stakeholder consultation."

The revised proposal notice was posted on November 10, 2000, with a 30-day comment period, and was planned to come into effect on January 1, 2001. The ministry received 41 comments. Most of the commenters requested an extension of the comment period to 60 or 90 days, and a delay in implementation by as much as one year. They said there was too much material to review in 30 days, and that some important details of the program, such as the reporting framework, were not available during the comment period. Many commented that the draft regulation and guideline were poorly written and difficult to understand. A common concern was that companies could not meet the impending implementation deadline, that more time would be needed to inform and train member companies or staff and to acquire monitoring and reporting equipment.

Other concerns raised during the comment period included the potential double counting of some substances (e.g., VOCs and particulates) and the need to monitor specific contaminants. Many commenters said it was difficult to figure out whether the regulation or certain parts of it would apply to an industry or facility. There was some concern expressed that a facility could become liable or be charged for exceeding emission limits if its own report to the ministry revealed that

information. Some thought the tables should be schedules to the regulation, not lists in the Guideline, which can be changed without consultation.

On December 28, 2000 MOEE posted an update to the Registry proposal, which said that MOEE would not be finalizing the regulation by the original target date of January 1, 2001. No additional comment period was provided. The update said that comments from reviewers almost unanimously requested an extension of the implementation date, and for further integration with the NPRI. MOEE did not announce its decision until late April, with an implementation date of May 1, 2001.

As a result of the comments, MOEE delayed the proposed implementation date by four months; improved the clarity of the regulation and Guideline; harmonized some definitions and lowered one threshold to conform to the NPRI; moved municipal sewage treatment plants from Class B to Class C to give them an additional year; and began working with Environment Canada to integrate the federal and provincial programs.

MOEE's description of the comments in its Registry decision notice listed only four items plus "miscellaneous editorial comments," and the description of changes the ministry made to address concerns was incomplete. Otherwise the proposal and description notices were very comprehensive, and MOEE provided a remarkable amount of background material through links to documents on its Web site, and direct contact with stakeholders. MOEE appears to have made a great effort to address concerns of stakeholders.

After the regulation was finalized the ministry continued to provide information to stakeholders by letter and email and held over 40 workshops to educate the regulated community about the new requirements. All supporting documents, reporting forms and a list of "Frequently Asked Questions" were placed on the ministry web site, and a telephone help line was established. Recognizing unresolved stakeholder concern about the rules, the ministry also set up a multi-stakeholder group to help it improve the Guideline, including future revisions to the substance list and reporting thresholds.

SEV:

The ministry's SEV consideration was brief. The ministry said the proposed program will help achieve environmental protection by encouraging emission reductions and will help to improve tracking of progress of programs such as smog, acid rain, air toxics and climate change. MOEE also said this air program is important to the ecosystem approach because air pollution causes water pollution to the Great Lakes watershed and also affects the health of human beings, vegetation and animals.

Other Information:

See pages 84 – 88 of the annual report and pages 76 - 85 in the Supplement for ECO review of MOEE's new emission limits and trading regulation.

ECO Comment:

The ECO commends MOEE for developing this monitoring and reporting program. Though the regulated community considers monitoring and reporting an administrative burden, it is a

necessary step for defining lasting air quality solutions. It will provide information that has not been available in the past. Most facilities are currently required to meet specific emission limits (usually based on half-hour averages) and some may be required to monitor their emissions to ensure they are in compliance with "point-of-impingement" standards. But few have been required to monitor or even estimate the total annual loadings (quantities) of their emissions and report them to MOEE. MOEE said that in the past it had received just a 20 per cent response rate to requests for voluntary reporting of emissions.

A mandatory monitoring system was needed for several reasons. 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 has had no inventory or measurement of actual emissions and no means to measure progress. This regulation will provide an information base to track emission trends and develop new programs if needed to achieve emission reductions. It also requires reporting of the rate of SO_2 and NO_x emitted per unit of energy produced, in the quarterly reports from electricity generation facilities. Consumers and decision-makers will need this information to compare the environmental impacts of different facilities and to verify claims made by electricity generators and retailers.

The ministry has provided industry with flexibility to determine what contaminants they emit, and how to measure or estimate their emissions. MOEE should review and audit facility reports and records periodically to verify the data, assess compliance with this regulation and assess whether the data being generated are reliable and sufficient for the ministry's stated purposes.

It is not clear that public access to emissions data will influence facility managers to reduce their emissions. The ECO has recommended in the past that MOEE summarize such data for the public. Presumably the ministry will be compiling and analysing the data from thousands of facilities to provide the province-wide information it will require for developing ministry programs and tracking progress. The public should also have access to that summary information.

Although the comment period was short for a proposal of this importance, MOEE did delay its final decision and the implementation date, and carried out a great deal of consultation with stakeholders both before and after the regulation was finalized. The ministry did a good job of communicating new developments by notifying interested parties by email, updating the proposal and decision notices, holding workshops and setting up a help line.

MOEE has established a multi-stakeholder group to provide advice on improving the program, including future revisions to the substance list and reporting thresholds contained in the Guideline. The ECO encourages MOEE to provide opportunities for broader public and industry comment on any proposed revisions. The Guideline is a "policy" under the *EBR*, and as such environmentally significant proposed amendments should be posted on the Environmental Registry for public comment.

Any monitoring and reporting system must strike a balance between timeliness, usability, cost, reliability of data, need for interpretation and explanation, and public accessibility. There will be

costs to industry, but the program should lead to environmental benefits, depending on how MOEE employs the information. MOEE has attempted to strike a good balance, has already taken many measures to address concerns, and appears willing to fine-tune the program as it is implemented.

Review of Posted Decision:
MOEE's Hazardous Waste Charge Initiative
(O. Reg. 501/01 amending Regulation 347 of R.R.O. 1990)

Decision Information:

Registry Number: RA01E0003	O. Reg. 501/01 Filed: December 18, 2001
Proposal Notice: July 5, 2001	O. Reg. 501/01 Gazetted: January 5, 2002
Decision Notice: December 18, 2001	O. Reg. 501/01 in effect: January 1, 2002
Comment Period: 60 days	Number of Comments: 25

Description:
Ontario's hazardous waste is managed under Regulation 347 of the *Environmental Protection Act.* Regulation 347 sets out requirements for the handling, storage, management and disposal of liquid industrial and hazardous wastes, and also includes a manifest system for tracking these wastes from the point of generation to final disposal. Regulation 347 also sets out the requirements for generator registration and defines responsibilities for generators, carriers and receivers of liquid industrial and hazardous waste in the province.

In December 2001, MOEE amended Regulation 347 through O. Reg. 501/01 in order to achieve two purposes. First, O.Reg. 501/01 implements a program of annual re-registration for generators of hazardous and liquid industrial waste ("generators"). Second, the regulation will allow MOEE to recover the ministry's program costs related to the management of liquid industrial and hazardous waste in Ontario. The costs would be recovered through a charge imposed on generators who produce these wastes.

Before O. Reg. 501/01, generator registration was a one-time requirement met through submitting a Generator Registration Report ("GRR") to MOEE. Registration was not required again unless there was a significant change, such as a change in company name or an addition of registerable wastes. According to MOEE, this resulted in many "outdated" or "dormant" registrants. Now under the new regulatory requirements, generators must submit this information to MOEE annually whether or not there are any process changes.

The second purpose of the regulation, ministry recovery of program costs, is to be achieved through implementation of a Minister's Requirement for Hazardous Waste Fees ("Waste Fee"). Currently, generators are not charged directly for services received from the province related to management of these wastes. The services for which MOEE proposes to recover costs from industry include:

1. A Hazardous Waste Information System.
2. Abatement and enforcement activities to ensure appropriate and responsible hazardous waste management practices.
3. The development of standards, policies, guidelines, regulations, and legislation related to hazardous waste.
4. The operation of the Spills Action Centre.
5. Public education, awareness, and communication.

Under the new program, waste generators who are currently required to register their liquid industrial and hazardous waste under Regulation 347 would be subject to the annual re-registration requirement and an annual re-registration charge (see Basic Fee below). Municipal household hazardous waste depots and soil remediation sites would be exempt from the charge (but not the annual re-registration requirements).

Generators in Ontario, as well as those out-of-province generators that send their wastes to Ontario for disposal, will be subject to a charge for their annual registration commencing January 1, 2002. The fee structure (unchanged from the proposal) will consist of three components:

1. Base Fee - $50. Charged to all generators for each registered site at the time of registration.
2. Manifest Component - $5 for each manifest used to ship waste off-site for treatment or disposal.
3. Tonnage Component - $10 per tonne of hazardous waste generated by all primary generators.

Implications of the Decision:
There are three main impacts of this decision. First, the requirement for annual re-registration of generators should assist in keeping waste data current. Second, the charge requirement should allow the ministry to recover its hazardous waste program costs. Third, the cost recovery regime may provide an incentive to generators to look at 3Rs alternatives for their wastes. Furthermore, the final design of this initiative raises a number of issues, including concerns about the quality of information generated, how it is gathered and its comparability to U.S. data.

Concerns about information on overall quantities and types of hazardous wastes. The new requirements for annual generator re-registration are intended to provide clearer information on quantities and types of hazardous waste generated. Some industry commenters were of the view that a program of regular re-registration of hazardous waste by generators would provide a method of keeping waste data current. Other industry commenters were of the view that the information on annual waste generation for reporting would be redundant, as it is already available on the waste manifest (Copy 1) currently sent to MOEE. Moreover, these industry commenters suggested that MOEE should consider requiring the submission of annual waste generation reports after the calendar year in which waste is generated to reflect actual waste disposed. The commenters noted that other jurisdictions, such as the U.S. (discussed below), do this. Reporting actual rather than expected waste quantities makes sense, as one industry commenter pointed out.

An environmental group strongly supported the annual generator registration initiative in principle, but had concerns about its implementation, e.g., the proposed regulatory text (s. 18(1) of the amended regulation) does not specify the contents of the annual Generator Registration Reports (GRR). The group argued that these reports should be required to include the following information regarding each waste generating facility:

- Location and district name;
- Industrial sector (via three digit SIC code);
- Total hazardous and liquid industrial waste generation;

- Total hazardous waste and liquid industrial waste generation broken down by waste class, code, and type;
- The fates of all wastes generated, broken down into on-and off-site fates, and within these categories amounts sent to: landfill; incineration; energy recovery; physical, chemical, or biological treatment; sewer disposal or transfer to sewage treatment plant; dust control; land application; underground injection; storage; or recycling.

Further, this commenter urged that in the case of off-site fates, total amounts transferred to each receiving facility also should be reported.

Although the amended regulation does not specify the contents of annual GRRs, MOEE's generator registration guidance manual does. Generators are required by the amended regulation to comply with the manual (s. 18(2) of amended regulation). The manual requires the reporting of many, but not necessarily all, of the items identified above by environmental group commenters. A key element missing from MOEE's manual list is hazardous waste and liquid industrial waste streams destined for recycling activities. These waste streams have for some years been exempt from *EPA* requirements for approvals, registration, and manifest requirements because of section 3(2) of Regulation 347. The purpose of the exemptions has been to make hazardous waste recycling activities more economically competitive with disposal. The new amendments arising from O. Reg. 501/01 do not alter these exemptions. In addition, the new requirements may not provide clearer information on quantities and types of hazardous wastes because the MOEE guidance manual requires only reporting of waste quantities *expected* to be generated rather than *actual* waste quantities generated.

Continued need for information on management and quantities of on-site wastes. MOEE stated that the amended regulation does not introduce new policy on waste streams requiring registration (including on-site waste streams, which are estimated to be 40 per cent of the provincial hazardous waste total). According to the ministry, on-site management activities, including incineration and sewer discharges have the potential for off-site impacts and that is why MOEE has required registration of on-site wastes as noted in the manual since 1985. However, comments from an environmental group highlighted gaps in the available information regarding hazardous waste generation and fates, particularly pertaining to on-site disposal. The same advantages and disadvantages of the new regulation (e.g. ,information comprehensiveness), noted in the preceding issue, also appear to apply to on-site wastes.

Comparability of MOEE data to US data. Comparability of US and MOEE data is important because of the significant cross-border movement of hazardous waste. The *Resource Conservation and Recovery Act* ("*RCRA*") requires the United States Environmental Protection Agency ("USEPA") to establish and promulgate standards regarding record-keeping on, and reporting of, hazardous wastes. *RCRA* requires hazardous waste generators to submit reports to the USEPA and the state governments at least every two years on the following matters:

- Quantities and nature of hazardous wastes that have been generated during the year;
- Disposition of these hazardous wastes;
- Efforts undertaken during the year to reduce the volume and toxicity of waste generated; and
- The changes in volume and toxicity of waste actually achieved during the year in comparison with previous years.

RCRA also requires the USEPA to set standards for maintaining records of how hazardous wastes are treated, stored or disposed of.

The USEPA and the states also use the data collected and reported for programmatic, regulatory, and trend analysis needs. *RCRA* information is also used for waste activity monitoring, compliance monitoring, technical assistance, program planning, waste minimization, and other program activities undertaken by USEPA and the states. This information is available on-line to industry and the public and can be searched and processed in an interactive manner subject to any claims of confidential business information made by a reporting generator or treatment, storage or disposal facility at the time the information is provided to USEPA.

In summary, the key remaining concerns with MOEE's initiatives are:

- the reporting of estimates, rather than actual hazardous waste generation;
- the continuing lack of capture of information about some recycled hazardous wastes; and
- that MOEE's information collection and reporting does not match that of the USEPA.

Public Participation & *EBR* Process:

MOEE received 25 submissions on the hazardous waste charge initiative during the 60-day comment period (10 from industrial associations, 14 from individual companies, and 1 from an environmental group). In addition to the *EBR* notice and comment process, MOEE held two information sessions during this period. Representatives from major affected stakeholders attended the sessions (26 individuals in attendance).

Generally, industry associations and individual companies supported the principles but not the particulars of annual re-registration and cost recovery. Regarding annual re-registration, some generators supported "regular re-registration" as a method of keeping waste data current, while other generators expressed concern that the frequency of re-registration would be too onerous. Several generators supported changing the re-registration requirement to once every three years. MOEE was of the view that there is a need to have several years of accurate, up-to-date, annual re-registration data in order to evaluate whether the frequency of re-registration could be reduced in future. In this regard, the ministry has committed to reviewing the program within a 3-5 year timeframe. As discussed above, the environmental and labour groups supported annual re-registration but argued for greater public access to information on waste generation by type, total waste generation, destination, and fate of wastes registered. MOEE did not comment in the decision notice on these submissions of the environmental and labour groups.

The environmental group representative commented that the proposed regulatory text (s. 18(3) of the amended regulation) is unclear about the nature of the information that is to be made available to the public on the MOEE Web site. Specifically, the commenter believes it is unclear if any information is to be posted beyond the following four categories: generator name; date of posting; generator registration number; and waste class identification number.

According to the environmental and labour group commenters, such limited information would be of marginal value to the public. In the view of these commenters, the ministry's Web site postings should include all information provided through the generator registration process, including: industrial sector, total waste generation, total of each waste generated, and total

amounts of wastes sent to each fate. These commenters provided many suggestions about improving information quality and access, e.g., that MOEE adopt an approach to public access like that of the National Pollutant Release Inventory or the Commission for Environmental Cooperation.

Regarding cost recovery, generators generally opposed one or more of the cost components that make up the charge. The ministry responded that it needed to ensure that costs are recovered from those responsible for generating such wastes. MOEE categorized, in the decision notice, the comments received and responded to them, using the following topics:

1. *Fee versus tax,* e.g., whether the fee was in reality a tax unrelated to cost recovery.
2. *Services Provided to Stakeholders,* e.g. whether the services provided are for the benefit of generators only or all Ontarians and, if the latter, whether they should be funded through general revenue rather than through cost recovery from generators.
3. *Program Review,* e.g., whether MOEE's commitment to review the program within 3-5 years should be set out in the regulations.
4. *Unlevel Playing Field,* e.g., whether MOEE has created an unlevel playing field by requiring some generators to pay the fees because they are subject to generator registration and manifesting requirements while exempting others from paying the fees because they are not subject to these requirements.
5. *On-Site Activities,* e.g., whether on-site waste management should be exempt from the charge because there is a decreased risk to the environment from these activities because there is no movement of wastes on public roads.
6. *Soil Remediation,* e.g., whether soil remediation should be exempted from the fee requirements.
7. *On-Site Wastewater Treatment, e.g.,* whether on-site wastewater treatment should be exempted from the proposed charge for these activities.
8. *Recycling, e.g.,* how recycling would be defined or determined.
9. *Waste Management Facilities and Transfer Stations* e.g., whether waste management facilities and transfer stations should be exempt from the charge since they are not the original waste generators.

SEV:

The ministry's consideration of its Statement of Environmental Values in this decision was explained in the following manner. First, from an environmental protection and resource conservation perspective, MOEE states that implementing the initiative would cause waste generators to re-evaluate the liquid industrial and hazardous waste that they produce and look at other alternatives to try and reduce the amount of waste generated in order to reduce or avoid the charge. MOEE also noted that the initiative contains a recycling incentive in that no tonnage charge is imposed for hazardous wastes sent for recycling. As a result, the overall effect of the initiative could be that less hazardous waste is generated, managed, and disposed, and more goes to recycling. Second, from an ecosystem perspective, MOEE was of the view that implementing the charge will cover the costs of the ministry's "cradle-to-grave" hazardous waste program and ensure continued administration and enforcement of Regulation 347.

Other Information:

In December 2001, MOEE proposed a number of further initiatives. These included:

- draft regulations that would phase-out the use of hospital incinerators, set requirements for the handling, transportation, and treatment of biomedical waste, and require the destruction of 99,000 tonnes of PCBs currently in storage; and
- release of a discussion document on possible pre-treatment requirements for hazardous wastes prior to land disposal.

MOEE has indicated that it will continue to release details of its hazardous waste law reform over a 2-3 year timeframe from December 2001.

ECO Comment:

There are three main impacts of this decision. First, the imposition of a requirement for annual re-registration of generators of hazardous and liquid industrial waste should assist in keeping hazardous waste data current. Second, the charge requirement should allow the ministry to recover its hazardous waste program costs. Third, the cost recovery regime may provide an incentive to generators to look at 3Rs alternatives for their wastes. It is too early to tell whether these three intended benefits will be realized.

Questions also remain about the adequacy of information that will be acquired by MOEE, its public availability, and the uses to which it may be put. Clearer information on quantities and types of hazardous may not arise if MOEE continues to rely on its existing manual, which calls for the reporting of waste quantities *expected* to be generated, rather than *actual* waste quantities generated. Further, the information may not be complete, because some recycled hazardous wastes will not be included.

Section 18(3) of the new regulation is unclear. It states that information to be posted on the MOEE Web site includes "applicable waste numbers accepted by the Director." "Waste numbers" could refer to waste class identification numbers or waste quantities/volumes. This is ambiguous and inconsistent when compared with the MOEE manual, which speaks of waste volumes generated. Accordingly, MOEE should clarify the content of the information that will be posted on the MOEE website and made available to the public as per section 18(3). In comparison, USEPA biennially collects information regarding the generation, management, and final disposition of hazardous wastes regulated under *RCRA*. The information is reported to Congress, the public, government agencies, and the regulated community in *The National Biennial RCRA Hazardous Waste Report*. USEPA and the states also use the data collected and reported upon for programmatic, regulatory, and trend analysis needs. It may be appropriate for MOEE to consider adoption of the information-collection and reporting approach used in the United States under *RCRA*.

MOEE anticipates that the waste charge will lead to waste reduction. One commenter suggested that the charge would need to be greater than cost recovery if it is to have a significant impact on waste generation and disposal. If the charges are set too low they may have no effect on moving generators toward 3Rs options. Further, this intended result – more 3Rs – can only be confirmed if accurate and detailed trends can be generated from the data, something that remains to be seen.

To encourage more recycling, MOEE has committed to working with interested stakeholders to develop a list of eligible recycling sites and to post them on the ministry website. MOEE should consult with a broad range of stakeholders and should ensure that sites are chosen based on their meeting state-of-the-art recycling standards. The credibility and effectiveness of the "recyclable materials" exemptions may depend on the success of this MOEE commitment, because mismanaged recycling activities can pose as much of a threat to public health and the environment as mismanaged treatment, storage, or disposal activities. This was highlighted in the summer of 1997 when large quantities of stored PVC plastic burned in the fire at the Plastimet facility in Hamilton. In 2002, MOEE restated its commitment to maintaining control of a list of recycling facilities and conducting reviews prior to placing any facility on the list.

The ECO notes, however, this initiative represents a significant improvement over the previous registration and reporting system. Furthermore, this initiative moves MOEE's hazardous management program closer to a user-pay system, i.e., those who generate the costs are charged for them. 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.

Review of Posted Decision:
Drinking Water Protection —
Smaller Water Works Serving Designated Facilities
(O. Reg. 505/01)

Decision Information:

Registry Number: RA01E0013
Proposal Posted: July 10, 2001
Decision Posted: December 28, 2001
Comment Period: 30 days
Number of Comments: 32
Regulation Filed: December 19, 2001

Description:

O. Reg. 505/01 is a new regulation under the *Ontario Water Resources Act* that sets out water testing and treatment requirements for smaller water works that serve designated facilities. The stated purpose of this regulation is to require that facilities in the broader public sector (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 take adequate precautions to provide safe drinking water. The regulation applies to owners of water systems supplying water to institutions that serve susceptible populations such as seniors and children because these water consumers 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.

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.

A designated facility is defined as a delivery agent care facility (such as an emergency hostel service), a health care facility (including public and private hospitals, psychiatric facilities, nursing homes and halfway houses), a public or private school, a social care facility (including day nurseries, children's residences, emergency shelters and sheltered workshops), and a college or university.

The regulation sets out a minimum level of treatment for subject water treatment or distribution systems. The owner of a water treatment or distribution system 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;
- water treatment equipment is provided according to the requirements set out in the regulation;
- the water treatment equipment is in operation whenever water is being obtained or supplied;

- the water treatment equipment is operated in a manner that achieves the capabilities required by the regulation; and
- the water treatment equipment is properly maintained only by trained persons.

The owner of a water treatment or distribution system is also required to keep written operating instructions, clearly marked adequate supplies of chemicals and replacement parts near the equipment.

O. Reg. 505/01 sets out the required standards 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 groundwater source must have adequate disinfection equipment and systems using a surface water source must have adequate filtration and disinfection equipment. The regulation also provides for:

- submission of a professional engineer's report certifying that a water treatment or distribution system using groundwater complies with the regulation (this requirement does not apply to a system using surface water as a surface water system requires separate *OWRA* approval);
- weekly flushing by operators of plumbing in systems serving schools, private schools or day nurseries;
- required periodic checks of all water treatment equipment to confirm proper functioning, including daily checks for chlorine residuals where chlorination is used;
- mandatory sampling and analysis for microbiological and chemical parameters by an accredited laboratory (requirements for microbiological testing were required to be in place within 60 days of the regulation coming into effect);
- immediate mandatory 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, along with confirmation that appropriate corrective action has been taken;
- mandatory corrective action in relation to adverse water quality as specified in the schedule to this regulation;
- posting of a warning notice at designated facilities by the owner of a water system, where the owner does not comply with sampling and analysis requirements, does not take corrective action for adverse water quality, or takes a corrective action which requires water to be boiled or not used; and
- making information available to the public, including reports summarizing water sample analysis and annual reports to the ministry.

Implications of the Decision:

O. Reg. 505/01 establishes a thorough regime of water testing and treatment to protect the health of vulnerable groups served by smaller water works in Ontario. However, the cost and complexity of meeting the requirements of the regulation may prove quite difficult for the owners of some of these smaller water systems. In conjunction with introducing the regulation, the

government has made some attempts to address the problem of financial resources. According to an MOEE news release, the Ministry of Education has consulted with school boards affected by the regulation and will invest nearly $13 million to help meet the water treatment requirements. Likewise, the Ministries of Community and Social Services and Health and Long Term Care are working with their stakeholders on implementing the regulation.

MOEE has also produced substantial new published material to support the implementation of the new requirements in O. Reg. 505/01, including "Drinking Water Treatment: A Guide for Owners of Private Communal Works and Other Small Water Supply Systems" (December 2001), and "A Kit for Water Works Owners – Ontario Regulation 505/01" (December 2001). The guide for owners includes plain-language information about managing a drinking water system, background on available water treatment technologies, and some guidance on how to select the appropriate treatment technology. The kit for water works owners provides additional detail including: a glossary of terms; a description of the responsibilities of water works owners under the regulation; a guide to sample collection methods; information on training for water works operators; an example of a compliance calendar to help organize sampling, analysis and reporting requirements; a package of forms needed to comply with the regulation; information on accredited labs; a list of public health units; and a sample annual report.

Notwithstanding the supporting material available, concerns remain about the implementation of the new requirements. MOEE has received many inquiries since the regulation came into force that indicates affected schools and care facilities require further clarification relating to various aspects of the regulation. Issues needing clarification 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.

MOEE appears to be open to the use of alternative technologies in disinfecting water and monitoring facilities. The guide for water works owners produced by MOEE does not limit its discussion on 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 stipulates standards of disinfection that must be met whether by chlorination or other disinfection equipment. O. Reg. 505/01 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.

Public Participation & *EBR* Process:
MOEE provided the minimum 30-day comment period on the Environmental Registry for this regulation. However, MOEE had previously consulted between August and November 2000 on the policy proposal that resulted in the introduction of this regulation. An 83-day comment period had been provided for a policy proposal entitled "Protecting drinking water for small

waterworks in Ontario" (Registry Number PA00E0027), which was accompanied by a discussion paper. This proposal contemplated a drinking water protection regime that might apply to establishments such as boarding houses, restaurants, tourist lodgings, assembly halls, churches, camps, gas stations and shopping centers, as well as schools, hospitals, social care facilities and day nurseries. Many of these types of establishments were ultimately not included in the regulation.

MOEE has never posted a decision notice for the earlier policy proposal, but according to a media backgrounder, MOEE received more than 100 written responses to the August 2000 discussion paper. Also, MOEE held four public meetings to gain further public input. According to MOEE, stakeholders indicated that a regulatory framework for designated facilities was required that should reflect the nature of smaller water systems. Because MOEE has not posted a decision notice, the ECO has not received copies of the public comments on the policy proposal from MOEE.

In response to the July 2001 Registry proposal notice for O. Reg. 505/01, MOEE received 32 comments from a broad range of stakeholders, such as school boards, group homes, municipalities, health units, engineers and residential care associations. While the comments included a wide range of concerns and suggestions relating to the regulation, some common themes emerged. For example, a number of commenters had interpretation questions about the extent to which the regulation would apply to small care facilities located in private residences, about the level of training required to be a "trained person" under the regulation, and whether teachers would have access to schools in off-hours if trained staff were unavailable to make water system checks on those days.

Some comments addressed the financial and technical difficulties in complying with the regulation. Four commenters expressed the need for increased funding from the Ontario government to meet the costs of the new drinking water protection regime. Seven commenters suggested that the provisions could make it impossible to provide social care in rural areas because the proposed regulation would make water treatment financially prohibitive. A number of commenters also noted that parochial schools established by Old Order Mennonite and Amish communities in Ontario would lack the technological infrastructure to support compliance with the new regulation.

Other submissions raised broad concerns about the regulation. Two commenters argued that MOEE does not have adequate staff to enforce the new regulation. Several commenters suggested that, in spite of the introduction of this regulation, a comprehensive source water protection strategy is still needed in the province. There was also criticism that the regulation failed to address the many small non-institutional water systems used by establishments such as restaurants, lodges, camps and motels that tend to be neglected and have problems.

A number of commenters raised other concerns and issues such as:

- an overly broad definition of "water for human consumption";

- the difficulty of having trained staff available for monitoring all locations;
- the required boil-water time of five minutes instead of the accepted one minute;
- changes to provisions relating to engineers and potential liability;
- the flushing requirement that could be a problem for systems discharging into an aging septic system;
- the use of alternate technologies such as ultraviolet disinfection instead of chlorination; and
- dealing with potential degradation within water systems exempted from O. Reg. 505/01 because they are supplied by systems covered under O. Reg. 459/00.

MOEE noted some of these comments in its decision notice for this regulation, and made a number of changes to the regulation in response to submissions received. The definition of "open" was modified to the extent that it applies to schools, so that a school is not considered open if only teaching, custodial or security staff members are present. The requirement that trained persons check equipment on a daily basis was changed to require only weekly checks to allow facilities to share trained staff. Also, the definition of "trained person" was made more specific. New provisions were added to the regulation to permit the use of remote chlorine residual and turbidity analyzers and alarms to reduce the need to have trained staff at every site to take daily measurements. MOEE also changed some phase-in requirements relating to chemical testing and notices of compliance.

SEV:
MOEE's SEV consideration document noted that the regulation will not affect environmental protection. The regulation will protect public health by ensuring that minimum levels of treatment to supply safe drinking water are met with treatment requirements varying according to whether sources are from ground or surface water. MOEE also submitted that ecosystem needs and uses of the water will not be adversely affected by the regulation because it will not affect the function of ground and surface water in the hydrologic system and the impacts of other uses on surface water.

Finally, MOEE concluded that this regulation will not affect the protection and conservation of Ontario's surface and groundwater resources. MOEE indicated that, although the regulation does not contain measures for conservation, it does not interfere with other provincial regulations or policies aimed at ensuring the protection and conservation of both surface and groundwater in Ontario.

Other Information:
This regulation is part of MOEE's Operation Clean Water initiative that was launched in response to the May 2000 tragedy in Walkerton, Ontario. Other elements of Operation Clean Water include O. Reg. 459/00, Drinking Water Protection — Larger Water Works and the proposed *Nutrient Management Act*. It should be noted that O. Reg. 459/00 was renamed Drinking Water Protection — Larger Water Works by O. Reg. 506/01 as an administrative

change to prevent confusion between these two regulations. It was originally entitled "Drinking Water Protection."

On April 5, 2002, MOEE posted a proposal notice for proposed amendments to Regulation 903 under the *OWRA* (Registry No. RA02E0007), relating to standards for the construction, maintenance, tracking and abandonment of all types of water wells.

ECO Comment:
Improved drinking water protection for smaller water works in Ontario is necessary and important. O. Reg. 505/01 is an important first step towards 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 available useful background materials 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. Also, MOEE has not addressed many concerns expressed in the comments responding to the Registry notice, such as the question of whether MOEE has adequate staff to enforce the new regulation or the concern that the regulation uses an overly broad definition of "water for human consumption."

As noted above, concerns have been expressed about the implementation of the new requirements. Further clarification is required concerning various aspects of the regulation, such as: the extent to which distribution systems must be flushed; whether both domestic hot water and cold water systems 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.

Although MOEE had previously consulted on the policy proposal for this regulation, it might have considered offering a comment period longer than the minimum 30 days, given the complexity of the regulation.

Review of Posted Decision:
Control Orders for Sudbury Smelters

Registry numbers: IA01E1207 and IA01E1208
Proposals Posted: September 11, 2001 Comment period: 60 days
Decisions Posted: February 12, 2002 Number of Comments: 6

Description
In February 2002, MOEE 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 require 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 the allowable limits of annual SO_2 emissions by 34 per cent by December 31, 2006
> -put in place a public notification system on poor air quality days by April 1, 2002
> -take over the operation and maintenance of the existing Sudbury air quality monitoring network by January 1, 2003.

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.

Implications of the Decision
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. This is because the major focus of past acid rain control efforts for these smelters has been regional ecosystem protection, i.e., reducing total annual acid loadings. Very substantial emission reductions were achieved between 1980 and 1996: INCO cut its annual emissions by over 70 per cent by rejecting the sulphur-bearing ore fraction and by investing in new smelting technology and an acid plant. Falconbridge cut its annual emissions by 57 per cent by modifying its roasters and electric smelting furnace, and by adding an acid plant. 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 in Ontario).

Ground-level peak concentrations to be cut
For Sudbury residents, these new control orders represent a significant reduction in allowable short-term peaks of ground level SO_2. Beginning in April 2002, Sudbury's

SO_2 peaks (averaged over one hour) may not exceed 0.34 ppm at ground level. Since 1983, the two smelters have been allowed to emit SO_2 off-property at a ground level concentration of 0.5 ppm, which is double the allowable Ontario Air Quality Criterion of 0.25 ppm applicable everywhere else in Ontario. MOEE originally set this special limit for the Sudbury smelters because of smelter technology limitations. But 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 increased 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
While short-term concentration peaks of SO_2 are clearly important to local health and vegetation, the overall 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 page 111 of this year's ECO annual report for more information on nutrient depletion in forest ecosystems).

These 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, INCO's SO_2 emission cap remains at 265,000 tonnes per year, and Falconbridge's SO_2 emission cap remains at 100,000 tonnes per year. These caps have been in place since 1994, under the Acid Rain Regulation.

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's decision notice states that Ontario has a new emissions trading system for SO_2 and NO_x, but that the application of the trading system to the industrial mining sector is still under review. MOEE also notes that the emission trading program should not impact on actual SO_2 reductions in the Sudbury area.

Public Participation and *EBR* Process
The ministry provided a 60-day comment period on these control orders, which is an appropriate period of time given the importance of these emission sources in the Sudbury

region. MOEE also held five open houses over a two-week period in the Sudbury area to discuss the proposed control orders. The open houses included evenings and weekends to accommodate a variety of schedules. The ministry also issued several news releases and media backgrounders in September 2001 to help provide context for the proposed control orders.

The ministry received six written comments in response to the Registry postings. (Although MOEE did not forward copies of these comments to the ECO due to the labour dispute involving the Ontario Public Service in the spring of 2002, one commenter copied our office directly.) MOEE noted that most commenters believed the companies should not be given until the year 2015 to meet the provincial standards for ground level concentrations of SO_2, and that the interim target of 0.34 ppm SO_2 was not low enough.

One environmental organization commented that the SO_2 loading reduction of 34 per cent was welcome but still not nearly enough to protect all sensitive ecosystems. They noted that a federal-provincial task group had concluded in late 1997 that further emission cuts of 75 per cent (beyond current commitments) would be needed to protect all of eastern Canada's sensitive ecosystems from acid rain.

The same environmental organization also noted that, in addition to SO_2 emissions, the two Sudbury smelters are major sources of toxic substances such as nickel and arsenic, and that MOEE acknowledged as far back as 1997 that its air quality standards for these two substances are outdated. The environmental group noted that the two smelters submitted 1999 reports to the National Pollutant Release Inventory, documenting INCO's air emissions of 84 tonnes of nickel, 80 tonnes of lead and 64 tonnes of arsenic. The Falconbridge smelter reported air emissions of 12 tonnes of nickel and seven tonnes of lead. MOEE responded that it is currently reviewing many existing air emission standards, including nickel and arsenic, but did not commit to a timeline for updating standards for these substances. Instead, MOEE stated that it expects emissions of nickel and arsenic to be reduced as a sideeffect of SO_2 emission reductions.

Statement of Environmental Values
(The ECO did not receive a copy of the SEV consideration due to the labour dispute involving the Ontario Public Service in the spring of 2002.)

Other Information
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. On September 12, 2001, MOEE released a report summarizing the findings of previous sampling. The report confirms that in Sudbury and surrounding areas, metals are present in concentrations exceeding the ministry's *Guideline for Use at Contaminated Sites*. The highest metal concentrations are typically found in the upper soil layers, indicating air emissions as the source. MOEE made these announcements

through news releases and provided information at its September 2001 open houses in Sudbury, but did not post the new soil sampling program on the Registry.

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, using the results of the new sampling. Both MOEE and the Medical Officer of Health believe there is no expected immediate risk to human health in the Sudbury area.

ECO Comment

These orders represent important environmental improvements, since they require significant reductions in both long-term acid loadings in eastern Canada as well as in local short-term SO_2 concentration peaks in Sudbury. The reductions in total loadings 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 SEV commitment 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 progress of emission reductions at these smelters, and more generally about the status of acid deposition ecosystem impacts and control activities in Ontario.

Review of Posted Decision:
Lakeview Thermal Generating Station Emission Limits

Decision Information:
Registry Number: RA01E0008
1st Proposal Posted: March 26, 2001 — Comment Period: 30 days
1st Decision Posted: July 3, 2001 — Number of Comments: 8

Registry Number: RA01E0014
2nd Proposal Posted: July 3, 2001 — Comment Period: 30 days
2nd Decision Posted: October 24, 2001 — Number of Comments: 15

Description

Background
Lakeview Generating Station is a very large coal-fired generating station in Mississauga, on the shore of Lake Ontario. Built in the 1960s, it is the oldest of Ontario's fossil fuel power plants and is a significant air pollution source. 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 of 2000, OPG announced that Lakeview was one of its first candidates for "decontrol," or sale, along with the Lennox station in eastern Ontario.

In May of 2000, the provincial government announced a moratorium on the sale of all coal-fired generating plants pending a review of environmental protection options to be put in place prior to the start of a competitive electricity market. Later in 2000, the Premier told local officials that the Lakeview plant would have to be converted to natural gas before being sold, to reduce air emissions.

Closing the Lakeview plant altogether was not an option. The Lakeview plant provides a reliable electricity supply for the nearby Toronto area during peak periods. The Independent Electricity Market Operator (IMO) reports that if some of the Darlington and Pickering units were not available during summer peak period, Lakeview would be necessary to maintain system reliability in the GTA.

After April 30, 2005, this power plant will be required to meet emission limits of a gas-fired generating station. Effectively, this new regulation requires the Lakeview Thermal Generating Station to cease burning coal by April 30, 2005. 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, but the plant will be permitted to exceed the cap under special circumstances.

Implications of the Decision
Lakeview's current emissions are considerable: the plant accounts for about 26 per cent of overall SO_2 emissions in the Greater Toronto Area (GTA) 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. More than half of the mercury emitted from Lakeview is ionic mercury, which tends to be deposited within 50 kilometres of the point of origin.

In the long term, MOEE's decision will improve emission rates for Lakeview. 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, and will, at the same time, 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.

Unfortunately, MOEE retreated from its earlier March 2001 proposal that the site should be equipped with *efficient* gas technology by 2005. The final regulation requires a 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 March 2001 position, then 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.

While the new regulation will improve Lakeview's emission <u>rates</u> by 2005 (measured in kg of NO_x/Megawatt-hour), there is, however, no certainty of reductions in <u>total</u> emissions. 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. Under the new emission trading rules for the electricity sector, Lakeview's emissions after April 2005 will be included in the overall emission cap on independent power producers. Lakeview will be issued a yearly NO_x allowance, and will be able to purchase emission reduction credits if it exceeds its allowance.

For the next few years, until April 2005, MOEE's decision effectively cuts Lakeview's NO_x emissions by imposing an emissions cap on the facility which is 40 per cent below what the plant emitted in the year 2000. The plant will be permitted to exceed this interim cap only under a "reliability must run" contract specified by the *Electricity Act*, or if the Independent Electricity Market Operator (IMO) asks the plant to increase power to help maintain electricity supply. Lakeview's owners and operators will have to report the quantities of these exceedances to MOEE annually. Low-NO_x burners have recently been installed on the operating units at Lakeview to help reduce emissions.

Public Participation and *EBR* Process
MOEE held two rounds of consultations. On March 26, 2001, MOEE posted a notice on the Registry to limit emissions from the Lakeview power station. This first proposal

notice did not include a draft regulation, but did state that "After April, 2005 any future electricity generation at the Lakeview site would be required to meet the emissions performance of *efficient* natural gas technology" (emphasis added). MOEE provided a 30-day comment period for this first notice, and received eight comments.

Most commenters supported the ministry's proposal to convert Lakeview from coal to natural gas. Environment Canada commented that the proposal would improve air quality if it were part of a province-wide plan to reduce a whole suite of air pollutants, but that it would not necessarily improve overall Ontario emissions if Lakeview's coal phase-out meant shifting generation to other coal-fired stations. OPG's comment stated that it "is supportive of government direction regarding the Lakeview site," but also referred to studies asserting that Lakeview specifically and OPG's plants generally were only small contributors to ground level ozone problems in southern Ontario and the GTA.

On July 3, 2001, MOEE posted a decision notice for the first posting, explaining that the ministry was "revisiting the initiative," in part due to comments received, and referring readers to a new proposal notice, again with a 30-day comment period. This time MOEE's description omitted the word "efficient" when describing the emissions performance that the gas-fired electricity generating station would have to meet. MOEE did include a draft regulation with this proposal.

The ministry's second proposal also added a provision that would have required Lakeview to purchase NO_x emission allowances from the U.S. Ozone Transport Commission NO_x Budget Program in Pennsylvania or New York if there are NO_x emissions above the fixed cap. This provision was removed in the final regulation since Ontario's own emission trading system had been established by this time.

MOEE received 15 comments on its second proposal. A number of commenters (especially Environment Canada, local municipal governments and environmental groups) were disappointed that MOEE had weakened its March 2001 proposal and would no longer require efficient natural gas technology at the site. They argued that this would result in much higher NOx emissions than necessary, and would also produce much higher CO_2 emissions per unit of electricity generated.

Commenters also noted that under the new rules of an open electricity market, new owners of the Lakeview facility may well decide to increase its electricity production from its current low levels of 20 to 30 per cent of total annual potential. Environment Canada raised the concern that under the new rules Lakeview's generation rate could rise to 90 per cent of capacity, and predicted that if Lakeview were to increase its generation to just 50 per cent of its capacity while burning gas in the old inefficient boilers, then NO_x emissions would be greater than the 1999 levels, and CO_2 emissions would be twice as high as 1999 levels.

A number of commenters recommended that if the facility won't be required to install new gas turbines, then at least the facility should be required to switch to natural gas

much sooner than 2005. By way of comparison, they noted that OPG required less than a year to switch the Lennox Generating Station to natural gas.

MOEE posted its decision notice on October 24, 2001. The ministry briefly noted the public concerns with the weaker environmental approach, but confirmed that the facility would not be required to install efficient gas technology. MOEE said it did not want to pre-determine the technology and business options for the station's future use. MOEE did not provide much new information to refute the criticisms of commenters.

Statement of Environmental Values
MOEE submitted an SEV briefing note which stated briefly that the new regulation would contribute to environmental protection, the ecosystem approach and resource conservation.

Other Information
This decision has links to other recent MOEE decisions, including the new emission limits and trading system for the electricity sector, and the new rules requiring industrial facilities to monitor and report their air emissions.

ECO Comment
Several positive aspects of this decision deserve note. Pursuant to past ECO guidance, MOEE took extra care and used two successive Registry proposals to consult the public on this issue. The ECO encourages all ministries to take this consultation approach, especially when important aspects of the proposal change before the ministry makes a decision.

MOEE's decision also has important positive environmental aspects. In the short term until April 2005, Lakeview's NO_x emissions will be capped significantly below current emission levels, although exceedances will be allowed under special circumstances. In the longer term, Lakeview's conversion from coal to natural gas will improve emission rates for NO_x and CO_2 for the facility, and will eliminate emissions of a number of toxic substances (such as mercury and SO_2) associated with coal burning. If, however, the plant in future is run at higher capacity than in recent years, then total emission loadings of NO_x and CO_2 for the facility may not improve. MOEE missed out on an opportunity to do much more for Ontario's air quality and energy efficiency when it failed to insist on the installation of much more efficient natural gas turbines.

It appears that MOEE decided not to require high efficiency gas turbines because this would increase costs for Lakeview's owners. According to MOEE figures, a combined cycle gas plant requires a capital investment of about $750/kilowatt of capacity, while using the existing boilers at Lakeview for natural gas burning would require an investment of about $20 to $60/kilowatt. Observers have noted that allowing Lakeview to keep its inefficient boilers will mean lower upgrade costs for the facility's new owners. This will improve Lakeview's market value and OPG's profits when the facility is sold.

Some groups are now urging the Ontario government to take a 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.

Clearly, MOEE will need to do more to control smog-causing emissions, since the initiatives taken thus far, such as these controls on the Lakeview power plant and the overall emission cap on the electricity sector, are likely to yield more modest benefits than originally expected.

Review of Posted Decision:
Emission Trading and NO_x and SO_2 Emission Limits for the Electricity Sector (O.Reg.397/01)

Decision Information:

Registry Number: RA00E0004
Proposal #1 Posted: January 24, 2000
Decision #1 Posted: March 26, 2001
Comment Period #1: 30 days
Number of Comments: 36

Registry Number: RA01E0009
Proposal #2 Posted: March 26, 2001
Decision #2 Posted: July 31, 2001
Comment Period #2: 90 days
Number of Comments: 61

Registry Number: RA01E0020
Proposal #3 Posted: July 31, 2001
Decision #3 Posted: October 24, 2001
Comment Period #3: 30 days, later extended to 60 days
Number of Comments: 36

Description

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. O. Reg. 397/01 has set new sector-wide caps on airborne emissions of NO_x and SO_2 from Ontario's coal and oil-fired power plants. It supplements a previous regulation, which sets SO_2 and NO_x emission limits on the combined emissions of the fossil power plants owned by Ontario Power Generation (OPG). The new regulation establishes two-step reductions in emissions, with the first reduction coming into effect at the end of 2001, and the next, more substantial reduction taking effect 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 trading, giving power plants the option either to cut their own emissions directly or to buy emission reduction credits to help meet their new emission limits. The power plants can trade among themselves within their own caps, but they can also buy emission reduction credits from other uncapped industries or organizations that have demonstrated emission reductions.

Emission reduction credits are intended to encourage emission reduction projects that might otherwise not be economical. They are also expected to spur technological innovations, which may then be more widely adopted, with greater environmental benefits. Emission trading systems are often considered best suited for pollutants which 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 the first regulated emission 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 OPG) to meet voluntary NO_x reduction targets in the year 2000.

MOEE also made several closely related announcements on October 24, 2001, the day that this regulation on emission limits and trading was finalized. The announcements helped to clarify and flesh out the ministry's next steps on controlling industrial sources of air pollution.

First, the ministry proposed to impose NO_x and SO_2 emission limits on a range of other industry sectors, including pulp and paper, cement and concrete, iron and steel, petroleum refineries, chemicals and non-iron metal smelters. MOEE posted this proposal on the Registry on October 24, 2001, with a three-month comment period, and stated that negotiations with industry had already begun. MOEE proposes that emission limits on these other sectors might be in place by the year 2004 or even earlier.

Second, MOEE proposed to move up the province-wide targets for reductions of NO_x and SO_2 emissions from the year 2015 to the year 2010. MOEE noted that this would help meet the commitment of achieving the Canada-Wide Standards for ozone and fine particulates by the year 2010. This proposal was also posted on the Registry on October 24, 2001, with a three-month comment period.

Third, MOEE finalized the regulation requiring the Lakeview Generating Station in Mississauga to convert from burning coal to natural gas by April 2005. See page 88 of the ECO Annual Report and pages 71 - 75 of this Supplement.

Key rules of the new trading system

MOEE summarized the key features of the trading system in a clearly written six-page technical description attached as a hypertext link to the decision notice. This document lays out how the ministry will establish emission limits and allocate emission allowances, how credits will be created and used, and how the trading system will be administered. These are some of the key features of the system:

- OPG's first year cap is 36 kilotonnes of NO_x (measured by NO), and OPG can emit more if the utility has purchased emission reduction credits (ERCs) to make up the difference.

- OPG is permitted to exceed its NO_x cap by up to 33 per cent through buying credits, and can exceed its SO_2 cap by up to 10 per cent by buying credits.

- In 2004, emissions from non-utility generators (NUGs) will be capped and will be allocated 10 kilotonnes of NO_x emissions. OPG's cap will be reduced by an equal amount in order to maintain the combined cap. NUGs will be able to sell their allowances to anyone, including OPG.

- A set percentage of emission allowances for both NO_x and SO_2 are "set aside" and can only be used by clean, renewable energy generation such as wind, solar or fuel cells. The set asides are 1 kt/year of NO_x and 4kt/year of SO_2. If portions of this set aside are unused by the end of any given year, they will be returned to OPG until the end of 2007.

- Emission reduction credits cannot be created without the approval of MOEE. To be eligible, emission reductions require a verification report by an independent third party, which indicates whether the emission reduction is surplus, real, properly quantified and unique. The verification report does not guarantee that the emission reduction credit will be approved by MOEE.

- Emission reduction credits are created and measured on a project basis. As long as a specific project at a facility can substantiate emissions reductions, it doesn't matter if overall emissions at the facility are rising.

- Capped emitters must monitor emissions with continuous emission monitors or with a method at least as accurate as continuous emission monitors (CEMs), and approved by MOEE.

The 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. OPG will be required to divest itself of 65 per cent of its holdings by the year 2012. Therefore, Regulation 397/01 includes a staged re-allocation of emission allowances away from OPG to non-OPG electricity generators. By the year 2008, all electricity generators will be competing for emission allowances based on their rate of 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 marketplace, reducing fossil fuel output. If this scenario materializes, actual emissions may fall, although not as a result of this regulation.

Implications of the Decision

This regulation spells out certain new air emission limits for Ontario's electricity sector that should provide more regulatory certainty for this industry through to the year 2010. MOEE states that the regulation will reduce NO_x and SO_2 emissions from the electricity sector, and will provide incentives to other sectors to reduce emissions. The regulation also has many critics, however, who variously point to deficiencies such as cost as a regulatory burden, unfair treatment of OPG's competitors, and environmental weaknesses. The environmental implications are most relevant to this discussion.

Environmental Implications

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. OPG is permitted to exceed its NO_x cap by up to 33 per cent through buying credits, and can exceed its SO_2 cap by up to 10 per cent by buying credits. 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. MOEE has heard from both Environment Canada and the U.S. EPA that the ministry's design does not protect the environment and is not compatible with the Canada/U.S. Ozone Annex.

MOEE has countered that Ontario's fossil 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 emission trades can only occur among a group of players that have a wide range of capacities to reduce their emissions. In contrast, the U.S. trading system operates with 200 coal-fired stations. Because Ontario's power sector has so few players, it needs the ability to trade with other (uncapped) sectors. However, MOEE has begun a process to place caps on a number of other industrial sectors.

Ontario won't meet 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 NO2) to 39,000 tonnes by the year 2007. The cap that MOEE set for all Ontario electricity producers by the year 2007 is 42,840 tonnes. This is a slightly larger cap, since it includes two northern Ontario power plants, Atikokan and Thunder Bay, which are not caught under the Ozone Annex. 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. But under the emissions trading rules allowed under Ontario Regulation 397/01, the electricity sector will be able to emit significantly more (up to 33 per cent more) NO_x in 2007 than contemplated under the Ozone Annex.

Weak SO_2 Cap

A number of commenters raised concerns that Regulation 397/01 will not result in any real reductions in SO_2 emissions, because the cap is very lenient, 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. For example, it is almost 10 per cent more SO_2 than OPG's plants emitted in 1999 or 1998, and about 85 per cent more than OPG's plants emitted in 1996. (OPG's fossil fuel emissions have increased since 1996 because of the shut-down of several nuclear plants.) Moreover, OPG may use emission reduction credits to exceed its SO_2 cap by up to 10 per cent, which could allow SO_2 emissions to rise up to 173.5 kt/year until the year 2007.

Implications for 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. Regulation 397/01 will not reduce these emissions, since its focus is strictly NO_x and SO_2. To reduce its NO_x emissions, OPG will be installing pollution controls (selective catalytic reduction units or SCRs) on two of its eight boilers at the Nanticoke coal-fired power plant, as well as at two boilers at the Lambton plant, for a combined cost of $250 million. The SCR units will cut NO_x emissions from the affected boilers by 80 per cent, but will not control other types of pollutants. Because SCR units are such an expensive investment, it also discourages utilities from later converting those boilers to cleaner burning natural gas. Environmentalists have argued that OPG should instead invest in converting 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, Lakeview Generating Station is the only one of OPG's coal-fired plants that must cease burning coal, by April 2005.

No emission performance standards
In the first proposal for emission limits issued in January 2000, MOEE announced a broad suite of new measures to control air pollution, including emission performance standards (EPSs) for the electricity sector. EPSs would limit the rate of NO_x and SO_2 per unit of electricity produced from fossil plants. These EPSs would apply to any Ontario fossil fuel power plant larger than 25 MW, and significantly, also to any electricity imported from fossil fuel plants in other jurisdictions. MOEE explained that its final regulation did not include this type of regulatory limit, because the U.S. regulatory framework has shifted from rate-based systems to a cap-based system. It is still possible that the U.S. will decide to set an emission rate standard for electricity that is imported into the U.S., but this is not yet the case.

Public Participation and *EBR* Process
MOEE provided very early public notice that it was considering the two key components of this regulation – emission limits on the electricity sector and an emissions trading system. Emissions trading has long been discussed in Ontario policy circles as an option for reducing the costs of pollution control. Ontario Hydro was studying NOx emissions trading as far back as 1991, as part of a multistakeholder group chaired by the Ministry of Energy. In 1996, a Pilot Emissions Trading Program was established in Ontario, with multistakeholder membership and participation by Ontario Hydro and the Ontario Government. In January 2000, MOEE announced that it would introduce lower regulated emission limits on NOx 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 that received 36 comments.

MOEE also went to the extra 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 ninety-day public comment period. The ministry received over 60 detailed submissions, mainly from engaged non-governmental organizations such as industry associations, consultants, environmental groups and other levels of government. These submissions included a very wide range of substantive and often conflicting recommendations to change 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 MOEE posted the notice during August, a peak vacation time. MOEE did respond to this concern, and re-opened the proposal for a further 30 days of public comment, until October 5, 2001.

Key points made in public comments (round three)
MOEE received 36 comments after posting the third version of its proposal, RA01E0020, on the Registry on July 31, 2001 and providing a 60-day comment period. Again, almost all of the comments were from organizations with some expertise in the issues, such as companies, industry associations, municipal and federal government departments and environmental organizations. The following list illustrates some of the issues raised by stakeholders.

Renewable set-asides
support for MOEE's move to include one kilotonne annual set-aside provisions for renewable energy and energy conservation *(Ontario Waterpower Association, Clean Air Action Corporation, IPPSO)*

new set-aside provisions are too complicated *(Enron Corp.)*

set-asides for renewable energy and energy conservation should increase step-wise annually, till they reach a 20% allocation target by the year 2010 *(IPPSO)*

Environmental Implications
concern that the July 31st proposal is (with the exception of the new set aside provision) environmentally no stronger than the March 2001 proposal *(Green Energy Coalition)*

trading with uncapped sectors is still a big concern, and isn't compatible with U.S. emissions trading system or with Ozone Annex *(Environment Canada, Green Energy Coalition, Ontario Clean Air Alliance, Pollution Probe, Ontario Forest Industries Assoc., Enbridge)*

-MOEE's approach still fails to control mercury, lead and *carcinogens (Environment Canada, Green Energy Coalition, Ontario Clean Air Alliance, Mississauga Air Quality Advisory Committee)*

the caps for NO_x and especially SO_2 are too lenient *(Toronto Public Health, Green Energy Coalition, David Poch, Pollution Probe)*

the proposal is not likely to produce any improvements in emission loadings or meet MOEE's emission reduction targets *(Energy Probe, Clean Electricity Markets Group)*

most OPG facilities will be able to operate without additional pollution control equipment until 2006 *(Clean Electricity Markets Group)*

Economic Implications
don't extend this trading system to other sectors, at least not until it has been assessed for several years *(Canadian Vehicle Manufacturers' Assocation, GM of Canada)*

this is not the least-cost way to achieve Ontario's NO_x reduction *targets (Ontario Forest Industries Assoc., Canadian Vehicle Manufacturers' Association)*

Design of Trading System
support for MOEE's decision to allow indefinite banking of credits and allowances *(Infineum, Clean Electricity Markets Group)*

generators should be allowed to use emission reduction credits to cover more than 33% of their NO_x emission allowances *(PG&E National Energy Group, Clean Electricity Markets Group)*

allocations of allowances should be given before, rather than at the end,of a compliance year *(ONGA, IPPSO, Clean Electricity Markets Group, Canadian Petroleum Products Institute)*

emission reduction credits should not be limited to a five year life-span *(Enbridge, Ontario Natural Gas Assoc., TransCanada Pipelines, Environmental Interface Ltd., Clean Air Action Corporation, Clean Electricity Markets Group)*

eliminate the 10 per cent environmental discount on ERC creation *(ONGA)*

keep the 10 per cent environmental discount on all ERCs created; in fact, make the discount rate as high as possible *(U.S. EPA)*

discounts based on directionality and distance are too complicated *(Enron Corp, TransCanada Pipelines, Clean Air Action Corporation, Clean Electricity Markets Group)*

don't force generators to install expensive CEMs or PEMs to monitor emissions to validate emission reduction credits *(TransCanada Pipelines, Enbridge, ONGA, Canadian Petroleum Products Institute)*

Fairness Issues
non-OPG electricity generators will be unable to determine their allowance allocations, and this uncertainty will discourage investment (*Enron Corp. Clean Electricity Markets Group)*

allocation of allowances should be on a facility basis for all parties, and OPG should not have the exclusive right to corporate-wide allowances *(Clean Electricity Markets Group)*

allocation of emission reduction credits discriminates against small generators *(Enbridge)*

Stakeholder comments certainly had an effect on the outcome of this consultation, since the final regulation included several key changes from earlier versions. In response to submissions from stakeholders, MOEE:

-added a clean energy set-aside:
a set amount of emission allowances for both NO_x and SO_2 are "set aside" each year and can only be used by clean, renewable energy generation such as wind, solar, run-of-the-river hydro or new hydro on existing dams, or fuel cells.

-removed distance discounting and directionality provisions:
MOEE had originally planned to allow the purchase of emission reduction credits from facilities up to 3,000 km away, but would have required discounts on credits created in locations that have little impact on Ontario's air shed. Many commenters, especially the U.S. EPA, said this was too complicated to work. MOEE replaced this provision with a requirement that eligible credits could only be created either in Ontario or in 12 key U.S. States upwind from Ontario's smog regions.

-agreed to allocate allowances at start of compliance year instead of at the end:
Many stakeholders had asked for this change to reduce uncertainty and risk for generators. The change will allow generators to take earlier actions to reduce emissions in a given year.

-decided against requiring continuous emission monitors (CEMs) for capped emitters:
MOEE had proposed in June 2001 that all capped emitters over a certain size would be required to install CEMs. But under the finalized Regulation, capped facilities have the option of using either CEMs or "other emissions monitoring methods approved by MOEE that are at least as accurate as the estimates from CEMs." MOEE decided to provide flexibility on techniques of emissions monitoring in spite of warnings by the U.S. Environmental Protection Agency (E.P.A.) that CEMs should be required for all coal units and for all emitters with post combustions controls. The U.S. EPA had also recommended that facilities

generating ERCs should be capable of meeting the same emissions measurement and reporting requirements set for the capped sources. The U.S. EPA had noted that "accurate emissions data are crucial to a market-based program where the currency is allowances or ERCs. Without accurate emissions data, there is uncertainty regarding the quantity of surplus allowances (or ERCs) that are available to buy or sell, and the quantity of actual emission reductions that have occurred."

-decided to be directly responsible for approving emission reduction credits

In March 2001, MOEE was still considering that ERCs might be certified by third parties. However, the U.S. EPA urged MOEE to play an active role in this key area, and noted that in the U.S., both verification and certification are inherently governmental functions, to protect against conflict of interest.

-decided to give emission reduction credits a lifetime of seven years, instead of five years:

Many pollution control projects are designed to cut emissions from a facility year after year. Some commenters wanted MOEE to give credits annually for such reductions, essentially without an expiry date. They argued that such incentives are necessary to spur companies to invest in environmental projects that would otherwise be uneconomical. Other commenters argued that the credits should expire after a few years, to encourage all emitters to continually find new ways to ratchet down their emissions over time. MOEE chose a compromise solution, so that emission reduction credits will expire seven years after the pollution control project is installed.

Statement of Environmental Values:
MOEE submitted an SEV consideration document outlining how this decision on emission trading and emission limits reflected various principles laid out in the ministry's Statement of Environmental Values. Briefly, the ministry stated that the decision would further goals spelled out in its SEV such as environmental protection, the ecosystem approach and resource conservation.

ECO Comment:
The ECO commends MOEE for posting multiple Registry notices on this important, complex issue. Finalizing this regulation has been an important step for MOEE and the outcome of much painstaking negotiation. 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 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.

Commenters have highlighted some significant weaknesses in this Regulation, which are expected to limit its environmental effectiveness, particularly the weak SO_2 cap and the fact that emissions of other contaminants such as mercury remain unaddressed.

A critical feature of this regulation 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 emission reduction credits approved, which will in turn depend on how carefully MOEE oversees this 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 NOx and SO_2 emissions under Regulation 127/01 (see pages 91 – 94 of the Annual Report). 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.

The ECO Website (www.eco.on.ca) contains a Glossary which defines some of the technical terms used in this discussion.

Review of Posted Decision:
The Cherry Hill Golf Club – OWRA s. 34 – Permit to Take Water

Decision Information:

Registry Number:	IA01E0358	Comment Period: 30 day(s)
Proposal Posted:	2001/03/15	Number of Comments: 39
Decision Posted:	2001/06/14	

Description:
The Cherry Hill Golf Club (the CHGC) is located near the Town of Fort Erie in the Regional Municipality of Niagara. For over 50 years, CHGC used a well on its property for irrigation. A permit to take water (PTTW) was not required for this well under the *Ontario Water Resources Act* (*OWRA*) because it was drilled before 1961. In 2000, CHGC made the decision to drill a new well. In the summer of 2000, CHGC applied to the Ministry of the Environment and Energy for a PTTW under Section 34 of the *Ontario Water Resources Act* (*OWRA*) so that it could begin taking a large volume of water for use in commercial golf course irrigation from the new well and the existing well. Water would be pumped from one well at a time into a pond/reservoir. The new well would be used as the primary irrigation well with the old well being used as a back up supply. Water would be pumped into the pond, and from there to the automated irrigation system.

The PTTW application, filed in March 2001, requested the following water taking rates for a period of 10 years:

- Well #1 (primary irrigation well), 300 Imperial gallons per minute, 432,000 imperial gallons per day, 184 days per year
- Well #2 (backup irrigation supply), 300 Imperial gallons per minute, 432,000 imperial gallons per day, 184 days per year
- The pond, 830 Imperial gallons per minute, 498,000 imperial gallons per day, 184 days per year

The ministry reviewed this application and approval was denied due to insufficient documentation about the potential ecological impacts of the water taking.

MOEE issued a temporary permit for a period of six months from June 1, 2001 to November 30, 2001, for a lesser quantity of water to allow the golf course to continue taking water during the summer and fall months. The temporary permit's conditions required CHGC to conduct pumping tests and collect more documentation on the aquifer parameters to determine the long-term impact on the aquifer and the domestic water supplies in the area. Once this additional information is collected, the MOEE has stated that it will consider issuing a long-term PTTW if it is submitted along with a comprehensive hydrogeological report for a longer term permit to take water.

Implications of the Decision:
The temporary permit authorized the use of the two wells for a six-month period that ended November 30, 2001. MOEE is not required to post proposal notices for PTTWs that are for periods of less than one year. MOEE has permitted the taking of water from the two wells at a reduced rate to allow for irrigation of the golf course and collection of additional information during the summer of 2001.

Although the PTTW was granted for a lesser quantity of water than originally requested, the CHGC had the potential for interference with neighbouring domestic and agricultural users of the groundwater. MOEE made the effort to address these concerns by attaching special conditions to the PTTW, requiring CHGC to cease water taking if it interfered with water supplies in use prior to the date of the permit. A special condition also was attached relating to water taking from the pond/reservoir, to address potential interference with stream flow for adjacent watercourses.

If a temporary permit is issued again for the summer of 2002, the public will not have the opportunity to comment on the proposal, because it is exempt from the *EBR* notice requirements.

Public Participation & *EBR* Process:
The first proposal notice was placed on the Registry on August 17, 2000 (IA00E1350). Ten comments were received as a result of that proposal notice. The proposal notice for this application had a 30-day public comment period, meeting the minimum requirements set out in the *EBR*. The application was amended and another proposal notice was placed on the Registry March 15, 2001 as *EBR* Registry IA01E0358. In total, there were 39 comments submitted as a result of both the August 2000 and March 2001 Registry notices. A number of comments were also received outside of the comment periods.

The decision notice included a summary of the comments submitted to MOEE, made accessible through a link on the Registry. The ECO commends the ministry for preparing this summary and making it publicly accessible. The summary of comments described the concerns about the application and how those concerns were taken into account by MOEE during its decision-making process. The majority of commenters were opposed to the PTTW. In a number of cases, written submissions addressed the potential implications of MOEE's issuing a PTTW for such substantial amounts of groundwater. Many of the comments called for MOEE to take a precautionary approach and collect practical and accurate information before making any decisions. MOEE stated that the comments were consistent with concerns within the ministry and as a result only a temporary permit was issued.

Concerns expressed by the commenters include the following:

Low Water
Many of the comments expressed concerns over the potential of reduced water supply that they

believed could take place if the local aquifers are affected by the proposed PTTW. In particular, many commented on the potential implications of a reduced water supply for livestock, the functioning of the ecosystem, the value of real estate and the additional charges associated with shipping water into the region if resident wells were to dry up.

Water Quality

Many commenters anticipated adverse effects related to water quality. It has been suggested that minerals such as sulphur and iron would be found at higher concentrations with wells reaching deeper aquifers and substantially diminishing the water table, causing odours during irrigation practices and making drinking water less palatable. Commenters were also concerned about the potential adverse effects due to more rapid infiltration of pesticides and fertilizers.

Water Level Monitoring

Many written submissions expressed concern about current and future monitoring of the region's groundwater resources. Some residents requested that MOEE determine the size of the aquifer. In addition, one written submission requested that an independent third party conduct the future monitoring of the region's groundwater. This particular request focused on the need to resolve issues related to reliability, accountability and the sufficiency of groundwater monitoring in the region. In addition, one commenter was concerned about the noise associated with monitoring wells.

Other Considerations

A number of comments suggested alternative approaches to meeting the CHGC requirements for water. Some commenters recommended that consideration be given towards the utilization of additional storage ponds to reduce the rate of water taking from the new wells. Moreover, one commenter recommended that MOEE and the CHGC consider using alternative water supply sources such as the municipal supply system and Lake Erie. A final concern addressed the need for contingency and remediation plans should any adverse effects arise.

MOEE Response to Concerns

In general, MOEE indicated that the concerns expressed by the public were also concerns of the ministry, which is why the ministry issued a temporary permit. MOEE has requested that the CHGC document their water outtake and exercise "Best Management Practices" in pumping this volume of groundwater from the region.

MOEE stated that the concerns related to odours and unpalatable drinking water would be addressed as required. In relation to the potential adverse effects due to more rapid infiltration of pesticides and fertilizers, MOEE stated that such effects are minimal since the pesticides used will degrade rapidly.

In addition, MOEE advised that all aquifer parameters and the potential for well interference would be evaluated in association with the new well pumping test. With respect to the issues of

reliability, accountability and sufficiency of monitoring, the CHGC installed new water level dataloggers in eight wells and would be responsible for the ongoing monitoring of those wells.

In response to the comments suggesting alternative water taking sources, the CHGC would take all facilities into account. With respect to contingency plans, arrangements would be made with the Town of Fort Erie to have an effective plan in place, which would be available to respond promptly under the *Environmental Protection Act*, the *Ontario Water Resources Act* and the special conditions of the PTTW. The remediation of any adverse effects would be conducted by the CHGC and a prompt alternate supply of water would be available when there is evidence of adverse effects from the water taking activities.

SEV:
MOEE does not consider its SEV in deciding to issue instruments. MOEE takes this position on the basis that staff considers its SEV in the development of instruments - considering it again for the granting of instruments is not necessary. However, s. 34 of the *OWRA* was first enacted in 1961, more than 30 years before MOEE's SEV was developed. Moreover, MOEE states that the SEV was already considered during the development of its classification regulation for instruments and thus any further consideration is not required.

In a recent Environmental Review Tribunal (ERT) decision on a third party appeal of a PTTW, the board noted that MOEE's interpretation of the SEV requirements is inconsistent with the *EBR*. The ERT also noted that the Water Taking and Transfer Regulation (O.Reg. 285/99) has incorporated the ecosystem approach described in the SEV, but that unfortunately MOEE has provided little policy guidance on how the ministry staff should implement an ecosystem approach when analyses of proposed PTTWs are conducted and the impacts of water takings are evaluated.

Other Information:
On August 17, 2000,the CHGC submitted an application for a PTTW under Section 34 of the *OWRA* for 10 years, 365 days per year. This application received 10 written submissions under the proposal notice *EBR* posting IA01E0350. This application was amended to be for 10 years, 184 days per year and re-posted to the *EBR* Registry Number: IA01E0358. The written submissions collected under *EBR* posting IA01E0350 were then transferred to *EBR* posting IA01E0358 and were taken into consideration when the ministry reviewed the amended PTTW application.

ECO Comment:
The management of Ontario's groundwater and the PTTW issuing process have become important concerns for many Ontario residents since the Walkerton tragedy in May 2000. The ECO's brief to the Walkerton Inquiry on Ontario's PTTW process noted that businesses and rural residents who once had an abundant supply of groundwater are feeling the effects of having to share groundwater resources with an increasing number of users. The latter part of the 1990s had lower than normal levels of precipitation, and above average temperatures, which have exacerbated water shortages and caused drought-like conditions in many parts of Ontario. The

CHGC application demonstrates the nature of the competing interests MOEE must balance when making a decision on whether or not to grant a PTTW.

Under Ontario Regulation 285/99, an MOEE director who is considering an application must consider matters related to the protection of the natural functions of the ecosystem and how the ground and surface water may affect or be affected by the proposed PTTW. The ecosystem approach places a burden on MOEE to consider the function of the ecosystem when making a decision and the ministry must consider the context of the ecosystem and decide how its natural functions will be impacted. The goal is to make a proactive and environmentally sustainable decision. However, as the ECO has previously reported, MOEE is hindered in its ability to apply an ecosystem approach due to a lack of analysis of overall trends in water taking.

Due to the large quantity of water being requested by the CHGC, MOEE granted a temporary permit with monitoring requirements that would be used to determine if the original quantities of water requested could be granted without causing adverse effects on the local ecosystem and other domestic users.

MOEE imposed a number of special conditions related to the concerns expressed by the commenters. One of the special conditions was for the daily recording of the pumping rate, total number of hours of pumping and total volume of water taken to be submitted by the end of the irrigation season in 2001. The ECO notes this was not submitted until April 2002. The ECO anticipates that the information recorded during the time period covered by the permit will be considered by MOEE when the CHGC re-applies for their longer-term permit.

In June 2002, the ECO was informed that no temporary permit has been issued for irrigation purposes for the summer and fall of 2002, but that CHGC had submitted an application for a new long-term permit that was under consideration. In June 2002, a proposal for a permanent PTTW was posted to the Registry.

Review of Posted Decision:
Environmental Assessment Requirements for Electricity Projects – Regulations and Guide (O.Reg. 116/01, O.Reg. 117/01)

Decision Information:

Registry Number: RA00E0005	Type of Posting: Regulation
Proposal#1 Posted: January 24, 2000	Comment period#1: 30 days / 20 comments
Proposal#2 Posted: June 2, 2000	Comment period#2: 32 days / 19 comments
Decision posted: May 8, 2001	Regulations filed: April 23, 2001

Description:

MOEE made two regulations that change the way in which the *Environmental Assessment Act* applies to electricity generating and distribution projects:

> 1) O.Reg.116/01 sets out what kinds of projects are subject to the *Environmental Assessment Act*. It also exempts a large segment of projects from the need for an individual environmental assessment, by requiring that they undergo an environmental screening process (set out in an accompanying guide).
>
> 2) O.Reg. 117/01 is an administrative regulation amending the General Regulation (Regulation 334 R.R.O. 1990) under the *Environmental Assessment Act* (*EAA*). The administrative changes were needed to remove the Ontario Hydro successor companies and municipal electric corporations from the list of public bodies in Regulation 334, and to remove obsolete references to them. The regulation also clarifies that electricity undertakings by bodies still subject to the *EAA* (such as Hydro One and other Crown agencies) will be subject to EA requirements only if those undertakings are designated under the Electricity Projects Regulation.

Two proposal notices were posted on the Registry, in serial fashion, and both focused on O.Reg. 116/01. The regulations were made on April 4, 2001, and filed on April 23, 2001.

The new regulations will require a new kind of environmental assessment process under the *EAA* for many public and private sector proposals for electricity projects that are expected to have significant environment impacts due to their technology or size (see table and discussion below). Assessments or screenings under the *EAA* will now be triggered by the environmental significance of an electricity project. Formerly, the assessment trigger was whether the proponent was from the public or private sector. The need for these regulations was driven by the Ontario government's legal and policy changes related to deregulation and creation of a competitive electricity market in Ontario (the primary legal change was enactment of the *Energy Competition Act* in 1998). Without these new regulations, new private sector electricity projects would not be captured by the *EAA*. The ECO identified this need in our 1998 annual report.

Key to this initiative is a self-assessment system based on thresholds and a new screening process for electricity sector projects. Briefly, to proceed with a project, a proponent would determine its category using the thresholds (some of which are set out in the table below). The

categorization of the project, in turn, determines the depth of review and level of public and agency consultation to be undertaken. Projects can fall into one of three categories:

(A) No *EAA* Requirements – Projects with relatively benign environmental effects would not require approval under the *EAA* unless designated by the Minister of the Environment and Energy (these projects are not listed in the regulation). MOEE indicates that the Environmental Registry will be used for public consultation on prescribed instruments needed for these projects and also that anyone can request that a Category A project be made subject to the *EAA.*

(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 get bumped up to Category C and be subject to an individual environmental assessment.

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

MOEE's Guide to Environmental Assessment Requirements for Electricity Projects (the "Guide") sets out a process primarily for Category B projects including recommendations on public consultation and the relationship to other legislation and processes. Also detailed in the Guide is how the public can make requests to bump-up a project from one category to another.

Electricity Project Type	**Category A: No EAA Requirements**[1]	**Category B:**[2] **Environmental Screening Process**[3]	**Category C: Individual EA**
Solar Photovoltaic	All	-	-
Any technology using an energy source not designated in the Regulation (e.g., fuel cells using hydrogen as fuel)	All	-	-
Emergency Generators	All	-	-
Wind turbines	< 2 MW	> 2 MW	-
Hydroelectric facilities	-	< 200 MW	> 200 MW
Natural gas4	< 5 MW	> 5 MW	-
Biomass (not including waste material)4	< 5 MW	> 5 MW	-
Landfill Gas/ Biogas	< 25 MW	> 25 MW	-
Waste biomass (includes woodwaste)4	< 10 MW	> 10 MW	-
Cogeneration – natural gas, biomass and waste biomass facilities with an efficiency of > 60%	< 25 MW	> 25 MW	-
Generation for use onsite	< 25 MW	> 25 MW	-
Oil	< 1 MW	1 to < 5 MW	> 5 MW
Coal	-	-	all

Note: Table abbreviated for length considerations; thresholds also exist for Transmission Lines, Transformer Stations as well as electricity projects generating from Municipal Solid Waste and Liquid Industrial or Hazardous Waste. Source: MOEE

1 Anyone can request that the Minister of the Environment and Energy make a Category A project subject to the *Environmental Assessment Act.*

2 The Environmental Screening Process outlines a process by which members of the public and agencies with outstanding environmental concerns can request that a project in Category B be elevated to an individual EA (Category C).

3 Some transmission facilities listed under Category B in this chart are subject to review under the Class EA for Minor Transmission Facilities.

4 "Cogeneration" or "Generation for use on-site" exemptions also apply to some facilities using these fuels.

Implications of the Decision:

MOEE's Regulatory Impact Statement is terse (a problem the ECO has noted in the past) and does not describe the impacts of the regulation in sufficient detail to be truly meaningful. It indicates that the changes will provide "clear guidance" to proponents, thereby reducing "government and industry operational costs." It also mentions that coal and oil-fired facilities "are not anticipated to be proposed in the foreseeable future."

Ministries are expected to describe the impact of regulatory amendments and new regulations according to their economic, environmental and social impact. Given the substantial changes to Ontario's electricity sector that will occur this decade through various initiatives (see "More Information"), it would have been helpful if a comprehensive assessment of the economic, environmental and social impacts of restructuring the electricity sector had been undertaken by a multi-ministry team. Then, by relying on such an assessment, MOEE could have provided a clearer, more complete review of the implications of this regulatory initiative within the overall electricity sector restructuring.

Economic and Environmental Implications

A primary impact of O.Reg.116/01 is to put in place an environmental assessment regime whereby electricity projects can proceed with minimal pre-approval or delay. Further, the Electricity Projects EA, in concert with the *Energy Competition Act*, will influence the size and type of projects that are built; for example, new coal-fired plants are unlikely to be built under the new system, partly because of the new EA requirements.

Economically, the new process should assist the development of electricity market competition, by providing more regulatory and process certainty than would have existed under the previous process. Enhanced regulatory certainty, combined with opening the market to competition, will bring changes to Ontario's electricity sector, including joint-ventures, partnerships and the entry of foreign competitors.

Environmentally, the new process tends to favour smaller and more environmentally benign projects and technology from a regulatory perspective and demands much more scrutiny of larger projects as well as those involving coal, oil, hydroelectricity and nuclear power. This aspect is likely to lead to lower fossil-fuel related emissions (like particulates, mercury, acid gases) per unit of electricity produced in the province. But the ECO acknowledges that implications are difficult to know with certainty, in part because of the lack of a comprehensive assessment of the likely environmental and economic consequences from the significant changes being made to the electricity sector in 2001/2002. ECO would like to have seen such an assessment, particularly given the Ontario government's commitment "to maintaining and improving environmental protection in an open electricity market." MOEE may have felt that undertaking an assessment to demonstrate the effect of improvements in environmental protection would be too complex at this time, given the large number of changes and factors influencing Ontario's electricity market.

Legal and Policy Implications

The regulation makes certain projects (those in Categories B and C) subject to the Act, but then exempts any project listed in the regulation from Part II of the *EAA*, which is the requirement for

environmental assessments, as long as the project has gone through the Environmental Screening Process (ESP) set out in an accompanying guide. This means that the project would not have to be approved by the minister or the Environmental Review Tribunal. According to MOEE, Category A projects are simply not subject to the *EAA.* However, MOEE indicates that *EBR*-prescribed instruments for these projects will be posted for comment on the Environmental Registry.

For Category B projects, proponents are legally responsible to meet the new EA requirements, but MOEE does not have to approve the proponent's undertaking. MOEE will only comment on issues under its mandate, e.g., on whether the Environmental Screening Process was followed properly. Unless a request to bump-up the project to a more detailed review is received from the public, a project may proceed (subject to site-specific approvals). If a bump-up request is denied, it is denied by the director of the Environmental Assessment and Approvals Branch, not the minister. The minister would be involved if the director's decision is appealed, or in any decision to order an individual environmental assessment. These practices vary greatly from other *EAA* environmental assessment processes. Key elements of the new EA process include:

- Private sector projects are now captured under the *EAA* in a consistent way. Without this amendment, private sector projects may have begun to proceed outside of the *EAA* but then be drawn in by project-specific individual requests for "designation" under the Act. The new predictable process gives investors in this sector more certainty, which is beneficial for making investments in new generation facilities in the province and ultimately for the opening of the market to competition.
- Electricity projects have a new kind of environmental assessment requirement, not an EA with ministerial or ERT approval, but a proponent-driven process where the proponent is responsible for following a process, but does not need ministerial approval to proceed.
- The Category B screening process has no provision for direct ministry responsibility for comments because the ministry is not making a decision under the Act and comments are sent directly to the proponent. Under a usual EA process, notice must be given to each municipality, the public may submit comments to the ministry, and any person may request a hearing by the ERT tribunal. These features are not part of the new screening process. Further, the new process cuts off further appeals under the *EBR*, as the public can no longer see, comment on or appeal the subsequent *EPA* or other approvals.

Public Participation & *EBR* Process:

MOEE posted this proposal for comment at two stages, in January and June 2000. In addition to the formal comment processes, MOEE held two workshops in 1998 and 1999 to solicit input from stakeholders. During the first comment period, 20 commenters made submissions. During the second comment period, 19 commenters made submissions. In total, 31 different agencies, organizations and individuals commented (eight of the commenters made submissions during both comment periods), providing approximately 156 pages (71+85) of comments over the two comment periods. Commenters raised in excess of 300 specific issues, points, or details about the regulation, process or guide, some of which were repeated by one or more commenters.

The first set of comments (received January 24-February 23, 2000) led to several significant revisions. For example, MOEE re-vamped the project categorization (i.e., A, B, C) to be more consistent with other EA processes, as per a stakeholder recommendation. The second set of

comments (received June 2-July 4, 2000) led to further refinement. The second proposal notice summarized stakeholder comments (to that point in time) into the following categories:

Comment period 1:

- Thresholds – whether or not to use numeric limits to define when review processes would be initiated. There was a diversity of opinion on the use of thresholds. MOEE decided to carry forward with their use. Stakeholders noted that thresholds are blunt instruments (as size of facility does not necessarily equate to impact) and often create seemingly peculiar inequalities between generation types (e.g., Category A threshold for wind turbines is 2 MW, above which a proponent would need to do an environmental screening; the equivalent for wood waste facilities is 10 MW and for landfill gas facilities is 25 MW).
- Screening – what type of criteria and methods would be used to review projects. MOEE's initial proposal on screening methodology was somewhat scant. It was further developed and refined with stakeholder input for inclusion in the second notice and guide.
- Grandparenting provisions – MOEE developed several provisions which appear to be able to deal with older, existing facilities and for those which were in planning at the time of these regulations being developed.
  For further details, on each of these issues see: www.ene.gov.on.ca/envregistry/012935er.htm

The decision notice posted on May 8, 2001, summarized the comments and their effect on the decision into the following categories:

Comment period 2:

- Use of thresholds – a rationale for the use of thresholds was provided. Some changes to the thresholds proposed in the revised proposal notice were made.
- Threshold for Wind Turbines – opinion was divided about the level of screening wind turbines should undergo. In the end, MOEE established a fairly conservative threshold that would not permit large-scale wind turbines, and particularly wind farms, to be established without a category B screening. Some members of the public felt strongly about the need to consult on these projects because of their significant physical presence.
- Oil and Coal-Fired Generation Threshold – the thresholds for coal and oil were made distinct in an effort to accommodate stakeholder concerns.
- Hydroelectric Threshold – The final regulation requires an individual EA for hydroelectric facilities generating 200 megawatts or more in response to a stakeholder comment. This will have the effect of making the Ontario *EAA* trigger similar to that of the federal CEAA trigger for these facilities.
- Harmonization – MOEE noted that stakeholders raised the need to harmonize requirements under MOEE's Electricity Projects EA and MNR's Water Management Planning Guideline. MOEE reported that harmonization was achieved between them and that compatibility and coordination was also achieved with the federal CEAA process, as requested by stakeholders.
- Decisions on Elevation Requests – MOEE retained its original proposal (i.e., request made by the public to MOEE for elevation from B to C) but made amendments which increase the onus on those seeking such a review, e.g., the time period for the Ministerial Review of the Director's decision was shortened from 30 days to 15 days and information to support the request must be filed (as opposed to simply the request itself).

- Level 1 Screening – originally Category B included a Level 1 screening that did not involve public consultation, MOEE, at the request of stakeholders, eliminated Level 1, such that all Category B screenings require public consultation.
- Class EA for Modifications to Hydroelectric Facilities – MOEE decided to permit OPG to continue using its Class EA for Modifications to Hydroelectric Facilities, with some conditions.
  For further details, on each of these issues see: www.ene.gov.on.ca/envregistry/012935er.htm

MOEE's explanation of the underlying issues and how the comments on each issue were or were not able to be factored into the final decision was very thorough and comprehensive. For this reason, the issues raised above, and their effect will not, for the most part, be reviewed in detail here (see decision notice). Two issues raised in this decision-making process that may continue to be issues for certain stakeholders are discussed below.

Given that over 300 specific points and issues were raised, MOEE could not be expected to accommodate every point. Indeed, there were opposing views on many issues, and some views naturally conflicted with others. Nevertheless, MOEE was able to adopt or incorporate many comments in some way and, for those which could not be accommodated, some type of response was generally or specifically provided in the decision notice.

Potentially Continuing Issues:
Notification about certain Category "A" projects. MOEE's Guide indicates that Category A project instruments must be posted as proposals on the Registry, which is beneficial for public consultation. However, concern was raised by some stakeholders that certain projects (notably smaller wind turbines) will escape the public notification and consultation requirements of the Electricity Projects EA by falling into Category A. For these stakeholders, the impacts of wind turbines (visual, land use, etc.) are significant. Furthermore, these facilities may escape public consultation on the Environmental Registry, as wind turbines may not require an instrument approval under an *EBR*-prescribed Act (e.g., *EPA* approval to discharge to air). Notification that a small windmill,i.e., less than 2 MW, was being considered for a site, would need to arise from some other process,e.g., municipal land use re-zoning or site application processes, as no public notice would be required under the Electricity Projects EA or the *Environmental Bill or Rights*.

Harmonizing and Streamlining Electricity Projects Approvals. Many stakeholders strenuously emphasized the need to harmonize various governmental processes for new electricity projects. Some sought to ensure hydroelectric projects are treated appropriately on the basis of environment impact when compared to other forms of generation, such as natural gas, biogas, landfill gas,etc. From the perspective of a stakeholder with an interest in hydroelectricity, certain hydroelectric projects could be viewed as being at a regulatory disadvantage, particularly very small operations (e.g., run of the river and micro-hydro installations). This is particularly relevant if the Electricity Projects EA aspires to treat all forms of generation equally from an impact perspective. Some small hydro installations could be required to be involved in three or more separate governmental or regulatory processes. In contrast, a similarly sized windmill, natural gas or biogas landfill gas facility could escape the EA process altogether, and in the case of the small windmill or a solar panel project, potentially avoid the *EBR* process as well. Further, hydroelectricity is the only project type for which the guide specifies that the proponent must

maintain communications with both MNR and MOEE district offices during the environmental screening process.

Public Consultation Summary
Given the complex make-up of this sector and its diversity of stakeholders, it is apparent that issues would arise no matter which approach to various issues MOEE had chosen to take. If MOEE had proposed that thresholds not be used, some commenters might have suggested that they be used to simplify decision-making, increase predictability and certainty, and allow the process to be proponent-driven. For several thresholds, there were opposing comments – some said they were set too high while others said they were set too low.

Similarly, MOEE appears to have tried to strike a balance between regulatory detail and efficiency. Some stakeholders provided some very specific or stringent recommendations which were not adopted by MOEE; had they been adopted, other commenters or proponents may have had cause for concern that the regulation and EA process were becoming incredibly encumbered. In this light, the structure of MOEE's new EA does a good job of reflecting the environmental concerns in the province at the time that it was drafted (e.g., the commitment to control air emissions from the electricity generation sector).

SEV:
MOEE conducted a basic consideration of its Statement of Environmental Values in making its decision. Its decision would appear to agree for the most part with statements in its SEV. The SEV consideration provides little new information or perspective. The statement on resource conservation seems to violate MOEE's SEV principle of resource conservation, which says: "The proposed program will streamline the approval process for the production of cost effective clean energy." Producing new supplies of energy has nothing to do with conserving electricity. At one time, the province was pursuing demand-side management, which effectively meant tackling energy demand before boosting production.

Other Information:
Many regulatory and policy initiatives undertaken during the current reporting year will have an impact on electricity generation and projects in the Province. These include new emission monitoring and reporting rules for most industrial sectors, including electricity; new emission caps and a new trading system for electricity generators; and the future conversion of Lakeview Generating Station from coal to natural gas. For information on these initiatives see the "Air Issues Update" section of the 2001/2002 annual report. Other processes, not concluded during this reporting period, but which will have an impact on the electricity generating sector include MNR's revision of its Water Management Planning Guidelines (PB01E6004) and the proposed amendments to the *Lakes and Rivers Improvement Act.*

ECO Comment:
MOEE deserves credit for attempting to balance the needs of proponents with the needs of commenters and the imperative of protecting the environment in designing its new environmental assessment requirements for electricity projects. The process of designing the new regime displayed adaptability and sensitivity to stakeholder concerns. The ECO is pleased that

MOEE has committed to posting instrument proposals for Category A projects on the Registry for public comment.

MOEE's objectives of making the new EA 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. The inability to incorporate all electricity project-related approval mechanisms into one master process probably reflects the inertia of various ministries, agencies and organizations.

As for generation types and environmental impacts, the new system encourages some types and scale of generation and discourages others. In this light, it is not so much a "levelling of the playing field" as has been suggested, but a reflection of the concerns in Ontario in the late 1990s about the impacts on air quality from certain types of generation. If the new Electricity Projects EA helps to achieve emission reductions and air quality targets, then its favouring of project types will be considered prudent planning. On balance, the new EA process for Electricity Projects is a considerable improvement over the regulatory regime that existed prior to this initiative.

SECTION 4

REVIEWS OF SELECTED DECISIONS ON POLICIES, ACTS, REGULATIONS AND INSTRUMENTS

MINISTRY OF MUNICIPAL AFFAIRS AND HOUSING

Review of Posted Decision:
Ministry of Municipal Affairs and Housing & Ministry of Environment and Energy
Bill 56, *Brownfields Statute Law Amendment Act, 2001*

Registry Number: AF01E1001
Proposal Posted: May 17, 2001
Decision Posted: April 12, 2002
Comment Period: 30 days
Number of Comments: 22
Act Proclaimed: November 2, 2001

Description:
Brownfields are lands that are abandoned, idle or underused and are difficult to develop because of real or perceived environmental contamination. The purpose of the *Brownfields Statute Law Amendment Act* (*BSLAA*) is to provide clear rules for cleanup and environmental liability, mechanisms to ensure quality cleanup, and planning and financing tools to enable the process.

At the end of the reporting period, the cleanup of brownfield sites was primarily governed by the 1996 Guideline for Use at Contaminated Sites in Ontario, administered by the Ministry of Environment and Energy (MOEE). Despite the guideline, potential developers have faced uncertainty with respect to regulatory requirements and future environmental liabilities. As a result, many developers have been unable to find financing to develop certain brownfield sites. One result has been abandoned sites on contaminated lands, often in urban centers.

The *BSLAA* amends the *Education Act*, *Environmental Protection Act* (*EPA*), *Municipal Act*, *Municipal Tax Sales Act*, *Ontario Water Resources Act* (*OWRA*), *Pesticides Act* and the *Planning Act*. The changes made to the *EPA* include new provisions on mandatory site assessment and cleanup to a range of 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, and who may conduct the assessment. A Record of Site Condition (RSC) describes the remediation work completed and the condition of the property, providing 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 certain 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 have acquired sites as a result of failed tax sales, or foreclosure. *BSLAA* makes analogous amendments to the *OWRA* and to the *Pesticides Act*, by protecting certain parties from environmental liabilities if they have complied with the site assessment and RSC requirements.

The Act provides better planning tools through amendments to the *Planning Act* and attempts to address financial issues surrounding brownfield development by providing protection to secured creditors and municipalities who become involved in a brownfield development, or who become owners of a brownfield property.

In addition to amendments to the *EPA*, *OWRA* and *Pesticides Act*, the *BSLAA* amends several Acts, or sections of Acts that are not prescribed under the *EBR*. Section 28 of the *Planning Act* is

amended to allow for community improvement plans to include environmental, social, and economic factors. Also, the requirement for the minister to approve the plans is eliminated with a few exceptions. Grants are also available from the municipality to owners or tenants of lands within the plan areas in order to rehabilitate the lands.

The following non-prescribed Acts are also amended:

- The *Municipal Act* is amended to allow for all or a percentage of municipal and education taxes to be frozen or cancelled during the rehabilitation and development period of a brownfield site.
- The *Municipal Tax Sales Act* is amended to allow municipalities the option to take possession of properties that have not been sold in a sale by a municipality for taxes owed without acquiring liability for environmental regulatory orders for five years.

Implications of the Decision:
Protection from certain environmental orders under the *EPA*, *OWRA*, and *Pesticide Act* will help to encourage the development of brownfields by allowing developers, municipalities, creditors, and trustees in bankruptcy to access sites and conduct investigations without the threat of impending MOEE orders. Prior to the *BSLAA*, a party that became involved with a contaminated site could become liable for damages and cleanup activities related to past contamination. Moreover, municipalities did not want to take ownership of abandoned sites, as they too would become liable to environmental orders. The changes made by *BSLAA* mean that after the filing of the RSC, there is limited liability for existing site contamination. The main problem with this approach is that environmental contamination often travels off the site of the initial contamination onto neighbouring properties. Owners or those in control of a site remain liable for off-site contamination and may be subject to MOEE orders under the *EPA* and *OWRA*.

In certain situations, the MOEE Director may issue a Certificate of Property Use (previously called a Certificate of Prohibition) that may put limitations on property use and construction. Certain conditions to the Certificate may also be imposed. The Certificate must be disclosed to all occupants of the property if it contains a provision that restricts the use of the property.

Although many regulatory orders cannot be issued during the investigation of a site and after the registration of the RSC, MOEE retains the authority to issue emergency orders if there is contamination on the site, which is a danger to the health or safety of any person. The health or safety of any person includes anger to water supplies used for human consumption.

While there is now a type of protection for on site contamination that predates the filing of the RSC, there is no protection from liability for off-site contamination. This means that orders can still be issued for historical contamination that originates from the property. As environmental contamination often is not contained within property boundaries, the risk of potential orders still exists. Moreover, the *BSLAA* does not bar civil litigation claims for torts arising either on or off-site.

Public Participation & *EBR* Process:
The proposal for the *BSLAA* was posted on the Registry for the minimum notice period of 30 days. However, submissions were made during committee hearings on Bill 56 that were also considered by MOEE and MAH when reaching their decision.

In their decision notice, MOEE and MAH summarized the 22 comments received by subject area. In general, the commenters had concerns regarding the clarity and extent of the new requirements under the Act and the new protections afforded to developers, purchasers, municipalities, secured creditors, receivers and trustees in bankruptcy. Where it was deemed appropriate, the ministries made some changes to respond to these concerns. For example, changes were made to Bill 56 to clarify who could file a RSC and what was required in a phase 2 environmental assessment, and to eliminate the requirement that a certificate be filed through the land registration system for properties where a RSC is posted to the Environmental Site Registry.

Municipalities also requested amendments that would extend the period of immunity that applies if they acquired a property through a failed tax sale. As a result, the period of immunity from MOEE environmental orders was extended from two to five years.

The financial community made comments with respect to the liability of secured creditors, receivers and trustees in bankruptcy. The bill was amended to clarify that parties who become owners of properties to pay taxes owed or through foreclosure are protected from liability for environmental orders if a RSC has been filed for the site. Also, secured creditors are now provided with five years of immunity from orders if they foreclose on a property.

Many commenters indicated they would like the provincial government to provide increased funding for brownfield redevelopment. The ministries responded that instead of increased funding, the *Municipal Act* was amended to allow for tax relief on the education portion of property taxes to offset or pay for the costs of a property during its development period.

SEV:
MOEE
The ministry's SEV states that its environmental protection strategy's first priority is prevention of pollution and its second priority is minimization of the creation of pollutants. MOEE stated the *BSLAA* will further this strategy by creating incentives for developers to clean up sites and reduce or eliminate environmental harm.

MOEE also stated that the *BSLAA* is in keeping with its principle of ecosystem protection because it will improve local ecosystems.

Finally, MOEE states the reuse of land promotes resource conservation by promoting urban renewal and reducing pressure on greenfield sites.

MAH
The ECO has pointed out in the previous year's reports that MAH's SEV, rather than focusing on meeting the purposes of the *EBR*, focuses on restructuring, streamlining, and assisting municipalities to be efficient. However, the ministry makes an effort to consider its SEV as part of a checklist when deciding if a proposal is one that should be placed on the Environmental Registry. As stated in the ECO's review of the *Municipal Act* (see the Supplement to the annual report pages 107 – 113), while this thoroughness is appreciated, MAH's SEV is supposed to be meaningfully considered in making the ultimate decision on a proposal, in keeping with the ministry's obligations under the *EBR*.

The ECO believes that the ministry's decision is consistent with the two environmental principals of its SEV. The *BSLAA* clarifies the liability of municipal governments which become owners of contaminated brownfield sites, which may encourage environmentally responsible decision-making on behalf of municipal governments.

The *BSLAA* also begins to address the inter-relationships of the economic, social and environmental factors of brownfield sites. Moreover, the Act will help to encourage a more efficient use of land and public resources.

Other Information:
Due to the broad nature of the *BSLAA* there are many relevant ministry initiatives related to the new Act.

Development permits
In order to provide municipalities with greater decision-making power with respect to site development, the province has selected three municipalities to implement a pilot development permit system (DPS). The DPS is a planning tool proposed to eliminate duplication and facilitate quicker approvals by combining three existing approval systems under the *Planning Act* – zoning, site plan control and minor variances. One of the three pilot project areas is the port lands and waterfront of the City of Toronto, an area with a number of brownfield sites. While the outcome of the pilot projects remains to be seen, it is hoped that the DPS and the amendments brought about by the *BSLAA* will work together to hasten brownfield redevelopment. (For more information on the development permit system, please see pages 119 - 122 of this Supplement)

Regulations regarding non-hazardous fill regulations
In 1998, MOEE posted a proposal notice on the Registry to amend the definition of inert fill under Regulation 347. The proposed regulation would create four inert fill classifications, which would specify acceptable fill quality based on background soil quality and effects-based cleanup criteria for the particular land uses described in the 1997 Guideline for Use at Contaminated Sites in Ontario. In addition, it would list provisions to deal with placement of soil at sites undergoing cleanup. To date, MOEE has not made a decision on this regulation and the inert fill definitions have not changed.

Compliance Guideline revisions
In 1997 MOEE posted a proposal to amend the Compliance Guideline F-2 to clarify for staff

". . . the allocation of environmental liability under existing legislation when issuing cleanup orders, reduce subjectivity and uncertainty associated with the application of liability allocation factors, maintain the incentive for landlords and investors to demand good environmental practices of those with whom they deal, and help reduce the number of appeals to the Environmental Review Tribunal."

In 2001, MOEE posted a decision notice stating it had implemented the amendments as posted, but indicated that the guideline will need to be further revised given the changes made to the various statutes by the *BSLAA.*

Smart Growth initiative
The *BSLAA* is part of the province's Smart Growth Initiative. The goalsof Smart Growth are to promote and manage growth and promote sustainable development. One goal is to maximize the efficient use of existing infrastructure, while respecting the environment. It is anticipated that the amendments made as a result of the *BSLAA* will help the province to meet these goals. (For a further discussion of Smart Growth, see pages 68 – 71 of this year's annual report.)

Environmental Management Protocol for Operating Fuel Handling Facilities in Ontario (GA1/99)
The protocol came into effect in October 2001 and is administered by the Fuel Safety Division of the Technical Standards and Safety Authority (TSSA). The protocol sets out spill reporting requirements and cleanup standards for fuel handling facilities in Ontario. In addition to requiring the mandatory reporting and recovery of spills and leaks, the protocol requires that any discovery of a petroleum product that has escaped to the environment or inside a building must be addressed. The TSSA can require that an environmental assessment report be prepared and, if necessary, the remediation or management of the environmental impact. When the new *BSLAA* regulations come into effect, the TSSA will amend the protocol to reflect the changes in brownfield cleanup standards.

ECO Comment:
The *BSLAA* has been referred to as "foundation" legislation because the foundation has been laid for future brownfields development through modifications of the environmental, planning and municipal rules. But the details of how the *BSLAA* will function on a day-to-day basis will be found in regulations. As of May 2002, MOEE was drafting regulations with respect to the new part XV.2 of the *EPA* (Provisions Applicable to Municipalities, Secured Creditors, Receivers, Trustees in Bankruptcy, Fiduciaries and Property Investigators) that were expected to be released by summer 2002. Other regulations regarding what constitutes a Qualified Person, records of site conditions, and cleanup standards are not expected to be ready until 2003.

The *BSLAA* will clarify and give legal effect to MOEE's Contaminated Sites Guidelines, which were first implemented in 1989 and updated in 1996. The current guidelines have been used over the past decade by landowners who want to sell, finance or develop contaminated lands. Generally, the guidelines have not encouraged the cleanup of contaminated lands as a result of the threat of environmental orders issued pursuant to the *EPA*, *OWRA* or *Pesticides Act*.

Moreover, MOEE's application of the guidelines and the enforcement of environmental orders have been challenged in several cases before the Environmental Review Tribunal.

In 1993, MOEE issued environmental orders against Appletex, a registered Ontario corporation, and two individuals who had roles in the operation of the company, requiring the cleanup of a heavily contaminated abandoned industrial property. The orders were appealed to the Board and the Board determined that the operators of the company could not be held liable for the cost of the cleanup because most of the contamination occurred before they took charge of the property. The Board rejected the notion that any owner and operator could be jointly and severally liable for all pollution problems and stated that there was an environmental security fund administered by MOEE available to cleanup sites where it is impractical for the owner to do so. Some believe the Board's decision in Appletex led to the creation of "orphaned" contaminated sites because the so-called "innocent" owner could not be ordered to comply with the environmental order, and the public purse lacked the resources to cleanup the site.

In order to help solve the problem of orphaned sites, the goal of the *BSLAA* is to promote the redevelopment and cleanup of contaminated sites to make more efficient use of existing urban infrastructure and provide an alternative to the development of greenfields and farmland. It does so through setting enforceable standards (as opposed to guidelines), creating public access to information through a public Environmental Site Registry, exempting developers and purchasers from certain ministry orders after a property is remediated in accordance with the new provisions and a RSC is filed, and by offering secured creditors, receivers, trustees and municipalities protection from specified orders. However, RSCs need only be filed when there is a change in use of the lands (e.g., from industrial to residential), and the ultimate cleanup standards will be found in yet to be released regulations.

The ECO will monitor the development of the regulations that will give substance to the *BSLAA*. The *BSLAA* creates a quality assurance process through its designation of "Qualified Professionals" who will sign off on RSCs, the mandatory reporting of site conditions on the Site Registry, and an auditing process to ensure compliance with the legislation and regulations. Moreover, the *BSLAA* allows the minister to delegate responsibility for establishment, maintenance and operations of the Registry as well as certain responsibilities of the Director. The ECO believes there should be a link to the Environmental Site Registry from MOEE's *Environmental Bill of Rights* homepage, and that the policy development work on the contents and requirements of notices and information on the site be the subject of an Registry notice.

Many commenters believe the *BSLAA* still does not distinguish between the actions of the polluter and the non-polluter (the "innocent owner"). Once a RSC is filed for a property, the owner or occupier of the property is protected from certain specified cleanup orders. However, the protection extends only to contaminants that were discharged to the property before the certification date and which were on, in or under the property as of the certification date. If contaminants move from the registered property to another, it may result in a cleanup order being issued to the owner of the property. The ECO believes the Act does not go far enough in helping to manage the risks associated with environmental liability.

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 civil and regulatory liability temporarily for a person or corporation which takes the initiative to begin cleanup measures.

A recent Court of Appeal Case in Ontario confirms that the fears of owners from off-site contamination are valid. The Court of Appeal affirmed the Ontario Superior Court decision awarding damages to a landowner whose land had been contaminated as a result of a gasoline spill to an adjacent property. The damages were to compensate for the cleanup of its land to pristine conditions. The damages were awarded despite the existence of the generic approach to site remediation in the Contaminated Soil Guidelines, which state that the levels of permissible pollutants vary depending on the use of the property. It will be interesting to see if the *BSLAA* will influence future similar civil actions.

The new protection provided by the *BSLAA* will help with brownfield redevelopment when it makes economic sense to rehabilitate lands for development, for example, in Toronto where real estate prices are high. Many smaller communities have brownfield sites that are unlikely to be developed because the land is not very valuable and there is little economic reason to redevelop.

The *BSLAA* has been criticized because it does not provide financial incentives to rehabilitate sites where the value of the land is low. Currently, the financial incentives include relief from provincial components of education taxes and municipal portions of the real property taxes during the rehabilitation period of the property. Some commenters believe that additional funding should be available in the form of increased provincial and federal grants for brownfield redevelopment. However, it does not appear that either the provincial government or the federal government has plans for this type of fund. The Ministry of Finance has stated that a brownfields fund will not be created until there is a better estimate of the number, size and state of contamination of brownfield sites in the province. Because of the lack of financial incentives, the Ontario regime lags behind the U.S. brownfield laws and policies. In 1980 the US Congress enacted the *Comprehensive Environmental Response, Compensation, and Liability Act* – commonly known as Superfund. The Superfund law created a tax on the chemical and petroleum industries to provide for a trust fund for cleanup of brownfield sites when no responsible party can be identified. Superfund is just one of many of the financial incentives offered in the U.S. for brownfield redevelopment.

The ECO looks forward to the *BSLAA* regulations being posted to the Registry so that Ontario residents will have the opportunity to comment on how the changes made by the Act will be implemented.

Review of Posted Decision:
Ministry of Municipal Affairs and Housing Bill 111
An Act to Revise the* Municipal Act *and to Amend or Repeal other Acts in Relation to Municipalities

Decision Information:

Registry Number: AF01E0002 Comment Period: 30 days
Proposal Posted: November 11, 2001 Number of Comments: 46
Decision Posted: January 16, 2002

Legislation in Force: The Act was given Royal Assent December 12, 2001 and will come into force on January 1, 2003.

Description:

Bill 111, *An Act to Amend the Municipal Act and to Amend or Repeal other Acts in Relation to Municipalities* (hereinafter referred to as *Municipal Act, 2001*), was introduced to the Legislature for first reading on October 18, 2001. The *Municipal Act, 2001*, represents the culmination of a lengthy consultation process by the government, and comes into force on January 1, 2003.

The current *Municipal Act* R.S.O. 1990 dates back to 1849 and is both highly detailed and prescriptive in nature. In Canada, the Constitution sets out which level of government (federal or provincial) shall have jurisdiction in certain areas. Because constitutionally the province retained power over local matters, the *Municipal Act* was drafted to be highly prescriptive in order to allow municipalities to undertake only those activities that are expressly authorized by the province. As a result, a myriad of amendments have been made to the legislation over the past 150 years which have made the *Municipal Act*, in the provincial government's own words, "complex, cumbersome, inefficient and confusing." Moreover, in the past 50 years, the provincial government has enacted dozens of statutes to supplement the powers of the municipalities in such areas as transportation and waste management.

The *Municipal Act, 2001,* is an important initiative, reflecting a process begun in 1996 to overhaul the delivery and funding of many government services. In 1996, the Who Does What panel was appointed, chaired by former Toronto mayor, David Crombie. One of the goals of the Who Does What panel was to provide advice to the provincial government on how to disentangle the area of provincial-municipal responsibility and government. The panel made recommendations to the Minister of Municipal Affairs and Housing that municipalities be recognized as responsible and accountable governments and that they be given the flexibility to act in certain areas without the need for legislation authorizing every municipal action. There was also a recommendation that municipalities be given "natural person powers" which would allow municipalities to organize their own affairs, charge for goods and services, enter into contracts, buy and sell land etc., without explicit authorization from the province.

In January 1997, the provincial government released a study paper to outline the need for a new

Municipal Act. In addition to other amendments, the 1997 study paper suggested that municipalities be granted natural person powers and provided with power to pass by-laws in 12 broad areas of authority including: 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.

The conclusions of the 1997 study paper were incorporated into a *Proposed New Municipal Act* in 1998. The 1998 Act was never introduced, but the proposal for the Act was placed on the Environmental Registry for public comment.

The *Municipal Act, 2001*:
The new Act received Royal Assent on December 12, 2001. *Municipal Act, 2001* builds on the 1998 proposed Act and the results of the subsequent consultations. It does not provide municipalities with the power to act autonomously from the province, but it does allow municipalities 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 ten different spheres of jurisdiction:

1. highways
2. transportation systems
3. waste management
4. public utilities
5. culture, parks, recreation and heritage
6. drainage and flood control (except storm sewers)
7. structures
8. parking
9. animals
10. economic development services.

Notably absent from the broad spheres of jurisdiction are areas formerly included in the 1997 and 1998 draft Acts, such as control over nuisances (noise, vibration, odour, dust); health and safety; and natural environment spheres. However, the new Act contains a specific section that allows municipalities to prohibit and regulate noise, odour, dust, vibration and outdoor lighting with certain restrictions.

Other key components of the *Municipal Act, 2001,* include the ability of a municipality to designate a road a toll highway, to exercise licensing powers in the areas of health, safety, nuisance control and consumer protection.

In addition, the legislation 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 provincial consultation with the municipalities. In December 2001, a two-year

Memorandum of Understanding between the Association of Ontario Municipalities and the Province of Ontario was signed to endorse the concept of consultation between the two parties.

Implications of the Decision:
Municipalities will now have greater power to act in their 10 spheres of jurisdiction without having to be specifically authorized by the province to do so. Greater jurisdiction in the 10 spheres, 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, licenses or approvals.

The areas of environment, health and safety and nuisance are those where municipalities could theoretically play a significant role. Because these areas are not included in the new Act's broad spheres of jurisdiction, the province retains more prescriptive powers to regulate in these areas. In its 2000/2001 annual report, the ECO recommended that MAH amend the *Municipal Act*, R.S.O. 1990, in order to allow municipalities to implement the environmental compliance responsibilities delegated to them by the Ministry of Environment and Energy (MOEE). The recommendation arose from the ECO's finding that, due to MOEE's Procedures for Responding to Pollution Incident Reports (1997), contraventions of the *Environmental Protection Act* arising from noise, dust, odour or vibrations were being referred to municipalities. Although not contained in the broad spheres of jurisdiction, *Municipal Act, 2001* contains a specific section allowing municipalities to prohibit and regulate noise, odour, dust, vibration, and outdoor illumination. The new Act also concurrently amends the *Environmental Protection Act* by repealing s. 178, which required municipalities to have approval of the minister when passing by-laws regulating noise and vibration. The result is that the province retains no approval authority over these types of by-laws. Municipalities will now be able to enact by-laws regarding noise, odour, dust, vibration, and outdoor illumination as long as they do not conflict with other restrictions contained in the new Act.

Of particular concern to a number of commenters is the future ability or inability of municipalities to respond to the public's environmental concerns, including those related to the use of lawn care pesticides. The concern stems from the 2001 decision of the Supreme Court of Canada in *Spraytech v. Hudson* ("the Hudson decision") that upheld the authority of the Town of Hudson, Quebec, to enact a by-law prohibiting the applications of pesticides within town boundaries. The Supreme Court of Canada held that the Hudson by-law was enacted pursuant to a general welfare provision of Quebec equivalent to Ontario's *Municipal Act* (*Cities and Towns Act* R.S.Q., c. C-19, ss. 410) that allows municipalities to enact by-laws "to secure peace, order, good government, health and general welfare". While the *Municipal Act, 2001* also has a general welfare provision (s. 130), the exclusion of health, safety and environment from the 10 general spheres of jurisdiction suggests that the provincial government would like to limit the ability of municipalities to enact pesticide by-laws in Ontario. Moreover, MAH makes a clear and unequivocal statement in its decision notice that "nothing in the *Municipal Act*, 2001 changes the authority of the *Pesticides Act* to regulate pesticide use in the Province."

Public Participation & *EBR* Process:
On April 7, 1998, prior to the release of the *Municipal Act,2001,* MAH placed a proposal on the Registry for *A Proposed New Municipal Act*. A decision notice for the 1998 proposal was placed on the Registry on November 2, 2001, when the proposal for the *Municipal Act, 2001* was loaded for a 30-day comment period indicating that the *Municipal Act, 2001* had been tabled with the legislature. While no comments were noted as being received in relation to the 1998 Registry proposal notice, the decision notice states that 300 comments were received as a result of other consultative initiatives. The ministry undertook other public consultation organized in the form of stakeholder Working Groups and minister's forums to discuss the issues of concern from the 1998 proposed legislation.

The *Municipal Act, 2001,* was introduced in the Legislature for First Reading on October 18, 2001. Given the complexity and length of Bill 111, a longer comment period should have been granted to enable all interested parties to make submissions. However, the ECO recognizes it was the government's goal to pass the final version of the Act before the end of the legislative session. Moreover, the *Municipal Act, 2001,* incorporated comments resulting from the 1997 proposal documents and the 1998 proposed Act.

There were 46 comments received by the ministry with respect to the November 2, 2001 Registry proposal notice, and more submissions were made during legislative committee hearings. All of the *EBR* submissions were the result of an organized campaign by the lawn care industry to express concerns about the responsibility of regulating pesticides and other environmental issues in the wake of the Hudson decision. None of the comments received were in favour of municipalities having greater control of environmental matters. The commenters believe that the provincial government should retain regulatory responsibility for regulating pesticide use in order to guarantee a province-wide set of standards to prevent a patchwork of municipal by-laws. The commenters are concerned that if municipalities are allowed to enact pesticide by-laws, municipal councils will base their decision to pass by-laws on "political activism" and not scientific evidence. Furthermore, the commenters believe that the wording of the *Municipal Act, 2001* should be strengthened to make it clear that Ontario municipalities do not have the authority to enact a by-law prohibiting pesticides.

One comment received by the ministry within the comment period was not part of the MAH file and was possibly not considered when making the final decision. A copy of the comment was forwarded directly to the ECO and was a more extensive comment than the others considered by the ministry. The comment emphasized that pesticides are regulated stringently by federal government through the Pest Management Regulatory Agency of Health Canada, and by the province. The commenter believes that education about the proper use of pesticides would be more beneficial than restrictive by-laws. Moreover, municipal regulation would duplicate the Healthy Lawns initiative currently under way by the federal, provincial, and territorial governments. The ECO is concerned that the comment was not considered and that it was not in the comment file provided to the ECO. Such an oversight shakes the confidence of the public that their comments can influence government decisions, and it is contrary to the intent of the

requirements found in the *EBR*.

SEV:
The ministry has established an Environmental Principle to accompany each of its five core businesses. The MAH core business activity that prompted the reforms contained in the *Municipal Act, 2001* is to "provide the governance and financial framework for local government". The corresponding Environmental Principle seeks to "clarify the role of the provincial and municipal levels of government as a means of increasing efficiency and accountability" and to encourage "environmentally responsible decision making by municipal government." The ministry states that the *Municipal Act, 2001,* is consistent with its SEV because, when enacted, it will clarify the powers of municipalities in relation to environmental matters. The ECO agrees that the clarity of the new Act will help both the municipalities and the provincial government clearly define their roles and responsibilities related to environmental regulation.

The process of SEV consideration seems to be confused at MAH. Currently, the ministry partially considers its SEV as part of a checklist when deciding if a proposal is one that should be placed on the Environmental Registry. While this thoroughness is appreciated, MAH's SEV is supposed to be meaningfully considered in making the ultimate decision on a proposal, in keeping with the ministry's obligations under the *EBR*. The ECO has contacted MAH about this matter and is optimistic that MAH will revise its SEV consideration procedures in the 2002/2003 reporting period.

Other Information:
Municipalities made it clear during consultation on the *Municipal Act, 2001,* that the Act was a good first step in reforming the relationship between the province and municipalities, but that a greater collaboration between the two levels of government was needed. There was a concern that despite the new powers accorded to municipalities, the province still retained the ability to override and restrict the new municipal powers. The result was the signing of a Memorandum of Understanding (MOU) between the Province of Ontario and the Association of Municipalities of Ontario (AMO). The MOU emphasizes the collaboration between the province and AMO on matters effecting municipalities. It explicitly states that the parties will respect each other's areas of jurisdiction and formalizes the principle of consultation prior to provincial implementation of legislation or regulation that will affect the municipal sector. The MOU took effect January 1, 2002, and expires January 1, 2004.

There are certain sections of the *Municipal Act, 2001* that have been proclaimed into force ahead of the other sections, which come into force January 1, 2003. Municipalities can now pass by-laws for the prohibition and regulation of nuisances, or matters that could become a public nuisance. If a municipal council arrives at its opinion that a matter is a nuisance in good faith, its opinion cannot be reviewed by any court. The newly in force sections of the *Municipal Act, 2001,* include power to regulate such things as fortification of land and to seek public input on

the licensing of an adult entertainment parlour, a body rub parlour, a rave or any other business.

The licensing ability of a municipality has been limited to the following areas: health and safety, nuisance control and consumer protection. This is more restrictive than the licensing ability under the *Municipal Act* R.S.O. 1990, which included the power to license "for the community and public interest."

Another piece of legislation passed in 2001 is also affected by the *Municipal Act, 2001.* The original Environmental Registry proposal for the *Government Efficiency Act, 2001,* indicated that the *Environmental Protection Act* (*EPA*) was being amended to delegate the minister's authority to the Director to approve municipal noise control by-laws. Ultimately, the *EPA* was not amended due to the *Government Efficiency Act, 2001* because the *Municipal Act, 2001,* repeals the *EPA* section dealing with the noise by-laws in its entirety and gives municipalities power to enact by-laws to prohibit noise, vibration, odour, dust and outdoor lighting without provincial approval.

ECO Comment:
As with many other Acts proclaimed into force in recent years, the extent of the powers granted to municipalities will be determined to a large degree by the regulations passed under the *Municipal Act, 2001.* As the *Municipal Act, 2001,* is not a prescribed Act under the *EBR*, proposals for environmentally significant regulations promulgated under the new Act will not be placed on the Registry for public comment.

The ECO has over the last several years observed that MOEE has effectively downloaded the responsibility for dealing with noise, dust and odour nuisances to municipalities. An MOEE policy directs ministry staff not to investigate most such complaints, and to refer them instead to municipalities. The *Municipal Act 2001* reinforces this direction, by removing the need for ministerial approval of municipal by-laws regarding noise and vibration.

However, s. 14 of the *EPA* still contains the general provision prohibiting the discharge of a contaminant. And the term "contaminants" includes noise, odour and vibration. It appears there has been de facto shift of noise, odour and dust concerns to municipal control that concerns the ECO. It seems increasingly unlikely that MOEE will put much enforcement effort into this area even if there are contraventions of s. 14 of the *EPA*. Lack of enforcement by MOEE may curtail the public's rights under the *EBR*, 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, leading to variable, patchy enforcement.

One of the most contentious issues surrounding the debate about the *Municipal Act, 2001* is the ability or inability of municipalities to pass by-laws regulating or prohibiting pesticide use, as the Town of Hudson, Quebec has done under Quebec's *Cities and Towns Act*. The Supreme Court of Canada affirmed the Town of Hudson's by-law stating it was correctly drafted under the general

welfare provisions of the Quebec *Cities and Towns Act*. The general welfare provision of the *Municipal Act, 2001* 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" and is almost identical wording to the former *Municipal Act* R.S.O. 1990, 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 from the broad spheres of jurisdiction, has led some stakeholders to describe the changes as "Hudson proofing" the *Municipal Act*, 2001 – meaning that the new provision would disallow municipalities from passing by-laws controlling pesticide use because they are already specifically regulated at the provincial and federal levels.

It does not appear that the new *Municipal Act, 2001,* will affect the ability of municipalities to enact by-laws to prohibit or regulate pesticides if they believe one is necessary to protect the health, safety and welfare of the municipality's inhabitants. This is because legislation in general is to be interpreted with a broad and purposive approach. One of the purposes of the new Act is to foster "the current and future . . . environmental well-being of the municipality." The additional wording in the s.130, the general welfare provision, would not lead to a conflict of laws since, while there are provincial and federal laws regulating certain aspects of pesticide registration and use, there are no laws that currently regulate municipal pesticide application. The federal *Pest Control Products Act* regulates the registration of pesticides for use in Canada, while the provincial *Pesticides Act* regulates the licensing and control of commercial applicators.

In addition, Ontario courts are currently interpreting the *Hudson* decision to allow for greater municipal control over areas that were once thought of as only provincial jurisdiction. This is a further endorsement of the precautionary principle.

Much of the implementation of the *Municipal Act, 2001,* will depend on as yet undrafted regulations. The ECO believes the regulation making power of the Act should be prescribed under the *EBR* so that proposals for environmentally significant regulations made under the *Municipal Act* will be posted on the Environmental Registry for public comment and review.

Review of Posted Decision:
Ministry of Municipal Affairs and Housing – Regulation to prescribe s. 29(1)1(a) and s. 34 of the *Building Code Act,* 1992 under the *EBR* (O. Reg. 129/01)

Decision Information:

Registry Number:	RF9E0001	Comment Period: 60 day(s)
Proposal Posted:	1999/01/14	Number of Comments: 0
Decision Posted:	2001/05/25	

Description: Prior to 1998, regulatory authority for all sewage systems was found under the *Environmental Protection Act* (*EPA*) which is administered by the Ministry of the Environment and Energy (MOEE) and prescribed under the *Environmental Bill of Rights* (*EBR*). In 1998, regulatory authority for smaller on-lot sewage systems was transferred to the *Building Code Act, 1992* (*BCA*), which is administered by the Ministry of Municipal Affairs and Housing (MAH) and, at the time, was not prescribed under the *EBR*.

To continue the application of the *EBR* to some aspects of on-lot sewage systems, MAH amended O. Reg. 73/94 of the *EBR* to include clauses 29(1)(a) and (c) and s. 34 of the *BCA* as prescribed provisions under the *EBR*.

This amendment classifies Minister's Rulings that approve the use of innovative sewage system technologies issued under s. 29 (1)(a) of the *BCA* and Minister's Rulings under clause 29(1)(c) of the *BCA* as Class I instruments under the *EBR*. These instruments are related to the construction, demolition, maintenance, or operation of sewage systems. The amending regulation, O. Reg. 129/01, was promulgated in May 2001.

Implications of the Decision:
O. Reg. 129/01 means that Minister's Rulings covering either new septics technologies or Building Code Commission (BCC) decisions that relate to septic systems will be subject to the *EBR*'s public notice and comment provisions, and proposals for such Rulings will be posted on the Registry for a minimum of 30 days to allow for public comment. BCC decisions and Ministers'Rrulings have province-wide effect.

MAH discusses the general implications of O. Reg. 129/01 in its decision notice and outlines several new opportunities for Ontario residents to become involved in environmental decision-making related to sewage systems. In particular, key Minister Rulings that amend building code standards and have the potential to affect a resident's right to a healthful environment will be open to review and comment by the public.

The importance of providing meaningful opportunities for the public to participate in decisions related to sewage systems is grounded in the potential adverse effects of malfunctioning septic

systems to the environment. As noted in the 1994/1995 ECO annual report, approximately one million septic systems were installed and operating in Ontario at that time. This number has increased since that time and there are concerns that a significant percentage may be malfunctioning in some way. A malfunctioning on-site sewage system can discharge harmful effluent through the groundwater and surface water, contaminate ecosystems, create foul odours, depreciate property value and make re-sale problematic. Public participation and reviews of septic system regulations can improve decision-making and potentially reduce adverse effects in the long term.

This decision has at least four significant implications, and these are discussed below.

1. <u>Proposals that have a Significant Effect on the Environment</u>:

The changes in O. Reg. 129/01 allow the public to comment on an MAH instrument proposal in relation to on-site sewage systems where the minister or the BCC approves the use of innovative materials, systems or building designs that are not already approved in the Ontario Building Code (which is a regulation under the *BCA*).

MAH staff did not wish to make the entire Ontario Building Code (OBC) subject to the notice and comment provisions of the *EBR*. Thus, under O. Reg. 129/01, a regulation made under s. 34 of the *BCA* is exempt from s. 16 of the *EBR* unless it relates to the construction, demolition, maintenance or operation of sewage systems, which are regulated under the Ontario Building Code (OBC). This means that the only provisions of the OBC that will be subject to the *EBR* are those related to on-site septic systems. Thus, MAH is not required to give notice on the Registry when it makes changes to the provisions of the OBC that relate to environmental standards of buildings, such as energy efficiency standards; these remain outside the purview of the notice and comment provisions contained in Part II of the *EBR*.

2. <u>Applications for Review:</u>

MAH also did not wish to make the entire OBC subject to applications for review under the *EBR*. Thus, only Clauses 29(1)(a) and (c) and s. 34 of the *BCA* are prescribed for the purposes of review under Part IV of the *EBR*. This means that any two persons resident in Ontario may make an application for review related to any existing instruments that have been issued under clauses 29(1)(a) and (c) and any regulations implemented under s. 34 of the *BCA*. However, a regulation made under s. 34 is exempt from an application for review unless it relates to the construction, demolition, maintenance or operation of sewage systems made under the *BCA*. Consequently, other facets of the OBC that relate to environmental standards of buildings, such as energy efficiency standards, remain outside the purview of applications for review under the *EBR*.

Ontario residents already had a broader right to request reviews of policies and laws related to on-site sewage systems before regulatory authority was transferred to MAH and the *BCA*. For example, residents could request that MOEE develop a comprehensive new regulatory scheme

for on-site sewage systems to protect Ontario's surface and groundwater supplies. It appears that this right has been largely preserved by the amendments contained in O. Reg. 129/01, but the ECO will monitor whether this is the case.

3. Applications for Investigation:

Under the current system, municipalities are responsible for investigations of OBC infractions. Since MAH is not responsible for investigations of OBC infractions, MAH was unable to make the OBC subject to applications for investigations under the *EBR*. Before the regulatory authority for septic systems was transferred to MAH and municipalities, Ontario residents had the right to apply for an investigation of whether a faulty system was contravening provisions in Part VIII of the *EPA*. Residents no longer have a similar right under the *BCA*. However, residents can still request that ministries such as MOEE and MNR investigate possible contraventions of the *Environmental Protection Act* (*EPA)* and the *Ontario Water Resources Act* (*OWRA)* if a septic system is malfunctioning and it is causing adverse effects on the environment.

4. Employer Reprisals:

MAH also decided to restrict how the employer reprisal provisions under the *EBR* apply to the OBC and the prescribed instruments. Thus, clauses 29(1)(a) and (c) and Section 34 of the *BCA* are prescribed for the purposes of employer reprisals under Part VII of the *EBR* if the application for protection under the *EBR* was made under an Act or provision that is prescribed for the purposes of paragraphs 4, 5 and 6 of sub-section 105(3) of the *EBR*.

However, an instrument made under clause 29(1)(a) and (c) or a regulation made under s. 34 is exempt from s. 105(3) of the *EBR* unless it relates to the construction, demolition, maintenance or operation of sewage systems made under the *BCA*.

Public Participation & *EBR* Process: Consultation packages were mailed to a number of stakeholders that included clear descriptions of the instruments being proposed for classification. These packages invited the various stakeholders to submit comments and suggestions with regard to the proposed regulations. The ECO commends MAH for this initiative.

In addition, the MAH provided a 60-day public comment period on this proposal. The ECO believes this comment period was appropriate; however, no comments were received during the comment period, though MAH did receive comments outside the comment period.

SEV: MAH's SEV includes a principle that provides for tough environmental protection planning for development applications that are not environmentally sound. This principle is integrated with three further principles that focus on restructuring, streamlining, and assisting municipalities to be efficient. While these latter principles tend to emphasize economic efficiency, rather than meeting the purposes of the *EBR*, the ECO believes that MAH's decision was consistent with their primary principle of identifying development applications that are

not environmentally sound. Thus, the ECO is satisfied that MAH incorporated its SEV in this decision and provided mechanisms to further Ontario's environmental protection goals.

Other Information:
The *BCA* and the OBC do not contain any specific direction to municipalities for re-inspection programs for existing septic systems. However, there is nothing in the *BCA* or the OBC which would prevent a municipality from establishing such a program. When the septics provisions were transferred to the *BCA* from the *EPA* in 1998, MAH stated that the enforcement of regulations related to existing septic systems was a local responsibility and strengthened the ability of municipalities to take action on unsafe septic systems. For example, the *BCA*'s definition of "unsafe" was expanded to include situations where a septic system is not operated or maintained in accordance with the *BCA*. In addition, OBC inspectors have the authority to order that tests or samples be taken by any person (not just the constructor).

In November 2000, MAH posted an information notice about a guide it had developed on re-inspection of septic systems, and explained that the proper operation and maintenance of septic systems by property owners is an important way of ensuring environmental protection and public health.

MAH says that its role on septics re-inspection is to facilitate the sharing of information among Septic Enforcement Agencies (municipalities, health units or conservation authorities) in order to assist them in making the decision to design and implement a local proactive Septic Re-Inspection Program, if they so choose. The proposed Guide discusses approaches that a number of agencies have taken to re-inspect existing septic systems, and MAH believes that this Guide is another element of MAH's efforts to educate the public in order to minimize impacts of failing septic systems.

In May 2001, MAH posted a proposal for a regulation to amend the OBC's septics provisions to mandate effluent filters in septic tanks and improve access to septic tanks to facilitate septic system maintenance and operation. MAH consultations identified two issues related to whether the OBC should mandate: (1) the installation of effluent filters in septic tanks to reduce the amount of solid materials which can impair a septic system's performance; and (2) that septic tanks must have accessible openings at or near grade level to permit easier maintenance and cleaning, including maintenance of effluent filters.

Effluent filters are installed at the outlet of the septic tank and prevent the passing of solid particles from the septic tank into the leaching bed. While not currently mandated, effluent filters can be installed as part of good design practice. MAH contends that mandating the installation of effluent filters in new septic systems will provide an additional measure to improve the functioning of these systems, prevent premature system deterioration and could reduce the likelihood of contamination of groundwater resources.

Septic tanks are almost always located below grade with access openings varying between just below the ground surface to several feet below grade level. Access to septic tanks at or near grade would be essential for the introduction of effluent filters and would ensure better system

maintenance, cleaning and operation. MAH states that providing easier access to the tanks will increase the likelihood of proper maintenance because it provides increased awareness of access to the system for initial and secondary (resale) owners. Access to septic tanks at or near grade would also make it easier for septic tank pumpers to do their work.

This is the first time that MAH has posted a notice on the Registry under O. Reg. 129/01. As of May 15, 2002, a decision notice related to this proposed regulation had not been posted on the Registry by MAH.

The ECO gave an ECO Recognition Award to one of MAH's education initiatives on septics – a certification and training program for septic contractors and inspectors – in the ECO's 1999/2000 annual report. The ECO also commends MAH for developing a brochure for property owners and cottagers who own septic systems, outlining how a septic system works, common system problems, tips on proper maintenance and use, and owner responsibilities.

ECO Comment: In late 1997, ECO staff first discussed the need for this regulation to prescribe on-site sewage systems with MAH. Despite the long delay in finalizing this regulation, the ECO recognizes the achievement of MAH in prescribing on-lot sewage systems and hopes that future environmental protection initiatives by MAH will not take so long.

It is regrettable that residents have lost the right to request an investigation of a faulty septic system under the *EBR*. It is possible that a faulty system might contravene the *BCA* long before it has caused an adverse effect under the *EPA* or the *OWRA*. As a result of these changes, residents now have to wait for real environmental damage before they can request an *EBR* investigation. In addition, the ECO suggests that MAH encourage municipalities and stakeholders to promote systematic and comprehensive septic re-inspection programs throughout Ontario to ensure that inspectors identify faulty systems before they cause serious ground and surface water pollution problems.

Review of Posted Decision:
Regulation to Establish a Development Permit System
in Pilot Project Areas
(O. Reg. 246/01)

Decision Information:

Registry Number: RF01E1001
Proposal Posted: May 7, 2001
Decision Posted: July 18, 2001
Comment Period: 30 days
Number of Comments: 9
Regulation Filed: June 22, 2001

Description:

This new regulation, O. Reg. 246/01 under the *Planning Act*, allows selected municipalities to implement a pilot land use development permit system (DPS) in several project areas set out in Schedule 1 to the regulation. These include the Township of Lake of Bays; the Gore historic area in the City of Hamilton; the Port lands and waterfront in the City of Toronto; the Winston Park West Employment District in the Town of Oakville; and sensitive well-head areas in municipalities of the Region of Waterloo. This schedule may be amended in the future to extend the DPS to other regions in Ontario.

The DPS is a planning tool proposed to supplement municipalities' existing land use powers. The stated purpose of the DPS is to eliminate duplication and facilitate quicker approvals by combining three existing approval systems under the *Planning Act* – zoning, site plan control, and minor variance – into one process. Within a development permit area a municipality would have enhanced power to regulate site alteration, including grading, dumping, and filling, and vegetation removal. The municipality would also be able to impose a broader range of conditions on the development of environmentally sensitive sites within the permit area.

The implementation of a DPS would be a local municipal undertaking. The municipality would amend its Official Plan to identify one or more development permit areas, and pass an enabling development permit (DP) by-law. In passing a DP by-law, the municipality would be required to provide:

- written notice of its purpose and effect;
- a statement that only the owner of the land subject to the application may appeal the decision to the Ontario Municipal Board (OMB); and
- a description of any internal review procedures in the by-law of decisions to issue or refuse to issue DPs.

This regulation allows a municipal council to delegate to an employee the authority to approve or refuse applications for development permits, issue development permits, attach conditions to the approval of development permits, or enter into agreements with respect to development permits. The regulation also sets out the application and appeal processes for a landowner seeking a development permit.

Implications of the Decision:
Enhancing municipalities' power to regulate site alteration and vegetation removal and to impose a broader range of conditions in a development permit area could allow them to better manage development in areas of environmental constraint or hazardous conditions. This has the potential to provide opportunities for improved environmental protection in Ontario. On the other hand, this streamlining may make development easier in areas such as the Lake of Bays, which is already under a great deal of development pressure.

Concern has been raised, moreover, that this regulation will have a negative impact on public participation in land use planning processes. The DPS provides for "up-front" public participation at the Official Plan amendment stage, before the development permit by-law has been enacted. Third parties may appeal the Official Plan amendment to the OMB. Once the DPS has been enacted, the public will have no right to appeal the development permit decision or conditions of approval. In contrast, residents now have full third-party appeal rights with respect to all of the *Planning Act* approvals that would be consolidated as part of a DPS.

Granting municipal councils the power to delegate to unelected staff the authority to approve, refuse, and apply conditions to development permit applications may reduce public accountability and participation. Inconsistencies may develop among municipalities related to the scope of delegated decision-making powers and to whom those powers are delegated.

Ultimately, the effect of this regulation will depend on how development permit by-laws are drafted by municipalities. As of January 2002, none of the pilot municipalities had passed such a by-law.

Public Participation & *EBR* Process:
The proposal for regulation was posted on the Registry for a 30-day comment period. However, the Ministry of Municipal Affairs and Housing posted only a description of the proposed regulation rather than the draft text of the proposed regulation. Two commenters requested the right to change their comments when the full text was made available.

The ministry received nine comments on this proposal. Four supported testing the DPS in the identified areas, and three requested that the pilot project areas be expanded or that the DPS be made available to all municipalities. One commenter objected to the inclusion of a specific area as a pilot project, while another requested a provision that the DPS not be used in areas subject to the *Niagara Escarpment Planning and Development Act (NEPDA).*

In responding to concerns about specific DPS sites, the ministry noted the regulation was enabling only, and that adoption of the DPS by a municipal council was subject to full public notice and appeal processes at the municipal level. The ministry also observed that none of the areas affected by the regulation was subject to the *NEPDA.*

Several commenters were particularly supportive of the enhanced power to regulate site alteration and vegetation removal. Three commenters requested that all parties have the same rights of appeal to the Ontario Municipal Board. One suggested that the approval decision for

development permit applications should rest with an elected council. Two commenters expressed concern about public participation in the DPS process and requested public education initiatives. The ministry acknowledged concerns about the impact on resident appeal rights, but felt they had to be balanced with the need to streamline the development process. The ministry maintained that existing third-party rights of appeal to the OMB at the official plan amendment stage was sufficient to allow public participation and ensure accountability. The ministry did not address requests for public education.

SEV:
The ministry considered its Statement of Environmental Values and found that, consistent with Principle 2, this regulation provides "tough environmental protection" and "better ability ('one-window planning services') to identify planning documents and development applications that are not environmentally sound."

Other Information:
This regulation grew out of a lengthy policy review process. Many of the concerns listed above had been expressed previously, during consultations undertaken in 1998 when MAH first posted a proposal for a DPS policy (Registry Number PF8E0001). At that time, the ministry circulated and posted on its own Web site a discussion paper on the DPS, convened meetings with key stakeholders, and established an advisory committee to provide input on pilot projects.

Through that consultation process, the ministry found broad support for enhanced public notification of official plan amendments and development permit applications. One environmental group submission, which was endorsed by a number of other environmental groups, expressed concerns about how the DPS would affect a number of facets of municipal planning, including public participation, right to appeal, and delegation of decision-making power.

This regulation is part of the province's Smart Growth strategy, the stated objectives of which are "sustaining a strong economy, building strong communities and promoting a healthy environment."

On March 12, 2002, O. Reg. 90/02 was filed to correct an error in O. Reg. 246/01. It amended O. Reg. 246/01 to include the Muskoka River in the pilot area of Lake of Bays. The earlier regulation should have included the Muskoka River, but it was inadvertently omitted.

ECO Comment:
The ECO shares the concern voiced by several commenters that this new regulation will limit public participation in the land use planning process. Although certain Official Plan amendments to designate development permit areas are posted on the Environmental Registry, their significance often might not be generally appreciated. Because members of the public do not have the right to appeal specific development permit decisions, if they miss the opportunity to participate in decision-making at the Official Plan amendment stage, they are effectively excluded from the planning process. Development permits may be issued long after the Official

Plan is amended, and it will be hard to anticipate what specific development permits will do. The ECO urges the ministry to undertake public education on the DPS to ensure that the public is aware of the implications of designating development permit areas in Official Plans.

The ECO notes that concerns about public participation and accountability were expressed numerous times: in comments on the policy proposal that preceded this regulation; at stakeholder and advisory council meetings; and again in comments on the proposed regulation. MAH should endeavour to better demonstrate that ministry staff have considered all relevant comments when making decisions about proposals.

The ECO also remains concerned that the regulation permits councils to delegate a great deal of discretionary authority to issue development permits to one individual, who may be subject to economic or political influences. It may be difficult to draft by-laws that anticipate and properly restrict the use of this discretion. The ECO also questions whether a lone individual can make good decisions on issues such as limiting the removal of vegetation or regulating lakeshore capacity with no government agency review and no input from third parties, when decisions such as these require knowledge of natural features and complex ecological processes.

The ECO is also concerned about how the provisions of development permits will be enforced since the regulation does not provide for inspection, monitoring, enforcement or penalties.

If the schedule to this regulation is amended to extend the DPS by-law to other regions in Ontario in the future, the ECO expects that such amendments will be posted on the Registry .

The ECO's 1997 annual report recommended that "[w]henever possible, ministries should include the actual text of proposals for new regulations and policies in Registry postings." The ECO encourages MAH to supply the actual text, not merely descriptions, of proposed regulations.

Review of Posted Decision:
Oak Ridges Moraine Conservation Act, 2001
(Bill 122)

Decision Information:
Registry Number: AF01E0003
Proposal Posted: November 2, 2001
Decision Posted: not yet posted
Comment Period: 30 days
Number of Comments: over 600
Royal Assent: December 14, 2001
Came into Force: November 16, 2001

Description:

Oak Ridges Moraine Conservation Act
In December 2001, the Ontario government enacted Bill 122, the *Oak Ridges Moraine Conservation Act, 2001* (*ORMCA*). The purpose of this Act is to allow for the establishment of an Oak Ridges Moraine Conservation Plan and to deal with other details such as transition issues, special provisions for prescribed lands, local Official Plan and by-law conformity, and conflict with existing planning documents.

The *ORMCA* is framework legislation that gives the government authority to protect the Oak Ridges Moraine. It permits Cabinet to make a regulation designating an area of land as the Oak Ridges Moraine (ORM) Area. (This was accomplished in O. Reg. 1/02, filed on January 10, 2002.) The Act also allows the Minister of Municipal Affairs and Housing to make a regulation establishing the Oak Ridges Moraine Conservation Plan ("the Plan") for all or part of the ORM Area. This was accomplished with O. Reg. 140/02, filed April 22, 2002. A review of the Plan must be carried out every 10 years to determine whether it should be revised, but the *ORMCA* prohibits such a review from considering removing land from the natural core areas or natural linkage areas. The Act requires the minister to undertake specific consultation and ensure that the public is given an opportunity to participate in this 10-year review.

The Act sets out the objectives of the Plan, which include:

- protecting, improving and restoring the ecological and hydrological integrity and functions of the ORM Area, including the quality and quantity of its water and other resources;
- ensuring that the ORM Area is maintained as a continuous natural landform and environment for the benefit of present and future generations;
- providing for land and resource uses and development compatible with the other objectives of the Plan;
- providing for continued development within existing urban settlement areas and recognizing existing rural settlements; and
- providing for a continuous recreational trail through the ORM Area that is accessible to all including persons with disabilities, and for other public recreational access.

The Act also provides guidance on the contents of the Plan, stating that the Plan may set out land use designations to which the Plan applies. The Plan may also: prohibit any use of land or the erection, location and use of buildings or structures except for purposes set out in the Plan; restrict or regulate the use of land or the erection, location and use of buildings or structures; and set out policies relating to land and resource protection and land development.

The *ORMCA* contains a number of provisions relating to the interaction of the Plan with existing municipal planning bodies and planning instruments. All decisions made under the *Planning Act* or the *Condominium Act, 1998*, must conform with the Plan, including those related to applications, matters or proceedings commenced but not decided as of November 17, 2001. A decision made in relation to an application, matter or proceeding before November 17, 2001 is not required to conform to the Plan. The Oak Ridges Moraine Conservation Plan prevails if it conflicts with an Official Plan, zoning by-law or Provincial Policy Statement. Municipal governments and planning authorities must amend Official Plans and zoning by-laws to conform to the Plan by specified dates.

The Act sets out a process for making amendments to the Oak Ridges Moraine Conservation Plan. Any amendments to the Plan must conform to the objectives of the Plan set out in the Act. The Minister may propose an amendment to the Plan, and may accept applications for amendments to the Plan from certain persons or public bodies. The Minister may make a regulation setting out the persons or public bodies that may make such applications and the circumstances in which they may be made. When an amendment to the Plan is proposed, the Minister must give notice and an opportunity to make written submissions to area municipalities or municipal planning authorities, and to other prescribed persons or public bodies, before making a decision. If written submissions are received, the Minister, after considering them, may proceed to make a decision on the proposal or may appoint a hearing officer to conduct a hearing and make written recommendations with respect to the proposed amendment.

Although the legislation was passed in December 2001, a provision in the Act deems it to have come into force on November 16, 2001, making it retroactive. This was necessary because the *Oak Ridges Moraine Protection Act, 2001* (*ORMPA*), which had placed a six-month moratorium on development on the ORM, expired on November 17, 2001. Under *ORMCA*, the Cabinet may prescribe lands on the ORM to which certain provisions of the *ORMPA* will continue to apply, reinstating the freeze on development in these areas.

Oak Ridges Moraine Conservation Plan

The final Oak Ridges Moraine Conservation Plan was released on April 22, 2002. The Plan sets out how future land use, development, site alteration and use of buildings will occur. 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. The Plan includes provisions to protect key natural heritage features and hydrological features regardless

of land use designation. It also includes provisions applying to the various permitted uses and to major development applications in most of the Plan Area. The Plan also says a continuous trail for non-motorized use will be established for travel along the entire Plan Area.

Natural Core Areas, which cover 38% 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% 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% 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% 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.

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. Key natural heritage features include: wetlands; significant portions of the habitat of endangered, rare and threatened species; fish habitat; ANSIs; significant valleylands; significant woodlands; significant wildlife habitat; and sand barrens, savannahs and tallgrass prairies. Hydrologically sensitive features include streams, wetlands, kettle lakes, seepage areas and springs. 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.

The Plan also requires all municipalities to prepare watershed and subwatershed plans, water budgets and conservation plans within specified dates. The Plan prohibits several land uses in wellhead protection areas and areas of high aquifer vulnerability as mapped by MOEE. Municipalities must establish wellhead protection areas and policies in their Official Plans. Some protections are also provided for landform features such as steep slopes, kames, kettles, ravines and ridges.

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. This includes: public highways; transit lines, railways and related facilities; gas and oil pipelines; sewage and water service systems and lines and stormwater management facilities; power transmission lines; telecommunications lines and facilities, including broadcasting towers; bridges, interchanges, stations and other structures required for the construction or use of the facilities listed. Applications for these uses must demonstrate the need for the project and that there is no reasonable alternative, as well as other requirements such as allowing for wildlife movement and keeping any adverse effects on the ecological integrity of the Plan Area to a minimum.

Most of the description of how the Plan will be implemented is contained in a document separate from the regulation. 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 better understand, interpret and implement the provisions of the Plan. These shall 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 will – in partnership and in consultation with various stakeholders – establish a data management system, including a database, performance indicators and a monitoring network, in order to assess changes in the ecological integrity of the Moraine and monitor the effectiveness of Plan implementation. The indicators would be evaluated to: measure ecological change; assess the effectiveness of the Plan in achieving its objectives; and help identify improvements needed to address problems.

Implications of the Decision:
Once implemented, the *ORMCA* and the Plan will provide long-term protection to the Oak Ridges Moraine Area. The objectives for the Plan set out in the Act emphasize that development and resource use in the ORM Area must be considered in the context of protecting the environment, and water quality and quantity.

Oak Ridges Moraine Conservation Act
The Act gives broad powers to the Minister of Municipal Affairs and Housing in relation to resolving conflicts between the Plan and municipal Official Plans or zoning by-laws, proposing and making decisions concerning amendments to the Plan, and dealing with matters related to the ORM Area that were appealed to the OMB prior to November 17, 2001. In particular, a great amount of discretion is bestowed in the authority given to the minister to propose an amendment to the Plan, refuse an application for an amendment made by a prescribed person or public body, and make the decision whether or not to approve a proposed amendment.

The *ORMCA* ensures that there will be public participation in decisions under the Act. When the minister carries out a 10-year review of the Plan, the minister must consult with affected ministries and public bodies, consult with the council of each municipality or municipal planning authority with jurisdiction in the ORM Area, and ensure that the public is given an opportunity to participate in the review. As noted above, a more limited consultation requirement applies to proposed amendments to the Plan, including notice and an opportunity to comment for each municipality or municipal planning authority with jurisdiction around the area and other prescribed persons or public bodies, as well as possible hearings.

In addition to provisions in the Act, MAH has informed the ECO that it is committed to complying with its obligations under the *EBR*, and will proceed to prescribe the *ORMCA* for the purposes of Parts II (public participation), IV (applications for review) and VII (employer reprisals) of the *EBR*. This means that the public will receive notice and have the opportunity to comment on regulations and instruments related to the *ORMCA* and will be able to make applications for review in relation to the Act. Whistleblower protection will be provided for employees of ministries, municipalities and other organizations.

Oak Ridges Moraine Conservation Plan

Fully 62% 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 is similar to the Niagara Escarpment Plan in its ecological basis. First, it identifies the ecological forms and functions, including their connections, which must be protected. Second, it attempts to create a buffer between these areas and urban centres. This approach represents progressive environmental planning. The Plan does not affect existing land uses, but adds new restrictions and planning requirements on future development. It restricts the types of development, site alteration or change in land use that may occur, 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 of the Oak Ridges Moraine will be preserved.

The Plan's provisions for protecting natural heritage features and hydrological features and functions are mandatory and not just policies 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 PPS, and does not require them to be identified as "provincially significant." Setting out the areas of influence and minimum vegetation protection zones in metres for each type of feature provides clear 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.

The Plan allows for transportation and utilities in the entire Plan Area, even in Natural Core Areas and in natural heritage or hydrologically sensitive features. The introduction to the Plan says they will have to meet stringent review and approval standards, but none are set out in the Plan. It says they are only allowed if need for the project has been demonstrated and there is no reasonable alternative. The Plan does not include criteria or review and approval procedures for determining whether those have 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."

There will undoubtedly be economic and social impacts for municipalities. Municipalities must now carry out additional studies of natural heritage and hydrological features, revise their Official Plans, prepare watershed and subwatershed plans and water budgets, and 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.

It is not known at this time what effect the Act and Plan will have on development patterns outside the Plan Area. The government maintains that the Act and Plan are key elements of their Smart Growth strategy, in steering development towards 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 southcentral Ontario to avoid re-directing development to the prime farmlands and natural areas off the Moraine.

Public Participation & *EBR* Process:

Background

The *ORMCA* was the culmination of a long process of public advocacy to protect the ORM. In the ECO's 2000/2001 annual report, we noted that two *EBR* applications had been submitted in March 2000 requesting a review of the need for a new policy, Act or regulation to ensure a long-term strategy to protect the ORM. The applications for review were submitted to the Ministers of Municipal Affairs and Housing, Natural Resources and Environment, who denied the requests. In their response, the ministers stated their belief that "the guidelines, policy and legislation comprising the current land use planning system in Ontario provides [environmental] protection. Since this sound provincial and municipal framework of policy, guidelines and legislation exists, each of us does not believe that a further review is warranted." The ECO

responded in the annual report by recommending that MAH, in consultation with other ministries and the public, develop a comprehensive long-term protection strategy for the ORM.

Prior to the October publication of this recommendation in the ECO's 2000/2001 annual report, however, the government enacted the *ORMPA* in May 2001 which placed a six-month moratorium on Official Plans, Official Plan amendments, zoning by-laws, or plans of subdivision involving lands on the ORM, stayed development applications before the OMB involving lands on the ORM, and prevented the OMB from issuing orders relating to such applications. According to MAH, the purpose of the moratorium was to allow for consultation with stakeholders and the public about which parts of the ORM should be protected and how they should be protected.

During this six-month moratorium, the government carried out public consultation through the Environmental Registry, panels and stakeholder meetings. An inter-ministerial team of senior government officials, with representation from MAH, MOEE, MNR, OMAF, MTO and the Ministry of Finance, was set up to undertake the consultation. In addition, an external Expert Advisory Panel, representing municipalities, environmental groups, development industry and resource and academic sectors, was assembled. This Panel produced a consultation paper, "Share Your Vision for the Oak Ridges Moraine," in August 2001 that was used as the basis for consultation with the public and stakeholders.

On August 14, 2001, a consultation notice was placed on the Registry with a 30-day comment period (Registry No. PF01E0003), and four public open houses/hearings and six stakeholder sessions were held across the ORM in late August and early September 2001. 550 comments were received. According to MAH, this input provided the basis for the new legislation and conservation plan. However, stakeholders expressed concern about the public consultation held on the Advisory Panel's recommendations. Hundreds of people attended each of the four evening public open houses, but only 150 selected stakeholders were invited to the four all-day workshops, and an unknown number to two implementation workshops. The ministry also received criticism from some Toronto environmentalists, politicians, media outlets and members of the public for not holding a public meeting in Toronto.

On November 1, 2001, the *ORMCA* was introduced in the Ontario legislature. A single proposal notice for the draft Act and 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 incorrectly 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 as to whether or not MAH would accept and consider public comments in response to the Registry notice on Monday, December 3, the next business day. In response to the ECO's query, MAH confirmed that it would accept comments received on the Monday.

Public Comments

The ministry received 550 comments on the "Share Your Vision" document and over 600 comments on the Act and draft Plan. Because MAH had not placed a decision notice on the

Registry as of May 2002, there was no summary available of comments on the draft Act and Plan or any indication of how the ministry considered those comments. Based on comments seen by the ECO, some development interests were completely opposed to the Act and Plan, but most other stakeholders such as municipalities, environmental groups, residents groups and the general public were in favour. Over all the ministry received strong support for the creation of legislation and a plan. However, there were concerns expressed 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 intent that they would implement the Plan, but asked the province to map all the areas with ecological constraints to development, allow municipal policies to be more restrictive than the Plan, and either exempt development controls from appeal to the OMB or else be responsible for defending the Plan before the OMB and courts.

Some of the comments made specifically about the provisions of the draft Act were resolved in the final version. For example, commenters were concerned about sections giving the minister discretion to revoke the Plan, and allowing a review to consider changing the boundaries of designated natural core or linkage areas. In response, MAH deleted the provision allowing the Minister to revoke the Plan and clarified that a review of the Plan could not consider removing land from the natural core or linkage areas. Commenters were also concerned that the Act confers on the Minister broad discretionary powers such as proposing and deciding on amendments to the Plan.

As noted above, the Plan contains provisions for protecting natural heritage features and hydrological features and functions that are mandatory and not just policies decision-makers must "have regard to," and that take precedence over other Acts and plans. Many commenters have suggested that the Province should use this model to improve land use planning and decision-making throughout southern Ontario.

There was support for the land use designations, but much debate about the permitted uses. The public and environmental groups generally opposed new or expanded aggregate operations, golf courses or roads on the Moraine. In contrast, the aggregate industry wanted aggregate operations allowed in Natural Core Areas as well. The ministry did not remove the restriction, but decided this issue would be re-examined during the 10-year review. Many commenters also recommended the government develop a comprehensive Smart Growth strategy for Central Ontario to address the need for transit and to avoid sprawl development leap-frogging over the Moraine.

One of the most controversial issues was aggregate operations such as pits and quarries. Most commenters said that no new aggregate operations or pits should be allowed in the Natural Linkage Areas or ever considered for the Natural Core Areas. 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 new mineral

aggregate operations and wayside pits to be established and existing ones to expand in Natural Core Areas. Municipalities may, and in fact are encouraged to, enact more restrictive policies than those in the Plan, except regarding agricultural uses or pits or quarries.

MAH made few major changes to the policies between the Share Your Vision document, the draft Plan and final Plan. A few changes were made in response to the concerns: some of the changes added additional protections and some may have weakened the Plan in minor ways. For example, in the final Plan, most of the description of how the Plan will be implemented is contained in a document separate from the regulation. In the draft Plan, this implementation document had been included in the proposed regulation. There were some controversial changes to the maps and land use designations in particular areas, including over 600 hectares of lands rezoned from Countryside to Settlement between the Share Your Vision document and the draft Plan, but only minor changes between the draft and final Plan.

SEV:
The ministry determined that the Proposed Act and Plan met the purposes of the *EBR* and MAH SEV principles. One of MAH's principles is to encourage environmentally responsible decision-making by municipal governments. Another is to assist communities to better protect their resources for economic use and/or environmental benefits by, in part, providing tough environmental protection. The ECO agrees with MAH's analysis that the new Act and Plan are consistent with these principles and the purposes of the *EBR*.

ECO Comment:
The *ORMCA* and Plan are important steps forward in environmental land use planning in Ontario. If implemented as planned, 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 Act and Plan, and recognizes the work of the staff of the various ministries involved, the members of the 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 obligations under the *EBR* by prescribing the *ORMCA* for the purposes of Parts II, IV and VII of the *EBR*.

As noted above, the proposed Act and Conservation Plan were both included in the same Registry notice. Given the complexity of these two proposals, they should have been posted in separate notices. 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 *ORMCA* quickly, especially given that the Act would be retroactive to November 16, 2001, the combination of Act and Plan was far too complex for the minimum comment period. Given that 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.

Also of concern to the ECO was the very short period of time that MAH allotted for the consideration of public comments before the Act was passed. Because MAH accepted comments until December 3, 2001, and the Act was passed on December 6, 2001, it is unlikely that there was adequate time for proper consideration of all comments.

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.

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 or criteria for interpreting the transportation provisions in the Plan, the ECO anticipates that new policies will be developed and shared with the public on the Registry for comment.

The ECO shares the strong concerns of many commenters about implementation of the Plan. The implementation material attached to the Plan indicates that the province anticipates a minor role for itself in implementation. The upper-tier municipalities have demonstrated their commitment to the Act and Plan, and have in most cases, specialized technical and environmental planners. 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. The ECO urges the provincial government to assist municipalities by providing baseline information and mapping to better describe the "ecological and hydrological integrity of the Moraine" and identify the areas subject to ecological constraints to development.

The implementation material attached to the Plan says that the provincial government will update existing technical guidelines or develop new ones as required to help the users of the Plan to better understand, interpret and implement the provisions of the Plan. The ECO encourages the ministries to do so, 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 difficult to measure.

As noted above, the implementation document separate from the Plan describes the government's intent to establish a database, identify performance indicators and establish a monitoring network. Unfortunately, there are no timelines and no clear indication of responsibility and accountability. The ECO urges MAH, MNR and MOEE to take responsibility, set targets and timelines, and begin planning these monitoring, indicator and evaluation systems immediately.

The *ORMCA* and the Plan are a solid foundation for the task of protecting the Oak Ridges Moraine. The ECO will monitor and report on their implementation in future reports.

SECTION 4

REVIEWS OF SELECTED DECISIONS ON POLICIES, ACTS, REGULATIONS AND INSTRUMENTS

MINISTRY OF NATURAL RESOURCES

Review of Posted Decision:
Ministry of Natural Resources Instrument Classification
Regulation under the *Environmental Bill of Rights*
(O. Reg. 261/01)

Decision Information:

Registry Number: RB7E6001
Proposal Posted: November 10, 1997
Decision Posted: July 13, 2001
Comment Period: 67 days
Number of Comments: 95
Regulation Filed: June 27, 2001

Description:

This regulation (O. Reg. 261/01) amends O. Reg. 681/94, which is the instrument classification regulation under the *Environmental Bill of Rights* (*EBR*). An instrument classification regulation for a ministry sets out the instruments issued under prescribed Acts that will be subject to the *EBR*. Instruments are legal documents that ministries may issue to companies, individuals, municipalities and conservation authorities allowing them to undertake certain activities. MNR issues many different types of instruments permitting activities such as operating sand and gravel pits, dredging or construction work around lakes and rivers, or trapping wildlife. Most activities covered by MNR instruments have some environmental impact, whether positive or negative. More than 87% of Ontario's land is owned by the Crown, and MNR instruments are required for most activities on Crown lands.

A ministry's instrument classification regulation is important for Ontario residents who wish to exercise their rights under the *EBR*. For example, the classification of an instrument determines whether a proposal to grant a licence or approval will be posted on the Environmental Registry. Section 19 of the *EBR* requires certain ministries to propose a regulation to classify proposals for instruments as Class I, II or III proposals. Whether and how an instrument is classified determines what level of public participation is available under the *EBR*. Unless an exception in the *EBR* applies, classified instruments must be posted on the Registry for a comment period of at least 30 days, and are subject to applications for review and applications for investigation. Class I and II instruments may be subject to applications for leave to appeal if they are subject to a right of appeal under another Act. Proposals for Class III instruments normally require a hearing before a decision is made.

MNR's instrument classification regulation contains a number of Class I and Class II instruments. None are classified as Class III. Some examples of Class I instruments in the regulation are:

- proposals to approve or amend a site plan, revoke a licence or issue certain aggregate permits under the *Aggregate Resources Act* (*ARA*)
- proposals to sell or lease land, or require an authority or municipality to carry out flood control operations under the *Conservation Authorities Act*
- proposals to issue a forest resource processing facility licence under the *Crown Forest Sustainability Act, 1994* (*CFSA*)

- proposals to issue an authorization for the release of wildlife or an invertebrate, or a licence to engage in aquaculture under the *Fish and Wildlife Conservation Act, 1997* (*FWCA*)
- proposals to make a declaration or amend a local plan under the *Niagara Escarpment Planning and Development Act* (*NEPDA*)
- proposals to designate an area as a zone, defining the purposes for which lands may be administered, or to issue a permit to erect a building or structure or make an improvement on public land in defined circumstances under the *Public Lands Act* (*PLA*).

The Class II instruments listed in the regulation include:

- proposals to issue licences to remove aggregate from a pit or quarry, to change conditions on licences or to require a site plan amendment under the *ARA*
- proposals to make orders, other than immediate orders, under certain provisions of the *Lakes and Rivers Improvement Act* (*LRIA*)
- proposals to approve an amendment to the Niagara Escarpment Plan under the *NEPDA*
- proposals to grant or amend permits to inject a substance other than oil, gas or water into a geological formation in connection with projects for enhancing oil or gas recovery under the *Oil, Gas and Salt Resources Act* (*OGSRA*).

Implications of the Decision:
The 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 receives notice of certain proposals for instruments on the Registry and may review and comment on these proposals, seek 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
- aquaculture facilities.

However, a significant number of MNR instruments were not classified in the regulation and are therefore not subject to the *EBR*. MNR's initial instrument classification proposal in March 1997 did not include a large number of environmentally significant instruments that would have been excepted from being posted on the Registry under ss. 32(1)(b) of the *EBR*. This section excepts from posting decisions implementing projects approved or exempted under the *Environmental Assessment Act* (*EAA)*. This meant that these unclassified but environmentally significant instruments would not be subject to other rights under the *EBR*, such as applications for review or investigation. MNR also initially proposed to limit the scope of certain classified

instruments so that they would only have to be posted if they affected land defined as "provincially significant."

After engaging in public consultation and discussions with the ECO, MNR developed a revised proposal, posted on the Registry in November 1997 and summarized in a consultation package, that increased the number of instruments classified in the proposed regulation to include instruments that would be excepted from Registry posting by s. 32 of the *EBR*. MNR also proposed to exempt from the notice and comment requirements in Part II of the *EBR* the orders that must be issued by MNR field staff on an immediate basis. This was to be accomplished by amending O. Reg. 73/94 under the *EBR*. These orders, and the instruments covered by the *EAA*, were to remain subject to applications for review and investigation.

However, the final regulation filed in June 2001 did not classify many of the instruments proposed by MNR in its second classification proposal because they are excepted from notice on the Registry by s. 32 of the *EBR*. Among the key instruments that were not classified in the final regulation are the following:

- proposals to issue a wayside permit to operate a pit or quarry under the *ARA*
- proposals to approve or amend forest management plans under the *CFSA*
- proposals for an agreement for the purpose of conservation or management of fish, wildlife or fish populations or their ecosystems under the *FWCA*
- proposals for approval to construct a dam under the *LRIA*
- proposals that the minister acquire land for the purposes of developing any feature of the Niagara Escarpment Plan under the *NEPDA*
- proposals for approval to construct and operate facilities in provincial parks under the *Provincial Parks Act*
- proposals to issue work permits under the *PLA*
- proposals for the sale or lease of public lands, or for the sale of water powers or privileges under the *PLA*.

Because instruments such as those listed here are issued to implement projects approved or exempted under environmental assessment, 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 in any case. However, since they have not been classified, the public has also lost other rights under the *EBR*, such as the right to apply for reviews and investigation.

The decision notice posted on the Registry in July 2001 offers an explanation of why the final regulation contained fewer instruments than the November 1997 Registry proposal. The decision notice stated that "[c]ertain groups of instruments are not contained in the regulation for the purposes of clarity where classification would be confusing and misleading because classification would not trigger a requirement for posting notice on the Environmental Registry or all the other consequences of classification…," including field orders, *EAA* exceptions and instruments issued by bodies such as conservation authorities and the Niagara Escarpment Commission. This statement is not accurate. As indicated above, the classification of these

instruments would have other consequences beyond requiring notice on the Registry, such as making them subject to applications for review and investigation. The decision notice also listed a number of instruments that had not been included in the final regulation due to: the repeal of legislative provisions related to proposed instruments; errors in the November 1997 proposal notice; the need for further consideration of existing confidentiality requirements for certain instruments under the *OGSRA*; clarification of notice requirements related to certain instruments under the *ARA*; and scoping and refining of posting requirements for other instruments under the *CFSA*, the *FWCA*, the *LRIA*; and the *PLA*.

MNR has advised the ECO of its interpretation that every 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. All MNR Acts make it an offence to contravene conditions of an instrument issued under those Acts.

Public Participation & *EBR* Process:

Background

Under the *EBR*, the Ministry of Natural Resources was required to propose its instrument classification regulation "[w]ithin a reasonable time" after April 1, 1996. The proposed regulation was first placed on the Registry as an information notice on March 11, 1997. Although it was posted as an information notice, written submissions on the proposal were invited during a comment period of 60 days. MNR also prepared a stakeholder package that was sent to key interest groups and made available to members of the public who requested it. On November 10, 1997, MNR posted a revised proposal notice on the Registry for a 67-day comment period. Again, a consultation package was distributed and made available. However, the final regulation was not filed until June 27, 2001, after a significant and inappropriate delay in finalizing MNR's instrument classification regulation. The decision notice concerning this regulation was posted on the Registry on July 13, 2001.

The ECO noted MNR's delayed instrument classification regulation in ECO annual reports dating from 1996 to 1999/2000. For example, in our 1998 annual report, we noted that MNR's failure to finalize the regulation meant that "members of the public are unable to scrutinize the ministry's proposals for specific instruments related to Ontario's natural resources and may not exercise their rights under the *EBR* to comment upon these proposals or apply for a review or investigation, if required."

The ECO responded to the long delay in implementing the instrument classification regulation by submitting a special report, entitled "Broken Promises: MNR's Failure to Safeguard Environmental Rights," to the Legislative Assembly of Ontario on June 21, 2001. The special report discussed the history of the process of developing MNR's instrument classification regulation, including the commitments that had been made to the ECO by MNR between 1995 and early 2001. At various times, the ECO was informed that the regulations would be finalized in early 2000, then at the end of 2000 and finally in early 2001. However, at the time the special report was issued, MNR had not communicated with the public about its intentions on the

regulation for three and a half years. The ECO also noted in the special report that MNR's delay in finalizing its instrument classification regulation had prevented Ontarians from exercising their rights under the *EBR*. The special report concluded that MNR's delay in completing its instrument classification regulation was unreasonable and unacceptable, and urged the ministry to finalize and publish its classification regulation by September 1, 2001. As noted above, the regulation was filed six days after the release of the ECO's special report, on June 27, 2001. The Registry decision notice concerning this regulation indicates the regulation was made by the Lieutenant Governor in Council, with the concurrence of Cabinet and on the recommendation of the Minister of the Environment. It should be noted that the Minister of Natural Resources did not have the legal authority to make the final decision concerning the regulation. Section 121 of the *EBR* provides the Lieutenant Governor in Council with the power to make regulations classifying instruments under the Act.

Public Comments

In its Registry decision notice, MNR reported that 100 comments were received in response to the Registry proposal notice. It appears, however, that 95 written submissions were received from members of the public. MNR informed the ECO that there was some confusion in reaching this number – one party phoned but did not make a written submission, and a few parties who phoned and provided written submissions were counted twice. Files submitted to the ECO show that 14 submissions were received by MNR in response to the March 1997 proposal (in addition to a submission from the ECO) and 81 submissions were received in relation to the November 1997 proposal.

The March 1997 proposal received a wide range of comments. Many commenters opposed the decision to exempt so many instruments from classification. For example, two commenters expressed concern about the many eligible statutory provisions that had not been proposed to be classified, and suggested that there had been a failure to prescribe significant instruments, such as sustainable forest licences under the *CFSA*. Three commenters objected specifically to the improper invocation of EA-related exceptions, arguing that it was improper for MNR to invoke timber management Class EA approval to exempt instruments under the *CFSA* because MNR was not meeting Class EA terms and conditions imposed by the Environmental Assessment Board, and that it was improper for Forest Management Plans to be posted only as voluntary information notices since they were so environmentally significant.

Other commenters believed that too many instruments had been classified and that some had been classified incorrectly. One commenter was concerned that proposals for instruments under the *ARA* would be designated as Class II or subject to more than a 30-day comment period. Another commenter urged that permits issued by the Niagara Escarpment Commission (NEC) and amendments to NEC permits not be classified, arguing that the *EBR* does not apply to agencies, boards and commissions.

Some comments objected to MNR's handling of the instrument classification process. One commenter noted MNR's "unconscionable" delay and the impairment of *EBR* rights. That commenter argued that MNR had not complied with the instrument classification process set out in s. 20 of the *EBR*, that it had no legal authority to exclude instruments from classification on

the basis of the EA exception in s. 32 of the *EBR*, and that MNR had failed to address certain procedural and transitional matters.

MNR's second proposal for the instrument classification regulation addressed many of the concerns expressed in the first round of comments. More instruments were classified, and the EA exception in s. 32 of the *EBR* did not preclude classification. Many instruments subject to EA were classified in the second proposal and subject to applications for review and investigation, if not for notice and comment on the Registry. For example, in MNR's second version of the regulation, proposed Forest Management Plans were included as Class I proposals. Likewise, MNR's second draft of the regulation included work permits issued under the *PLA* as Class II instruments, which had not been included in the first proposal due to an invocation of s. 32 of the *EBR*.

Many more comments were received in relation to the November 1997 proposal, although approximately 70 of these were nearly identical letters received from stakeholders connected with the aggregate industry. These commenters emphasized that proposed Class I and II instruments under the *ARA* should not be classified as instruments because a similar process of public review and consultation going beyond the scope of the *EBR* or the *EAA* already exists, and that the *EBR* duplicates the requirements of the *ARA*. They argued that it was unnecessary to include site plan amendments as classified instruments since increased public scrutiny through the Registry notice and comment process would not increase their environmental soundness. One commenter was concerned that a large volume of *ARA* instruments would reduce the effectiveness of the Registry. In the final version of the regulation, many of the proposed *ARA* instruments remained as classified instruments, although some were removed because MNR claimed they were field orders or EA exceptions, or for other reasons.

A few commenters recommended that certain instruments not be classified as had been proposed. One commenter suggested that the new proposal was counter to the government's agenda for streamlining the development approvals process. Another noted that land use concerns were typically local in nature and province-wide notice could result in uninformed appeals. Three commenters submitted that the *EBR* process would add delay to an already slow and duplicative process. Several others objected to existing licenses being subject to reviews and investigations.

Some members of the public, including one large non-governmental organization, suggested that MNR still had not classified all of the environmentally significant instruments. One commenter criticized the continued delay in finalizing the instrument classification regulation and MNR's failure to prescribe certain environmentally significant instruments. It was also suggested that the EA coverage of some of MNR's instruments said to be excepted under s. 32 of the *EBR* may be outdated and may not provide adequate public participation.

In its July 2001 decision notice on the Registry, MNR provided a summary of the comments made on the two proposals. The decision notice set out four main categories to describe the comments: overlap and duplication with existing consultation; too many instruments in the proposal for a regulation; too few instruments in the proposal for a regulation; and *EAA* exception to notice. In relation to the concern that consultation requirements imposed by the

EBR would duplicate existing requirements and cause delay in decision-making, MNR agreed that existing consultation requirements for some instruments provide opportunities for public participation (such as consultation requirements for new licences under the *ARA*), but responded that integrating *EBR* consultation requirements into the existing process would not result in delays in making decisions. In response to the concern that too many instruments were included in the regulation proposal, MNR stated it believed the regulation had achieved a balance between industry concerns and the public's desire to participate in decision-making. MNR added that the list of instruments had been further refined to eliminate those that would not have a significant effect on the environment, such as certain instruments under the *ARA*.

MNR also noted in the Registry decision notice the concern that certain additional instruments should have been classified, but were excluded. MNR responded that a number of these instruments "were not environmentally significant in and of themselves because they were merely implementing environmentally significant decisions made under another instrument or through land use or resource management processes." MNR also submitted that the Task Force on the Ontario Environmental Bill of Rights, which developed the *EBR*, had recognized that it could be appropriate, under some MNR statutes, for no instruments to be classified. MNR believes it has achieved a balance in its instrument classification regulation. In response to the criticism that MNR had used the s. 32 EA exception inappropriately, MNR argued that its *EAA* requirements already impose notice and consultation procedures for environmentally significant activities and that it would be inappropriate for the *EBR* to create new public notice obligations for these instruments. However, MNR did not acknowledge that failure to classify these instruments restricted the public's right to apply for a review or investigation.

SEV:
In its SEV briefing note, MNR stated that it had considered its SEV in making this decision, although it was "of the view that the enhanced consultation opportunities provided by the proposal and the subsequent regulation would not have a significant effect on the environment, given existing consultation opportunities and the fact that MNR's decision making processes are not primarily instrument driven." The briefing note pointed out that the regulation contributes to MNR's goals and objectives by identifying instruments with a significant effect on the environment, setting out a consistent approach to providing notice on the Registry, and broadening the public notice provided. MNR also claimed that the regulation serves several of its *Direction 90's* policy principles concerning the limits of the development of natural resources, respect for the precautionary principle, and giving people a real voice in decisions affecting their lives.

Of the 11 desired outcomes identified in its SEV, MNR stated that the regulation addresses the following six through the enhanced opportunities for public notice and comment: healthy ecosystems are secured; land and natural resources are planned for and management in an orderly way; allocation of natural resources is efficient and fair; significant natural heritage features and landscapes are protected; Ontarians demonstrate widespread understanding and acceptance of the need to follow the principles and practices of sustainable development; and human life, property and natural resource values are protected. MNR also submitted that no aspects of the instrument regulation conflicted with MNR's SEV. MNR did not identify any

specific *EBR* purposes served by the regulation beyond the fulfillment of the requirements in s. 19 of the *EBR*.

Although MNR has considered its SEV in developing the instrument classification regulation, it has not acknowledged that the goals of its SEV might have been better achieved if more instruments had been classified, including those subject to the EA exception. MNR's SEV consideration document focuses on the public notice and comment implications of the instrument classification regulation, and does not recognize other *EBR* rights such as applications for review and investigation.

Other Information:
In its July 2001 Registry decision notice, MNR mentioned that it was in the process of developing a new Class Environmental Assessment (EA) for Resource Stewardship and Facility Projects (Registry No. PB8E6012) which is expected to cover a number of projects currently under MNR's Class EA for Small Scale Projects, as well as some projects currently subject to *EAA* exemption orders. The new Class EA will contain specific public notice and consultation requirements for various instruments, including many that were excluded from the instrument classification. (See pages 314 – 319 of this Supplement for the ECO's analysis of this new Class EA.)

In August 2001, the ECO wrote to MNR about its final decision on the instrument classification regulation. In this correspondence, the ECO asked MNR for an explanation as to why MNR decided not to follow through on its 1997 commitment to the ECO to include in the regulation all relevant environmentally significant instruments so that these instruments would be subject to reviews and investigations, even if they were excepted from notice and comment requirements. In its response, MNR implied that the final decision was out of the hands of MNR and was made by Cabinet. MNR stated:

> There has been no breach of MNR's October 1997 commitments. MNR explained its intention to include the section 32 notice exceptions in its November 1997 revised proposal for a regulation and followed through when it included section 32 exceptions in its November 1997 revised proposal. The regulation as made by the LGC in accordance with the authority under clause 121(1)(j) of the *EBR*, does not contain the s. 32 instruments.

ECO Comment:
As noted above, the June 2001 special report commented on the extreme delay in finalizing the regulation. 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 was disappointed that the final regulation did not include many of the instruments that were included in MNR's second proposal for the regulation. In the ECO's opinion, it is a misinterpretation of the *EBR* to omit instruments from classification on the basis that they are field orders, or are subject to the s. 32 EA exception. Under our interpretation of the *EBR*, s. 32 has no bearing on a ministry's instrument classification process and should be

applied, along with other *EBR* exceptions, only after a ministry has finalized its instrument classification regulation and ministry staff are considering whether a particular prescribed instrument is supposed to be posted on the Registry for notice and comment. In this way, other *EBR* rights that apply to classified instruments, such as applications for review and investigation, would be safeguarded.

The ECO is also concerned that some instruments have been omitted from classification, purportedly because of the s. 32 exception, but are not actually caught under an undertaking subject to EA or subject to an exemption order. MNR's exemption order 26/7 (MNR-26/7), which MNR relied on in deciding not to prescribe many of its instruments, applies to "dispositions by MNR of certain or all rights to Crown resources or land." In MNR's internal procedure document related to MNR-26/7, certain instruments are explicitly said to be not subject to the exemption order, and are not subject to alternate means of *EAA* coverage. These instruments have not been classified under the *EBR* either, so are not subject to the *EBR* or the *EAA*. MNR considers that an instrument issued for an activity for which rights or resources have already been disposed is not a disposition under the *EAA*. For example, if MNR has granted a waterpower lease in accordance with MNR-26/7, subsequent approvals such as work permits for that project are considered "regulatory in nature and are not dispositions subject to this exemption."

The ECO also questions whether there is in fact public participation equivalent to the *EBR* in all of the MNR's EA and Class EA consultation processes. The ECO has addressed this issue in the context of several ministries in this annual report. (Please see pages 34 – 41 for further analysis of this issue.)

Review of Posted Decision
Ontario Low Water Response Plan (2001)

Decision Information:

- Registry Number: PB00E6011
- Proposal[1] Loaded: July 24, 2000
- Decision[2] Loaded: May 24, 2001 & June 21, 2001[3]
- Comment Period: 60 days
- Number of Comments Received: 2
- Decision Implemented: May 2001

Description:

Low precipitation and surface water levels in 1998 and 1999, which likely lowered groundwater levels, prompted the government to develop a plan that included water level monitoring in the province and local conservation and use-restraint measures for times of drought.

In May 2001, a MNR decision notice posted on the Environmental Registry explained that MNR and other government ministries were implementing this Plan, entitled "Ontario Low Water Response Plan (2001)." The Plan, based on existing legislation and regulations, is intended to ensure provincial preparedness to assist in coordination of knowledge and resources, and to support local response in the event of a drought.

The Ontario Low Water Response Plan (LWR Plan) was created by representatives from the Ministries of Natural Resources (MNR), Environment and Energy (MOEE), Agriculture and Food (OMAF), Municipal Affairs and Housing (MAH), and Enterprise, Opportunity and Innovation (MEOI) along with the Association of Municipalities of Ontario (AMO) and Conservation Ontario (CO).

The LWR Plan contains three main components described below in more detail.

Monitoring and Reporting on Water Levels Province-Wide

Several provincial agencies (MNR, MOEE and OMAF), Environment Canada, conservation authorities and other stakeholders provide monitoring data to MNR, which analyzes the information, and generates maps and reports that present which areas of the province (if any) are experiencing low water or drought conditions. The maps and conditions reports are available on MNR's web site (http://www.mnr.gov.on.ca/MNR/surface_water/index.htm) for most of the period from January 2000 to present.

Identifying Drought and Taking Action

The LWR Plan establishes three levels of drought and low water, based on thresholds that are linked to precipitation and water level monitoring results. Level One (warning and voluntary water conservation) provides the first indication of potential water supply problems. Level Two (water conservation and restrictions on non-essential use) indicates a more serious problem. Level Three (conservation, water use restrictions and regulation), the most serious stage in the LWR Plan, means that water supply is unable to meet local demands. Precipitation data and

1 The Proposal was entitled Ontario Water Response – 2000" (OWR 2000))
2 The Decision is entitled Ontario Low Water Response Plan (2001)" (OLWR)
3 MNR re-posted the notice with this new date and an updated electronic link; this is what currently appears on the Environmental Registry

stream flow indicator results are used to determine the levels. The LWR Plan describes how an area of the province may move from one level to another.

Describing Roles and Responsibilities
The LWR Plan describes provincial ministries' responsibilities and local jurisdictions' roles. A key proposal of the Plan is the creation of watershed-based local water response teams, usually established by the local conservation authority and composed of local water users, water managers and representatives from the key provincial ministries. The LWR Plan suggests that water response teams be activated once a watershed reaches a Level One warning stage. These teams determine where local water shortages may occur, encourage water conservation through education and public awareness, and in cases of water shortages, may make recommendations about water allocation.

The Plan also recommends activation of a local subcommittee of the province's Ontario Water Directors' Committee (OWDC – described below under "Public Consultation") when a watershed enters Level Two. This ensures a state of readiness in case a watershed enters Level Three, when water allocation and water restrictions are implemented. The LWR Plan defines the essential, important and non-essential water uses that an OWDC subcommittee would consider and acknowledges the difficult decisions that must be made at a local level in ranking priorities for water use between activities and users.

In cases of extreme drought, MOEE may use its authority under the *Ontario Water Resources Act* to control new water takings or limit water takings by existing permit holders. MNR also has been designated by Cabinet as the lead ministry under the province's *Emergency Plans Act* in case of a drought emergency.

Implications of the Decision:
The collaborative and consensus-building approach promoted through the LWR Plan should help competing water users to work together and promote a consensus-based approach to decision making. As noted in the May 2002 Walkerton Inquiry Part 2 Report, involving a broad cross-section of water users during planning processes helps to ensure that all issues are considered and that new perspectives are brought forward.

The LWR Plan provides a useful framework for protecting ecosystems from over use in times of drought stress. The indicator system will be further strengthened in several years when, according to MNR, groundwater and aquifer indicators will be added to the LWR Plan framework. Over time, these additional indicators will provide useful data on long-term trends and water use. The water condition maps and reports generated through the Plan's implementation can serve as a valuable resource for municipalities' long-term water management and land use planning exercises and the province's permitting activities.

Unfortunately, several important features related to water quality, monitoring and reporting are missing from the LWR Plan. The Plan does not specifically acknowledge the potential for low water conditions to affect water quality. If receiving streams or lakes experience low water conditions, they may not be able to provide enough dilution for discharges that are legally

permitted under the *OWRA* for facilities like sewage treatment plants, and industrial and commercial operations. MOEE states that it sets these facilities' discharge limits conservatively and in a way that accounts for low flow conditions. While not a common practice, the ministry could issue emergency orders or control orders to limit emissions in extreme circumstances. Furthermore, MNR has authority under the *Lakes and Rivers Improvement Act* to increase or decrease water releases from reservoirs should circumstances require it.

The agencies that developed the LWR Plan focused on the more common water management tools such as municipal by-laws restricting water use and MOEE restrictions on water takings. However the Plan would be more thorough if it included mechanisms to link water quantity readings with water quality measurements gathered from other sources. For example, the ECO believes that provincial and local officials should consistently consider whether low water conditions are contributing to violations of the Provincial Water Quality Objectives in streams receiving sewage treatment plant discharges of treated water.

The LWR Plan document notes that the indicators for precipitation and stream flow currently in place will be monitored and reviewed periodically to determine if the thresholds are set at correct levels. Yet the Plan does not provide any time frame for when this important exercise will occur, or how the ministry will communicate the results of such an important change. Nor does the Plan commit MNR to reviewing whether the definitions of essential, important and non-essential water uses are effective in practice or in need of refinement.

The LWR Plan urges water response teams to conduct annual self-evaluations during and after droughts to assess the effectiveness of communications, drought response measures and monitoring. But MNR, as the lead LWR Plan ministry, makes no commitment to gather this information regularly or communicate results to the public.

MNR states that water response teams will identify where new development may lead to problems and where new development may be permitted given appropriate conservation measures. The ministry also states that water response teams, along with the ministry and conservation authorities, may identify necessary actions for improving the overall environmental quality of watercourses to mitigate low water risks. These are laudable goals. But the LWR Plan states that a water response team is not established until Level One low water conditions are confirmed. Unless water response teams become more permanent working groups within the community, they will not have the capacity to do preventative planning on a consistent basis.

MNR staff seem to support, in principle, the longer-term operation of water response teams either as their own entity or integrated into a municipality's or conservation authorities' watershed management planning team. However, the ministry has no authority to require this type of arrangement. In the future there may be an opportunity to combine water response teams' work with that of local groups developing watershed-based source protection plans recommended by the Walkerton Inquiry.

Public Participation and *EBR* Process:
The ECO is pleased that MNR provided a 60-day public comment period. But, as noted on page

34 of the ECO's 2000/2001 annual report, the notice should have been posted for consultation earlier, at least concurrent with the draft document's release.

Two groups that MNR consulted with during LWR Plan development submitted comments on the proposal. MNR did not make any changes to the proposed policy as a result of the two comments received. The ministry described the comments as favourable to the proposal, but with suggestions for specific recommendations.

While the commenting groups did acknowledge some positive aspects of the LWR Plan, the ECO would not characterize all their comments as "favourable". Both commenters pointed to the urgent need for the province to develop a comprehensive water resource management policy. Such a policy could include watershed planning and protection of the water cycle, with a focus on maintaining and enhancing the quality and quantity of ground and surface water.

MNR stated that it forwarded the groups' suggestions to the province's Ontario Water Directors' Committee (OWDC) for its consideration. OWDC is composed of representatives of MOEE, MNR, MAH, OMAF, and MEOI. The Committee provides a useful tool for multi-ministry decision-making. However, very little publicly available information exists about the Committee or its deliberations. While MNR notes that the OWDC is coordinating the province's work on broader water management policies, the commenters have no assurance of whether, how or when their comments will be considered or implemented.

SEV:

MNR provided information to demonstrate consideration of its Statement of Environmental Values. The LWR Plan does integrate ecosystem, social, economic and scientific considerations in an approach to minimize the effects of drought on Ontario's ecosystem, communities and economy. The Plan should also help MNR meet its goal of enhanced citizen and ministry understanding of the principles and practices of sustainable development. This understanding can lead to more informed decision-making and shared responsibility for achieving sustainability.

But the ministry has overstated the role the LWR Plan can play in meeting other components of its SEV related to protecting and conserving Ontario's environment. For example, the LWR Plan has not been given regulatory status (although MNR, MOEE and local municipalities have some statutory and regulatory tools through use of provincial legislation or local by-laws). The limited scope of the LWR Plan means that it cannot play a major role in meeting certain MNR objectives such as ensuring the long-term of health of ecosystems. For the same reasons, the LWR Plan cannot completely fulfil the ministry's goal of ensuring the continuing availability of natural resources for the long-term benefit of Ontarians. Only a province-wide water management strategy (as described above under "Public Participation") can address key issues such as incorporating water conservation practices into agricultural, commercial and industrial operations, issuing permits to take water, and land use planning activities.

Other Information:

Factors Leading to the Development of the Low Water Response Plan

Ontarians and Canadians are among the world's largest water users. Population growth is expected to continue in Ontario. For example, in the Credit River Watershed alone, urbanization is predicted to increase from 20 per cent to 40 per cent by 2021. This means that the need for a broad province-wide water management strategy that includes water quality, water quantity and conservation measures cannot be emphasized enough.

The effect of low water conditions on ecosystems and local economies can be long lasting. Businesses that rely on large water quantities such as nurseries, industrial facilities, water bottlers, canning companies, agriculture, and golf courses are all vulnerable to water shortages and can be devastated by chronic drought conditions. In times of low water, a river's ability to cope with other stresses such as sewage effluent can be reduced. This can result in restrictions on sewage treatment plant expansion and the requirement for expensive alternative treatment systems. Lake-based sewer and water supply can also be affected.

An Opportunity for Increasing Awareness of Low Water Issues

Under the LWR Plan, the job of informing local citizens, industries and farmers about a low water situation or drought conditions appears to rest most often with conservation authorities and local municipalities. The availability of current and historic condition reports and monthly maps is a positive step. Placement of an Information Notice on the Environmental Registry at the beginning of a Level One low water situation could provide another tool increasing public awareness of the operation of water response teams across the province, and availability of the maps and condition reports. Providing this type of information on a Web site like the Registry may be one step toward increasing awareness of the need for water conservation on an ongoing basis. The notice could be updated as a watershed's level changes, or conditions revert back to normal.

Next Steps

Level One and Level Two low water conditions occurred in Ontario throughout 2001. As of August 2001, 24 water response teams were established or were being established.

During the 2001/2002 winter, MNR consulted with many WRT members and decided that the ministry will make improvements to the LWR Plan in response to the input received. Plan revisions will likely focus on clarifying how decisions are made to classify a watershed at a different water response "levels." Apparently WRT members have had differing perspectives on how to interpret indicators and triggers for moving between the levels of low water and drought described in the LWR Plan.

The ECO is pleased that MNR sought the input of water response team members to develop an understanding of the LWR Plan's effectiveness. Clear rules and processes are critical given the serious ecosystem and socio-economic implications to implementing the regulatory measures during a drought situation. MNR expects to post a draft of a revised LWR Plan on the Environmental Registry for public comment later in 2002. However, the recommendations contained in the Inquiry Report for the establishment of watershed-based source protection plans and support for watershed planning in general could have an effect on MNR's next steps.

ECO Comment:
It can take years to for nature to replenish rivers, streams and groundwater after a period of prolonged dry conditions. So, the government's establishment of the LWR Plan is a positive development, especially since changing climate patterns may make drought a more common occurrence. The Plan provides a framework for making decisions in extreme situations that attempt to balance environmental and human needs. Successful implementation of the LWR Plan will depend on several factors such as provincial and local capacity through a commitment of staff and financial resources, and clear "rules" and processes that are easily understood by the participants.

With respect to financial resources, MNR did provide some funding to water response teams last year. The ministry is reviewing the funding approach and considering future options, including whether or not base funding should be provided to these teams.

MNR's proposal to re-post a refined LWR Plan on the Registry for consultation will provide stakeholders with an opportunity to make suggestions for improving clarity and to discuss other improvements. For example, an important matter for consideration is the role and impact of agricultural drainage in contributing to or mitigating against local low water conditions. The Plan could also more clearly link water quality and water quantity issues.

The LWR Plan could also benefit from a greater commitment to monitoring and reporting on "lessons learned." MNR staff rightfully want to keep the reporting efforts of volunteers to a minimum. But neither the province nor the water response teams will be able to understand the effectiveness of various water management tools unless water response teams' data are analyzed on a province-wide basis. Ontarians also deserve to know how decisions are made under this Plan and how well Ontario's water resources are being protected through the Plan's use.

Several conservation authorities are conducting studies on water allocation and water budgets. This information will be submitted to the provincial government, which will consider how it might fit the study results into an Ontario-wide approach. The provincial Groundwater Monitoring Network (currently under development) and municipal groundwater management studies will also contribute important information. New requirements on municipalities and land developers wishing to develop land on the Oak Ridges Moraine mean that water budgeting and water conservation plans have to be devised. This may provide a model for the future. Province-wide adoption of the watershed-based source protection plans recommended by the Walkerton Inquiry would also assist broad water management planning exercises.

As the initiatives and ideas described above are in the early stage of development, a comprehensive water management planning framework for the province still appears a long way off.

Review of Posted Decision:
MNR's Forest Management Guide for Natural Disturbance Pattern Emulation

Decision Information:
Registry Number: PB00E7004
1st Proposal Posted: September 29, 2000
Comment period: 60 days — Number of comments: 1,487

2nd Proposal Posted: August 31, 2001 — Decision posted and implemented: Nov. 28, 2001
Comment period: 60 days — Number of comments: 1,486

Description and Background:
In late 2001 MNR finalized the "Forest Management Guide for Natural Disturbance Pattern Emulation" (hereafter the NDPE Guide or the guide), providing new direction to the forest industry for planning clearcuts in Ontario. The NDPE Guide applies to all areas managed under the clearcut silvicultural system. Clearcuts currently account for almost 90 per cent of the total area harvested in Ontario. This includes most of the harvest in the boreal forest and about 25 per cent of the area harvested in the Great Lakes-St. Lawrence forest. Some aspects of the NDPE Guide are also applicable to areas cut under other methods.

The NDPE Guide says that its underlying rationale is that the most reasonable course for sustaining forests and their biological diversity is to emulate the processes under which they have evolved. This principle has been incorporated into the *Crown Forest Sustainability Act* (1994) and other MNR policies. The dominant natural disturbance in Ontario's boreal forest is fire; other natural disturbances include insects, disease and wind. Periodic fires created large, even-aged stands of fire-tolerant species such as black spruce and jack pine. Fire is also the dominant natural disturbance in the Great Lakes-St. Lawrence forest, but with fewer and smaller fires than in the boreal. MNR says that fire control measures have significantly reduced the number of wildfires and the total area burned in Ontario since the 1950s, and that clearcutting is the best available replacement for those stand-replacing disturbances.

The main direction in the NDPE Guide is to move toward a more natural landscape pattern, by replicating the size and distribution of historical fire patterns. The guide sets out landscape level direction for planning the size and location of clearcuts in each five-year operational forest management plan (FMP) as well as directions for trying to emulate the effects of fire on the structure of the forest at the scale of the forest stand or community of trees. The stand level standards and guidelines will be applied in forest management plans scheduled for approval in 2003 and the full guide will be applied in forest management plans scheduled for approval in 2004.

In the past clearcuts have been planned in Ontario according to guidelines designed to protect habitat requirements of a few key wildlife species called "featured species," including moose, deer, pine marten and pileated woodpecker. MNR says that use of those guidelines has resulted in a checkerboard pattern of clearcuts that are much smaller than historical fires and have increased the amount of forest edge. Recent MNR research on the effectiveness of the moose habitat guidelines concluded that, even though clearcuts between 80-130 ha were expected to

provide the best moose habitat, they required high road densities, allowing hunters better access to the moose, resulting in higher moose harvests and lower moose populations.

As described in our review of MNR's Forest Management Guidelines for the Conservation of Woodland Caribou on page 53 of the Annual Report and pages 184 - 189 of the Supplement, caribou are very sensitive to forestry operations and require large areas of undisturbed forest. Woodland caribou range has receded north in step with the expansion of forest harvesting, causing local extirpations. The caribou guidelines recommend maintaining large areas of uncut area in mature forest and concentrating harvest in cuts over 10,000 ha in the hope that in 80 or more years those areas may once again be suitable caribou habitat.

Past rulings and directives influenced MNR's decision to finalize this guide. First, the Environmental Assessment Board considered the issue of clearcut size in its 1994 approval of MNR's Class EA for Timber Management on Crown Lands in Ontario. The Board agreed with MNR that clearcutting was an appropriate harvest method, particularly in the boreal forest, and that a range of sizes was needed to approximate natural disturbances. The Board also recognized public concern about large clearcuts, however, and the uncertainty about the environmental effects of both small and large clearcuts. The Board ordered that clearcuts normally be planned in a range of sizes up to 260 hectares (the maximum allowed under the moose habitat guidelines), but allowed for exceptions above the 260 hectare limit for biological and silvicultural reasons. The Board ordered MNR to implement the restriction and to develop standards for configuration and contiguity of clearcuts. Second, in turning down a 1999 request for an individual environmental assessment for the Temagami FMP, the Minister of the Environment ordered MNR to produce a draft of the required guidelines for public review and to finalize the guidelines in 2001, and to defer harvesting of a number of planned large clearcuts until the guidelines were finalized and could be applied to the planning area.

The direction in the NDPE Guide is of two kinds: "standards" are described as mandatory requirements that must be met with little room for interpretation; "guidelines" must be considered but the forest manager has flexibility to interpret and adapt them to meet the specific needs of the local management unit. Each sustainable licence holder will apply the guide when planning and undertaking forestry operations on the forest management unit (FMU) they are licensed to manage. Over the term of each five-year forest management plan (FMP) on each FMU, a range of clearcut sizes (many small, some medium sized, and a few large) should be created to ensure the cuts emulate natural fire disturbances.

MNR's finalized NDPE Guide restricts the number of cuts that may exceed 260 ha to 20 per cent in the boreal forest and ten per cent in the Great Lakes-St. Lawrence forest, but there is no upper limit on their size. The guide states "MNR believes this is consistent with the EA Board's direction that clearcuts should not routinely exceed 260 ha." This means that although the number of large cuts is limited, most of the area cut may be in large clearcuts. 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 guide. New clearcuts must be separated in time from older clearcuts either long enough to allow vegetation in the old

clearcut to reach 3 m in height, or 20 years, whichever occurs first. If these conditions are not met, a suggested separation formula may be used to determine the separation between clearcuts.

Each forest management plan must be prepared using an estimate of historical natural disturbance for that forest. The NDPE Guide says that the period 1921 to 1950 provides the best available data to represent the "natural" disturbance regime in Ontario. MNR says that data for an earlier time period, if available, could show different fire frequencies and extent, and may be used if approved by MNR staff. Each forest management plan must also include forest composition objectives and age class structure that move towards the estimated natural forest condition. A benchmark forest condition must be established for each FMU, usually in consideration of a larger ecoregional context. These benchmarks may be based on either local historical fire data, a local protected area over 50,000 ha, a simulated fire regime, or the current forest condition. The standards and guidelines in this section are vague and appear to allow a wide range of possible outcomes. While every plan must be approved by MNR, considerable discretion appears to be given to forestry companies to set goals for the future forest condition on each FMU under this guide.

The NDPE Guide also contains standards and guidelines intended to emulate some of the structural effects of fire. The standards include:

- retaining internal patches greater than 0.25 ha that will not be available for subsequent harvest
- peninsular patches of which 50 per cent may be harvested after the clearcut reaches 3 metres in growth
- 25 well-spaced trees per hectare, including at least 6 large diameter live cavity trees

There is no standard for the percentage of forest that must be left in residual areas, but the suggested guidelines range from 10-34 per cent. Other guidelines include:

- suggested rules for placing residual areas
- leaving living trees vs. dead trees
- leaving downed woody debris in order to return nutrients to the soil
- using prescribed burning as frequently as possible in order to simulate the fire process, rapid turnover of nutrients and regeneration
- maintaining old growth and natural age class structures
- to avoid salvage logging after fires in some areas.

The NDPE Guide also includes discussion of the need for monitoring and research, because most of the direction in the guide represents new and untested requirements.

Implications of the Decision:
The implications of the NDPE Guide are largely unknown, and some of the potential impacts will not be seen for decades. The ministry, forest industry, environmental groups and others provided varying opinions about the potential environmental, social and economic impacts.

Application of the NDPE Guide will result in a wider range of clearcut sizes, with most of the area harvested in the boreal forest being in larger clearcuts than in the past. Those cuts, however, will be of a more natural shape and will have residual individual trees and patches. This will be

an improvement over past practices where blocks of forest were cut clear. MNR says that application of this guide over time will create a landscape that appears more natural than the one that has developed with the application of many of the species-specific wildlife habitat guidelines. MNR says that when viewed from an aircraft or on the ground, clearcuts will be more aesthetically pleasing than the old-style clearcuts with no trees left standing.

MNR commissioned a major study to evaluate the economic and ecological impacts of the existing guidelines and proposed new guide on two case study FMUs, using computer simulation and evaluation tools. The consultants found that application of the new guide resulted in significantly fewer active roads. They concluded that the trade-offs between timber production and biodiversity depend on each particular forest and its characteristics. The consultants said "although the alternative guidelines produced a somewhat more natural landscape pattern on both forests, the analysis raised many questions about using natural disturbance patterns as management goals." They said that given the enormous variability in nature, trying to pursue an idealized, average distribution of cut block sizes was anything but natural.

The effect of the guide on wood supply will probably not be known until it is applied to the first set of forest management plans. Two recent studies have determined that application of the woodland caribou habitat guidelines, which are based on the same principles of natural pattern emulation, has reduced wood supply. On the other hand, the study commissioned by MNR to test the NDPE Guide found that the use of larger clearcuts increased wood supply available for harvest in one management unit by 36 per cent, at the expense of marten habitat, which also prefer old coniferous forest. In the other management unit all harvesting scenarios (even the existing caribou guideline) resulted in a significant loss of caribou habitat. One generalization they were able to make was that as area and volume harvested increases there is a corresponding decrease in the older conifer forest important for some wildlife species.

MNR says that consolidating harvesting activities by making some larger cut patches on the landscape will provide for the habitat needs of a broader array of forest wildlife, and that the approach should be viewed as a preventive measure to avoid unknown, long-term impacts of harvesting on forest ecosystems. Many commenters, however, are concerned that larger clearcuts will just increase the negative impacts of clearcutting – for example, soil compaction, disturbance of wildlife habitat, nutrient depletion, and forest conversion from black spruce and jack pine to trembling aspen and balsam poplar.

MNR acknowledges in the NDPE Guide that there is uncertainty about the ability of the guide to achieve its biodiversity objectives, and that research is needed on all aspects of the guide. MNR says that if the monitoring determines 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.

Public Participation & *EBR* Process:
MNR put a great deal of effort into the public consultation process for this guideline. The public and stakeholders were given many opportunities to provide comment and participate in the development of the guideline, including two proposals notices posted on the Registry, each with a 60-day comment period. MNR also set up a multi-stakeholder writing team and consulted its

Provincial Forest Technical Committee (PFTC). The writing team member representing environmental groups withdrew from the project, however, stating that the environmental community's concerns were not being addressed.

MNR posted its first proposal notice on September 29, 2000, with a 60-day comment period. The ministry received almost 1,500 comments. The writing team carried out further review of the technical directions and a public workshop was held. A subsequent draft (not publicly released) was discussed with the PFTC and representatives of the two major stakeholder groups (environmental community and forest industry). MNR said in its decision notice on the first proposal that they were not able to reach consensus. A number of major changes were made between the first and second drafts to respond to concerns expressed by various parties. MNR removed a number of controversial provisions, including: the proposed upper limits to the size of disturbances – 10,000 ha in the boreal and 3,000 ha in the Great Lakes-St. Lawrence forest; guidance for roads; and the suggested disturbance templates that had been developed by MNR staff based on analysis of Ontario's fire history records. MNR then posted the second draft of the guide on the Registry on August 31, 2001, for a 60-day comment period. The ministry again received about 1,500 comments. After minor revisions the guideline was approved and a final decision notice placed on the Registry on November 28, 2001.

In describing the comments on the second proposal notice, MNR said that almost 70 per cent of the approximately 1,500 comments were form letters, most of them generated from internet websites. Six petitions were received, including a statement of conservation concerns signed by nearly 300 scientists and 1,000 other people. It recommended the government:

- abandon the guideline's focus on clearcut size as a meaningful indicator of sustainable forestry and stop the push for larger clearcuts as an objective in forest management planning
- develop rules for forestry that require the maintenance and restoration of natural levels of old, large, intact, remote forests many boreal forest species depend on;
- significantly increase the use of partial harvest systems (i.e, trees are harvested in a series of operations) instead of clearcutting to maintain greater habitat structure in the forest after logging

Approximately 400 of the submissions received were not form letters. Only seven comments received were supportive of the NDPE Guide. MNR did not summarize all of the technical comments in its decision notice, but instead distilled the comments into seven broad issues and provided MNR's response to each. This over-simplified the description of the comments in the decision notice, but given the large number of comments, it was a valid approach for the ministry to take. The ECO reviewed comments on both draft proposals from major stakeholders and some individuals.

The forest industry association and many individual companies stated they could not support the August 2001 draft, primarily because it was untested with respect to impacts on wood supply and cost. Industry reminded the ministry that the 1999 Ontario Forest Accord included a commitment by the Ontario Government to the forest industry of long-term continuity and security of wood fibre supply and that long-term wood costs and volumes available for industrial use were not to be affected. They pointed out that, based on MNR's analysis of fire records, requiring 80 per cent of cuts in the boreal to be under 260 ha would continue to result in an

unnatural pattern of disturbances. They requested that requirement be lowered to 70 per cent in the northern boreal. Industry also said that they needed MNR to develop and provide to the industry planning tools needed to do the job, particularly spatial planning tools.

Many members of the public, for example environmental groups, scientists, foresters and others stated that large clearcuts should not be allowed, predicting negative environmental impacts. Many commenters objected to MNR's suggestion that the NDPE Guide and the new caribou guidelines would benefit wildlife. As one group said, "Woodland caribou flee every area where industrial scale logging has taken place." The group went on to say that clearcuts devastate native wildlife populations by increasing habitat for wildlife species that prefer early successional forest conditions, including invasive species and edge species.

Many environmental groups praised MNR for introducing progressive forestry practices such as leaving residual forest patches, leaving a range of tree species, fine and coarse woody debris, using prescribed burning, maintaining a natural proportion of uneven-aged forest, retaining old growth and natural age class structures, and using partial harvest methods. But they were concerned that most of the progressive policies are guidelines and not standards. Many commenters noted that the suggested sizes of residual patches are guidelines only, and recommended that the guide require a minimum average of 25 per cent of clearcut areas to be left uncut. Many submissions elaborated upon the many biological, chemical and structural differences between fire and clearcutting, and suggested that MNR either drop the guidelines altogether or include additional measures to mitigate those differences.

Several disparate interests urged MNR to address the problem of roads, saying that roads have the most lasting impact on the environment, and conversely, that they are important for other commercial interests. The first draft manual included a section on roads, but it was removed in the second version. MNR says this is because adequate direction on roads is provided in the Forest Management Planning Manual.

Another controversial issue is the relationship between the NDPE Guide and existing wildlife habitat guidelines such as the caribou, marten or moose guidelines. Conservation interests are concerned that the NDPE Guide places primacy on the large-scale disturbances over individual species' habitat requirements. But industry commenters asked for a clear and unequivocal statement in the NDPE Guide that the other guidelines are not additive to this guide.

Many commenters noted MNR's strong wording in the guide recommending use of prescribed burning to simulate the rapid turnover of nutrients and to aid regeneration: "The importance of using prescribed burning as frequently as possible as a silvicultural treatment to better simulate what fire would do cannot be overemphasized." This appears as a guideline only, so commenters recommended MNR be more prescriptive and set out actual standards to increase the use of prescribed burning on clearcuts.

SEV:
The ministry prepared a SEV briefing note that demonstrates the SEV was considered.

Other Information:
In 2002 MNR also posted a proposed Old Growth Policy and a Fire Management Policy, both of which will have an impact on the implementation of the NDPE Guide.

ECO Comment:
The ECO received complaints about the public consultation and the manner in which this guide was developed. This is understandable, given the long-standing controversy about clearcut size and the potential impacts of the guide. But MNR went well beyond the minimum requirements of the *EBR*, posting two drafts of the proposed guideline on the Registry, with a total comment period of 120 days. Further, the ministry was dealing with timelines imposed by the EA Board and MOEE.

The cynicism of some of the commenters about the ministry's motives was expressed loud and clear. One group stated that the public's "impression is that this is only a thinly veiled smokescreen to allow larger clearcuts for commercial reasons, to the detriment of other aspects of the forest/wildlife complex." Another group wrote "this guideline and the move towards larger clearcuts is widely viewed as a timber grab because it relaxes operational restrictions designed to protect biodiversity values." The public is also concerned that the NDPE Guide will allow an increase in the amount of harvest, but the annual allowable cut is determined in a different process, and MNR has insisted that it will not increase.

Many commenters also took exception with the way MNR interpreted the EA Board's terms and conditions as set out in the 1994 Approval of MNR's Timber Class EA and their Reasons for Decision. They pointed out that the NDPE Guide's rule that 80 per cent of clearcuts in the Boreal Forest must be under 260 ha is not much of a restriction because there is no upper size limit to the other 20 per cent of cuts. At the time of writing in May 2002, MNR is seeking approval from MOEE to replace the EA terms and conditions related to clearcut size with a reference to planning clearcut harvest operations "in accordance with the most current direction and standards in MNR's approved implementation manual(s) relating to the emulation of natural disturbance patterns." If approved, that would mean that future versions of the NDPE Guide would no longer have to incorporate the 260 ha restriction. The ECO urges MNR to involve the public and other stakeholders in any future revisions to this guide.

The NDPE Guide is internally inconsistent about the relationship between the guide and the existing caribou, marten, moose and other wildlife habitat guides. This is a concern for the forest industry and the conservation community for different reasons. The NDPE Guide wisely says that, because its effectiveness has not been tested, formal, rigorous monitoring of the guide to assess its effects on habitat for featured species such as marten is required before the established guidelines are relaxed. However, in another section the guide says that the natural disturbance pattern should be adjusted to meet the needs of caribou, marten or another species only "if absolutely necessary to prevent significant habitat losses." The ECO urges MNR to confirm that habitat 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 featured species.

MNR acknowledges some of the NDPE Guide's limitations up front. The ministry

acknowledges that application of the guide will not mimic the results produced by fire because harvesting is a mechanical process while fire is a chemical one. MNR sets out some of the ways in which fire and clearcutting differ, for example nutrient recycling, pathogen control, soil compaction and species regeneration. The NDPE Guide also acknowledges that harvest must be designed to complement, not replace, the historical natural fire size frequency distribution, because fires still do occur. The guide does not describe how those differences and limitations will be addressed, however. Ontario's boreal forests will continue to experience large fires, and the largest fires tend to burn out of control. MNR will need to find ways to account for these losses in its allocation of allowable cuts, to ensure that the total amount of forest burned and harvested stays within a reasonable range of natural variation.

The NDPE Guide also says that a legacy of fire suppression combined with forest harvesting in Ontario appears to be changing forest vegetation communities, which might have long-term negative impacts on wildlife. It is well documented that the boreal forests are shifting from conifers such as spruce and pine to hardwoods such as trembling aspen and balsam poplar. Many studies have suggested that clearcutting with inadequate regeneration effort is the main cause of this species conversion. There is no evidence that the ministry actively desires to encourage or curb the trend of 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 this guide as standards. MNR needs to be much clearer about its long-term provincial and landscape-level targets for the boreal forest, including what the tree species composition should be, what caribou populations should be maintained, and so on.

Industry said they must be given the necessary tools and greater flexibility to implement the guide. In response to 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." These concerns were expressed by many stakeholders, including the forest industry, which said that 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 be adequately funded to collect data and develop the necessary spatially based modelling and decision support tools.

Most research efforts, including MNR's analysis of historical fire patterns, have been carried out at a large scale – the landscape level or ecoregional level. But this guide, even the incorporation of natural disturbance patterns, will be applied at a local level during the development of forest management plans for each individual forest management unit. There are 10 "site regions," the basis for MNR's ecological and fire history analysis, in the area where forestry occurs, but 55 forest management units. Many observers are concerned that the valid ecological rationale for this broad landscape approach is hard to reconcile with the forest management planning process and allocation of allowable cut for each individual management unit. It is the ministry that must take the larger landscape view and ensure that the planned harvest for each unit is compatible with ecoregional goals and historical disturbances. As described in the caribou guidelines, this kind of planning must happen on a very large spatial and temporal scale, spanning more than one FMU over more than one rotation of the forest.

MNR is one of the first jurisdictions to attempt to implement this new approach, although many other jurisdictions are moving in the same direction. The paradigm of emulating natural disturbances appears to be a sound ecological approach to forest management, but it is an experiment on a massive scale. The ECO urges MNR to oversee its implementation closely – to provide industry with the tools necessary not just to estimate the historical disturbance regime, but also to plan the new harvest patterns carefully, taking into account their impact on wildlife, other users of the forest and future forest composition in mind.

The ECO is pleased that MNR has acknowledged the need for more research and monitoring of the implementation of the guide. MNR must continue to study the differences in the impacts of fire and clearcutting on soils, nutrients, regeneration and wildlife, and to monitor application of the guideline and revise it where needed, to ensure that this is truly adaptive management.

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.

Review of Posted Decision:
Orono Forest Crown Land Management Plan

Decision Information:

Registry Number: PB01E3010
Proposal Posted: 2001/08/28
Decision posted: 2001/10/23
Comment period: 30 days
Number of comments: 0
Decision implemented: 2001/10/18

Description:

The Orono Forest Crown Lands consist of approximately 425 hectares of plantations, fields, and naturally forested valley lands. They are situated within the Wilmot Creek watershed, west of the Village of Orono in the Municipality of Clarington. The Orono Forest Crown Lands were purchased in 1922 to establish one of several provincial tree nurseries and forest stations in Ontario. The site of this nursery was originally chosen for its reforestation needs, its proximity to rail and road transportation, an adequate water supply and a good labour source.

MNR privatized Ontario's nursery operations throughout the 1990's. This reorganization of responsibilities and operations was an attempt to promote increased efficiency in the ministry. MNR introduced a series of nursery closures in 1992 and 1995, the latter year affecting the Orono facility. The site officially closed in 1996 and, subsequently, 145 hectares of the property were sold in 1997. The remaining 425 hectares were retained as Crown land and were managed by the Aurora District of the MNR.

A formal partnership between the MNR and the community-based Orono Crown Land Trust was established in 2000 to cooperatively manage the site. The Orono Forest Crown Land Management Plan allows various private and public agencies to guide the multiple-use of the site within the context of the area's larger natural heritage framework. The partnership agreement includes granting tenure through the issuance of a Land Use Permit under the *Public Lands Act*. A series of objectives and detailed policies within the Plan guide conservation efforts and dictate allowable activities.

Implications of the Decision:

In forming a public partnership, MNR placed a significant amount of decision-making authority with the local advisory committee. Although public participation is laudable, MNR should not view this approach to the management of Crown lands as absolving the ministry of its responsibilities. The future implications of this decision depend on how well the Plan is implemented.

This site serves an important role in the area's natural corridor network. Important north-south connections, linking to the Oak Ridges Moraine, are retained through the conservation objectives of the Orono Forest Crown Land Management Plan.

Public Participation & *EBR* Process:

MNR initiated a long series of public consultations on the management of the Orono Forest Crown Lands. Gartner Lee Limited was retained to prepare background studies and to initiate public consultation. Questionnaires distributed by the firm received an usually high response rate from the local community. This public interest in the planning process led to a series of well-attended meetings. An advisory committee was formed with a wide variety of involved stakeholders. Subsequently, this advisory committee drafted the Plan and entered into a formal agreement with MNR to manage the Crown lands. An adaptive management style was undertaken, facilitating ongoing communication subsequent to the initial implementation of the Plan. MNR states that this approach to management "must be proactive, flexible, and adaptive to change. Use of these unique lands must be balanced, monitored, and reassessed over time to prevent harmful impacts to the environment." Therefore, many aspects of the Plan are dependent upon local involvement.

The proposal notice for this policy was posted on the Environmental Registry for 30 days, receiving no comments.

SEV:

MNR reviewed its SEV in an extensive fashion in the creation of this Plan. ECO agrees that this decision is consistent with many principles and values contained in the ministry's SEV and the purposes of the *EBR*.

Other Information:

The closure of this nursery was part of a larger plan by the province to privatize such operations.

The vision of the Orono Forest Crown Land Management Plan states that "as the forest lands mature, most will be returned to a natural state contributing to the surrounding nature area." Small-scale timber harvesting operations will "thin the stands to improve growth and health of the stands and to promote natural successional processes." MNR states that all efforts will be made to return any revenue generated from these operations to the management of the site.

ECO Comment:

ECO supports the adaptive management undertaken by the Orono Crown Land Trust which promotes ongoing monitoring and community involvement. This partnership between the local community and MNR should continue so long as the Orono Crown Forest Management Plan is being successfully implemented.

MNR should continue to conduct ecosystem and compliance monitoring, since the Orono Crown Land Trust may not possess the necessary technical expertise. The ECO also notes that MNR should ensure that it takes all opportunities to give monies generated from on-site forestry activities to the Orono Crown Land Trust.

Review of Posted Decision: MNR Policy for the Issuance of Work Permits under Section 14 of the *Public Lands Act*

Decision Information:

Registry Number: PB8E6011	Comment period: 30 days
Proposal Posted: May 15, 1998	Number of comments: 0
Decision posted: June 4, 2001	Final policy issued: January 29, 2001

Description:

This policy was developed to assist MNR staff in issuing work permits under Section 14 of the *Public Lands Act* (*PLA*). Work permits are required for certain activities on public lands or shore lands.

MNR's notice indicated that the existing policy, issued in 1990, had to be extensively re-written to reflect the changes made to the issuance of work permits by Bill 26 (the *Savings and Restructuring Act* enacted in 1996). The Bill 26 changes to the *PLA* and its regulations resulted in a significant reduction in the number and type of work permits issued. For example, work permits are no longer required for prospecting activities for mineral exploration. They are still required for new roads and water crossings related to mineral exploration. In 1996 the ministry estimated that it processed more than 50,000 work permits a year, and that the new regulations would reduce the total by 80 per cent. MNR currently estimates that approximately 3,000 work permits are issued per year.

Work permits continue to be required to:

- construct or place a building on public land;
- construct a trail, water crossing or road on public land;
- dredge shore lands;
- fill shore lands;
- remove aquatic vegetation from certain shore lands;
- place a structure that occupies more than 15 square metres of shore lands.

This policy directs MNR staff on how and when work permits are to be issued, and provides further interpretation of the legislation and regulations. For example, the policy explains how to differentiate between a proposed trail and a road. This is an important issue because trails for mineral exploration are exempt and roads are not. It also provides direction on how to handle fisheries concerns, based upon "A Protocol Detailing the Fish Habitat Referral Process in Ontario," dated August 2000. MNR says that under the protocol a project which may harm fish habitat must be subject to an external review by either a conservation authority or the federal Department of Fisheries and Oceans.

Implications of the Decision:

The changes to the work permit program were made in 1996 with the passage of the *Savings and Restructuring Act* and related new MNR regulations. Therefore the revised policy itself is not responsible for changes to the program; it merely advises MNR staff how to implement the 1996

legal and regulatory changes and administer the permit process. In its SEV briefing note, MNR said that this policy "is consistent with the changes that were made to the work permit regulations in 1996 by providing an explanation on applicability of the regulations so that only those activities which have the potential for harmful environmental effects are subject to the work permit requirements."

The revised policy hints at a change to the way the program is administered, above and beyond the reduction in the number of permits issued. For example, the first objective of the revised policy is "to treat clients fairly," by having regard for the property rights of land owners and applying conditions to work permits that are reasonable and are not unduly onerous or unnecessary.

Public Participation & *EBR* Process:
There were no comments on the policy proposal, so MNR did not make any changes to the draft.

Individual work permit applications will not be posted on the Environmental Registry because MNR did not prescribe them as instruments under the *EBR*. In an earlier proposal for its instrument classification MNR had originally proposed that these would be classified as Class II instruments, but decided against it because they are covered under the *Environmental Assessment Act* (*EAA*).

The work permits policy does not require mandatory notice for work permits. Several of the "objectives" of the policy suggest discretionary consultation:

2) "to ensure that the interests of neighbouring property owners and stakeholders are considered when reviewing applications that may have an adverse impact on those interests by requiring the applicant to obtain written comments from those who may be impacted"
5) "to ensure that consultation is had with First Nations, where applicable concerns exist, such as in a land claim or traditional use area."

The policy also requires staff to follow other MNR procedures that set out the ministry's *EAA* requirements as the issuance of a work permit is, in most cases, considered to be a "disposition" for the purposes of MNR Exemption Order 26/7 under the *EAA*. Under Exemption Order 26/7, if the MNR Area Supervisor determines that a proposed activity may have significant adverse effects on the environment, then notice and a 30-day comment period are provided to the public, interested individuals, government and other agencies. If not, the work permit may be issued without notice or consultation.

MNR staff have informed the ECO that public notice has varied for different types of work permits and different parts of the province. For example, they estimate that in southern Ontario at least 95 per cent of work permits would involve notice to neighbours at a minimum. In the near north the estimate is 75-90 per cent, including neighbours and resource users. Notice is provided less often in the far north because the population is sparse.

MNR has recently incorporated dispositions such as work permits into a new proposed Class

Environmental Assessment. The Class EA will replace the existing exemption order and will require revision of the work permits policy. The Class EA (which had not been approved by MOEE at the time of writing in March 2002) as drafted still allows ministry discretion to decide the Category of each project on a case-by-case basis and to determine what kind of notice should be provided, and to whom. The proposed screening requirements are more rigorous ,however, and the notice requirements for each Category of projects will be clearer.

SEV:
MNR provided a detailed SEV briefing note, approved by the Director of the Lands and Waters Branch on May 25, 2001.

Other Information:
The ECO examined MNR's record in providing public consultation on instruments issued under the *PLA* in a separate research project. A report on the findings of that study can be found at pp. in the annual report. A description of MNR's instrument classification regulation can be found at pages 34 - 41 in the annual report and pages 134 - 142 of this Supplement.

ECO Comment:
There were no public comments on this proposal. It is unlikely, however, that comments on this proposal would have significantly changed the direction of the program, given that the more substantive changes were made through the *Savings and Restructuring Act* in 1996.

The new policy contains the objective of ensuring that neighbours and stakeholders' concerns are considered, and an objective to meet the requirements of the *EAA*. But neither the policy nor MNR's current or proposed new *EAA* coverage require mandatory public notice or consultation for any type of work permit activity. They both provide great discretion to MNR staff to determine whether notice should be provided, and to whom.

The government drastically reduced the types of activities requiring permits in 1996, and focused on those considered the most environmentally significant. In its SEV briefing note MNR said, "work permits are issued for activities that have the potential for negative environmental effects." This suggests that all activities still requiring a work permit should be considered environmentally significant. The ECO has some concern that public notice or consultation rights are left to the discretion of local MNR staff on a case-by-case basis. Applications for the types of activities which still require work permits should be thoughtfully evaluated as to environmental significance and the need for public consultation.

Review of Posted Decision:

Regulation under the *Fish and Wildlife Conservation Act* to support the proposed management strategy for the wolves of Algonquin Provincial Park (O. Reg. 515/01)

Decision Information:

Registry Number: RB01E6005
Proposal Posted: 2001/11/19
Decision posted: 2002/02/21

Comment period: 30 days
Number of comments: 1,041

Description:

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 the park by means of the *Provincial Parks Act*. However, an issue central to the viability of this population is human-caused mortality outside the boundaries of the park. The home-ranges of the wolves of this population frequently extend beyond the park boundaries, causing high mortality rates due to hunting and trapping.

Given these pressures, the Algonquin Wolf Advisory Group (AWAG) asserts that the regulation of wolf mortality outside the park "may be one of the most critical management actions that is feasible." With a few notable exceptions, MNR has historically allowed for a year-round open season on wolves with no bag-limits across the entire province. The Province of Ontario had, in fact, offered a bounty on wolves up until 1972.

Controversy has surrounded the taxonomic status and evolutionary origin of this animal. Scientific debate has ranged between describing it as a subspecies of gray wolf (*Canis lupus*) to a distinct species (*Canis lycaon*). The taxonomic classification of this animal is made difficult due to its similarities to the red wolf (*Canis rufus*), which is an endangered species in the United States. The classification of the eastern wolf is further complicated by to its ability to breed with similar animals, such as coyotes (*Canis latrans*).

In 1998, MNR established 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) gray wolves of Algonquin Provincial Park and surrounding areas." AWAG included representatives from local communities, government, hunting organizations, environmental organizations, and the academic community.

On February 15-18, 2000, AWAG hosted a Population and Habitat Viability Assessment (PHVA) workshop. The goal of this workshop was to provide an independent review of the available scientific data on the wolves of Algonquin. It was facilitated by representatives of the Conservation Breeding Specialist Group of the Species Survival Commission of the World Conservation Union (IUCN). 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 taxonomy of the

eastern wolf. The report also recommended that the full range of the eastern wolf, beyond the boundaries of Algonquin, should be assessed.

On December 5, 2000, AWAG submitted a report, The Wolves of Algonquin Provincial Park, summarizing their findings and providing 24 recommendations to MNR. Its principal recommendation was the "implementation of a long-term Adaptive Management Plan for the wolves of Algonquin Provincial Park to significantly reduce the risk of population decline arising from human-caused mortality, and to maintain the wolf population at a level which is consistent with the long-term carrying capacity of the Park."

MNR placed the proposal notice on the Environmental Registry on November 19, 2001, for a 30-day public comment period. The ministry sought to implement all 24 recommendations from AWAG's report. MNR expanded one recommendation to place a 30-month moratorium on the regulated hunting and trapping of wolves to include the 39 townships surrounding the park. As was also recommended in AWAG's report, MNR committed to developing a science strategy to monitor the status of the wolves and the effectiveness of the moratorium.

Implications of the Decision:

The taxonomic classification of the eastern wolf, particularly whether it is a distinct species, has significant implications for its conservation measures. In following the Committee on the Status of Endangered Wildlife in Canada's (COSEWIC) classification of the eastern wolf as subspecies of gray wolf, MNR is not obliged to extensively modify its statutory and regulatory frameworks. Therefore, this animal continues to be subject to all statutory and regulatory provisions affecting the gray wolf. However, scientific debate does exist. The PHVA report concludes that the available scientific information suggests that the eastern wolf "should not be considered a subspecies of the Gray Wolf," implying that it should instead be its own species. This conclusion has also been reflected in the greater scientific community.

The proposal notice on November 19, 2001, stated that MNR would create a "science strategy to enhance research and monitoring" of the eastern wolf. MNR asserts in the decision notice 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." The decision to extend the moratorium will be based on the results of the analysis of the monitoring program. MNR is proposing a "before and after" approach to evaluate the moratorium.

The ECO is concerned that an insufficient period of time exists to assess the impact of the moratorium scientifically. This concern was 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 strike by Ontario Public Service Employees Union. Ignoring these these delays, 30 months does not allow for sufficient time to conduct such an ambitious and important monitoring program. ECO believes that the monitoring program will not be able to detect any significant changes in the wolf population size precisely enough before the decision to renew the moratorium in the spring of 2004. Lacking a rigorous scientific assessment of the moratorium, an informed decision by the ministry to renew or not to renew the moratorium cannot be made. 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 due to its environmental significance.

It is difficult to distinguish visually between eastern wolves and coyotes because of their physiological and behavioural similarities. 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. Many commenters 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.

Within the townships subject to the 30-month moratorium and all other areas, MNR allows eastern wolves to be killed subject to the provisions of the *Livestock, Poultry and Honey Bee Protection Act.* One of the purposes of this Act is to allow farmers to defend their livestock. Changes to the taxonomic status of the eastern wolf, from subspecies to distinct species, would require amendments to the *Fish and Wildlife Conservation Act* and the consideration of amendments to the *Livestock, Poultry and Honey Bee Protection Act*.

MNR states in the decision notice that its "park wolf management strategy already includes actions related to the enhancement of habitat and prey availability within the park." Because the focus of this conservation strategy centres on the Eastern Wolves of Algonquin Provincial Park, the park's management plan has an important role to play. The Algonquin Provincial Park Management Plan states that "the objective of wildlife management in the Park is to foster the continued existence of the full array of native wildlife and their natural habitats, and to ensure that no vulnerable, threatened or endangered (VTE) species are extirpated by other than natural processes." Algonquin's management plan states that a "Wildlife Management Plan will contain management guidelines for the Park's wildlife and wildlife habitat." However, as of April 2002, no such management plan has been completed by MNR.

Public Participation & *EBR* Process:

MNR states that "consultation during the development of the original Algonquin Provincial Park Master Plan and the current Algonquin Provincial Park Management Plan indicated wide public support for protecting wolves within the park." This concern relating to the protection of wolves in the park was reflected in both the 1974 and 1998 management plans. The park management plan was posted on the Registry as an information notice in 1999.

On December 5, 2000, AWAG submitted a report, The Wolves of Algonquin Provincial Park, summarizing their findings and providing twenty-four recommendations. The report was posted on the Registry as an information notice inviting comments 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." MNR should have posted it as a regular proposal notice on the Registry. This January 15, 2000, 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."

On November 6, 2001, MNR issued a press release announcing the proposal. The proposal notice was posted on the Environmental Registry for public comment from November 19 to December 19, 2001. On December 20, 2001, the decision was made and filed amending Ontario Regulation 670/98 (Open Seasons – Wildlife) under the *Fish and Wildlife Conservation Act* with the Registrar of Regulations, then appearing in print in the Ontario Gazette on January 5, 2002. On December 28, 2001, MNR issued a press release stating that the decision had been made. On February 21, 2002, MNR posted the decision notice on the Registry. ECO received a complaint from the public with regard to the delay in posting the decision notice.

MNR received 1,041 comments on its proposal notice of November 19, 2001. 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 sought a longer or permanent moratorium. In contrast, most of the dissenting opinion sought a return to AWAG's recommendations and its more limited protection of the wolves. MNR states that it "considered the comments," but it did not indicate on the decision notice how any of the comments were incorporated. As the decision was implemented the day after the comment period ended, MNR could not have properly considered all the public comments. MNR did follow general public sentiment in this issue, but it did not explain in the decision notice how it incorporated any of the public comments. Such an approach to public participation is not consistent with adaptive management.

SEV:

MNR asserts that it considered its Statement of Environmental Values in its decision. The ministry states that the decision "supports the goal of ensuring long term health of ecosystems by protecting the eastern wolf that inhabits Algonquin Provincial Park from potential over-exploitation by hunters and trappers, thereby contributing to the continuing availability of the eastern wolf for the enjoyment of all Ontarians. The wolves of Algonquin Park are a biological feature of provincial significance and attract worldwide attention." MNR states that the anticipated environmental, social and economic consequences of this decision are primarily positive.

Other Information:

This amendment to Ontario Regulation 670/98 (Open Seasons – Wildlife) under the *Fish and Wildlife Conservation Act* is part of the larger issue of protecting species in Ontario. The Province of Ontario has committed to protecting such species by means of the National Accord for the Protection of Species at Risk and the National Statement of Commitment to the *Canadian Biodiversity Strategy*. For MNR to implement the *Canadian Biodiversity Strategy*, it should protect and restore "viable populations across their natural historical range." As such, it is necessary to monitor the status of this species in locations other than those areas surrounding Algonquin Provincial Park.

COSEWIC classifies the eastern wolf as a subspecies (*Canis lupus lycaon*). COSEWIC lists its risk category as being of "special concern." In its own system of listing species at risk, MNR

describes the status of the eastern wolf as "indeterminate" and the ministry considers it as a subspecies of gray wolf.

It is believed that the eastern wolf is found mainly in the Great Lakes and St. Lawrence regions of Quebec and Ontario. Its estimated range covers approximately 210,000 km^2. 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 species has been extirpated from the more populated, southern portions of its range due to the loss of habitat and an insufficient prey-base. COSEWIC believes that although some local populations are being hunted at unsustainable levels, the overall abundance of the subspecies seems to have remained relatively stable over the past decade.

Five subspecies of gray wolves are believed to inhabit North American, of which four are primarily found in Canada. North of the estimated range of the eastern wolf in Ontario, the *nubilus* subspecies of gray wolf is the predominant canid. Ontario's border with Manitoba is thought to be the eastern range limit of the *occidentalis* subspecies of gray wolf. These two subspecies of gray wolf, much larger than the eastern wolf, most closely resemble the popular perception of wolves held by the public-at-large.

The eastern wolf is currently interpreted by MNR, as a subspecies of gray wolf, to be a "furbearing mammal" under Schedule 1 of the *Fish and Wildlife Conservation Act*. Despite the 30-month moratorium in the affected townships, hunting and trapping of the eastern wolf is allowable in other areas pursuant to the *Fish and Wildlife Conservation Act* and its regulations. The PHVA report concluded that conservation efforts should undertake "a regional focus beyond the boundaries of Algonquin Provincial Park and consideration of ecological connectivity to adjacent areas is necessary to address the wolf issue."

This decision relates to MNR's over-all approach to wild canid management and conservation in Ontario. In 1998, MNR released A Review of Wolf and Coyote Status and Policy in Ontario. MNR notes that this document "attempts to provide a point-in-time summary of knowledge on these species and to recommend action. It is not, however, a proposal of policy." The ECO believes that this document should have been posted on the Registry, since it recommends forms of action. Given recent developments, this document is now dated, requiring revision and re-release. MNR should post future re-releases of this document on the Registry for public comment.

The proposed federal species at risk legislation has a potentially significant bearing on this decision. Bill C-5, *An Act respecting the protection of wildlife species at risk in Canada*, is awaiting third reading before Parliament as of the spring of 2002. This legislation would give added protection to species at risk such as the eastern wolf. Bill C-5 exceeds the limited provisions found within Ontario's *Endangered Species Act* as it would not only protect endangered species, but it would also protect species of special concern.

Within the townships subject to the 30-month moratorium and all other areas, the eastern wolf remains subject to Ontario Regulation 665/98 (Hunting), s. 88, which permits a licence holder to

chase wolves with hunting dogs "during the day at any time of the year… but not kill or capture" them. Changes to its taxonomic classification from a subspecies to a species would likely exempt the eastern wolf from this provision. Under any taxonomic classification, the eastern wolf is subject to MNR's Control of Mammalian Predators policy, last revised in 1982. MNR should up-date this policy in the near future given advancements in this field in the last several decades. Any up-date of this policy should also be posted on the Registry for public comment.

In February 1998, MNR had proposed protecting wolves in the Townships of Clyde, Bruton and Eyre in Algonquin Provincial Park. On July 31, 2000, the ECO wrote to MNR to inquire as to the status of this proposal. On November 3, 2000, MNR replied to the ECO that a decision was pending. MNR should up-date this proposal on the Environmental Registry to explain that it has been decided by means this particular decision to ban the hunting and trapping of wolves in the 39 affected townships.

ECO Comment:
The ECO encourages MNR maintain the moratorium on the hunting and trapping of eastern wolves in the townships surrounding Algonquin Provincial Park until such time that the population is scientifically demonstrated to be a viable population. The maintenance of the moratorium until the population is in fact proven to be viable 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.

The ECO encourages MNR to provide sufficient staff and resources to support the long-term monitoring of the eastern wolf in the area of Algonquin Provincial Park and across its natural range in Ontario. This monitoring data is necessary for MNR to make a scientifically informed decision as to whether the moratorium should be extended beyond the current 30 months, which ends on June 30, 2004. The moratorium in the townships surrounding Algonquin Provincial Park should also be extended to include coyotes to minimize human-caused mortality risks to eastern wolves. Given the high level of public interest in this animal, MNR should periodically inform the public on the progress of the monitoring program.

The ECO is concerned that MNR did not follow the intent of the *EBR* with regard to this issue. In the Supplement to the 2000/2001 annual report, the ECO took issue with MNR having posted AWAG's report as an Information Notice on the Registry disallowing formal public comment, yet informally inviting public comment on the ministry Web site. MNR received more than a thousand public comments on the subsequent proposal to adopt the recommendations and amendment the regulation. 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 in 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 be able to comment in 2004 when it ends. The 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.

The ECO 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. This discrepancy still exists and is also reflected in MNR's Index List of Vulnerable, Threatened, Endangered, Extirpated, or Extinct Species (VTEEE) of Ontario. MNR should consider listing the eastern wolf on its VTEEE list as a species of "special concern" to reflect COSEWIC's designation. Such a classification would reflect a precautionary approach to the uncertainty surrounding the population size and distribution of the eastern wolf. MNR should also consider classifying the eastern wolf as a "specially protected mammal" under Schedule 6 of the *Fish and Wildlife Conservation Act* until it is no longer considered a species of special concern. These classifications would be consistent with MNR's own description of eastern wolves as "a biological feature of provincial significance" which receives "worldwide attention."

Review of Posted Decision:
Waterfront Boundaries for Grants of Public (Crown) Lands

Decision Information:

Registry Number: PB7E6017
Proposal Posted: 1997/11/03
Decision posted: 2001/07/12
Comment period: 30 days
Number of comments: 0
Decision implemented: 1998/06/01

Description:

This MNR policy changes the methods used to survey waterfront boundaries for grants of Crown lands. Since 1980, MNR has used a straight line survey approximating the water's edge, regulated water level or flood contour elevation. This surveying method also incorporated a small set-back from the water's edge. Thus, this practice resulted in the retention of a narrow strip of land still owned by the Crown, between the granted private property and the water's edge, regulated water level or flood contour elevation. In some cases, the straight line method of surveying will be retained if special circumstances exist.

When MNR agrees to dispose of ungranted lands, such as road allowances, Crown shoreline reserves, or other waterfront land, the surveying of granted lands will delineate a boundary on the water-side of the property at the actual water's edge on unregulated waterbodies or at the highest regulated water level on regulated waterbodies. The waterfront boundary may be the flood contour elevation where flooding rights exist or are planned.

The policy also establishes a method that MNR can use when it wishes to rebut the presumption of *ad medium filum aqua* and retain ownership of non-navigable waterbodies. When a property is bounded by a non-navigable waterbody, this English Common Law doctrine extended ownership to the middle of the waterbody. In cases where the Crown wishes to retain ownership of the non-navigable waterbody, it must expressly exclude this area in surveying the saleable property.

Implications of the Decision:

This policy affects the surveying of road allowances in unincorporated territory and Crown shoreline reserves. In 1850, Ontario adopted a practice of establishing road allowances around the shores of many lakes and rivers. These road allowances were usually, but not always, measured 66 feet in perpendicular width. This measurement was not always from the water's edge. In some cases it was from the top of the bank or another topographical feature. In areas where there were no road allowances, the province retained 66 feet of land in from a waterbody as the result of a 1887 Order in Council which was intended for "Reserving right of access to the shores of all rivers, streams and lakes for all vessels, boats and persons together with the right to use so much of the banks thereof not exceeding one chain in depth from the water's edge as may be necessary for fishery purposes."

From 1980 to 1999 MNR used a straight line method of surveying to determine the boundary of a property when disposing of previously ungranted or reserved Crown land adjacent to a

waterbody. Straight line surveying can result in a portion of the land at the water's edge remaining in the possession of the Crown. The new policy will allow MNR to sell Crown land to the water's edge after it has met its requirements under the *Environmental Assessment Act.*

MNR states that this new survey boundary practice may marginally increase the number of road allowances sold, as the historical retention by the Crown of the strip of land at water's edge may have dissuaded certain buyers.

Public Participation & *EBR* Process:
No comments were made by the public during the 30 days which the proposal was posted.

The decision notice for this policy was not posted in a timely manner. The proposal was posted on November 3, 1997. ECO records show that this policy was implemented by MNR on June 1, 1998. The ECO wrote to MNR on May 28, 1999, and on July 31, 2000 to inquire regarding the posting of this decision notice. On November 3, 2000, MNR stated in correspondence to the ECO that the decision was still pending. In further correspondence, dated June 28, 2001, the Director of the Lands and Waters Branch stated that the file on this policy proposal had been lost. The decision notice was posted on the Environmental Registry on July 12, 2001.

SEV:
MNR considered its Statement of Environmental Values in the development of the policy. MNR states that this policy meets its objective "to protect human life, the resource base and physical property from the threats of forest fires, floods and erosion," as surveying will now emulate the natural boundary of the water's edge or flood contour elevation.

Other Information:
The issue of waterfront boundaries is a contentious one that has been the subject of some dispute between private land owners, who believe the boundary of their waterfront properties to be the water's edge, and the Crown, who maintain that land adjacent to the water's edge was never patented and disposed of. The issue is contentious as Crown ownership means the lands are accessible to the public, which private landowners believe is a violation of their rights.

Several court decisions have addressed the wording of Crown patents granting private titles to waterfront lots. The Crown's position that patents did not extend to the water marks has not been accepted by the courts. As a result, this new policy brings MNR into conformity with recent court decisions outlining how the Crown should determine the boundaries of land granted by Crown patents.

ECO Comment:
The ECO supports this policy, which modernizes MNR's surveying practices. However, the ECO notes that this decision notice was not posted on the Registry within a reasonable length of time. The proposal was placed on the Environmental Registry on November 3, 1997 and the decision was posted July 12, 2001. In the interim, the policy was implemented. The ECO did contact MNR to inquire as to the delay. MNR cites losing the file as the cause. The CO feels, in view of its repeated inquiries, that MNR should have posted this decision notice earlier.

MNR should have explained the rationale for this policy more clearly in its proposal and decision notices. This policy aligns MNR's surveying methods with those accepted by the courts and seen as good practice by the profession of surveying. This fact should have been clearly identified by MNR.

Several environmental implications may exist with regard to this policy and its relationship to other policies. This policy may be relevant to the Strategic Lands Initiative, as MNR hopes that this new surveying practice will assist in the sale of Crown lands. The Strategic Lands Initiative aims at selling ecologically marginal lands to assist in the purchase of areas that will enhance Ontario's biodiversity. The ECO notes that the ecological criteria for the Strategic Lands Initiative could be more detailed. MNR should also consider the merits of ensuring a percentage of shoreline of any waterbody remains as Crown land for habitat protection and public access. As stated in previous annual reports, the ECO recommends that MNR notify the public of the sale of Crown lands.

The ECO notes that this policy appears to be part of a gradual trend of reduced MNR oversight of shoreline activities. In carrying out its mandate to protect fish habitat, MNR should continue to ensure that landowners do not undertake destructive developments on the riparian areas of their properties. MNR should also ensure that the beds of non-navigable waters, unless specifically excluded from the granted property, are not environmentally degraded by landowners.

Review of Posted Decision: MNR's Forest Information Manual

Decision Information:

Registry Number: RB00E7001
Proposal Posted: December 11, 2000
Decision posted: May 30, 2001
Regulation Gazetted: May 12, 2001

Comment period: 36 days
Number of comments: 1
Regulation approved: April 25, 2001

Description:

The Forest Information Manual (FIM) sets out mandatory requirements for the forest industry and MNR to produce information for forest management planning in Ontario. The manual is the last of four that the *Crown Forest Sustainability Act, 1994* (*CFSA*) says MNR must develop and approve by regulation under the Act. The manuals, particularly the Forest Management Planning Manual (FMPM), set out the rules for planning and conducting forestry operations in Ontario. The FIM lays out the information requirements in detail.

The FIM requires the production of forest resources inventories, maps, annual reports, forest operations inspections and other information. It will be used to ensure compliance with the *CFSA*, its regulations and the other three manuals. It is also designed to meet the information needs for the planning, monitoring and reporting terms and conditions of the 1994 approval of MNR's Class Environmental Assessment for Timber Management (Timber Class EA). The information will also be used by MNR to prepare annual reports on forest management and five-year state of the forest reports.

Many of the requirements of the FIM came into effect when the regulation was approved in April 2001, and others will come into effect over the next several years. The FIM is considered a work in progress, because the ministry is also carrying out a review of the forest management planning regime, which is expected to result in revision of the manual by spring 2003. Technical specifications referred to in Appendix I are released separately and may be changed at any time. The technical specifications include detailed standards, formats, protocols and standards for quality control and verification.

The manual imposes new requirements on the forestry industry, and particularly on Sustainable Forest Licence (SFL) holders who carry out forestry operations on Crown Lands. The ministry has transferred many of its former responsibilities – from planning and carrying out operations to data collection and compliance activities – to SFL holders since the mid-1990s. By 2000 the SFL holders held licences for 95 per cent of the Forest Management Units (FMUs) on Crown Lands. MNR and the forest industry formed a Joint Information Management Team to determine the split of responsibilities for data collection such as the forest resources inventories (FRIs).

MNR's intent to privatize all aspects of data collection and inventory was described in its 1996 Forest Management Business Plan. Industry's major concerns were the cost burden, the expectation that they would have to provide public access to data that could potentially be used against them, and that they would have to inventory lands not even available for timber

production. The ministry and industry agreed on shared costs for the one-time digitizing of all existing FRIs. As set out in the finalized FIM, SFL holders must update the FRIs but will maintain ownership and confidentiality of their "source data," as described below. They are primarily responsible for timber or forestry related information, and the ministry remains responsible for non-timber information.

The FIM is almost 400 pages long, divided into five parts:

Part A - Information Policy – Ownership, Copyright, and Intellectual Property Rights
This section mainly deals with ownership and accessibility of information. The manual distinguishes between the "information and information products" SFL holders are required to provide to the MNR under the FIM and the "source data" that the SFL holders may have collected in order to produce the required information.

The information and information products will normally be made available to the public, but the minister will make that determination and decide on conditions, prescribe fees, and determine how information may be used by third parties. The FIM says the public will normally have access to hard copies of maps and reports, electronic files including geographical information and databases, and opportunities such as public information centres where information may be viewed.

The source data does not have to be provided by SFL holders to MNR unless the ministry requests it for auditing purposes. The FIM does not give any indication of how often it might make such a request but states that the source data "will normally be treated as confidential information." Some examples of source data are: aerial photography and interpretation; satellite imagery and analysis; maps, surveys, tests, inspections and other records; growth and yield regeneration studies; company compliance data; or any information used to determine the geographic location or to provide additional descriptive data about a value.

The manual includes a procedure to attempt to resolve access to information disputes between the industry, MNR and third parties.

Part B – Information for Strategic and Operational Planning
This section describes the information needed for planning forestry operations as set out in the FMPM, including base mapping information, identification of values, FRIs, and predictive modeling of wildlife habitat and other values. Part B also defines the roles and responsibilities of MNR and SFL holders in producing each type of information.

Base Features Information
MNR is responsible for providing base features information, essentially a base map in digital form that shows geographic and administrative base features. Geographic base features include lakes, rivers, watersheds, vegetation, geological features, airports, roads, railways, buildings and hydro lines. Administrative features include municipal boundaries, forest management units, fisheries management units, mines, mining claims, parks, conservation reserves, Crown lands, private lands, federal lands and First Nations lands.

Values
Values are features or conditions of the forest that are of interest and must be considered when planning forest operations. MNR is responsible for providing known information about non-timber values, which are features, areas, ecosystems and land uses of significance not related to timber production. Examples of non-timber values include caribou habitat, wintering areas, calving sites, travel corridors and migration routes; and Lake Trout habitat, feeding areas and nursery areas. Natural heritage values include Areas of Natural and Scientific Interest, wetlands, and designated old growth forests. MNR must give priority in its data collecting to potential areas of forest operations for a plan in preparation. SFL holders are required to provide information about any new non-timber values or changes to values encountered during operations.

MNR must produce values maps for each FMU showing currently "known" values. If there isn't enough existing information about a value, then it is not "known" and will not normally be considered in forest management planning. MNR has discretion to use the precautionary principle and require special consideration, but "MNR will not apply the precautionary principle to the extent that SFL holders (plan holders) or other forest resource licence holders become the de facto collector of information for non-timber values." The manual is emphatic on responsibilities for non-timber values identification and mapping: "The MNR must also ensure that the responsibilities to meet these requirements are not transferred to SFL holders." In other words, a commitment that MNR will not renege on the negotiated split in responsibilities is written right into the manual.

Forest Resources Inventories (FRIs)
The FIM says, "These inventories form the most significant component of background information used in forest management planning on Crown lands in Ontario. The planning and the stewardship inventories also constitute the greatest demands for information requirements prescribed by the FIM."

Traditionally, MNR prepared a new FRI for each unit every 20 years, but most of the province's coverage had become more than 20 years old by the mid-1990s. In the new system, two kinds of FRIs are required – a stewardship inventory and a more frequent planning inventory, so the information will be updated more frequently. In the new FRI system, the vintage of any information should not exceed 25 years, except for some forest types that have not been affected by forest operations or natural changes.

The stewardship inventory is a description of the area, based on actual measurements and collection of forest cover data. Lands are classified by photo-interpretation, analysis of satellite imagery or field surveys and inspections. MNR will still provide industry with the geographic base information and resource information for all lands and waters not available for forestry. SFL holders are responsible for producing the FRIs, and collecting information about roads and forest cover in the "production forest" or area available for forestry. The SFL holders will be responsible for updating the base FRIs, but only with existing information. The example provided in the manual is that SFL holders are not required to conduct evaluation or classification of wetlands even though wetlands information is not available for all FMUs.

The planning inventory contains the existing stewardship inventory and additional information describing past harvest, renewal and other decisions. This information forms the basis of the development of each new forest management plan. Complete planning inventories are required every five years.

Part C – Annual Operations
Information needed for planning annual forestry operations includes forest operations prescriptions and an annual work schedule. Forest operations prescriptions provide a record of the combination of silvicultural (harvest, site preparation and renewal) activities planned and carried out on each specific site, so that they can be tracked and evaluated in the future.

Part D – Monitoring, Reporting & Evaluation
This section sets out the information required for annual reports. It includes requirements for tables of information on operations, results of silvicultural effectiveness surveys, and forest operations inspections.

Part E – Mapping Requirements
This section sets out requirements for the creation and provision of hardcopy maps and information required for preparing a forest management plan. The required maps include strategic planning maps showing a 20-year horizon, operational planning maps required for the five-year term, annual planning maps, insect pest planning maps and report maps.

Implications of the Decision:
MNR's proposal notice included a Regulatory Impact Statement (RIS) describing the anticipated environmental and social impacts as neutral to positive, and the economic impacts as positive.

Environmental effects
MNR said that while the FIM will have no direct impact on the environment, provision of standardized and consistent data would result in better decision-making and management of Crown forests.

Social effects
MNR stated in its RIS that it anticipated that the use of digital (electronic) information would result in better ability to analyze and report on the health of forest resources. The ministry also said the FIM improves access to information and will ensure that the public and resource stakeholders have access to consistent information about Crown forests. It will improve MNR's ability to monitor and to produce public reports. The public should also begin to see better maps, reports and inventories available during forest management planning.

Concerns have been expressed, however, about the policy decision to restrict public access to industry data, some of which used to be publicly available when collected by the ministry. Non-governmental organizations have reported to the ECO that they are getting less access to information about Crown forests. For example, air photos, which have been available through the MNR for decades are now, are getting more difficult to obtain.

Economic impacts
MNR said it expected some "minimal increases in some information management costs," but that the efficiencies and savings gained from standardizing the information requirements would "significantly out-weigh the negative economic impacts." It is unclear whether MNR is referring only to the economic costs and benefits to the ministry. The changes have a negative impact on SFL holders, who bear all new costs of conducting new inventories and other data collection required by the FIM. The public may also face increased costs to access information because the minister may establish fees for providing any information collected under the FIM to the public.

Public Participation & *EBR* Process:
The ministry consulted extensively with the forest industry for several years in developing the FIM. MNR's Registry notice says that this consultation occurred at "both technical and high level policy perspectives." The notice also says that "information sessions" were held with MNR staff, SFL holders, major non-governmental (NGO) and Native organizations before posting the proposal on the Registry. Licence holders regulated by the manual were involved in its development from the start, and other stakeholders were given less opportunity to affect the substance of the manual.

Only one written comment was received during the *EBR* comment period. The commenting NGO noted that MNR provided a 36-day period over the year-end holiday season, and said that was too short a time for the public to comment on a manual that is thick and technical, especially since the ministry had consulted extensively with the timber industry. The ministry replied that the length of the comment period was appropriate given the neutral to positive impacts of the proposal.

The NGO comment expressed concern about two main issues: the restriction of access to source data and the focus of the FIM on timber-related information. MNR's decision notice said that the source data is bought and paid for by the SFL holders. Requiring them to make it public might jeopardize the forest industry's incentive to invest in innovative and state-of-the-art technologies. The notice said that the ministry can still request the source data for verification purposes, which ensures that the information, which is provided to the public, is of high quality.

In response to the concern about a narrow focus on information based on the cutting and growing of trees, the ministry said the FIM was a work in progress. The ministry said that Version 1.0 was created to fill the information needs for forest management and reporting of operations on Crown lands and that Version 2.0, expected in 2003, will consider other types of information. The commenters were also concerned about relying on the forest industry to provide information on non-timber values when they encounter them. MNR's response was that the ministry remained responsible for collecting non-timber values information, but that it would rely on SFL holders and the public to provide up-to-date information about non-timber values.

The comment did not result in any changes to the FIM, but MNR said that most of the concerns can and will be dealt with through proper communication messages delivered during the implementation and training efforts put forth by MNR to support the roll-out of this manual.

SEV:

The ministry provided the ECO with a very thorough description of how it considered the ministry's SEV in making the decision. MNR's SEV sets out a number of objectives and principles related to ensuring the long-term health of ecosystems and natural resources. MNR says that the FIM is an important part of one of the supporting strategies set out to achieve those objectives – an improved knowledge base. That strategy says:

- The ministry will be a focal point for the establishment of information standards and the provision of data, information and knowledge about the geography of Ontario's landmass and its natural resources, and for reporting on the status of resources in Ontario.
- It is particularly important to determine what more is needed to be learned about Ontario's natural resources and factors impinging on them to set direction for policy and program development, or to assess existing programs.

The ECO agrees with MNR's conclusion that the decision is consistent with the ministry's SEV.

Other Information:

The FIM explains that one of the most critical sources of information needed is the results of silvicultural effectiveness monitoring surveys carried out to determine the success of harvest and renewal operations. Surveys will be compared to the desired regeneration or management targets set for each forest stand to answer the questions, "What did we intend to accomplish? "What did we actually accomplish?" and "How well did we do it?" A new guideline, the *Silvicultural Effectiveness Monitoring Manual for Ontario* (SEMMO), was finalized in 2001. It was posted on the Environmental Registry (PB01E7001) a few months after the FIM and received no comments. Part D of the FIM describes the silvicultural monitoring data that SFL holders must provide to the ministry. The SEMMO is a guidance document describing different methodologies to meet the FIM requirements.

ECO Comment:

The ECO commends MNR for finalizing this manual, as it will provide an improved information base to assess the sustainability of lands under commercial timber production. We are concerned, however, that the manual fails to address the need for improved collection of information on non-timber values such as wildlife, wetlands, species at risk and old growth forests. The ECO understands public concerns that the forest industry has been given too much responsibility and influence on ministry policy. This information collection, monitoring and reporting system must be accessible to the public in order for its results to be understood and trusted by the public and other critics.

The two new manuals approved in 2001, the FIM and SEMMO, were required not only to meet the requirements of the *CFSA* and the Timber Class EA, but also to address mounting criticisms that the ministry could not adequately measure or report on forest operations or sustainability of the forest. Concerns about the FRIs, monitoring of regeneration success, and public reporting were noted throughout the 1990s by the Provincial Auditor, the Environmental Assessment Board (now known as the Environmental Review Tribunal), the ECO and a number of others. Most of the independent audits of individual FMUs carried out in 1998 and 1999 found poor data collection, records and reports; some concluded that there was not adequate information to determine regeneration success or to assess the sustainability of the forest.

Since late 2000, MNR has worked hard to address these criticisms. The ministry released a backlog of required annual reports on forest management with the information it had and finalized the FIM and SEMMO. Each successive annual report and five-year Assessment of Forest Resources / State of the Forest report should improve as the information requirements of the manual are phased in. MNR points out, however, that "it will be several years before a comprehensive provincial database exists for FRI information based on the requirements and standards prescribed in this manual and based on the staggered plan production schedules."

The new FRI is more detailed and standardized across all forest management units, and will be updated with new information every five years. Significant improvements in information management have been developed over the past few years with the new "digital FRI" and use of geographic information systems. MNR has made good progress on standardizing data requirements and converting maps and databases into digital formats over the past few years. While the technology for managing information has improved, many experts remain concerned that some databases are lacking, because MNR has not been collecting the data and is not requiring the forest industry to collect it either.

A recent MNR report, "Evolution of Ontario's Living Legacy," reflected on the 1997-1999 planning process. It said that the GIS technology was immensely useful, but also that "the technology allowed for the production of maps that looked very professional, but sometimes the appearance of high quality obscured the fact that there were shortcomings in the underlying data and information." Similarly the FRIs and other maps and information products used in the forest management planning process may have significant but invisible information gaps.

The report identified several problems with MNR's data, inventories and information management that are relevant to this review. Its criticisms of the FRIs should all be remedied by the FIM. It also said that some of the other most critical data sets were not in a very usable state, and many types of information were missing. Some of the missing information was collected through partnerships with stakeholders. However, the report also says the Ontario's Living Legacy (OLL) process was hampered because some parties were unwilling to share their data. This is a concern because the idea of "data sharing" is incorporated into the FIM – MNR is relying on the forest industry and others to provide the ministry with new information on non-timber values.

The OLL report said that an interesting result of the more open approach was that stakeholders were able to see what data the ministry had and didn't have. This increased trust on the part of groups and individuals who believed that the ministry had much more information in its data bank than actually was available. While MNR's data bank of information on harvest levels, silvicultural treatments and other forest industry activities will now be improved, there is nothing in the FIM that ensures non-timber information will be collected or databases improved.

Recent Independent Forest Audits prepared for MNR have found a gap in identification and monitoring of non-timber values. The OLL report said that "inventories of natural heritage features and areas tackled over the [past] two decades had covered only a small portion of the province…" The FIM says that only "known" values will be mapped or considered in forest

management planning, and that the SFL holders should not become “de facto” collectors of information on non-timber values. For these reasons it is important that the MNR continue to collect data and complete inventories such as the wetlands inventory and wildlife population and habitat studies. This issue is touched on in the ECO review of the ministry’s Caribou Management Guidelines at pages 184 - 189 of the supplement and page 53 of the annual report). This information is needed not only for planning forestry operations, but also for long-term land use planning and other MNR responsibilities for Crown lands.

The ECO is concerned about how this manual was developed, and the lack of transparency in the process. The policies and responsibilities were worked out between just two parties: the ministry and the forest industry. It appears that the draft manual was implemented over several years before it was finalized or approved by regulation. Later information sessions with other stakeholders and a Registry proposal notice did not result in changes to the manual.

Concern has also been expressed about public access to information being restricted because of the decision to transfer responsibility for data-gathering to the industry. The data collection and reporting system must be seen to be credible and testable in order for the public to trust MNR’s assessment of the sustainability of Crown forests. MNR has the discretion to grant public access to requested information, and a process to resolve disputes between SFL holders and the public. The ECO urges the ministry to interpret the policies and procedures in the FIM in a generous manner so that public access to information will be safeguarded.

Review of Posted Decision:
Amendment to Regulation 328, R.R.0. 1990, under Endangered Species Act: listing of the few-flowered club-rush, horsetail spike-rush and slender bush clover as endangered species

Decision Information:

Registry Number: RB00E6006
Proposal Posted: 2000/12/21
Decision posted: 2001/06/18
Comment period: 30 days
Number of comments: 2
Decision implemented: 2001/04/21

Description:

This amendment to Regulation 328, R.R.O. 1990, under the *Endangered Species Act* (*ESA*), adds three plants to the list of Ontario's endangered species. 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. Seventy-five per cent of the known habitats for these plants are located on lands under public ownership.

The few-flowered club-rush, also know as the shy or bashful bulrush, is an herbaceous perennial sedge which grows in small clumps. It typically grows in forest-dominated environments, and requires a warm climate. Southwestern Ontario is at the extremity of its northern range. This plant is known to have grown in only two locations in Ontario in recent years. These sites are located in Toronto and Hamilton. In 2000, a joint federal-provincial recovery planning team was formed for this plant. The few-flowered club-rush will now receive endangered species status for its populations located in Tallgrass Prairie Heritage Park, Ojibway Park and Black Oak Heritage Park in the City of Windsor.

The horsetail spike-rush is an asexual perennial plant belonging to the sedge family. It grows in shallow waters or along the edges of ponds. Its only known location in Canada, consisting possibly in a single plant, is in Long Point National Wildlife Area in the Regional Municipality of Halidmand-Norfolk. The horsetail spike-rush will now receive endangered species status for this population at this site. No recovery plan has been drafted for this plant.

The slender bush clover is a perennial herb. It grows in quasi-prairie environments, preferring exposed mineral soil. This plant may require natural disturbances such as fire to sustain populations successfully. In Ontario, it is found only in three locations in Essex County. In 1975, MNR and the City of Windsor began restoration efforts, including the use of prescribed burns. In 1998, under the auspice of the Tallgrass Communities Recovery Plan, the World Wildlife Fund Canada and MNR drafted a recovery plan, but it remains unapproved. The slender bush clover will now receive endangered species status for its populations located in the Royal Botanical Gardens in the City of Hamilton and the Town of Dundas, in addition to Lot 32, ranges 2 and 3 in the City of Pickering.

Implications of the Decision:

MNR states that the purpose of regulating these three rare plants is to increase their protection, as well as raise public awareness. The recovery of these plants is dependent upon the development of recovery plans for each species and their implementation. However, recovery plans are not required by the *ESA* or 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 in only 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 geographic limitations within the *Endangered Species Act* and this regulation is to prevent the trans-plantation of flora without the knowledge of MNR. This provision is necessary to ensure that planned efforts are capable of tracking and monitoring the species at risk.

Public Participation & *EBR* Process:

In preparing the proposal, MNR identified and consulted affected landowners. The landowners were sent letters or contacted about the intent to regulate the species as provincially endangered. Follow-up interviews were conducted and MNR reported that no major concerns were raised by any landowner.

The proposal was posted on the Registry for 30 days, receiving two comments. Both commenters expressed their support for the regulation. One party further suggested that conservation measures should exceed those described in Section 5 of the *ESA* to include the restoration and expansion of suitable habitat, in addition to ensuring monitoring and enforcement. MNR considered these comments as being beyond the scope of the proposal.

There was sufficient detail in the content of the posting. An appropriate Web site explanation of the decision using plain language was given, including hyper-links to relevant information. A contact name was given in the decision. The 30-day comment period was an adequate period of public consultation.

SEV:

The regulation of these three plants is relevant to the third objective in MNR's Statement of Environmental Values, "to protect natural heritage and biological features of provincial significance." Socio-economic concerns were considered, as a portion of the habitat of the three plants is under private ownership. This regulation serves the purposes of the *EBR* with respect to the protection and conservation of biological, ecological and genetic diversity.

Other Information:

This amendment to Regulation 328, R.R.O. 1990, under the *ESA*, is part of the larger issue of protecting species at risk in Ontario. The Province of Ontario has committed to protecting such species by means of the National Accord for the Protection of Species at Risk and the National Statement of Commitment to the Canadian Biodiversity Strategy.

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*. Section 5(b) 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. Species at risk require a broad definition of habitat so as to include potential areas of recovery. The issue of habitat is of particular significance as its loss is consistently among the greatest threats to species at risk. For MNR to implement the Canadian Biodiversity Strategy, it should protect and restore "viable populations across their natural historical range."

MNR consults affected landowners prior to regulating an endangered species. Although public consultation is laudable, the speed at which species are regulated is then dependent upon the provision of sufficient staff by MNR.

In January, 2002, MNR proposed to add more additional species to Regulation 328, R.R.O. 1990 under the *ESA*. The species proposed to be listed as endangered are 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*).

The proposed federal species at risk legislation has a potentially significant bearing on this decision. Bill C-5, *An Act respecting the protection of wildlife species at risk in Canada*, is currently awaiting third reading before Parliament. This legislation would give added protection to species at risk, requiring the formulation and implementation of recovery plans.

ECO Comment:

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 unchanged since that time. ECO encourages MNR to initiate the necessary public debate to assess options to prevent the 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 endangered species and encourages the ministry to ensure there are sufficient funds and staff to identify species at risk in Ontario and to implement recovery planning.

Review of Posted Decision:

Forest Management Guidelines for the Conservation of Woodland Caribou: A Landscape Approach – For use in northwestern Ontario

Decision Information:

Registry Number: PB8E6019
Proposal Posted: 1998/09/01
Decision posted: 2001/11/29

Comment period: 30 days
Number of comments: 16

Description:

The Forest Management Guidelines for the Conservation of Woodland Caribou recommend forest landscape planning and management practices to assist in sustaining populations of forest-dwelling woodland caribou (*Rangifer tarandus caribou*). These guidelines recommend techniques for protecting current habitat and creating future habitat. MNR states that the guidelines should be applied in the context of regional, sub-regional, and forest management unit planning scales. The objective of the guidelines is to ensure "a suitable and sustainable landscape containing year-round caribou habitat" and maintaining caribou range occupancy in the context of forest operations. These guidelines will affect Ontario's boreal population of woodland caribou, which number approximately 2,700 animals and are considered a "threatened" population. Woodland caribou are known to be very intolerant of human disturbances such as forestry operations.

The *Crown Forest Sustainability Act* (*CFSA*) requires that forest practices emulate natural disturbances and landscape patterns, while minimizing adverse impacts. A guiding principle of the legislation is that ecological processes and biodiversity should be conserved. The *CFSA* requires that various manuals be prepared and adhered to, including the Forest Operations and Silviculture Manual. This manual establishes various guidelines to mitigate the negative effects of forest operations on select species. These various guidelines, including the Forest Management Guidelines for the Conservation of Woodland Caribou, must be considered during forest management planning and forest operations.

These guidelines are to be applied in concert with MNR's Natural Disturbance Pattern Guide (See pages 50 – 56 of the annual report). MNR states "the [caribou] guidelines were modified and finalization was subject to completion" of the Natural Disturbance Pattern Guide. MNR explains that "instead of applying a number of different guidelines to create habitat for a limited number of wildlife species, applying guidelines that simulate how natural disturbances create wildlife habitats is considered to be a better way of maintaining featured species and biodiversity." The Natural Disturbance Pattern Guide is intended to serve as a "coarse filter" to produce "habitat conditions at the stand and landscape levels that are required by wildlife species using all successional stages of the forest." However, MNR admits that the effectiveness of this approach is untested, requiring a rigorous monitoring program.

The Natural Disturbance Pattern Guide has broad implications for the boreal population of woodland caribou as 20 per cent of the number of harvest blocks may exceed 260 ha in the boreal forest. Clear-cuts of this size are allowable based on several conditions, including if the

clear-cut is "part of an overall strategy to provide wildlife habitat." Should the pattern and sizes of clear-cuts require adjustments based on the perceived needs of selected species, MNR states that it should use "a more natural disturbance pattern first and only deviate from it if absolutely necessary to prevent significant habitat losses."

MNR has designed the Forest Management Guidelines for the Conservation of Woodland Caribou to serve as a "fine filter" for forest management planning. At a regional scale, the guidelines recommend that woodland caribou be managed on a time horizon of 80 years or more, that protecting selected winter habitat areas and strategic calving areas should be a priority, and that primary roads avoid traditional and potential winter habitats. At the level of forest management units, the guidelines recommend:

- Areas with high potential to provide current or future winter habitat should be managed for winter habitat by prescribing disturbance events in the order of 10,000 ha or greater, or maintaining them as part of 10,000 ha or greater tracts of older forest.
- Maintain or allocate potential winter habitat tracts based on relative habitat supply and local ecological context. Assess relative habitat supply on an area approximately 700,000 ha in size.
- Manage the winter habitat tract to a future forest condition that provides for winter habitat value and refuge from predators and human disturbance.
- Apply a 1000 m Area of Concern to all calving areas and develop an appropriate prescription for this AOC.
- Forest management activities in snow-free season habitat should 1) discourage conversion to hardwoods, 2) avoid fragmentation and 3) promote no net change in forest composition or structure at the regional and local landscape level compared to pre-disturbance conditions or best estimates of what a fire-driven ecosystem would maintain.
- The preferred approach to maintaining connection between summer and winter habitat is by place disturbance events under the Forest Management Guidelines for the Emulation of Fire Patterns to maintain connectivity between large habitat tracts.
- Where landscape does not facilitate connectivity between large habitat tracts and travel routes are known, priority should be given to maintaining the integrity of the vegetation along these routes, through harvest scheduling and building upon riparian zones.
- Where isolated habitat tracts are located near the southern boundary of the zone of continuous distribution, a two-kilometre-wide (approximate) corridor of relatively mature to mature timber should be maintained to connect with nearest neighbour mature habitat tracts.

At the site level, the guidelines recommend that the harvest areas be regenerated to restore the composition and structure of the previous forest, that documented salt licks used by caribou should be a minimum 120 m AOC, and that forest access roads be of a temporary nature when constructed in significant winter or snow-free season habitat tracts.

Implications of the Decision:

MNR recognizes that the boreal population of woodland caribou "could be considered an indicator of long term forest health." Pursuant to the *CFSA* and the Forest Management Planning Manual, measurable indicators for biodiversity must be used in the determination of forest

sustainability. The boreal population of woodland caribou is an indicator of forest sustainability due to their narrow ecological tolerances and their sensitivity to human disturbances. As such, the ECO believes that they should unequivocally be used to assess the sustainability of forest operations within their current range.

MNR asserts that these guidelines are based on adaptive management. This approach ideally recognizes the inherent uncertainty in the management of natural resources. Adaptive management necessitates ongoing monitoring and, if necessary, the use of alternative solutions or strategies. MNR acknowledges that "uncertainty about the long-term effectiveness of these guidelines for both caribou and the forest industry" exists. However, an adaptive management approach seemingly conflicts with the ministry's commitment to the forestry industry of a constant timber supply.

The ability of MNR to determine the impacts of forestry operations on the boreal population of woodland caribou is dependent on effective monitoring. A rigorous monitoring program should contribute to any necessary amendments to forest management plans, including at any time before the required five-year review and renewal of a plan. MNR's Forest Information Manual makes the ministry responsible for monitoring non-timber values such as woodland caribou. However, recent Independent Forest Audits have found a gap in the identification and monitoring of non-timber values, establishing the risk that forest operations will not adequately consider species such as woodland caribou. MNR should ensure that affected Sustainable Forest Licence holders are provided up-to-date information on woodland caribou.

MNR is obliged to monitor global ecological cycles, such as climate change, to anticipate the potential impacts on forest sustainability. Some experts predict that Ontario's boreal forest will undergo dramatic changes, including a higher occurrence of forest fires and a shift in vegetation zones as a result of climate change. These effects will also change the distribution of many species, such as the boreal population of woodland caribou. Despite the recommendation to plan for a time horizon of 80 years or more, the guidelines do not address the role of climate change and its relationship with forest operations and caribou.

Public Participation & *EBR* Process:

MNR states in its Registry decision notice that "these guidelines evolved from interim direction established in 1994 and related background policies since 1989." The Registry posting of the proposal stated that "the guidelines are to be completed by the fall of 1998."

ECO wrote in its 1999/2000 annual report that "the draft guideline has been implemented already, as per MNR direction dated March 4, 1999. MNR should post a decision notice on the Registry to inform the public that a decision was made to implement the guidelines, and to describe the effect of public comment on the guidelines." In September 2000, MNR informed the ECO that the ministry was reconsidering the direction taken in the guidelines and that a Registry notice would be provided in the fall of 2000. The ECO wrote in its 1999/2000 annual report that "if MNR is reconsidering the direction in the guidelines, it should post a new proposal notice to solicit public comment before revised guidelines are implemented." It does not appear that a new direction was taken in the final decision.

This proposal was posted on the Registry for a 30-day comment period, receiving 16 comments. MNR could have provided more detail in the proposal notice. MNR summarized and responded to each of the comments in the decision notice. MNR made minor changes to the policy based on four of the comments. Few of the total comments were in opposition to the policy and most of the commenters were primarily concerned with limitations to hunting opportunities on the affected lands. Other comments concentrated on the implementation of the guidelines and methodological approaches.

The Registry proposal notice stated that additional participation had been solicited from members of the forest industry, conservation organizations, MNR specialists and technical staff. One organization was concerned that it had received its copy of the draft guidelines halfway through the comment period, noting that it had a limited time to submit comments. Given the length and technical nature of this policy, MNR should have posted this proposal for a longer comment period. The ministry also should not have waited three years to post the decision on the Registry.

SEV:

MNR states that it considered its Statement of Environmental Values in the development of the policy. In considering SEV commitments, MNR detailed how the policy complements the ministry's goal and objectives. MNR stated that its objective "to protect natural heritage and biological features of provincial significance" is of particular relevance to the conservation of woodland caribou and their habitat. Further, the desired outcomes of the policy are that:

- The woodland caribou habitat management guidelines will help ensure that healthy populations of caribou and other terrestrial wild life will be safe-guarded over geographical area and time.
- The implementation of these guidelines will help ensure integrity of natural processes and the inherent productivity of the land.
- That the variety of life – biological diversity – will be conserved.

Other Information:

The Forest Management Guidelines for the Conservation of Woodland Caribou are part of the larger issue of conserving species in Ontario. The Province of Ontario has committed to protecting such species by means of the National Accord for the Protection of Species at Risk and the National Statement of Commitment to the *Canadian Biodiversity Strategy*. For MNR to implement the *Canadian Biodiversity Strategy*, it should protect and restore "viable populations across their natural historical range" where possible.

Five subspecies of caribou were historically found in North America. Peary caribou (*R.t. pearyi*) inhabit northwest Greenland and the Queen Elizabeth Islands in the Canadian Arctic. Barren ground caribou (*R.t. groenlandicus* and *R.t. granti*) inhabit northern boreal forests from northern Manitoba to Alaska. The subspecies (*R.t. dawsoni*) of caribou which inhabited the Queen Charlotte Islands is now extinct. Woodland caribou (*R.t. caribou*) are found from Newfoundland to the Yukon. Within Ontario, woodland caribou are generally now found north of 50 degrees latitude in Ontario. As recently as the late 19th century, they ranged as far south as central

Ontario to approximately 46 degrees latitude. It is estimated that 20,000 woodland caribou currently inhabit northern Ontario, of which 2,700 comprise the remaining boreal population.

The Forest Management Guidelines for the Conservation of Woodland Caribou incorrectly identify the boreal population as a "vulnerable" species. In 2000, the Committee on the Status of Endangered Wildlife in Canada (COSEWIC) upgraded the designation of the boreal population of Woodland caribou to "threatened." COSEWIC estimates that there are 188,850 woodland caribou in Canada, of which approximately a quarter constitute the boreal population from British Colombia to Labrador. COSEWIC has designated three other populations of caribou as endangered and two other populations as threatened. COSEWIC observes that "forest management practices and the spread of agriculture and mining have resulted in the loss, alteration and fragmentation of important caribou habitat." The guidelines themselves acknowledge these pressures in stating that there has been "local extirpation coincident with the expansion of forest harvesting" in Ontario.

The Forest Management Guidelines for the Conservation of Woodland Caribou are currently applied "where woodland caribou habitat management is recognized as a priority, either through designation of caribou as a featured species or through designated zoning recommended through regional land use planning." MNR should ensure that forest management plans conform with any future recovery plan presented by the Recovery of Nationally Endangered Wildlife (RENEW).

In Ontario, MNR has not given the boreal population of woodland caribou a designation on its Index List of Vulnerable, Threatened, Endangered or Extirpated (VTEE) species. The boreal population of woodland caribou meet MNR's own definition of threatened species, which are "any indigenous species of fauna or flora that, on the basis of the best available scientific evidence, is considered to be undergoing a definite non-cyclical decline throughout all or a large part of its Ontario range, and that is likely to become endangered if the factors responsible for the decline continue unabated." The *Fish and Wildlife Conservation Act* identifies woodland caribou as a "game animal." However, Ontario Regulation 670/98 (Wildlife – Open Seasons), Table 10, does prevent the hunting of the species by means of a year-round closed season.

The boreal population of woodland caribou should be considered as a "featured species" under MNR's Forest Operations and Silviculture Manual and the Selected Wildlife and Habitat Features: Inventory Manual. The Forest Management Guidelines for the Conservation of Woodland Caribou are consistent with MNR's definition of featured species as "a species for which habitat management is conducted explicitly." MNR should include species designated as threatened by COSEWIC in its interpretation of featured species as those "endangered species by law, and threatened species by policy."

The proposed federal species at risk legislation has a potentially significant bearing on this decision. Bill C-5, *An Act respecting the protection of wildlife species at risk in Canada*, is currently awaiting third reading before Parliament. This legislation would give added protection to species at risk, including the boreal population of Woodland Caribou. In many respects, Bill C-5 exceeds the limited provisions found within Ontario's *Endangered Species Act*, which does not recognize threatened species.

The conservation of the boreal population of woodland caribou requires large protected areas. These protected areas serve as refuges from human activity, but also as benchmark areas by which to scientifically compare human impacts on the intervening landscape. The historical ecological processes of these protected areas should occur relatively unimpaired. The boreal forest is a fire-driven landscape, and fire suppression activities in protected areas should occur in the context of caribou conservation. As such, MNR's Forest Fire Management Strategy for Ontario will have a significant impact on species such as Woodland caribou. Protected areas, such as Caribou and Wabakimi Provincial Parks, will also play an increasingly important role in the future status of the boreal population of woodland caribou.

MNR should consider woodland caribou habitat and range occupancy in the creation of new protected areas. In 2001, MNR proposed the Northern Boreal Initiative to initiate land use planning north of 51 degrees latitude. This area of Ontario is north of the Area of Undertaking for the Class Environmental Assessment for Timber Management on Crown Lands and the Ontario Living Legacy planning area. The Northern Boreal Initiative is founded in part upon the 1999 Forest Accord, which will open northern Ontario to forestry and other resource industries, but which also supports an increase to the existing representative parks and protected area system.

ECO Comment:

The ECO encourages MNR to conduct a rigorous scientific monitoring program of the boreal population of woodland caribou. MNR does acknowledge that the effectiveness of these guidelines is untested and that woodland caribou are sensitive to human disturbances. The ECO 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.

MNR must review the guidelines themselves at least every five years to determine the need for revision and, as such, re-post the guidelines on the Environmental Registry if significant changes are adopted. As the guidelines were implemented in 1999, this review must be done by 2004. However, MNR has proposed consolidating 34 forest management guidelines into six new guidelines by 2003. MNR has suggested that the Forest Management Guidelines for the Conservation of Woodland Caribou would be incorporated into a new Landscape Direction guideline, which will also include the Forest Management Guide for Natural Disturbance Pattern Emulation.

The ECO encourages MNR to implement any future federal-provincial recovery plan for the boreal population of woodland caribou. MNR should consider listing the boreal population of woodland caribou as "threatened" to reflect COSEWIC's designation.

Review of Posted Decision:
940787 Ontario Limited Amended License, Township of Wilmot

Decision Information:
Registry Number: IB01E3002
Proposal Posted: September 27, 2001
Decision Posted: January 15, 2002
Comment Period: 30 days
Number of Comments: 2
License Amended: November 5, 2001

Description:
940787 Ontario Limited (the "licensee") was granted a temporary increase in the tonnage it may excavate under its aggregate license in the Township of Wilmot, Regional Municipality of Waterloo. The licensee had requested a temporary increase of 50,000 tonnes for the year 2001 to meet market demand and unexpected sales, bringing its limit from 90,000 tonnes to 140,000 tonnes annually. The Ministry of Natural Resources (MNR) decided to increase the tonnage limit by only 25,000 tonnes, allowing the licensee to extract 115,000 tonnes from the licensed site. This increase was valid for the year 2001 only, and MNR informed the licensee that no further increases in tonnage limits will be granted in 2002 unless the licensee meets requirements requested by the Regional Municipality of Waterloo pertaining to road improvements at the gravel site.

Implications of the Decision:
The decision to grant a temporary increase in the tonnage excavated from this property may adversely affect road safety because it will increase truck traffic at the site. Also, the existing road access to and from the gravel site needs to be re-designed to reflect the current standard for gravel pit access. The Regional Municipality of Waterloo recommended that the company be required to make road improvements. However, the negative impact will be limited by the fact that MNR approved the temporary license condition for only one year and warned that there would be no more increases in tonnage until the work required by the regional municipality was done.

Public Participation & *EBR* Process:
The proposal was posted on the Registry for a 30-day comment period. MNR stated that while no comments were received as a result of the Registry notice, 2 comments were received as a result of the circulation process under the *Aggregate Resources Act*. MNR stated that the ministry took these comments into consideration when it made the final decision to grant the temporary tonnage increase.

MNR also noted that the licensee requested comment from the Regional Municipality of Waterloo and the Township of Wilmot. The Township of Wilmot was concerned about the impacts of the tonnage increase in terms of hours of operation and numbers of trucks. The township suggested that a substantial increase in traffic might warrant advance signaling or other road enhancements.

The Regional Municipality of Waterloo contended that road improvements are required before the tonnage limit is increased because it will increase truck traffic at the site and the existing

access must be re-designed to reflect the current standard for gravel pit access. The regional municipality requested that MNR not allow the increase unless appropriate work was first ordered to improve the entrance to the gravel pit and make other road improvements. Although it was expected that an application for a zoning by-law amendment would be forthcoming, the *Planning Act* does not permit provisional approval of zoning by-law amendments subject to the applicant's meeting conditions. Therefore, the regional municipality believed that it would not be able to ensure road improvements through this process.

MNR took into account the concerns raised by the commenters and responded by approving the temporary license condition for a lesser tonnage for only one year and warning that there would be no further increases in tonnage until the work required by the regional municipality was done.

SEV:
MNR did not provide any documentation regarding consideration of its SEV in making this decision. It is unclear why MNR failed to prepare a SEV consideration document for this decision. The ECO intends to follow up with MNR on this issue in the next reporting period.

ECO Comment:
It appears that MNR attempted to balance the interests of the licensee and the concerns of the commenters in reaching its decision.

MNR noted that the comments were received under an *ARA* process and not in response to the Registry notice. Until the public is made aware that MNR is now posting instrument proposals on the Registry, there may be few comments in relation to *ARA* and other instruments received under the public participation provisions of the *EBR*.

Review of Posted Decision:
Amendments under Bill 119, the *Red Tape Reduction Act, 2000*, to nine statutes administered in whole or in part by the Ministry of Natural Resources.

Decision Information:
Registry Number: AB00E4001
Proposal Posted: 2000/05/12
Decision Posted: 2001/08/09
Comment Period: 30 days
Number of Comments: 4

Description
The purpose of this legislative initiative was to make a series of very specific amendments to nine separate Acts of law. The amalgamation of amendments into one single proposed statute is called an "omnibus bill." Through this omnibus bill (Bill 119), MNR amended the *Aggregate Resource Act*, the *Conservation Land Act*, the *Forestry Act*, the *Crown Forest Sustainability Act*, the *Lakes and Rivers Improvement Act*, the *Mining Act*, the *Niagara Escarpment Planning and Development Act*, the *Oil, Gas and Salt Resources Act* and the *Public Lands Act.*

The stated purpose of Bill 119 amendments is to:

- clarify legal ambiguities *in various piece of legislation;*
- eliminate excess red tape *for proponents and government staff involved in approvals processes;*
- improve service for *clients of MNR*;
- simplify decision-making processes *for stakeholders;*
- and enhance natural resource protection *in the province*.

While some of these amendments are administrative in nature, and some will enhance natural resource protection, other amendments will assist with natural resources development in Ontario, which could have impacts on the environment.

Below is a summary of the key changes made:

Under the *Aggregate Resources Act* (*ARA*), any public authority, or any person who has a contract with a public authority, can apply for a wayside permit to operate a pit or quarry to obtain aggregate for road maintenance or construction. The *ARA* is amended by Bill 119 to allow wayside permit site plans to be changed and expiration dates to be extended if projects have not been completed. The *ARA* is also amended to permit the minister to order a person to perform progressive or final site rehabilitation even if that person is no longer a licensee or permittee. Licensees and permittees must now notify the minister and the Aggregate Resources Trust of changes in name or address.

The *Conservation Land Act (CLA)* is amended to permit the minister to make regulations to expand the definition of "conservation body." As per *CLA* s.3(1), "conservation body" now means:

a. the Crown in right of Canada or in right of Ontario,
b. an agency, board or commission of the Crown in right of Canada or in right of Ontario that has the power to hold an interest in land,
c. a band as defined in the *Indian Act* (Canada),
d. the council of a municipality,
e. a conservation authority,
f. a corporation incorporated under Part III of the *Corporations Act* or Part II of the *Canada Corporations Act* that is a charity registered under the *Income Tax Act* (Canada),
g. a trustee of a charitable foundation that is a charity registered under the *Income Tax Act* (Canada), or
h. any person or body prescribed by the regulations.

The definition of "forest resource" in the *Crown Forest Sustainability Act* (*CFSA*) is expanded to include parts of, or residue from, trees in a forest ecosystem. The definition of "forest resource processing facility" is likewise expanded. The limitation period for notifying a person of an administrative penalty for an alleged offence is extended from one year to two years after the act or omission occurs. If forest resources or products are seized and detained, the expenses incurred are to be paid by the person from whom they are seized. Ministry employees and agents may enter private land for the purposes of the *CFSA*, and cross private land to reach a Crown forest. Previously, the *CFSA* made it an offence to contravene specific provisions or regulations. It is amended to make it an offence to contravene any provisions or regulations.

The definition of forest tree pests in the *Forestry Act* (*FA*) no longer requires that they be designated in regulations. The *FA* is further amended such that, if a municipality or conservation authority sells or leases land acquired with the assistance of a grant from the minister, at least 50 per cent of the proceeds would be directed to the municipality or conservation authority. Municipalities may now require that persons engaged in forest operations on municipal land meet the same minimum qualifications established by the Forest Operations and Silviculture Manual under the *Crown Forest Sustainability Act.*

The *Lakes and Rivers Improvement Act* (*LRIA*) is amended to permit the minister to order the owner of a dam or other structure to prepare a management plan for its operation, and operate the dam or other structure in accordance with this plan. The *LRIA* is further amended such that only an engineer, not (as previously stipulated) an inspector, may report concerns about personal injury or property loss or damage resulting from the design, construction, or condition of a dam.

Amendments to the *Mining Act* permit the minister to issue leases for the temporary storage of hydrocarbons and other prescribed substances in underground formations on Crown land. This is intended to contribute to more cost-effective delivery of natural gas in Ontario and elsewhere. Previously, this activity took place without leases being issued. The minister is also permitted to issue exploration licences and production and storage leases for land that is already subject to a licence or a lease.

The *Niagara Escarpment Planning and Development Act* (*NEPDA*) is amended to make several changes to the Niagara Escarpment Plan review process. A review of the Niagara Escarpment Plan is to be undertaken not later than the tenth anniversary of the date the Plan was approved or the twelfth anniversary of the date the minister established the terms of reference for the previous review. Previously, the Ontario government was required to launch a review approximately every five years. The review is to be conducted in accordance with the terms of reference established by the minister. The *NEPDA* now allows the Niagara Escarpment Commission to hold public meetings to comment on proposed amendments to the Niagara Escarpment Plan, and requires that the Commission make copies of the Plan available to the public. When the Plan is amended, the minister shall provide a copy of the amendment to affected municipalities, but is no longer required to provide copies to land registry offices.

The amended *NEPDA* makes it clear that municipalities, local boards, and ministries cannot undertake any planning or development that is in conflict with the Niagara Escarpment Plan. If a person undertakes any development that is in contravention of the *NEPDA*, and the minister has reasonable grounds to believe that it causes or is likely to cause a risk to public safety or environmental damage, the minister is now authorized to issue a stop work order. The minister may delegate this power to the Niagara Escarpment Commission or the director of the Commission only. Contravention of a stop work order is an offence. The minister may, as a condition of issuing a development permit, enter into an agreement with an owner of the land, register that agreement, and enforce its provisions against the owner and any subsequent owners of the land. The *NEPDA* is amended to clarify that decisions made by the minister's delegates must be made in accordance with the Niagara Escarpment Plan.

The *Oil, Gas and Salt Resources Act* is amended to make it an offence for a director or officer of a corporation to direct, authorize, assent to, acquiesce or participate in the commission of an offence under the *OGSRA* by that corporation.

Amendments to the *Public Lands Act* (*PLA*) make it an offence to contravene any provisions or regulations of the Act except where otherwise provided, authorize the court to make compliance orders, and provide the possibility of increased fines and penalties. A new provision establishes a two-year limitation on proceedings in respect of offences under the *PLA*. Previously, there was no limitation and so offences had to be prosecuted within the six-month limitation period provided under the *Provincial Offences Act*. The minister may now block any road dedicated to public use and not within a municipality, and sell, lease or otherwise dispose of the soil and freehold of any road or road allowance that has been blocked. When land is registered in the Crown's name, reverts to or is vested in the Crown, the minister is no longer required to give notice to adjoining landowners. Instead, the minister may forward a certificate stating that the land is deemed to be public lands to the appropriate land registry office.

Implications of the Decision

Many of the amendments introduced in the *Red Tape Reduction Act, 2000* will increase opportunities for environmental protection by enhancing MNR's monitoring capabilities, improving enforcement tools and remedies for non-compliance, and clarifying the application of several statues. Two examples follow.

In 1998, the ECO received an application for investigation alleging numerous contraventions of the *Crown Forest Sustainability Act* (*CFSA*), the *Public Lands Act,* and other environmental legislation by forestry companies harvesting on public land in the Algoma Highlands. MNR undertook an investigation, confirmed 10 specific contraventions, and recommended enforcement action in three cases. In other cases, however, MNR could not take enforcement action because the limitation period on setting penalties or charges under the *CFSA* had expired. In the 1998 annual report, the ECO recommended that, in order to better reflect the frequency of audits and investigations by MNR staff, MNR should extend the limitation periods for contraventions of forestry laws. Amendments to the limitation periods set out in the *CFSA* and the *Public Lands Act* will enable MNR to enforce those Acts more rigorously and effectively.

For the latest review of the Niagara Escarpment Plan, initiated June 15, 1999, the Niagara Escarpment Hearing Officers developed new Rules of Procedure. The stated purposes of these rules were: to facilitate and enhance access and public participation; to ensure the efficiency and timeliness of the proceedings; and to encourage co-operation among hearing participants and make the process as non-adversarial as possible. The new procedure required that written submissions be filed electronically and posted on the Niagara Escarpment Hearing Office's Web site for public review. Any interested person could post a written question to a participant who had filed a submission, and participants were required to monitor the Web site, answer any questions asked of them, and file their responses with the Hearing Office. Environmental groups told the ECO that the electronic hearing format inhibited many people from becoming involved in the review, and prevented the full examination of evidence presented.

Public Participation & *EBR* Process

MNR originally posted the proposal notice on May 5, 2000, but did not provide access to the text of the proposed amendments. It re-posted the notice on May 31, to provide a link to the draft text. It did not, however, extend the comment period, leaving only a few days for public comment on the draft text. The proposal notice included contact names and information for comments and for questions about specific amendments. MNR received four comments during the posting period. Although commenters were generally supportive of the Act, all made multiple suggestions for consideration by MNR. MNR summarized and responded to each suggestion in its decision posting.

One commenter opposed changes to the *Aggregate Resources Act* that allow wayside permittees to change site plans without public notice, and also allow the minister to extend indefinitely the expiration of a wayside permit. The commenter expressed concern that these provisions would decrease public participation and confidence in the environmental decision-making process. MNR responded that public consultation would result in considerable delays, and the minister would not extend a deadline if it were not in the public interest.

One commenter expressed concern that the designation by Cabinet of additional conservation bodies would be too slow. MNR agreed, and revised the proposed amendment to authorize the minister to make regulations.

One commenter opposed the amendment to the *Lakes and Rivers Improvement Act* that would permit only an engineer to report concerns about personal injury or property loss or damage resulting from the functioning of a dam. MNR responded that the amendment was intended to ensure that potentially hazardous dams be examined by qualified persons, and does not prevent any other person from notifying the minister of other types of problems or concerns.

Concern was expressed over the amendment to the *Mining Act* that would allow the Ministerto issue licences for temporary underground hydrocarbon storage. One commenter felt that there was insufficient evidence that this activity would not pose a threat to the environment or human health and safety. MNR responded that underground storage of natural gas is a proven technology.

Several concerns were raised over amendments to the *Niagara Escarpment Planning and Development Act.* One commenter felt that the Act should include procedures for providing public notice of meetings to discuss amendments to the Niagara Escarpment Plan (NEP). MNR responded that the Niagara Escarpment Commission (NEC) already has procedures for public notice in place. One commenter opposed the requirement that objections to the NEP amendments be made in writing. MNR responded that written objections are more easily tracked by the NEC. The commenter also suggested that the Act should continue to require the provision of NEP amendments to land registry offices. MNR responded that such a requirement would increase costs, and that the NEC will query all land registry and municipal offices in the area, and provide amendments to those offices that wish to receive them.

Two commenters supported in principle the amendment authorizing the minister, the NEC or NEC director as the minister's delegate to issue stop work orders, but opposed the limitation of this power to situations where the minister has reasonable grounds to believe the contravention is causing or is likely to cause a risk to public safety or significant environmental harm. MNR responded that this Act, like many others, provides for the exercise of discretion in issuing stop work orders.

One commenter observed that the term "planning activity" used in the proposed amendments was not defined in the Act, and suggested that it might be interpreted too broadly and therefore limit the abilities of municipalities, local boards and ministries to conduct planning. MNR agreed, and removed the term "planning activity" from the proposed amendments. Two commenters were strongly supportive of the amendment requiring decisions by the minister's delegates, including the NEC, be made in accordance with the Niagara Escarpment Plan.

Comments on the *Public Lands Act* were generally supportive of the proposed amendments. One commenter opposed repealing provisions that required the minister to notify adjoining land owners when land became registered in the Crown's name or reverted to or vested in the Crown. The commenter submitted that landowners should be kept informed of changes in the status of adjoining lands, and should have opportunities to make any interest in the land known to MNR. MNR responded that following the incorporation of this amendment, MNR will adopt a practice of inspecting all lands that become public lands, and, where site inspection reveals occupation or an improvement made by an abutting owner, work with that owner to resolve the interest.

SEV
MNR considered its SEV in making this decision. It concluded that the proposal furthered several important policy principles, and integrated social and economic considerations with environmental ones. MNR determined that the proposed amendments would assist it in fulfilling its mandate and serving clients, stakeholders, and the public more efficiently and effectively. MNR believes that greater efficiency will, in turn, enhance its ability to achieve specific objectives, including the long-term preservation of ecosystem health, natural resource sustainability, protection of natural heritage features and landscapes, maintenance of economic development potential, and decision-making based on accurate and comprehensive natural resource science and information.

Other Information
Prior to the introduction of the *Red Tape Reduction Act, 2000,* two other "Red Tape Reduction" bills had been posted on the Environmental Registry. On February 6, 1997, a proposal notice (Registry Number AB7E4001) was posted providing a 45-day comment period on Bill 119, *Red Tape Reduction Act* (Ministry of Natural Resource), *1997,* which had been introduced for First Reading on February 3, 1997. Bill 119 included amendments to the *Conservation Authorities Act, Crown Forest Sustainability Act, Forest Fires Prevention Act, Forestry Act,* and *Lakes and Rivers Improvement Act.* The bill was re-introduced on May 25, 1998, as Bill 25, the *Red Tape Reduction Act, 1998,* with changes proposed by MNR were set out in Schedule "I". The *Red Tape Reduction Act, 1998,* received Royal Assent on December 18, 1998. (For the ECO review, see the ECO 1998 annual report at p. 242.)

On December 16, 1998 a proposal notice (Registry Number AB8E4002) was posted to provide a 45-day comment period on Bill 101, *Red Tape Reduction Act, 1998* (no. 2), which had been introduced for first reading on December 15, 1998. Amendments to statues administered by MNR, including the *Aggregate Resources Act, Fish Inspection Act, Forest Fires Prevention Act, Game and Fish Act, Niagara Escarpment Planning and Development Act, Oil, Gas and Salt Resources Act,* and *Public Lands Act,* were set out in Schedule "M". The proposal notice was re-published on January 20, 1999, to extend the comment period by 23 days. Bill 101 passed second reading, but died on the order paper when the session ended. It was re-introduced as Bill 12, *Red Tape Reduction Act, 1999,* with amendments to statutes administered by MNR set out in Schedule "M". The proposal notice was republished to update information. Again, the bill did not pass before the end of the Parliamentary session. It was re-introduced on November 4, 1999 as Bill 11, *Red Tape Reduction Act, 1999,* with amendments to statutes administered by MNR set out in Schedule "N". The *Red Tape Reduction Act, 1999* received Royal Assent on December 22, 1999. (For the ECO review, see the ECO 1998 annual report at p. 242.)

Two commenters on this proposal expressed concern that the number and variety of amendments included in omnibus-style legislation makes it difficult for the public to review and comment on proposals. One commenter expressed particular concern that the *Niagara Escarpment Planning and Development Act* was amended through omnibus legislation twice in just over one year. Another commenter, an environmental organization, referred to comments it had submitted on the *Red Tape Reduction Act, 1999,* in which it observed that it was very confusing to have

multiple bills entitled “Red Tape Reduction” since it was not immediately apparent whether those bills proposed new amendments, or re-introduced ones not passed in previous sessions.

ECO Comment

The ECO shares commenters’ concerns about omnibus-style legislation. The ECO first recommended that ministries stop using omnibus-style legislation to reform environmental laws and regulations in the 1996 annual report. Since then, in addition to the various “red tape reduction” Acts, the government also introduced the *Services Improvement Act* and the *Government Efficiency Act*, omnibus bills that both included environmentally significant amendments.

MNR posted this complex proposal on May 12, for a 30-day public comment period. Access to the text of the proposed amendments wasn’t provided until May 31. Two of the commenters asked MNR to extend the comment period, and one stakeholder group related its concerns to the ECO. MNR refused to extend the comment period and advised ECO staff that the government’s legislative timetable for the 2000 Spring Session required that the comment period end no later than mid-June. As it turned out, the *Red Tape Reduction Act, 2000* was not introduced to the legislature until October, leaving ample time for MNR to have extended the comment period.

In the 2000 annual report, the ECO described the *Red Tape Reduction Act* as a “particularly noteworthy example” of proposals with inadequate comment periods, and outlined several steps ministries should take to help make the *EBR* a more useful public policy tool. These included making the full text of draft Acts available for at least the 30-day minimum comment period, and where ministry staff believe the proposed legislation may be passed into law prior to the end of the comment period, clearly explaining within the Registry notice that the comment period may be truncated. The ECO urges MNR to adopt these measures, and help ensure that the public participation objectives of the *EBR* are not undermined.

The ECO commends MNR for extending the limitation period during which prosecutions can be undertaken under the *PLA* and the *CFBA*.

The ECO commends MNR for clearly summarizing the comments it received and describing its response to each concern.

Review of Posted Decision:
Bill 57, the *Government Efficiency Act, 2001,* amending four statutes administered in whole or in part by the Ministry of Natural Resources

Decision Information:
Registry Number: AB01E4003
Proposal Posted: May 9, 2001
Decision Posted: January 29, 2002
Comment Period: 30 days
Number of Comments: 1

Description:
This Act makes changes to four Ministry of Natural Resources (MNR) statutes, intended to clarify legal ambiguities, eliminate unnecessary red tape, update statutes, enhance public safety and compliance, simplify decision-making, and improve client service.

The definition of "Crown forest" in the *Crown Forest Sustainability Act* (*CFSA*) is expanded to include forests on lands owned by provincial government agencies other than the MNR. The amended *CFSA* authorizes the Minister of Natural Resources to approve changes to Forest Resource Licenses where such changes comply with existing land use and forest management plans and the licensee has agreed to them in writing.

The *Lakes and Rivers Improvements Act* (*LRIA*) is amended to allow the minister to make regulations governing the design, construction, operation, maintenance and safety of dams, and to make immediate orders necessary to protect public safety and health without the formal requirement to issue notice of intent to the person to whom the order is directed. The amended *LRIA* also establishes a new limitation period of five years on the prosecution of offences under the Act.

The definition of "operator" in the *Oil, Gas and Salt Resources Act* (*OGSRA*) is expanded to include holders of licenses or permits issued under the Act. Other amendments to the *OGSRA* allow the minister to refer matters related to natural gas storage to the Ontario Energy Board, and allow applicants to request the minister refer matters to the Board.

The *Public Lands Act* is amended to allow the minister to release any species of trees reserved by the Crown and acquire any species of trees not previously reserved by the Crown and not under timber license.

Implications of the Decision:
The MNR claims that amendments introduced in the *Government Efficiency Act, 2001*, may increase opportunities for environmental protection by clarifying the application of statutes and enhancing compliance and enforcement provisions.

Public Participation & *EBR* Process:
The MNR received one comment during the 30-day comment period. The commenter expressed concern about changes to the *Lakes and Rivers Improvement Act* that remove the requirement to serve notice of intent in instances where the minister feels an immediate order is necessary to

prevent injury or property damage resulting from dam operation, construction or failure. The commenter agreed that the protection of public safety and property should be paramount, but submitted that the ministry should at least attempt to contact the owner of the dam by telephone or fax before issuing an order. The commenter felt that by contacting the owner before issuing an emergency order, the ministry could clarify the situation and avoid unintended consequences.

SEV:
MNR considered its SEV in making this decision. It concluded that the proposal supported the principle that sustainable development relies on the integration of social and economic considerations with environmental ones. MNR determined that the proposed amendments would assist it in fulfilling its mandate more efficiently and effectively. MNR believes that greater efficiency will, in turn, enhance its ability to achieve specific objectives, including orderly planning and management of land and natural resources, securing healthy ecosystems, enhancing economic development associated with natural resources, and protecting human life, property and natural resource values.

Other Information:
The *Government Efficiency Act, 2001* is the fifth omnibus bill amending MNR statutes passed since 1995. Four omnibus bills that have included changes to statutes administered by the MNR have been posted on the Registry since 1998. The *Public Lands Act* and the *Oil, Gas and Salt Resources Act* were amended previously by the *Red Tape Reduction Act 1998* (Registry Number AB7E4001), the *Red Tape Reduction Act, 1999* (Registry Number AB8E4002) and the *Red Tape Reduction Act, 2000* (Registry Number AB00E4001). The *Lakes and Rivers Improvement Act* and the *Crown Forest Sustainability Act* were both amended previously by the *Red Tape Reduction Act 1998* and the *Red Tape Reduction Act, 2000.*

ECO Comment:
A commenter on an earlier omnibus bill amending a number of MNR statutes observed that this style of legislation makes it difficult for members of the public to ascertain whether proposed changes are of interest to them. Another objected to the piecemeal amendment of environmentally significant legislation, and felt that government should adopt a more comprehensive approach. The ECO shares these concerns. In its 1996 annual report, the ECO recommended that ministries stop using omnibus-style legislation to reform environmental laws and regulations.

The ECO commends MNR for providing an Internet link to text of the proposed amendments and for clearly summarizing the comment it received and describing its response to the concerns expressed.

SECTION 4

REVIEWS OF SELECTED DECISIONS ON POLICIES, ACTS, REGULATIONS AND INSTRUMENTS

TECHNICAL STANDARDS AND SAFETY AUTHORITY

Review of Posted Decision:
Technical Standards and Safety Authority
Liquid Fuels Handling Code

Decision Information:

Registry Number: RT01E0001
Proposal Posted: March 7, 2001
Decision Posted: February 19, 2002
Comment Period: 45 days
Number of Comments: 0
Date Code Came into Effect: October 1, 2001

Description:

The Liquid Fuels Handling Code (hereinafter referred to as the "Code") is a core part of the regime in Ontario that regulates how fuel is handled, stored or dispensed. The fuels subject to regulation by the Code are fuels for motor vehicles or fuel oil and include gasoline and other liquid petroleum products, other than wax and asphalt.

The Code establishes the general requirements for the storage, transfer and dispensing of liquid fuels. In addition it establishes which international and national standards must be followed, such as those of the Canadian Standards Association and the American National Standards Institute.

The Code was adopted by reference into the Liquid Fuels Handling Regulation, O. Reg. 217/01 filed June 22, 2001 by O. Reg. 223/01. However, because the new Code was not issued at the same time as the regulation, the former Gasoline Handling Code remained in effect until September 30th, 2001, with the new Code taking effect October 1, 2001. The Regulation and the new Code replace the *Gasoline Handling Act* and the Gasoline Handling Code.

Until 1997, the *Gasoline Handling Act*, and the Gasoline Handling Code were administered by the Fuel Safety Branch of the Ministry of Consumer and Business Services (MCBS), formerly the Ministry of Consumer and Commercial Relations. In 1997, administration and enforcement of the Regulation and the Code were transferred to a private, not-for-profit agency called the Technical Standard and Safety Authority (TSSA). The authority for the transfer is found in the *Safety and Consumer Statutes Amendment Act,* which was enacted in 1996 creating the TSSA and transferring the administration of seven safety statutes from MCBS to the TSSA. In June 2001, the *Technical Standards and Safety Act* (*TSS Act)* was proclaimed and the seven safety statutes, including the *Gasoline Handling Act* were repealed.

The *Gasoline Handling Act* and the Gasoline Handling Code were subject to the *EBR*. Section 42 of the *TSS Act* states that the *EBR* applies to all matters to which the *Gasoline Handling Act* would have applied had it not been repealed. Although the *TSS Act* itself has not yet been formally prescribed under the *EBR*, the ECO has been assured by MCBS that the necessary regulatory amendments are in the process of taking place.

Implications of the Decision:
The proclamation of the *TSS Act* in June 2001, combined with the filing of the Liquid Fuels Handling Regulation (O.Reg. 217/01) and the adoption of the Liquid Fuels Handling Code by O.Reg. 223/01, means that matters formerly regulated by the *Gasoline Handling Act* and the Gasoline Handling Code are now covered by the new regulatory regime.

Moving the former provisions of the *Gasoline Handling Act* into regulation provides greater flexibility to the TSSA and MCBS, as regulations are more easily amended than Acts. However, it also reduces the oversight role of the Ontario Legislature in forming policy and law with respect to liquid fuel handling in Ontario.

The content of the Liquid Fuels Handling Code and of the Regulation do not appear to be substantively changed from its predecessors. Generally, an attempt was made by the drafters of the code to be less prescriptive, in order to allow the Code to respond to changing industry safety standards. The TSSA has informed the ECO that the primary focus of the Code is on leak detection to prevent or minimize leaks before an environmental impact occurs. The Code removes any misconceptions that minimal rates of leakage are acceptable.

Public Participation & *EBR* Process:
The TSSA posted the Code and the Liquid Fuels Handling Regulation on the Registry for a 45-day comment period. No comments were received on the proposal notice. The lack of comments received on the Registry notice is likely due to the extensive consultation that has already been undertaken by the TSSA and MCBS with respect to the legislative and regulatory changes begun in 1997.

The proposal notice was placed on the Registry on March 7, 2001. Although the Code was implemented October 1, 2001, a decision notice was not placed on the Registry until February 19, 2002,after a request from the ECO. TSSA staff informed the ECO that they believed the required decision notice had been placed on the Registry in October 2001, and apologized for the oversight. Presumably, as the TSSA becomes more familiar with their *EBR* responsibilities, such oversights will not occur.

SEV:
The TSSA must consider the ministry's SEV to determine if a decision it is about to make is environmentally significant, and then must apply the purposes of the *EBR* when making an environmentally significant decision. In SEV consideration documents provided to the ECO in May 2002, the TSSA stated that the Code is considered to be environmentally significant because it will have a substantial protective effect on the environment.

TSSA programs that have been transferred from MCBS have several objectives to promote environmentally significant decision-making. Two of the objectives are to: evaluate and adopt safe, new, environmentally sound technology in the storage, handling, and use of hydrocarbon fuels and pressurized liquids and gases; and to encourage environmentally responsible design, construction, maintenance, recycling and disposal techniques in regulated industries.

In SEV consideration documents, the TSSA states that the Code ". . . contains requirements for the installation, operation and decommissioning of aboveground and underground storage tanks and piping. When such installations are done according to the Code, the risk of discharging of contaminants into the environment will be reduced."

The ECO believes the Code is in keeping with MCBS's SEV.

Other Information:
As mentioned previously, with the promulgation of the safety regulations (with respect to liquid fuels and other non-prescribed matters) and the adoption of the Code, the *TSS Act* is now fully functioning and the transition from government administration and enforcement to a private corporation is now complete. In its 2000/2001 annual report, the ECO recommended that the enactment of the *TSS Act* required careful scrutiny by Ontario residents as the TSSA is a model of alternative service delivery to be implemented in other government ministries.

Also, while the Code is a significant document, it must be read together with the Liquid Fuels Handling Regulation, O. Reg. 217/01, which replaces most of the provisions formerly contained in the *Gasoline Handling Act*. The regulation sets out, among other things: licensing and registration requirements; what must be done if an "unacceptable condition" occurs with respect to equipment or a facility; how equipment is to be tested; and the registration of contractors who install, remove or service liquid fuel handling equipment. While O. Reg. 217/01 was filed in the summer of 2001, as of May 2002 the Ministry of Consumer and Business Services had not yet posted a decision notice.

The Environmental Management Protocol For Operating Fuel Handling Facilities in Ontario (GA1/99) was also placed on the Registry as a proposal in March 2001, and the decision notice was posted in February 2002, the same day as the decision notice for the Code. The Protocol replaces the Gasoline Handling Standard 13 (GH13), also referred to as "Interim Guidelines for the Assessment and Management of Petroleum Contaminated Sites in Ontario, August 1993." The proposal notice states: "The replacement is necessary to provide consistency with other provincial environmental guidelines and regulations and to reflect the dynamic nature of this regulated industry." The Protocol sets out additional detailed spill reporting requirements and cleanup standards for fuel handling facilities. One of the most significant changes made by the Protocol is that in addition to the mandatory reporting of spills and leaks, a protocol is established for when a petroleum product is discovered to have escaped to the environment. The addition of protocol for the discovery of petroleum products is significant because often contamination exists as a result of historic spills and leaks that have not been reported.

The Code states that if there is a spill or a leak of a fuel to the environment or within a building, the Spills Action Centre of MOEE must be notified. Up until 1997, MOEE annually published the Spills Action Centre Summary Report, which provided an overview of the number and type of spills reported to the ministry in a calendar year. While this information was last published for the 1995 calendar year, the ECO has been informed that the information is still being compiled

and is available from MOEE upon request. The TSSA uses the Spills Action Centre as its reporting facility and all spills reported related to the TSSA's mandate is forwarded to the TSSA for abatement and compliance activity if necessary.

ECO Comment:
The Code and its related documents are part of the policy shift in government toward performance-based, rather than rules-based compliance. The Code sets out how fuel handlers are to carry out their activities, but is less specific in its requirements than the Gasoline Handling Code to allow for greater flexibility when industry safety standards are updated or amended. One of the goals of the creation of the TSSA, and the subsequent legislative and regulatory amendments, was to achieve a more responsive regulatory environment. One of the keys to successful performance-based standards is that they work only when regulators regularly enforce them, and we encourage the TSSA to do so.

As stated previously, administration and enforcement of the new Code's corresponding documents have now been transferred from MCBS to the TSSA, a non-profit corporation. MCBS has informed the ECO that the *Safety and Consumers Statutes Act* and Ontario Regulation 280/01 provide the TSSA with full administrative authority for all aspects of the *TSS Act* except for the regulation-making authority. This is the legal authority for TSSA to enforce and prosecute offences according to the *Provincial Offences Act*. The ECO believes that MCBS and the TSSA should develop a policy on enforcement and make it available for public comment on the Registry.

Some critics have observed that the TSSA accountability system is akin to the "fox guarding the hen house" because the majority of the board of directors are members of the various regulated industries. However, the board also has three directors from consumer and public interest groups. Furthermore, decisions on enforcement and prosecution are made by statutory Directors, who are separate from the board of directors. The TSSA should ensure its enforcement activities remain transparent by including detailed and current information and trends about abatement, compliance and enforcement activities.

One industry expert estimates that 15 per cent of secondary underground storage tank containment systems fail. Given that the risks of contamination to the soil and groundwater are significant if a spill occurs either below or above ground, it would be useful if the TSSA provided an annual spills report to indicate trends in the amount and quantity of fuel being leaked or spilled from facilities or underground storage tanks.

SECTION 5

SUMMARY OF ECO REVIEWS OF APPLICATIONS FOR REVIEW AND INVESTIGATION 2001-2002

SUMMARY OF THE ECO REVIEWS OF APPLICATIONS FOR REVIEW AND APPLICATIONS FOR INVESTIGATION 2001-2002

NOTE: An allegation contained in an application may or may not have been proven to be an offence under the laws of Ontario or Canada

Review of Application R0266: Review of Regulations for refillable containers for Carbonated soft drinks (MOEE)

Review Undertaken: September, 1995

Description

The applicants wanted Reg. 340 (container regulation) and s.3 of Reg. 357 (refillable containers for soft drinks) under the *Environmental Protection Act* to be replaced with policies that promote effective multi-material recycling programs and packaging stewardship in general. The applicants felt that the refillable quota regulation treats the soft drink industry unfairly, and that the regulations damage the environment through negative impacts on solid waste diversion and energy use.

Ministry Response

The Ministry of Environment and Energy (MOEE) agreed in 1995 to review Regs. 340 and 357 in the broader context of overall program streamlining and planned to report its decision by early 1997.

In its 1997 report prepared for the ECO, MOEE stated that the ministry had been seeking stakeholder views on alternate approaches for promoting refillable containers through its consultations as part of the MOEE regulatory reform exercise. In addition, MOEE stated that it had referred the related issue of funding the Blue Box system and clarifying roles and responsibilities in the province's solid waste management system to the Recycling Council of Ontario (RCO).

In its 1998 report to the ECO, MOEE stated that it continued to consider stakeholder views on alternate approaches for promoting the use of refillable containers through the ministry's regulatory review exercise. MOEE also noted that due to the complexity of this issue, the government is still considering all options for managing soft drink and other beverage containers in the province and no decisions had yet been made on the refillable regulations.

In August 2000, MOEE provided an update on R0266 in response to the 1999 draft ECO annual report. MOEE stated the following:

- On November 3, 1999, the Minister announced the establishment of the Waste Diversion Organization (WDO), a partnership including representatives from industry, provincial

and municipal governments, and a non-governmental organization, with a commitment of $14.5 million from its members to help fund municipal Blue Box and other waste diversion programs. The Organization will develop, fund and implement programs for composting, recycling, special household waste depots, and in the longer term, address problem wastes, such as tires, used oil and other special household wastes.

- The WDO has also been asked to develop options for a sustainable funding formula to provide up to 50% of the net operating costs for municipal Blue Box programs, as well as to continue the programs described in the WDO's Memorandum of Understanding (MOU). The WDO has also been asked to develop a special household waste management program, including options for its funding.
- The ministry, in recognizing consumer preferences, has moved to deal with the non-refillable containers through the Blue Box Program. The refillable soft drink container regulations are closely linked to the Blue Box Program since the regulations' refillable requirements were related to recycling rates and prompted the initial industry funding support for the Blue Box Program in 1985. The regulations will be reviewed after testing the effectiveness of the new organization. No enforcement of these regulations will occur while this review is underway.

In July 2002, MOEE provided an update on R0266 in response to the 2001-2002 draft ECO annual report. MOEE stated the following:

> The *Waste Diversion Act, 2002* (*WDA*) received Royal Assent on June 27, 2002, and the ministry will be finalizing the review of Regulations 340 and 357, which are tied to the *WDA*. The *WDA* requires the establishment of Waste Diversion Ontario (WDO) which will be requested to develop a sustainable funding plan for the Blue Box program. Once the WDO is up and running and municipalities are receiving funding, the review of Regulations 340 and 357 will be finalized.

ECO Findings/Comments

The ECO finds the seven-year delay in completing this review unacceptable. The applicants are entitled to a response within a reasonable length of time. MOEE's action in this case amounts to an abuse of process since the ministry appears unwilling to commit to a reasonable timeline for completion of the review.

Review of Application R0334: Classification of Chromium-containing materials as hazardous waste (MOEE) Review Undertaken February, 1996

Description
The applicants requested that Regulation 347 under the *EPA* be reviewed. Under the current regulation, a waste is considered toxic if the total chromium extracted from it during a leachate test exceeds 5 mg/L. The applicants said the legislation should differentiate between toxic and non-toxic forms of chromium. Treating a non-toxic material as hazardous places an unnecessary economic burden on industry.

Ministry Response
MOEE decided in 1996 to conduct a review.

In December 1997, MOEE told the ECO that proposed changes to a federal Transport Canada regulation will deal with this issue. MOEE indicated that in the interests of federal/provincial harmonization work, and to avoid duplication of effort, it was waiting for the federal regulation to be finalized before doing its own review. MOEE did not anticipate that the federal work would be complete before early 1998.

In December 1998, MOEE indicated that this review would be part of the national harmonization initiative review related to the definition of hazardous waste. The ministry stated that it exercises no control over the timing of this federal initiative. MOEE informed the ECO in July 2002 that the applicant is no longer producing the chromium-containing waste stream. MOEE therefore intends to contact the applicant to determine if they may be withdrawing interest in the review.

ECO Findings/Comments
The ECO finds the seven-year delay in completing this review unreasonable. ECO will monitor the progress of the recent initiative by MOEE, which may lead to withdrawal of the interest on the part of the applicant and a closing of the file.

Review of Application R2000001: SWARU
(Review or Investigation Undertaken)

Background/Summary of Issues Raised by Applicants
The SWARU incinerator in Hamilton, Ontario, has been operating since 1972 , and burns approximately 40 per cent of the city's municipal waste. Since the late 1980s, local residents have raised concerns about this incinerator, particularly about its dioxin emissions.

In August of 1997, the Regional Council of Hamilton-Wentworth established the SWARU Community Liaison Sub-Committee (SCLS), composed of regional councillors and citizen members, to provide advice on the operation of the incinerator. The SCLS remained in place until 1998. However, in May 2000, two of the former citizen committee members submitted an application for review under the *EBR*, and announced to the media that they were taking this step because they were frustrated with the lack of progress on reducing emissions from SWARU.

The applicants noted in their submission that the SCLS's advice on the operation of the

incinerator had not been followed. The SCLS had recommended no increase in waste tonnage burned, along with a move from a five days/week burning schedule to a seven days/week schedule. This would prevent the significant toxic air emissions caused by shut-down and start-up procedures twice a week. Instead, regional council decided to go to a seven days/week operating schedule, but also to increase the waste tonnage burned, and bring the incinerator to full capacity.

In the year 2000, the facility emitted approximately 5.5 grams of dioxins and furans, measured as Toxic Equivalent Quotient (TEQ). Canada-wide, municipal waste incineration 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 Canada's municipal waste incinerators.

The applicants applied for an *EBR* review of the SWARU incinerator's three certificates of approval, 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 certificate of approval was originally issued in 1972 and had no conditions. The applicants noted that although the incinerator has a tonnage limit of 550 tonnes of waste per day, there is no way to weigh the waste, and instead tonnage can only be estimated based on steam pressure generated by the boilers. This has environmental impacts because the quantity of waste burned is directly related to the quantity of air emissions.

The applicants were also concerned that the ash solidification certificate of approval allows SWARU to mix hazardous fly-ash with cement kiln dust to stabilize it, and then dispose of it in a municipal landfill. The applicants stated that no other incinerator in Ontario is allowed to do this, and that the operators of SWARU have not provided evidence to prove that this procedure is safe. The applicants also stated that although the certificate of approval requires both monthly and semi-annual reports on the ash treatment, the MOEE has never received such reports.

The main concern of the applicants was with the air emissions certificate of approval, issued in 1996. They stated that this C of A allows SWARU to emit exceedingly high levels of dioxins, furans and other toxic substances which pose significant health risks to the community. The applicants also had a general concern about ongoing noise and odour problems, and believed that the certificates of approval for waste disposal and air emissions need new conditions to address these concerns.

Ministry Response

MOEE informed the applicants in August 2000 that the ministry would, over the coming year, undertake a "focussed review" covering some (but not all) of the concerns raised. At the same time, MOEE also provided the applicants with an informative five-page Decision Summary, which itemized the concerns of the applicants as well as the ministry's preliminary responses to

those concerns.

MOEE's review team included staff from three separate parts of the ministry: the local 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 Certificates of Approval, responding to almost all of the concerns of the applicants. The ministry also noted that they 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 semi-annually 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, including:

-ways to better control and monitor the quantity of waste that is burned
-limiting the service area to the City of Hamilton
-leachate testing of fly ash, and proper handling of ash found to be toxic through the leachate test
-controls on dust emissions from handling waste and ash
-requiring SWARU to meet Canada-Wide Standards for Dioxins and Furans by 2006
-stronger rules on continuous monitoring and reporting

MOEE staff also recommended improved complaint response procedures to address odours, noise and dust. The new condition would require that all complaints be recorded and investigated to determine the cause, and that any problems be rectified to prevent a future occurrence. The complainant would have to receive a response, the district MOEE office would be advised of the complaint, and MOEE would receive a formal report.

MOEE reviewers also recommended a number of changes to the existing Cs of A which were not specifically requested by the applicants, including a requirement for an independent third party review to ensure that the operation has not deteriorated after a period of time, development of a storm water management plan, and a site closure plan. Since the facility no longer has a formal Citizens' Liaison Committee in place, MOEE is considering imposing a requirement to form such a committee in the amended C 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.

ECO 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 supporting evidence,

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 yet been finalized by August 2002. Although MOEE can impose 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 approvals 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 year 2000 annual report similarly noted that MOEE needed to update many outdated Cs of A, and stated that "We found 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 useful for MOEE to provide a public update on the progress of these ministry-wide improvements.

Review of Application R2000013: Soil Conditioning Sites (Review Denied by MOEE)

Background/Summary of Issues

The applicants requested a review of Regulation 681 under the *EBR*, which currently exempts certificates of approval for land application of sewage sludge ("Soil Conditioning Sites") from

being posted on the Environmental Registry. The applicants were concerned that Certificates of Approval for Soil Conditioning Sites are not classified as instruments under the *Environmental Bill of Rights* (*EBR*). The applicants noted that this means that neighbours do not have a right to be notified before sewage sludge is applied to agricultural lands, nor do members of the public have a right to comment on such proposals or request leave to appeal such certificates of approval, once issued.

The applicants noted that land application of sewage sludges has environmental and health and safety implications, since sludges may contain high levels of viruses, bacteria, other pathogens and heavy metals that can migrate to surface water, groundwater and drinking water and affect the habitat of wildlife.

The applicants also noted that without advance public notification, neighbours adjacent to the sludge disposal sites are not able to evaluate site suitability, identify environmental concerns, or have their wells tested before sludge spreading begins. As well, prospective purchasers or lessees of rural properties have limited mechanisms to check whether sludge was spread at a given property.

Ministry Response

MOEE denied this application for review, stating that a review was already under way, covering the policy framework for managing sewage biosolids, septage and pulp and paper sludges. The ministry stated that the Certificates of Approval for organic soil conditioning sites will be part of this review, and that all proposed changes will be posted for consultation on the Environmental Registry.

ECO Comment

MOEE's decision to deny this *EBR* application for review was reasonable under the circumstances, since the issue of managing sewage sludge was already under review by the ministry, and is the subject of proposed new legislation currently before the Ontario Legislature. But the ministry failed to let the applicants know about important time-limited opportunities to comment on the proposed *Nutrient Management Act* (*NMA*), through the Environmental Registry and through a series of legislative committee meetings. The ministry's response to the applicants provided only a broad-brush overview of the existing legislative framework and a vague comment that a policy review was under way.

If the ministry had mailed its decision to the applicants by the May 11, 2001 deadline, some of this vagueness would have been understandable, since the new legislation was not announced until June 13, 2001. But since an error at the ministry caused a 2 ½ -month delay in mailing an MOEE letter describing the decision, the important new information could at least have been included in the covering letter to the applicants.

The ministry also did not respond to the applicants' specific concerns about inadequate public notification and consultation on sludge application sites. It is not yet clear whether the proposed new legislation will include provisions for Ontario residents either to receive notification of,

comment on, appeal, or request reviews or investigations of site-specific approvals. It is possible that some of these issues may be addressed in regulations developed under the proposed *NMA.*

The ECO's 2000/2001 annual report reviewed Ontario's management of sewage sludge in some detail and noted the absence of public consultation rights: "MOEE provides no opportunity for public consultation on approvals for land spreading of sewage sludge, since they are not classified as instruments under the *EBR*. Thus, there is no information posted on the Environmental Registry, no public comment opportunity, and no opportunity for the public to request either leave to appeal or a review under the *EBR*, once an approval is issued." Similarly, Ontario residents currently have no right to request an investigation under the *EBR* if they have evidence that terms and conditions specified in an approval for a sludge spreading site are being contravened.

A good way to provide public rights to comment on site-specific approvals would be to prescribe certain sections of the proposed *NMA* under the *EBR*. The ECO recommended this approach to OMAF in a February 2002 letter, but OMAF's reply, dated March 18, 2002, was non-committal. It appears that OMAF and MOEE are continuing to struggle with the question of whether the *NMA* – or sections of the Act - should be prescribed under the *EBR.*

The *NMA* became law in June 2002. The ECO will continue to monitor the development of regulations under the *Nutrient Management Act*, including how well the public will be consulted on site-specific approvals under the new legislation.

Review of Application R2000014: Review of Electricity Market Reform Denied by MEST/MOEE∗ (Review Denied by MOEE)

Background/Summary of Issues

This application was submitted in March 2001. The applicants requested a review of the existing policy on electricity market reform, including Bill 35, the *Energy Competition Act*; changes to the Ontario Energy Board (OEB); the Independent Market Operator (IMO); and the application of the *Environmental Assessment Act* (*EAA*) to the electricity sector.

The applicants believed that the existing policy on electricity market reform fails to support the government's stated objective "to facilitate energy efficiency and the use of cleaner, more environmentally benign energy sources." The applicants provided six specific reasons or examples of the perceived problems with existing policy:

∗ The Energy portfolio of the former Ministry of Energy, Science and Technology (MEST) was transferred to the recreated Ministry of Environment and Energy (MOEE) in April 2002

1. Direction given to the Ontario Energy Board by MEST/MOEE has resulted in an inconsistent approach to enabling local renewable generation and cogeneration.

2. The OEB has not been given clear direction by the ministries to support conservation programs in the electricity sector, despite OEB's excellent work promoting energy conservation in the natural gas sector.

3. Current proposals for emission controls will actually increase emissions in a wide range of carcinogenic and greenhouse gas pollutants.

4. Environmental approvals processes remain ill-defined, slowing investment in clean plants while coal and nuclear plant refurbishments have been effectively exempted from meaningful environmental review.

5. The proposed "green power labeling" system does not include a green power standard, and is not adequate to enable customers to make informed decisions about the environmental impacts of their electricity purchases.

6. New regulations have been passed eliminating consideration of environmental factors by the OEB in its approval process for transmission upgrades at the border needed to support exports.

The applicants provided background information in the form of a report entitled *Green Report Card on Electricity Restructuring in Ontario,* published in late 2000 on behalf of the Green Energy Coalition. The application was sent to both MEST and MOEE.

Ministry Response
MEST/MOEE denied the review in May 2001, primarily because the legislation and existing policy was made less than five years earlier, and because many of the issues raised in the application are still under development, with opportunities for public consultation.

MEST/MOEE responded to the issues raised regarding energy efficiency, environmental disclosure and renewables, as follows:

1. "Energy efficiency
   - Facilitating energy efficiency is an objective of the OEB, and the Board will consider this as it develops the full regulatory framework later in 2001."

2. Environmental disclosure labeling
   - Phase I, which began in March 2000 is "a transitory phase."
   - The ministry is developing a 2nd phase of the program that will provide actual, historic information to consumers, which has been calculated and verified by a tracking system.
   - During the design of Phase II the ministry will consider comments raised in the application and by other stakeholders regarding inclusion of emission data and

establishment of distinct categories for each alternative power source (wind, solar, biomass, and waste).
- The ministry will consult widely on the development of Phase II, and the regulations will be posted for public review and comment on the Environmental Registry.

The ministry did not provide a timeline for completion of Phase II of its environmental disclosure labeling program.

3. Renewable electricity generation
   - Open access to the electricity grid and consumer choice are the first steps
   - Provincial ministries are working with stakeholders to examine other policy approaches to support renewable energy

ECO Comment
The ministry's main reason for denying this application for review was valid. The existing electricity restructuring policies were less than five years old, and many of the issues raised in the application were still being developed at the time this application was considered. The ministry said that the issues are being addressed through other processes with stakeholder consultation, but did not provide much detail to the applicants about how they could participate. The ministry confirmed that regulations for new energy efficiency standards and regulations setting out the consumer disclosure program will be posted on the Environmental Registry for public comment.

At the time of writing (August 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. MEST/MOEE has provided the ECO with an update on progress. For example, MEST/MOEE is still developing an environmental labeling program intended to help consumers make informed choices about their electricity sources. 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. Through these consultations, 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*, which was passed by the Legislature on June 27, 2002, authorizes the Lieutenant Governor in Council 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 Environmental 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.

In February 2002, MEST/MOEE finalized a regulation under the *Energy Efficiency Act,* which sets minimum energy efficiency levels for three products, and updates the referenced national standards for 11 other products. This regulation affects a variety of products, including

swimming pool heaters, clothes dryers, refrigerators, freezers, oil furnaces, and room air conditioners. The final regulation postponed for more than two years the compliance date for swimming pool heaters and clothes dryers, in order to give manufacturers more time to prepare, and also to help harmonize Ontario's standard with a similar federal regulation. This decision was posted on the Registry as RO00E0002 on February 28, 2002.

With regard to energy conservation programs, the Ontario Energy Board will be examining the role electricity distribution utilities may play in this area. 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 distribution companies might promote energy efficiency. Any resulting programs would not be implemented before 2004. Finally, recommendations on alternative fuels were tabled on June 5, 2002 ,in the final report of a legislative committee established to examine this issue. The report contains 141 recommendations that aim to increase power from renewable energy sources, promote conservation and energy efficiency, and expand the use of alternative transportation fuels. The ECO will continue to monitor the development of policies to encourage energy conservation and promote the use of less polluting fuels.

Review of Application R2000015: Review of Electricity Market Reform (Review Denied by MOEE)

Background

This application was submitted in March 2001. The applicants requested a review of the existing policy on electricity market reform, including Bill 35, the *Energy Competition Act*; changes to the Ontario Energy Board (OEB); the Independent Market Operator (IMO); and the application of the *Environmental Assessment Act* (*EAA*) to the electricity sector.

The applicants believed that the existing policy on electricity market reform fails to support the government's stated objective "to facilitate energy efficiency and the use of cleaner, more environmentally benign energy sources." The applicants provided six specific reasons or examples of the perceived problems with existing policy:

1. Direction given to the Ontario Energy Board by MEST/MOEE∗ has resulted in an inconsistent approach to enabling local renewable generation and cogeneration.

2. The OEB has not been given clear direction by the ministries to support conservation programs in the electricity sector, despite OEB's excellent work promoting energy conservation in the natural gas sector.

3. Current proposals for emission controls will actually increase emissions in a wide range of carcinogenic and greenhouse gas pollutants.

4. Environmental approvals processes remain ill-defined, slowing investment in clean plants while coal and nuclear plant refurbishments have been effectively exempted from meaningful environmental review.

5. The proposed "green power labeling" system does not include a green power standard, and is not adequate to enable customers to make informed decisions about the environmental impacts of their electricity purchases.

6. New regulations have been passed eliminating consideration of environmental factors by the OEB in its approval process for transmission upgrades at the border needed to support exports.

The applicants provided background information in the form of a report entitled *Green Report*

∗ The Energy portfolio of the former Ministry of Energy, Science and Technology (MEST) was transferred to the recreated Ministry of Environment and Energy (MOEE) in April 2002

Card on Electricity Restructuring in Ontario, published in late 2000 on behalf of the Green Energy Coalition. The application was sent to both MEST and MOEE.

Ministry Response:
MOEE denied the application in May 2001, stating that "processes are underway or measures have already been implemented to address the areas identified in the Application for Review."

MOEE responded to the two issues under its jurisdiction: emissions controls and the environmental approvals processes. MOEE stated that the ministry's proposed emission control regulations were posted on the Environmental Registry for public comment in March 2001, and that new Environmental Assessment regulations for the electricity sector were finalized and implemented in April 2001, after two rounds of public notice on the Environmental Registry.

MOEE also said it was (along with other provinces and territories) in the midst of developing a Canada-wide Standard (CWS) for mercury emissions from coal-fired power plants.

ECO Comment
The ministry's reasons for denying the application were valid. The ministry was at that time in the midst of developing its regulations for emission limits and environmental assessment requirements for the electricity sector. MOEE did not respond specifically to the applicants' criticisms of the proposed emission limits and trading system, but described the Environmental Registry notice for new emission controls and the opportunity to comment on that proposal.

Many new developments have occurred since MOEE considered this application, and several are reviewed elsewhere in this year's annual report. MOEE's regulation for an emission limits and trading system for the electricity sector is described on pages 84 – 87 of the annual report. MOEE's decision to require Lakeview generating station to switch from coal to natural gas is described on page 88. New environmental assessment requirements for the electricity sector are described on pages 89 - 91.

Some of the issues raised in this application remain unaddressed. For example, MOEE said it was participating in the Canada-wide standard setting exercise to set new standards for mercury from the electricity generation sector. But it did not provide any details about when new standards were expected to be implemented. The ministry also did not respond to the applicants' concerns about the need to control emissions of the other pollutants related to coal-fired electricity generation.

The ECO will continue to monitor how MOEE considers and addresses the environmental effects of electricity restructuring.

Review of Application: R2000016
Application for a Review of the Ontario Drinking Water Standard for Trichloroethylene (TCE)
(Review Denied by MOEE)

Description

In March 2000 trichloroethylene (TCE) and other volatile chlorinated compounds were discovered in several private wells in Beckwith Township, a rural community near Ottawa. TCE is a blue or colourless liquid with a chloroform-like odour. TCE is used primarily to remove grease from metal parts and equipment, but has been used in the past as a dry-cleaning agent and an anaesthetic. It can also be found in paint-related products and some automotive chemicals. TCE is considered a high volume chemical in the United States where it is produced in excess of 1 million pounds per year. Production of TCE in Canada stopped in 1985, although it is still imported for use. According to data collected by the National Pollutant Release Inventory, the total release of TCE in Ontario for 1999 was 624,280 kg (99.9 per cent of which was to air) placing Ontario marginally below Pennsylvania, the US state with the highest reported environmental release. The volatile nature of TCE means that releases to land or surface water quickly evaporate and it has only a moderate potential to accumulate in the environment. However, if TCE contaminates a groundwater source it can remain in the watershed for extremely long periods and potentially lead to the contamination of drinking water wells.

Not all of the health risks from TCE exposure are known. It is known that exposure can occur through inhalation as well as ingestion. Once inhaled, the lungs and the gastrointestinal tract can absorb TCE. If inhaled in large doses, TCE can cause a range of adverse health effects including: dizziness, headaches, and nerve damage. Dermal exposure can cause skin rashes. High levels of exposure in industrial settings have resulted in liver and kidney damage. Research has attempted to associate TCE contaminated drinking water with increased number of birth defects and childhood leukaemia, but the results of such studies have been determined to be inconclusive. Increased rates of childhood leukaemia in Woburn, Massachusetts generated a complex and lengthy class action lawsuit in the 1980s. The lawsuit inspired the book and subsequent movie, *A Civil Action*. As a result, risks associated with TCE have been brought to the forefront of the public consciousness.

Subsequent to the March 2000 discovery of the contaminated wells in Beckwith, the applicants state the groundwater TCE plume was determined to be 9 km long and is alleged to have originated from a property that accepted waste from the Town of Carleton Place and Beckwith Township from 1966 to 1973. Initially, the Ministry of Environment & Energy (MOEE) supplied bottled water to 240 households whose wells contained TCE. Filtration devices were installed in 20 homes whose wells contained TCE levels in excess of the Ontario Drinking Water Standards (ODWS) of 50 micrograms per litre (0.05 mg/L). After a review of the toxicological and epidemiological data, Dr. Gardner, the Medical Officer of Health for Greenville, Lanark &

Leeds District Health Unit, recommended to MOEE that filters be provided to all homes with TCE levels above 5 micrograms per litre (0.005 mg/L). Following Dr. Gardner's advice, MOEE installed carbon filters to treat drinking water in all homes with TCE levels greater than 5 micrograms per litre.

The contaminated water in Beckwith Township prompted the applicants to request a review under the *EBR* of the ODWS for TCE. The applicants believe that the current ODWS for TCE does not take into account pathways of exposure in addition to ingestion, such as dermal exposure or inhalation of the contaminant that may occur while bathing. As a result, the applicants believe the ODWS should be lowered to 5 micrograms per litre, which would bring Ontario in line with the current U.S. Environmental Protection Agency (EPA) standard.

The current Canadian drinking water guideline for TCE is under review by the Federal/Provincial/Territorial (F/P/T) subcommittee on Drinking Water. This review is being conducted because there is new information on the health effects of TCE.

Health Canada states that:

> *In recognition of advancing research into the health effects of TCE and in an exercise of the precautionary principle, until a new guideline is established, it would be appropriate and prudent to assess exposure of individuals currently using drinking water supplies containing TCE. Individuals may require additional protection from TCE-containing water used for showering and bathing.*[1]

The guideline was set in 1987 before scientists recognized that exposure to TCE through inhalation was equivalent to the consumption of drinking water. The current standard is 50 micrograms per litre. This is ten times the standard set by the US Environmental Protection Agency (EPA), which is 5 micrograms per litre.

In setting ODWSs, Ontario usually adopts the Canadian drinking water guidelines established by Health Canada. Ontario participates in the development of the guidelines through its membership on the F/P/T subcommittee on drinking water. Before adopting the Canadian drinking water guideline, MOEE posts proposals on the *EBR* Registry.

Pending the F/P/T review, the applicants request in their application for review that an interim drinking water standard for TCE be established at 5 micrograms per litre (0.005 mg/L)

Ministry Response

MOEE denied the application, noting that the CDWG for TCE is currently under review by Health Canada. In its response to the applicants, MOEE stated that it is participating in the review through its membership on the F/P/T Subcommittee. A review of the ODWS will occur in conjunction with the CDWG review. As a result, MOEE determined that an immediate adoption of an Interim Maximum Acceptable Concentration (IMAC) is not warranted.

Moreover, MOEE stated there is insufficient data to support the immediate reduction of the ODWS for TCE to the current U.S.EPA Maximum Contaminant Level as this U.S. level is currently under "critical review." Previously it was believed that TCE was a "non-threshold" carcinogen while more recent data indicate that a threshold for TCE carcinogenicity may exist.

In response to the applicants' allegation that Ontario's Provincial Water Quality Objectives (PWQO) are more stringent than the ODWS, MOEE states that the PWQO are indicators of the quality of surface water. MOEE's explanation for the PWQO for TCE's being more stringent than the ODWS is that the PWQO is designed to protect all forms of aquatic life for indefinite exposure duration.

ECO Comment

The ECO acknowledges the level of expertise being dedicated to the review of the CGWG at the federal level. Changing an ODWS may have broad implications for both industry and regulators. However, the applicants were not requesting a complete review of the ODWS, but that MOEE set an Interim Maximum Acceptable Concentration (IMAC) level at 5 micrograms per litre (0.005 mg/l) pending the outcome of the national review.

It should be noted that there is nothing preventing MOEE from setting a more stringent standard, or implementing a more stringent interim standard, pending the outcome of the federal review process. Indeed, Health Canada acknowledges that the review process is a lengthy one and that any concerns over TCE contamination issues should be discussed with provincial authorities. Moreover, MOEE's standard-setting documents indicate that they may choose to develop an ODWS that is independent of the national process.

Developing an interim standard for Ontario is not without precedent. In 1997, Ontario set an interim ambient air quality criterion for PM10 (small particulates) based on "Numerous recent epidemiological studies [that have] linked PM_{10} exposures with serious health effects ranging from respiratory and cardiac symptom-related hospital admissions to premature mortality." The interim standard was set despite Ontario's involvement with Environment Canada and Health Canada in developing air quality objectives for PM_{10} and $PM_{2.5}$.

MOEE must keep in mind that U.S. standards may need to be tailored to address Ontario's special issues and needs. Based on the National Pollutant Release Inventory, it appears that a greater amount of TCE is released in Ontario than in almost every other jurisdiction in the United States. This means there is greater potential for release and contamination of TCE to the environment.

The MOEE's response to the Medical Officer of Health's request in Beckwith, sends a mixed message to the residents of Ontario. MOEE states it is confident that the ODWS for TCE adequately protect the health of Ontarians. Yet MOEE deferred to the opinion of the Medical Officer of Health in Beckwith Township by implementing a standard that is 10 times more

stringent than applied elsewhere in the province. The approach requested by the applicants would have reconciled this dual standard for TCE in drinking water, even if only on an interim basis.

Review of Application: R2001001
Review of the need for changes to the *Planning Act*, the Provincial Planning Statement and/or the One-Window Planning System Policy in particular as they pertain to the Callander Bay Development (Review Denied by MAH)

Description
The applicants called for a review of a series of statutes and policies, including the *Planning Act*, the Provincial Policy Statement, the One-Window Planning System policy, natural heritage planning, the federal *Fisheries Act*, and the *Lakes and Rivers Improvement Act*. The applicants were concerned with the way natural heritage, particularly fish habitat, is considered in the planning approvals system. Specifically, the applicants were concerned with the manner in which these statutes and policies related to the Callander Bay Development.

The applicants were concerned that the development of a 300-unit subdivision located in the Township of North Himsworth, District of Nippissing, would adversely affect part of the shoreline, fish habitat, and fishery of Lake Nippissing. MNR had designated the shoreline of the subject property as Class 1 walleye spawning habitat and the ministry also raised concerns with regard to development at the water's edge of the property. MNR originally recommended a 30 metre shoreline buffer, but the ministry later compromised its position stating that only a 15 metre set-back for structures was required. The developer intended to build small structures in this area of the subject property. MAH subsequently approved the development. Structures up to 400 square feet, such as saunas and gazebos, were allowed to be built up to 4.5 metres from the water's edge.

Ministry Response
MAH responded that "in light of previous reviews of the *Planning Act* and provincial policies and the anticipated review of the Provincial Policy Statement, a separate review of the *Planning Act*, the PPS and the one window planning service is not warranted."

The application for this development was received by MAH on March 24, 1995, and was subject to the requirements of the 1983 *Planning Act* and the individual policy statements that were in effect at the time of the application. The One Window Planning System policy was approved and the *Planning Act* was revised in 1996, including the introduction of the Provincial Policy Statement which is now also under review.

Under the *EBR*, MAH is not required to review the *Planning Act*, the Provincial Policy Statement or the One-Window Planning System Policy, as they are decisions made within five years preceding this application. MAH has denied similar applications in recent years on the same basis.

ECO Findings/Comments
The ECO finds MAH's reasons for denying the application for review were reasonable given that the Act and policies in question were introduced in 1996. Further, the Provincial Policy Statement is under review. However, MAH did not specifically address the applicants' main concern with regard to the size of buffers for the protection of shorelines and fish habitat.

The ECO will monitor how ministries respond to its recommendation 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." ECO will also continue to monitor the review of the Provincial Policy Statement.

Review of Application: R2001002
Review of the need for changes to the *Planning Act*, the Provincial Planning Statement and/or the One-Window Planning System Policy in particular as they pertain to the Callander Bay Development (Review Denied by MNR)

Description
The applicants called for a review of a series of statutes and policies, including the *Planning Act*, the Provincial Policy Statement, the One-Window Planning System Policy, natural heritage planning, the federal *Fisheries Act*, and the *Lakes and Rivers Improvement Act*. The applicants were concerned with the way natural heritage, particularly fish habitat, is considered in the planning approvals system. Specifically, the applicants were concerned with the manner in which these statutes and policies related to the Callander Bay Development.

The applicants were concerned that the development of a 300 unit subdivision located in the Township of North Himsworth, District of Nippissing, would adversely affect part of the shoreline, fish habitat, and fishery of Lake Nippissing. MNR had designated the shoreline of the subject property as Class 1 walleye spawning habitat and the ministry also raised concerns with regard to development at the water's edge of the property. MNR originally recommended a 30 metre shoreline buffer, but the ministry later compromised its position stating that only a 15 metre set-back for structures was required. The developer intended to build small structures in this area of the subject property. MAH subsequently approved the development. Structures up to 400 square feet, such as saunas and gazebos, were allowed to be built up to 4.5 metres from the water's edge.

Ministry Response
MNR decided that a review of natural heritage issues and the existing planning system was not warranted because this matter was already the subject of the five year review of the Provincial Policy Statement. MNR further supported the denial of this application for review as "there is not potential for harm to the environment if a separate review is not conducted under Part IV of the *EBR*." MNR also added that a review is not warranted because the key objectives of the MNR SEV will be achieved regardless of whether a separate review is conducted. MNR did state that it will monitor

the site and the ministry will take any necessary action under the federal *Fisheries Act* if necessary.

MNR also described its reasons for denying a review of the protection and enforcement provisions of the *Lakes and Rivers Improvement Act*. MNR reasoned that the matter of protection of fish habitat is already subject to periodic review in the context of the five-year review of the Provincial Policy Statement and that there is no potential for harm if a separate review is not conducted. MNR stated that it will be participating in the review of the Provincial Policy Statement, focusing on natural heritage, including fish habitat and that it will continue to monitor this specific site. MNR stated that the enforcement provisions of the *Fisheries Act* already provide "adequate remedies for harmful alteration, disruption or destruction of fish habitat."

With regard to the Callander Bay Development, MNR stated that location or construction approval were not required under the *Lakes and Rivers Improvement Act*. The development was proposed on land, not within a lake or river, and as such was not subject to the regulations under the Act. MNR was of the opinion that other legislation such as the federal *Fisheries Act* provided the necessary development control if shore-based development is proposed that could affect fish habitat, and that such legislation provided adequate remedies if harmful alteration, disruption or destruction of fish habitat is discovered.

ECO Findings/Comments

ECO finds MNR's reasons for denying the application for review were reasonable given that the protection of fish habitat is already subject to the five year review of the Provincial Policy Statement. However, MNR should have explained clearly whether the buffer sizes were adequate for the protection of shorelines and fish habitat.

ECO will monitor how ministries respond to its recommendation 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." ECO will continue to monitor the review of the Provincial Policy Statement.

Review of Application: R2001003
Review of the enforcement of the *EPA* and the *OWRA* with respect to their inadequacy in protecting the environment and fisheries habitat in Callander Bay
(Review Denied by MOEE)

Background/Summary of Issues

The applicants were concerned that the development of a 300-unit subdivision located in the Township of North Himsworth, District of Nippissing, would adversely affect part of the shoreline, fish habitat, and fishery of Lake Nippissing. The Ministry of Natural Resources (MNR) had designated the shoreline of the subject property as Class 1 walleye spawning habitat and the ministry also raised concerns with regard to development at the water's edge of the property. MNR originally recommended a 30-metre shoreline buffer, but the ministry later compromised its position stating

that only a 15-metre setback for structures was required. The developer intended to build small structures in this area of the subject property. The Ministry of Municipal Affairs and Housing (MAH) subsequently approved the development. MAH allowed the land owner to build structures up to 400 square feet in size, such as saunas and gazebos, up to 4.5 metres from the water's edge.

The applicants called for a review of a series of statutes and policies, including two administered by the Ministry of Environment and Energy (MOEE): the *Ontario Water Resources Act (OWRA)* and the *Environmental Protection Act (EPA)*. Other laws and policies of concern to the applicants included: *Planning Act*, the Provincial Policy Statement, the One-Window Planning System Policy, natural heritage planning, the federal *Fisheries Act*, and the *Lakes and Rivers Improvement Act*. Specifically, the applicants were concerned with the manner in which these statutes and policies related to the Callander Bay Development. Since portions of the application for review raised issues about policies and laws administered by MAH and MNR as well as MOEE, the application was forwarded to three ministries.

With respect to the *EPA* and the *OWRA*, the two statutes administered by MOEE, the applicants wanted MOEE to review administration and implementation of the statutes in relation to whether they adequately protected natural heritage issues. The applicants also suggested that the decision to approve this project should constitute a contravention under legislation administered by MOEE.

Ministry Response

MOEE decided that a review of natural heritage issues and the existing planning system was not warranted because the application did not identify any adverse environmental affects related to the decision to approve this project that would constitute a contravention under legislation administered by the MOEE. As well, MOEE stated that the current legislated requirements under the *OWRA* and the *EPA* related to development applications provide clear standards that protect Ontario's environmental quality. In addition, MOEE stated that neither the *EPA* nor the *OWRA* were instrumental in the decision to approve the development and MOEE merely played an advisory role on approval of the project.

MOEE also stated that the subdivision would have full benefit of municipal services, and while approvals are needed under *OWRA* for extensions to the water and sewage works, this did not directly affect the MAH decision to approve the development under the *Planning Act*. The MOEE approvals under *OWRA* almost always follow the *Planning Act* approvals.

MOEE's third and final reason for denying the *EBR* application was that no potential contraventions of MOEE legislation were identified in its review of the subdivision application. The application was dealt with adequately under the *Planning Act.* MNR and MAH both denied the reviews forwarded to them.

ECO Comment

The ECO finds MOEE's reasons for denying the application for review were reasonable given that the protection of fish habitat was already subject to approvals under the *Planning Act.* The

ECO also agrees that neither the *EPA* nor the *OWRA* were instrumental in the decision to approve the development as the Acts and MOEE were used simply as advisory tools.

MOEE should have responded to the applicants within the prescribed time limits. While MOEE received the application on April 10, 2001, the applicants were not notified of the ministry's decision until July 18, 2001, which is well past the 60-day period that ministries are allocated in s.70 of the *EBR* for responding to applications for review.

The decision not to conduct a review was made by the Director of MOEE in the Northern Region. While his position would ensure that he was very knowledgeable in the policy and background surrounding the case in question, it also means that he would have had previous involvement and interest in the decision. ECO recommended in 1997 that ministries assign such decisions to a branch or person without previous involvement or a direct interest in the issue.

Review of Application: R2001004
Review of North Simcoe Landfill Certificate of Approval

Background/Summary of Issues Raised by Applicants
The applicants requested a review of the certificate of approval (C of A) issued in 1998 for the proposed North Simcoe Landfill. The applicants cited concerns about:

- a Simcoe County Environmental Services Committee (ESC) Report, dated February 2001, that allegedly presents new information about a large amount of groundwater that will enter the proposed landfill site, which may necessitate changes to landfill site design features such as inclusion of a landfill liner;
- the potential for site dewatering to divert drinking water from human use and the uncertain time frame for this activity;
- the potential for the proposed landfill, when operating, to lower the water table and affect local wells;
- the potential for landfill leachate to contaminate nearby ground water and surface water in nearby agricultural drains and ditches, and creek; and,
- the potential for development of a composting facility on land adjacent to the proposed landfill site that was recently acquired by the County, which could increase local truck traffic.

The applicants questioned the siting of a landfill within a likely water recharge area, and in an area characterized by high water pressure. Furthermore, the applicants expressed concern about a potential contravention of the C of A, related to site preparation work.

The North Simcoe Landfill was planned according to an *Environmental Assessment Act* (*EAA*) process and a public hearing under the *Consolidated Hearings Act*. The hearing board approved the landfill undertaking in February 1995, subject to *EAA* conditions and technical conditions the board would impose in the C of A under the *Environmental Protection Act*. The hearing board issued these conditions in February 1996. These decisions were subsequently challenged in 1997 through an application for judicial review and an application to the Ontario Court of appeal.

Both applications were dismissed.

Despite issuance of a C of A for the landfill site in 1998, the landfill has yet to be constructed. According to the Ministry of Environment and Energy (MOEE) the final detailed design and operations report has yet to be submitted to the Director. The C of A prohibits the County from constructing any works associated with the landfill site until the ministry approves this report. According to the ministry's response to the applicants, the community will continue to be consulted about the landfill's design through the Community Monitoring Committee (CMC). MOEE has noted that the CMC was given the opportunity to consider the Environmental Services Committee Report referenced by the applicants.

Ministry Response

MOEE denied the request for review because the C of A was issued within the last five years. The ministry asserts that the applicants failed to demonstrate that there is social, economic, scientific or other evidence that failure to review the decision could result in significant harm to the environment or that the evidence was not taken into account when the decision sought to be reviewed was made.

Information Contained in the February 2001 County Committee Report

The ministry assured the applicants that it would consider the information presented in the February 2001 ESC Report, along with hydrogeological and technical investigations required by C of A conditions, when the MOEE reviews the County's final detailed design and operations report.

Use of a Landfill Liner to Optimize Site Design

MOEE noted that it would allow the use of a liner or recompacted base as an "optimization feature" (to reduce the amount of groundwater flowing into the base of the landfill), provided that such a feature would allow enough incoming water pressure to contain landfill leachate. The ministry believes that this design optimization does not affect the nature of the original *EAA* approval and that such a feature would help protect the environment by promoting water conservation.

Potential for Impact to Ground and Surface Water

In responding to the applicants' concerns regarding the potential impact of contaminated surface water on nearby surface water and wells, the ministry referred to two technical reports dating back to the late 1980s. MOEE noted briefly that surface water would be diverted away from contact with garbage and that a leachate collection system would treat surface water as necessary, as well as groundwater. The ministry cited the name of one other landfill site in Ontario using the same "hydraulic trap design," but provided no further information that would give the applicants insight.

Flowing Wells on the Proposed Landfill Site

The ministry noted that the C of A requires the County of Simcoe to abandon the two on-site artesian wells prior the start of landfilling activity.

ECO Comment
MOEE's handling of this application was disappointing.

The ministry did not clearly indicate whether it considered the applicants' evidence to be "new" or whether that information was available when the C of A was issued. The applicants cited what they believed to be new information about the quantity of water that might enter the landfill site and the effect this water quantity could have on landfill design. They contrasted their "new" information with water quantity figures presented in the 1987 hydrogeological study prepared for the proposed landfill site. Yet MOEE stated that the applicants did not provide enough evidence to substantiate their point. The ministry should have explained why the applicants failed to provide adequate evidence.

MOEE has told the ECO that it did not consider the applicants' information as new because the ministry anticipated the need for the submission of more detailed information when the C of A was issued. Specifically, the ministry expected this through the requirement for hydrogeological/geotechnical studies that would support preparation of the detailed landfill design and operations report. MOEE has noted that the evidence provided by the applicants was contained in a preliminary report meant to address the ministry's requirement for supplemental studies. MOEE has stated that it will fully review the supplemental information, as well as the landfill design and operations report against provincial water-related guidelines.

The ECO notes that while the process may have accounted for additional information to be provided, the technical details were not available at the time the original decision was made.

The ministry did not specifically address concerns raised by the applicants regarding the potential effect of landfill site operation on water quantity availability in nearby wells. Nor did the ministry explicitly respond to the applicants' concern about an unknown time frame for landfill site dewatering. MOEE could have provided a more thorough response to explain how existing C of A conditions will protect ground and surface water.

The role of the CMC in the development of landfill design appears to be a positive feature. But MOEE could have provided more information to the applicants about the Committee itself, and its role and ability to influence ministry decision making about the landfill's design. It would have also been helpful for the ministry to explain to the applicants the steps and time frames being used by the ministry as it proceeds with its review of the landfill design and operation report.

The proposed landfill site has generated much controversy over the years, as demonstrated by an environmental hearing and several legal challenges. As such, it would have been appropriate for the ministry to assign consideration of the applicants' request for review to ministry staff having no previous involvement in the issue. MOEE has stated that an independent staff person co-

ordinated the ministry's response with input from knowledgeable technical staff.

Technical report references included with the application indicate that the landfill site is located in an area characterized by a great upward flow of water. A video included with the application, showing the pressure of one of the on-site artesian wells, bears this out. Despite four years having elapsed since issuance of the C of A, the landfill's final design and operation report has still not been submitted to the MOEE Director. Given all these factors, the applicants deserved a more thorough response from the ministry. We also encourage MOEE to ensure that it always provides applicants with a clear and complete reason for the decision it makes on an application.

Review of Application: R2001005
Review of North Simcoe Landfill Certificate of Approval

Background/Summary of Issues Raised by Applicants

The applicants requested a review of the Certificate of Approval (C of A) issued in 1998 for the proposed North Simcoe Landfill. The applicants cited concerns about:

- new information regarding a large amount of groundwater that will enter the proposed landfill site, which may result in changes to landfill site design features such as inclusion of a landfill liner;
- the lifespan of the proposed landfill liner;
- credibility of the technical reports produced for the County of Simcoe
- the quantity of water and length of time that water will be taken for landfill site dewatering and the diversion of that water away from other uses;
- the potential for landfill leachate to contaminate ground water and surface water (MacDonald Creek, a tributary to the Wye River that flows to Georgian Bay);
- the potential for any surface water contamination to affect salmon spawning habitat in nearby MacDonald Creek; and,
- potential for development of a composting facility on land adjacent to the proposed landfill site that was recently acquired by the County

The applicants questioned the siting of a landfill on such a wet site characterized by high water pressure. The applicants note that if the site will be re-designed to include a landfill liner, then there may be other more suitable locations for a landfill.

The North Simcoe Landfill was planned according to an *Environmental Assessment Act* (*EAA*) process and a public hearing under the *Consolidated Hearings Act*. The hearing board approved the landfill undertaking in February 1995, subject to *EAA* conditions and technical conditions the board would impose on the C of A under the *Environmental Protection Act*. The hearing board issued these conditions in February 1996. These decisions were subsequently challenged in 1997 through an application for judicial review and an application to the Ontario Court of appeal. Both applications were dismissed.

Despite issuance of a C of A for the landfill site in 1998, the landfill has yet to be constructed.

According to the Ministry of Environment and Energy (MOEE) the final detailed design and operations report has not yet been submitted to the Director. The C of A prohibits the County from constructing any works associated with the landfill site until the ministry approves this report. According to the ministry's response to the applicants, the community will continue to be consulted about the landfill's design through the Community Monitoring Committee (CMC). MOEE provided a name and telephone number to the applicants should they wish to participate on the CMC.

Ministry Response

MOEE denied the request for review because the C of A was issued within the last five years. The ministry asserts that the applicants failed to demonstrate that there is social, economic, scientific or other evidence that failure to review the decision could result in significant harm to the environment or that the evidence was not taken into account when the decision sought to be reviewed was made.

Hydrogeological Information Regarding Water Volume and Pressure

The ministry assured the applicants that it would consider the hydrogeological information contained in the application, along with hydrogeological and technical investigations required by C of A conditions, when the MOEE reviews the County's final detailed design and operations report.

Credibility of Technical Reports

MOEE stated it had no reason to doubt the credibility of the technical reports produced by the consultants. The engineering consultants are accredited by professional agencies. In addition, the County is required to submit a final detailed design and operations report to the CMC for its review. According to the hearing board's decision in 1996, a sum of $15,000 has been allocated for the CMC to review that report. The CMC can choose the expert it considers appropriate. The ministry noted that it will consider any such CMC report review when it assesses the detailed design for the landfill.

Impact of Contaminated Surface Water

In responding to the applicants' concerns regarding the potential impact of contaminated surface water and drinking wells, the ministry referred to two technical reports dating back to the late 1980s. MOEE noted that surface water will be diverted away from contact with garbage and that a leachate collection system would treat surface water as necessary as well as groundwater. The ministry cited the name of one other landfill site in Ontario using the same "hydraulic trap design," but provided no further information that would give the applicants insight. MOEE briefly described the proposed design work necessary for the bottom of the landfill and acknowledged that dewatering may be necessary to maintain a stable base during excavation. Construction dewatering may require a permit to take water under the *Ontario Water Resources Act*.

Proposed Liners

According to MOEE, the issue of whether or not a landfill liner might be necessary as a design feature (subsequent to a more detailed assessment of the site) was raised during the board hearing. The ministry accepts the use of a liner or a re-compacted base as an optimisation feature to reduce groundwater infiltration, as long as enough groundwater continues to enter the landfill to contain landfill leachate. MOEE noted that the CMC considered information on the proposed use of liners when presented with a February 2001 County of Simcoe report that presented the issue.

Proposed Composting Plant

MOEE noted that the County of Simcoe has not selected a preferred site for a waste management facility that will divert and compost waste. If the County decides to proceed with such a facility, approval would be required under the *Environmental Protection Act*.

ECO Comment

The ECO has concerns about some aspects of the ministry's handling of this file.

MOEE did not clearly indicate whether it considered the applicants' evidence to be "new" or whether that information was available when the C of A was issued.

The applicants cited what they believed to be new information about the quantity of water that might enter the landfill site and the effect this water quantity could have on landfill design. MOEE should have explained why the applicants failed to provide adequate new evidence.

MOEE has told the ECO that it did not consider the applicants' information as new because the ministry anticipated the need for the submission of more detailed information when the C of A was issued. Specifically, the ministry expected this through the requirement for hydrogeological/geotechnical studies that would support preparation of the detailed landfill design and operations report. MOEE has noted that the evidence provided by the applicants was contained in a preliminary report meant to address the ministry's requirement for supplemental studies. MOEE has stated that it will fully review the supplemental information, as well as the landfill design and operations report against provincial water-related guidelines.

The ECO notes that while the process may have accounted for additional information to be provided, the technical details were not available at the time the original decision was made.

While the ministry stated that C of A conditions would protect ground and surface water, MOEE's response did not acknowledge the residents concern about potential fisheries impacts. If a permit to take water under the *Ontario Water Resources Act* is issued for site dewatering it is unlikely to appear on the Environmental Registry, as it would be issued to implement a decision under the *Environmental Assessment Act*. For more information, please refer to pages 34 – 41 of

this year's annual report.

The role of the CMC in the development of landfill design appears to be a positive feature. MOEE provided helpful information about the role of the Committee.

The proposed landfill site has generated much controversy over the years as demonstrated by an environmental hearing and several legal challenges. As such, it would have been appropriate for the ministry to assign consideration of the applicants' request for review to ministry staff having no previous involvement in the issue. MOEE has stated that an independent staff person co-ordinated the ministry's response with input from knowledgeable technical staff.

Technical reports indicate that the landfill site is clearly located in an area characterized by a great upward flow of water. Despite four years having elapsed since issuance of the C of A, the landfill's final design and operation report has still not been submitted to the MOEE Director. Thus, the ECO appreciates the concerns of the applicants. MOEE should ensure that it always provides applicants with a clear and complete reason for the decision it makes on an application.

Review of Application R2001006: Review of the *Mining Act* and necessary statutory, regulatory and policy changes to protect all Conservation Reserves and Provincial Parks in Ontario from any industrial activities (Review Denied by MNDM)

Background

The applicants requested a review of the necessary statutory, regulatory and policy changes to protect the McLaren Forest Conservation Reserve legally and permanently, as identified in Ontario's Living Legacy Land Use Strategy in 1999, and all conservation reserves and provincial parks of Ontario from any industrial activities, including any activities relating to mining access, staking, exploration, sampling or development. At issue is the conflict between new protected areas in Ontario and existing mining claims, new mining claims, and new mineral exploration.

The *Mining Act*, s. 30.1b, states that no mining claim shall be staked out or recorded on any land "for which an application brought in good faith is pending in the Ministry of Natural Resources under the *Public Lands Act* or any other Act, and in which the applicant may acquire the minerals that are included in the application." In the event that a staked claim overlaps an intended conservation reserve and a valid area for staking, Ontario Regulation 7/96, s. 11.2, dictates that "land that is not open for staking that is encompassed in a valid mining claim does not form part of the area of the mining claim." Further, the *Mining Act*, s. 35.1a, gives authority to the Minister of Northern Development and Mines to "withdraw from prospecting, staking out, sale or lease, or any combination of them, any lands, mining rights or surface rights that are the property of the Crown."

McLaren Forest Conservation Reserve, north of Sturgeon Falls, is described as area C159 in Ontario's Living Legacy Land Use Strategy, covering 369 hectares. It is located partly within

Nipissing Game Preserve, near Marten River Provincial Park. This site was listed as a candidate conservation reserve in October 1998. In July 1999, the province publicly announced the area as a conservation reserve in Ontario's Living Legacy Strategy. However, no regulation under the *Public Lands Act* has yet been filed 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 April, May, and June 2001. The applicants assert that this conflict between protected area designations and new mining activities is a province-wide problem, occurring in at least seven other sites. McLaren Forest Conservation Reserve was the primary example in the application and the ministry response, but the other sites are described below.

The Eden Township Forest Conservation Reserve, covering 109 hectares, is known as area C157 in Ontario's Living Legacy Land Use Strategy. This site, half way between Killarney Provincial Park and the city of Sudbury, protects a red pine and cedar forest on a landscape of low hills. MNR describes this forest as providing the best example of this landform and vegetation complex in the area. The applicants assert that, as with the McLaren Forest Conservation Reserve, mining withdrawal boundaries do not match the OLL site boundaries. There appear to be two new claims in this site, staked in July 2001.

The Lake Superior Highlands Conservation Reserve is known as area C1519, covering 46,734 hectares. This site is adjacent to Pukaskwa National Park and is part of the Great Lakes Heritage Coast. MNR describes this site as possessing a mix variety of forest types, in addition to providing critical habitat for Woodland caribou. The applicants assert that there are almost 700 mining claims on the site, in addition to an active gold mine.

The Magpie River Terraces Conservation Reserve is known as area C1520, covering 2,352 hectares. This site features 10 distinct terraces formed by dropping lake levels in the Superior basin, representing the most dramatic and best developed such features along the Canadian shore of Lake Superior. The applicants assert that the boundary of this site has changed substantially from that identified in the 1999 Ontario's Living Legacy strategy because of the existence of mining claims and activity. Land was added to compensate for the mining tenure and was designed to capture more of the river terraces. Claims currently exist around the boundary of this site, leaving no opportunity to expand protection.

The Woman River Complex Conservation Reserve is known as area C1564, covering 9,463 hectares. This conservation reserve, northwest of Gogoma, encompasses a wide variety of forest types and wetlands. The applicants assert that the entire site is almost covered by mining claims.

Chiniguchi Provincial Park is known as area P174, covering 7,082 hectares. This waterway park, northeast of Sudbury, is intended to protect a collection of lakes and an old-growth red pine forest. This site will also protect a variety of cultural features, including First Nation's pictographs. The applicants assert that this site has 76 active mining claims and 26 patents and leases.

Killarney Lake Lands Provincial Park is known as area P187, covering 15,079 hectares. This site is intended to be classed as a natural environment park. This site will complement, while remaining

autonomous from, the existing Killarney Provincial Park. MNR states that the "proposed natural environment provincial park classification (to be resolved through future public consultation) will allow a broader range of recreational uses (e.g., hunting, fishing, commercial tourism) than the wilderness classification of Killarney." The same rationale is applied to Killarney Coast and Islands Provincial Park, known as area P189, which covers 13,1791 hectares. This site is intended to be classed as a waterway park. The applicants assert that these two proposed provincial parks have 62 active mining claims within their boundaries.

Algoma Headwaters Provincial Park is known as area P273, covering 40,355 hectares. This site, northeast of Sault Ste. Marie, is to be classed a natural environment provincial park. MNR states that this park will protect seven major forest types growing in the region. The applicants assert that this site has nine active mining claims within its boundaries.

Ministry response

MNDM denied the application for review. The ministry stated that a review was not in the public interest based on its participation in the Ontario's Living Legacy planning processes. MNDM states that "the Government accepted the Lands for Life Round Tables' recommendation that existing mining tenure not be included in the protected areas." The ministry does acknowledge that the applicants have "some legitimate concerns regarding interim protection," but any problems are simply administrative in nature.

MNDM asserts that all the staked claims referred to by the applicants, except for one in Eden Township Forest, were in place before the adoption of Ontario's Living Legacy in July 1999. The ministry states that interim protection was not given to proposed protected areas until the options had been finalized and withdrawal orders for staking were done when the draft Ontario's Living Legacy was announced in March 1999. Where staked claims are within the boundaries of proposed provincial parks or conservation reserves, these areas will be regulated "if and when the mining land tenure lapses." Once tenure lapses, MNDM asserts that it has a process in place to ensure that such land will not be reopened for staking.

MNDM's reasons for denying the application for review do not appear to be valid. In 1999, McLaren Forest Conservation Reserve should have been withdrawn from staking and received interim protection with other such protected areas part of Land Use Strategy, but it did not. In June of 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." On June 26, 2001, several claims were staked within the proposed boundaries of McLaren Forest Conservation Reserve. On June 28, 2001, MNR placed a notice on the Environmental Registry stating its intent to regulate McLaren Forest Conservation Reserve. These claims were legally staked as 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, due to the delay of MNDM's withdrawal order to cover the entire site, the claims were legally staked, and there is now a risk that this area will not be incorporated into the regulated conservation reserve.

MNDM stated that withdrawal orders had been issued in 1996 for McLaren Forest Conservation Reserve, as part of an earlier process to expand Ontario's protected areas. However, MNDM stated that MNR did not provide it with a new request to withdraw the site as a result of Ontario's Living Legacy. MNDM states that the original withdrawal order did not cover the entire site, so it remained partially open for staking. The ministry has since adjusted the withdrawal order "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."

MNDM does not explicitly refer to s. 67 and s. 68 of the *EBR*. The ministry states that a review is not in the public interest based on the recent public participation in the Lands for Life program. MNDM further asserts that it gave "major consideration" to its SEV for Ontario's Living Legacy land use strategy. However, the ministry acknowledges that the applicants have raised some legitimate concerns regarding interim protection for the recommended protected areas.

ECO Comment

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 Round Tables, or their locations made public, to provide interim protection during the planning process. MNR identified McLaren Forest to the Round Tables as a provincially significant natural heritage area in 1997. MNR also adopted a policy which states 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." In 1998, it was confirmed as a candidate conservation reserve in the Consolidated Recommendations of the Boreal West, Boreal East and Great Lakes-St. Lawrence Round Tables. In 1999, Ontario's Living Legacy was formally announced, which included the site. In the same year, the province introduced the Ontario Forest Accord, which further states that parks and protected areas resulting from the Lands for Life Process "will exclude mining… with a regulatory context that provides permanence." In 2001, areas within McLaren Forest were then staked. However, in June of 2001, several claims were staked within the proposed boundaries of McLaren Forest Conservation Reserve.

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. The application for review was denied by MNR and MNDM. The ECO disagreed then with the ministries' rationale for denying the application. The ECO reported 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."

Clearly, areas such as McLaren Forest Conservation Reserve have not been protected, despite commitments by MNR and MNDM to do so. After denying this application for review, MNR and MNDM subsequently announced in March 2002, a significant shift in policy as "the status quo is unacceptable." The government stated in a letter to the Ontario Prospectors Association that there will be no new exploration on untenured land within Ontario Living Legacy sites as the concept of

"half-parks… is untenable." Further, the ministries indicated that a process will be developed to examine options to address existing mineral tenure in such sites. Based on this public reversal of policy, MNR and MDNM should not have denied this application for review under the *EBR*. The intent of the *EBR* is that if a ministry decides to conduct a review or alter policy as a result of an application, the ministry should acknowledge that in response to the applicants. By denying the application, but subsequently altering policy, the ministries are not conducting themselves in an open or transparent fashion.

MNDM has also committed to developing a provincially significant mineral potential manual to be applied in all future planning initiatives. Such a manual was placed on the Environmental Registry by MNDM for public comment in 2001, but the ministry subsequently withdrew it "pending further internal review." The purpose of the Provincially Significant Mineral Potential Mineral Resource Assessment Manual for Ontario was to "assess the metallic and industrial mineral resource potential of land in Ontario… to support implementation of the Ontario's Living Legacy land use strategy and future land use planning initiatives in the province." In the ECO's 1999/2000 annual report, MNDM commented that it was working with MNR to assess the potential environmental impacts of any new mineral exploration policies. The ECO committed to monitoring the issue and will continue to do so.

The application was not dealt with in accordance with s. 70 of the *EBR* which states that a decision must be provided within 60 days. The application was received by the ECO on November 26, 2001. MNDM received the application on December 3, 2001. MNDM should have provided a decision by February 3, 2002. However, the ministry did not provide a 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 MNDM has previously not met the minimum requirements of the *EBR* for handling a similar application for review. In the application for review concerning Mellon Lake Conservation Reserve, discussed in the ECO's 2000/2001 annual report, it was reported that MNDM also missed deadlines and failed to provide two mandatory notices.

Review of Application R2001007: Review of the *Mining Act* and necessary statutory, regulatory and policy changes to protect all Conservation Reserves and Provincial Parks in Ontario from any industrial activities (Review Denied by MNR)

Background

The applicants requested a review of the necessary statutory, regulatory and policy changes to protect the McLaren Forest Conservation Reserve legally and permanently, as identified in Ontario's Living Legacy Land Use Strategy in 1999, and all conservation reserves and provincial parks of Ontario from any industrial activities including any activities relating to mining access, staking, exploration, sampling or development.

The *Mining Act*, s. 30.1b, states that no mining claim shall be staked out or recorded on any land "for which an application brought in good faith is pending in the Ministry of Natural Resources under the *Public Lands Act* or any other Act, and in which the applicant may acquire the minerals that are included in the application." In the event that a staking claim overlaps an intended conservation reserve and a valid area for staking, Ontario Regulation 7/96, s.11.2, dictates that "land that is not open for staking that is encompassed in a valid mining claim does not form part of the area of the mining claim." Further, the *Mining Act*, s.35.1a, gives authority to the Minister of Northern Development and Mines to "withdraw from prospecting, staking out, sale or lease, or any combination of them, any lands, mining rights or surface rights that are the property of the Crown."

McLaren Forest Conservation Reserve, north of Sturgeon Falls, is described as area C159 in Ontario's Living Legacy Land Use Strategy, covering 369 hectares. It is located partly within Nipissing Game Preserve, near Marten River Provincial Park. This site was listed as a candidate conservation reserve in October, 1998. In July, 1999, the province publicly announced the area as a conservation reserve in Ontario's Living Legacy Strategy. However, no regulation under the *Public Lands Act* has yet been filed 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 April, May, and June 2001. The applicants assert that this conflict between protected area designations and new mining activities is a province-wide problem, occurring in at least seven other sites. McLaren Forest Conservation Reserve was the primary example in the application and the ministry response, but the other sites are described below.

The Eden Township Forest Conservation Reserve, covering 109 hectares, is known as area C157 in Ontario's Living Legacy Land Use Strategy. This site, half way between Killarney Provincial Park and the city of Sudbury, protects a red pine and cedar forest on a landscape of low hills. MNR describes this forest as providing the best example of this landform and vegetation complex in the area. The applicants assert that, as with the McLaren Forest Conservation Reserve, mining withdrawal boundaries do not match the OLL site boundaries. There appear to be two new claims in this site with staking dates in July 2001.

The Lake Superior Highlands Conservation Reserve is known as area C1519, covering 46,734 hectares. This site is adjacent to Pukaskwa National Park, being part of the Great Lakes Heritage Coast. MNR describes this site as possessing a mix variety of forest types, in addition to providing critical habitat for Woodland caribou. The applicants assert that there are almost 700 mining claims on the site, in addition to an active gold mine.

The Magpie River Terraces Conservation Reserve is known as area C1520, covering 2,352 hectares. This site features 10 distinct terraces formed by dropping lake levels in the Superior basin, representing the most dramatic and best developed such features along the Canadian shore of Lake Superior. The applicants assert that the boundary of this site has changed substantially from that identified in the 1999 Ontario's Living Legacy strategy because of the existence of mining claims and activity. Land was added to compensate for the mining tenure and was designed to capture more of the river terraces. Claims currently exist around the boundary of this site, leaving no opportunity to expand protection.

The Woman River Complex Conservation Reserve is known as area C1564, covering 9,463 hectares. This conservation reserve, northwest of Gogoma, encompasses a wide variety of forest types and wetlands. The applicants assert that the entire site is almost covered by mining claims.

Chiniguchi Provincial Park is known as area P174, covering 7,082 hectares. This waterway park, northeast of Sudbury, is intended to protect a collection of lakes and an old-growth red pine forest. This site will also protect a variety of cultural features, including First Nation's pictographs. The applicants assert that this site has 76 active mining claims and 26 patents and leases.

Killarney Lake Lands Provincial Park is known as area P187, covering 15,079 hectares. This site is to be classed as a natural environment park. This site will complement, while remaining autonomous from, the existing Killarney Provincial Park. MNR states that the "proposed natural environment provincial park classification (to be resolved through future public consultation) will allow a broader range of recreational uses (e.g., hunting, fishing, commercial tourism) than the wilderness classification of Killarney." The same rationale is applied to Killarney Coast and Islands Provincial Park, known as area P189 which covers 13,1791 hectares. This site is to be classed as a waterway park. The applicants assert that these two proposed provincial parks have 62 active mining claims within their boundaries.

Algoma Headwaters Provincial Park is known as area P273, covering 40,355 hectares. This site, northeast of Sault Ste. Marie, is to be classed a natural environment provincial park. MNR states that this park will protect seven major forest types growing in the region. The applicants assert that this site has nine active mining claims within its boundaries.

Ministry Response

MNR denied this application for view on several grounds. In making reference to S. 68 of the *EBR*, the ministry states the policy direction taken for most of the issues raised in the application were a result of Ontario's Living Legacy Land Use Strategy and, therefore, were made within the last five years. The ministry asserts that it considered its SEV in formulating the policies and that no significant harm will be caused in not undertaking a review. MNR also states that forest reserve policies should not be examined in isolation from the broader approach to land use and protected area planning conducted by the province.

The applicants expressed concern about the potential environmental impacts of allowing the continuation of mining tenure, including the associated exploration and development activities, within areas recommended for regulation as provincial parks or conservation reserves. MNR states that any areas with mining tenure were classed as forest reserves which permit mineral exploration, mining and related access. The ministry also states that they "are to be withdrawn from staking, so that if claims lapse the area can be added to the protected area." In summary, MNR responds that "with some exceptions… the examples cited in the application relate to areas with mineral tenure that existed at the time the Land Use Strategy was released in 1999. These areas are designated as Forest Reserves, and do not currently form part of the recommended protected areas." The applicants also expressed concern that mineral exploration is allowable in protected areas that are

identified as having provincially significant mineral potential.

The ministry's reasons for denying the application do not appear to be valid. In 1999, McLaren Forest Conservation Reserve should have been withdrawn from staking and should have received interim protection with other such protected areas part of Land Use Strategy, but it did not. In June of 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." On June 26, 2001, several claims were staked within the proposed boundaries of McLaren Forest Conservation Reserve. On June 28, 2001, MNR placed a notice on the Environmental Registry stating its intent to regulate McLaren Forest Conservation Reserve.

MNR did not request that MNDM withdraw the area from staking until November 9, 2001. The claims in question were legally staked,as 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, due to the delay of MNDM's withdrawal order to cover the entire site, the claims were legally staked and this area now risks not being incorporated into the regulated conservation reserve. MNR stated that the applicants' concerns were "primarily administrative in nature." However, the ministry does acknowledge that "some lands that had been recommended to form part of the conservation reserve did not receive interim protection."

The applicants presented numerous arguments as to why S. 68 of the *EBR* should not be used as a basis to deny the application for review, including that failure to undertake a review would cause significant harm to the environment by permitting industrial activity at the site. MNR did refer to s. 68 of the *EBR* in its denial to review the application, stating that the policy direction taken for most of the issues raised in the application were a result of Ontario's Living Legacy Land Use Strategy, which was introduced on July 16, 1999. MNR also states 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 is not environmentally benign, particularly in the context that the sites in question were to be given protection due to their environmental significance.

MNR also referred to s. 67 of the *EBR* in its denial to review the application. The ministry also asserts that it considered its SEV in the development and approval of Living Legacy Land Use Strategy, including the decision to permit controlled mineral exploration in portions of new protected areas. In contrast to the ministry's position, the applicants state that allowing the staking of claims is inconsistent with MNR's commitments in its SEV:

- healthy populations and communities of terrestrial and aquatic life will be safe-guarded over geographical area and time
- the variety of life – biological diversity – will be preserved

In responding to the concern expressed by the applicants that the potential for harm to the

environment exists if a review is denied, MNR states that "the significant environmental gains associated with the new Living Legacy protected areas far outweigh policy level concerns regarding potential impacts to natural heritage values in the forest reserves and adjacent areas." Further, MNR argues that "it would be inappropriate to review the forest reserve policies in isolation from the larger perspective that was a foundation of the Ontario's Living Legacy decisions." Given that MNR received several other applications for review focusing on the need to change the policy, regulatory, and statutory framework for protected areas in Ontario, the ECO believes that this reason is not valid.

MNR did not provide any information to assist the applicants in resolving their concerns. MNR should have informed the applicants that an up-dated exception notice had since been placed on the Environmental Registry to regulate 20 Conservation Reserves under the *Public Lands Act*, including McLaren Forest Conservation Reserve. This posting was placed on the Environmental Registry on November 28, 2001, two days after the application for review had been filed. However, MNR has not established an actual date for the regulation of McLaren Forest Conservation Reserve.

ECO Comment

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 Round Tables, or their locations made public, to provide interim protection during the planning process. MNR identified McLaren Forest to the Round Tables as a provincially significant natural heritage area in 1997. MNR also adopted a policy that states 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." In 1998, it was confirmed as a candidate conservation reserve in the Consolidated Recommendations of the Boreal West, Boreal East and Great Lakes-St. Lawrence Round Tables. In 1999, Ontario's Living Legacy was formally announced, which included the site. In the same year, the Province introduced the Ontario Forest Accord, which further states that parks and protected areas resulting from the Lands for Life Process "will exclude mining… with a regulatory context that provides permanence." However, in June of 2001, several claims were staked within the proposed boundaries of McLaren Forest Conservation Reserve.

In 2000, ECO received a similar application for review centering on the issue of mining and protected areas, specifically dealing with Mellon Lake Conservation Reserve. The application for review was denied by MNR. ECO disagreed then with MNR's rationale for denying the application. ECO reported 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."

ECO believes that MNR should re-assess the statutory, regulatory and policy framework governing protected areas in Ontario. Clearly, areas such as McLaren Forest Conservation Reserve are not being protected, despite commitments by MNR and MNDM to do so. After denying this application for review, MNR and MNDM subsequently announced in March, 2002, a significant shift in policy

as "the status quo is unacceptable." The government stated in a letter to the Ontario Prospectors Association that there will be no new exploration on untenured land within Ontario Living Legacy sites as the concept of "half-parks… is untenable." Further, 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. Based on this public reversal of policy, MNR and MDNM should not have denied this application for review under the *EBR*. The intent of the *EBR* is that if a ministry decides to conduct a review or alter policy as a result of an application, the ministry should acknowledge that in response to the applicants. By denying the application, but subsequently altering policy, the ministries are not conducting themselves in an open or transparent fashion. The ECO committed to monitoring any developments with regard to theses issues and will continue to do so.

Review of Application R2001008: Review of the *Provincial Parks Act* (Review Denied by MNR)

Background/Summary of Issues

The applicants, Environmental Defence Canada (formerly known as the Canadian Environmental Defence Fund), requested a review of the *Provincial Parks Act* (*PPA*), which has not been significantly amended since it was enacted in 1954. The applicants said a review is needed for three primary reasons: since that time our understanding of ecology, ecosystems, and management practices 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* and comparisons to the recently overhauled *Canada National Parks Act* (*CNPA*) as evidence in support of their application for review. The supporting material included recommendations from many sources that the Act be reviewed and revised. The applicants pointed out that the government has explicitly committed to reforming the act, but has not.

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. The applicants' submissions on each of these aspects are summarized below.

Ecological Principles: The "purpose" section of the *PPA* emphasizes "healthful enjoyment," not conservation. In contrast the *CNPA* states that the maintenance of ecological integrity shall be the first priority in all park management decisions. The applicants recommended the purpose section of the *PPA* be amended to include a clear ecological vision and a commitment to protect ecological integrity. The applicants also said that requirements in the *PPA* for public participation and consultation regarding parks establishment, management and policy-making

would increase government accountability.

Management Components: The *PPA* says little about how parks should be managed and does not make management planning mandatory. Consequently, according to the applicants, only about one-third of existing parks have management plans. In contrast the *CNPA* requires management planning, review of management plans and reporting. The applicants suggested that the *PPA* should include a requirement for management plans, ecosystem-based management, and ecological monitoring and reporting in order to enable adaptive management.

Prohibitions/Restrictions: There are virtually no legal restrictions on human activities and developments under the *PPA*. Some prohibitions are contained in the "Ontario Provincial Parks: Planning and Management Policies" (1978; updated 1992) (hereafter referred to as The Blue Book), but protection is not guaranteed because policies, unlike laws, can be changed readily and are less enforceable. The applicants believe that industrial and recreational activities such as mining, logging and hunting pose a threat to existing protected areas. They also said that the *PPA* should be amended so that, similar to the *CNPA*, parks cannot be decreased in size or removed from the system through ministerial discretion.

Ecosystem Level Planning: The applicants believe a significant shortcoming in the existing parks system is the omission of a guiding, far-reaching vision to conduct planning on an ecosystem level. They said a revision of the *PPA* should include a commitment to the goal of connecting ecosystems – for example incorporating corridors to maintain the genetic diversity of wildlife.

In summary, the applicants said that if Ontario's parks are to act as ecological benchmarks and protect species and ecosystems, they need to be protected in perpetuity from incompatible industrial, recreational, and commercial activities. Protection in their opinion requires reform of the *PPA* to include commitments to maintain ecosystem integrity – biodiversity - over the long term.

Ministry Response

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). The ministry said that "allocation of staff and funding to a review of the *PPA* may be considered, in the context of other commitments and priorities, when the current OLL implementation plan is completed in 2003/2004."

Implementation of OLL involves: regulating 378 new protected areas, including 61 new provincial parks and additions to 45 others; undertaking resource inventories and planning for the new areas; developing an ecological monitoring framework for protected areas; and protecting species at risk.

MNR said "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."

Responding to specific criticisms, the ministry said:

- The parks policies and procedures as well as Registry notices ensure public consultation during the development of park management plans and major amendments to plans.
- A draft Class EA for parks and conservation reserves, when approved, will establish public consultation requirements and ensure environmental effects of activities are considered.
- Management direction (in the form of park management plans *or* interim management statements) has been approved for 221 of the 271 parks that existed prior to OLL.
- Amendments to the *PPA* and regulations also involve obligations under the *EBR*.
- The *PPA* provides formal legal recognition of provincial park boundaries, because boundaries are established by regulation under the Act and approved by Cabinet.

The ministry assured the applicants that the information they had provided would be considered during any review, and that a review would involve extensive public consultation.

ECO Comment

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

The ministry denied the request 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. The ministry also said the matter was already subject to periodic review. Its reasoning was that the Lands for Life (LfL) 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 OLL. However, that was more than three years ago, in March 1999. It was also noted in the application that the Progressive Conservative party made an election promise in 1995 to amend the *PPA*. The ministry's statement that allocation of staff and funding to a review of the Act *may be considered* in 2003/04 is not a commitment, and is not a reasonable interpretation of "periodic review."

It is noteworthy that the ministry accepted a review was needed but denied the application. While the ECO acknowledges that implementation of OLL is important, accepting this application under the *EBR* might have led to consideration earlier than 2003/2004, and perhaps even a decision that this review was a higher priority than some aspects of the OLL or other ministry programs. MNR's description of the activities involved in implementation of the OLL suggests this work would be done by technical specialists, not the policy staff who would carry out a review of the *PPA*. The *EBR* provisions do not require a ministry to undertake an

immediate review – s. 69(2) says a minister may develop plans and set priorities for the reviews required to be conducted under this Part in his or her ministry. Instead of turning down the review, MNR could have planned it with a long timeframe, perhaps initiating some steps concurrent 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 certainly not managed primarily to conserve biological diversity or to protect ecosystems and processes, and, except for conservation reserves regulated under the *PLA* 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 - 157 in the 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' points, that the legislative framework – the *PPA* itself – is inadequate. Moreover, the policy framework is not binding and may be changed readily. Many decisions regarding park management and public consultation are made on a case-by-case basis by MNR staff. While the ECO acknowledges that many aspects of the existing parks policies and procedures are admirable, we share the applicants' concerns.

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 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 government creating new categories of "protected areas." In 1994 the government introduced a new type of protected area called "conservation reserves," regulated under different legislation. 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. For discussion of conservation reserves issues, see pages 117 – 120 of the annual report.

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. The public was allowed to comment on most of the changes, and most strongly disagreed with allowing sport hunting and mineral exploration in the new parks. Many parties have raised concerns with the ECO, the Legislature and MNR about the lack of adequate public participation in the minister's March 1999 decision to allow hunting in existing wilderness parks and the March 2002 reversal of the OLL decision to allow mineral exploration in new parks.

MNR says that over time The Blue Book will be revised to incorporate policy direction arising

from the Land Use Strategy, but in the meantime an internal memo provides clarification of management policies for provincial parks as amended by the Land Use Strategy. It says "Ontario's Provincial Park Policy is now a three-tiered policy. Policies apply differently to: all provincial parks outside the OLL planning area; pre-existing provincial parks inside the OLL planning area; and new provincial parks and park additions inside the OLL planning area. Government has agreed in principle to undertake a review of the provincial park legislation and policy as part of its response to the LfL Round Table Recommendation #10. On an interim basis, these tables define current provincial park policy." Given all this, parks policy is becoming more complicated and fragmented, reinforcing the need for an overhaul of the legislation to establish clear and legal first principles.

The ECO is encouraged that MNR has committed to carrying out a review and that a review would involve extensive public consultation and would consider the information provided by the applicants. The Act clearly needs to be revised to incorporate the goals of biodiversity conservation as well as a strong regulatory framework to guide policy, permitted uses, management planning, public participation and other matters raised in this application. The ECO recommends that MNR begin planning how such a review would be undertaken.

Review of Application: R2001009

Review of the need to prescribe the City of Toronto Under the *Environmental Assessment Act* pursuant to s. 17.1 (Review denied by Ministry of Environment and Energy)

Description

The applicants requested 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 Ontario's *Environmental Assessment Act (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 proposal. Either the Minister of the Environment or a hearing board would decide whether or not to approve the proposal.

The *EAA* applies to undertakings by or on behalf of the Government of Ontario, a public body, or a municipality. An undertaking is defined by the legislation to include "an enterprise or activity or a proposal, plan or program." Because 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 Regulation 334. For example, an undertaking by a municipality that has an estimated cost of not more than $3.5 million is exempt. Estimated cost is further defined to exclude the cost of acquisition of land or the operation of the undertaking. If a municipality was planning on siting its own landfill or incinerator for waste, it would be required under the *EAA* to conduct an environmental assessment of its proposed undertaking. However, prior to 1997, if a

municipality decided to contract with a third party for waste disposal at a private landfill or incinerator, it would be exempt from the *EAA* because the cost of the planning process that led to the decision to contract with a third party would almost always be less than $3.5 million.

As a result of modifications to the *EAA* proclaimed into force in 1997, Cabinet may make the type of regulation requested by the applicants. Specifically, Section 17.1 of the *EAA* allows Cabinet to pass a regulation or regulations requiring one or more municipalities, which would otherwise be exempt from the requirements under the Act and are entering into contracts for waste disposal or incineration, to conduct an environmental assessment. The power to pass a regulation is discretionary and each situation would be 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 by a senior MOEE official in 1996 during committee hearings on the *EAA* amendments, the *EAA* was amended to include s. 17.1 to require a municipality:

> *. . . to comply with the contents 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 from the municipality that is proposing to enter into the contract.*

There is a long and acrimonious history surrounding Toronto's waste disposal problem that extends back to the 1980s. From January 1996 to October 2000 Toronto engaged in an extensive planning process in order to determine how best to deal with its waste.

Initially, Toronto believed that cabinet would make a regulation prescribing its ultimate waste planning decision under the *EAA*. A regulation was never filed. In October 2000, Toronto City Council made the decision to award its waste disposal contract to the Rail Cycle North consortium, which proposed to ship Toronto's garbage to the abandoned Adams Mine site in northern Ontario. For a variety of reasons known only by Toronto City Council, agreement on the terms of the contract could not be reached between Rail Cycle North and Toronto. Ultimately, the contract was awarded to Republic Services (Canada) Ltd. to ship Toronto's waste to a landfill site in the state of Michigan.

Ministry Response

The ministry denied the application on the basis that Toronto's waste disposal planning process is exempt from the *EAA* by clause 5(2)(a) of Regulation 334 because it has an estimated cost of less than $3.5 million. The ministry interpreted the subject of the application to be a request that Toronto's waste management planning process be prescribed under the *EAA*. This was not the correct characterization of the applicants' request for review. The applicants were requesting the

need for a regulation that would prescribe Toronto's decision to contract with a third party to transport waste by truck out to Michigan. The applicants believed MOEE should undertake the review because "the proposed plans of the City of Toronto to contract with third parties to transport waste the United States …for disposal will likely result in social, economic and environmental impacts on residents and the environment of the Province of Ontario."

In addition to being exempt under Regulation 334, Toronto should not be prescribed under s. 17.1, the ministry stated, because municipalities are responsible for waste management planning, while the province is responsible for the regulation of waste sites and systems. MOEE noted that any waste site or system selected by Toronto would have to have the proper approvals under the *Environmental Protection Act*.

ECO Comment

MOEE's response to the application is unclear and confusing. It is clear that when the *EAA* was amended to include s. 17.1, it was to be used to prescribe under the *EAA* municipalities who were contracting out for waste disposal services. This is precisely what the applicant requested in their application. To say that the planning process is solely the responsibility of the municipality appears to ignore the legislative history of the s. 17.1 amendment. If a regulation were enacted under s.17.1, a municipality would have to look at alternatives to their waste disposal options, and the corresponding environmental effects as required under the *EAA*. These activities, by their very nature, are planning activities as they precede the end result of the process, which is the awarding of the contract. Moreover, the province becomes involved in other municipal planning processes through its municipal class EA provisions for sewers, water and roads.

The only logical reason for amending the *EAA* to include s. 17.1 is that municipalities who conducted a planning process, and then contracted with a third party, would be caught under the Act which would not be the case otherwise. The provision was meant to be used on a case-by-case basis, at the discretion of Cabinet. Between the years of 1997 and 2000, Cabinet exercised its discretion and did not create a regulation bringing Toronto's waste disposal contract under the *EAA*, despite the Toronto waste contract being the most significant of such decisions in the history of the province.

There are currently no policies or guidelines to indicate under what conditions Cabinet may enact a regulation under s. 17.1. This absence of an *EAA* interpretive framework means that decision-making by municipalities on waste contracting has 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.

Since amending the *EAA* to include the possibility that municipalities may be prescribed if they contract with a third party for waste disposal, Cabinet has not made the decision to prescribe any municipalities. MOEE's current position that waste management planning is in the sole jurisdiction of the municipalities seems to ignore the fact that s. 17.1 was intended to allow MOEE to require

exactly what the applicants requested.

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. In the alternative, the *EAA* should be amended to allow for a common sense interpretation that will allow for greater certainty in the municipal waste planning process.

Preview of Application: R2001010: (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 which are a small fraction of the normal charge. The mixture of paper mill sludge and sand is called Sound-Sorb and is considered a product rather than a waste by MOEE. Therefore, the ministry does not regulate this material, or control how it is placed on land. If this material was 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 Sound-Sorb 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 were carried out for the Durham Region Health Department in 2001. These tests 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. MOEE has informed the ECO that the final report will be issued in December 2002. The ECO will report on the outcome of MOEE's review in the next annual report.

Review of Application R2001011: Review of the *Provincial Parks Act*
(Review Denied by MNR)

Background/Summary of Issues
The applicants, the Algonquin Wildlands League and the Federation of Ontario Naturalists, requested that MNR begin the process of designing a comprehensive review of the *Provincial Parks Act* (PPA). This application bears similarities to R2001008, submitted by Environmental Defence Canada.

The applicants stated the ministry should undertake the review because the *PPA* is out of date and is severely flawed. The Act was last substantially revised in 1954, and places no onus on maintaining and restoring the ecological integrity or biodiversity of parks. They said it fails to provide for adequate public consultation and allows for the exploitation of provincial parks in ways that typically degrade or destroy ecological integrity, including logging, mining, hydro-electric development and transportation corridors for non-park purposes. They itemized the following problems with the current *PPA*. They said the current Act:

a) is inconsistent with provincial policy
b) lacks a statement of purpose and objectives for the provincial park system
c) lacks an explicit commitment to permanently protect significant natural features and processes within provincial parks
d) contains no process for the establishment, de-designation, or alteration of the boundaries of provincial parks
e) provides the public with no rights of appeal or legal standing to challenge key parks decisions
f) contains no requirement for public consultation regarding provincial park policy and management
g) contains no legal obligations respecting the production, review, implementation, and evaluation of park management plans
h) fails to recognize the need to monitor the effectiveness of plans or to require that management plans reflect the best available science on protected areas and biodiversity
i) fails to recognize the need for a broader ecosystem approach to management
j) accords no recognition to existing Aboriginal and treaty rights
k) fails to require that economic development and activities be assessed in light of the protection objective
l) allows potentially destructive resource activities including prospecting, mining, aggregate or soil/peat extraction, and logging in provincial parks
m) contains no provisions regarding the purposes and circumstances for which road openings and closures in provincial parks are permitted
n) contains no provisions regarding the acceptable size and impacts of facilities
o) contains no requirement to assess the impacts or sustainability of recreational activities in provincial parks

The applicants said the current *PPA* is inadequate to protect biodiversity and natural heritage. Protecting the park system from the adverse effects of industrial activity would be a key component of Ontario's biodiversity protection efforts. The applicants described many reasons why the review should be undertaken, with a substantial amount of supporting material.

The applicants suggested a committee include representation from the Ontario Parks Board, MNR, First Nations, academics, professionals, experts from the Panel on the Ecological Integrity of Canada's National Parks, naturalist groups, parks groups, recreational organizations, tourism organizations and consumptive users. They also suggested a timetable for the development of Terms of Reference

Ministry Response
The ministry's response to the Wildlands League and the Federation of Ontario Naturalists was identical to its response to Environmental Defence Canada (see writeup of R2001008), with one major addition addressing the issue of how the review might be planned: MNR said that when the Ontario Parks Board of Directors was consulted about how the review might be carried out, that they and the Parks Board would consider the consultative process matters raised by the applicant.

ECO Comment
See ECO analysis and comment on R2001008.

These applicants also requested that MNR establish a process to decide *how* to do the review in order to get it started. MNR's response was weak on two fronts. First, MNR said there was no need because the government had already committed to consulting with the Board of Ontario Parks about how this review might be carried out. The Parks Board is comprised of 6 to 12 members at any time, and is not equivalent to the broader consultative structure suggested by the applicants, which would include representation from the Parks Board and many other experts and interest groups. Secondly, MNR gave no response to the applicants' suggested timetable for the process. The government's commitment to consult with the Board of Ontario Parks was made in March 1999, more than three years ago. The ministry's response to the applicants did not provide any indication as to when it might consult the Board or begin its consultations, beyond saying that funds and staffing dedicated to this initiative *may be considered* in 2003/2004.

It is encouraging that MNR has said that the Board and ministry will consider the consultative process matters raised by the applicants, and that any review would involve extensive public consultation. The ECO urges MNR to begin planning sooner than 2003/2004 how the review will be undertaken, and to make a firmer commitment than the "agreement in principle" and "may be considered" language provided to the applicants.

Review of Application R2001012:
Review of MNR's Forest Management Guidelines (Denied)

Background/Summary of Issues

In late 2001 the Sierra Legal Defence Fund and Algonquin Wildlands League released a report entitled "Improving Practices, Reducing Harm: Making Best Practices a Practical Reality in Forest Management." The report summarizes the findings of a 1998-1999 field audit of logging operations in the Lower Spanish Forest northwest of Espanola and makes 17 recommendations. They inspected a number of sites and found logging in buffer zones and reserves, and damage to streams and fish habitat at water crossings. They observed machinery driven through wetlands, trees cut down to the banks of small lakes and streams, and debris dumped into waterways.

The applicants did not apply for an investigation of those alleged contraventions of forestry rules, however. They instead applied for a review of the rules governing forestry operations by industry and of MNR's forest inspections and compliance program. The *EBR* application specifically requested a review of the regulatory and policy changes needed to incorporate the report's recommendations into Ontario's forestry management practices. The 17 recommendations in "Improving Practices, Reducing Harm" include a wide range of issues covering environmental protection, guideline interpretation, reporting, education and training, research and a number of inspection and compliance matters. The applicants stressed the need to protect water quality and areas designated as reserves and to govern site impacts such as rutting and compaction. They also recommended that MNR complete the surveying of the province's wetlands and improve the identification of small streams and wet areas.

This is the third forest audit carried out by the applicants. In 1998 they submitted an application for investigation of alleged contraventions of a number of laws by forestry activities in the Algoma Forest Management Unit that was supported with evidence from their first audit. MNR agreed to carry out an investigation. A ministry team undertook the investigation, confirmed some of the contraventions and recommended that the relevant forestry guidelines be reviewed, clarified and strengthened. In the ECO's 1998 annual report we reported that MNR carried out a thorough investigation, but that the findings raised serious issues about MNR's guidelines and compliance practices. Since then MNR has taken many measures to address some of the problems identified, and has continued to provide the ECO with updates on related activities.

Ministry Response

MNR stated that a review under the *EBR* was not warranted because a review and revision of the guidelines in question was currently under way, and that this review has already considered most of the concerns raised by the applicants. The ministry pointed out that it had already incorporated many of the findings of the 1998 investigation into ministry procedures, and that those findings had also previously been provided to the writing teams currently revising the guidelines. The ministry said it had forwarded the report "Improving Practices, Reducing Harm" to the guideline writing teams to ensure that none of the recommendations was overlooked.

MNR said it confined its response to the following MNR documents because they seemed to be the most directly relevant:

- Timber Management Guidelines for the Protection of Fish Habitat (1998)
- The Code of Practice for Timber Management Operations in Riparian Areas (1991)
- Environmental Guidelines for Access Roads and Water Crossings (1990)
- Forest Compliance Handbook (June 1996; revised March 2000; with periodic updates)

MNR said that an independent comprehensive review of all 34 forest management guidelines was undertaken in 2000, partly in response to the Ontario Forest Accord. (The Ontario Forest Accord was a 1999 agreement between the forest industry, MNR and environmental groups; item 27 said they would all support an independent review of the forest management guidelines, to ensure they are effective and efficient). MNR said that the 80 recommendations from that review were carefully considered by its Provincial Forest Technical Committee, and are currently being incorporated during a complete restructuring and amalgamating the 34 existing guidelines into six new guides. The ministry said that "in general the topics covered in 'Improving Practices, Reducing Harm' will be addressed in the new Site Guide," one of the six new guides.

The ministry also described another review of these guides that began earlier and is likely to be completed sooner. As required by the Environmental Assessment Board's 1994 approval of MNR's Class EA on Timber Management, some forest management guides were already being revised prior to the comprehensive guideline review. MNR said that "revisions to the Riparian Code of Practice, the Fish Habitat Guideline and the Access Roads and Water Crossings Guideline are continuing and were expected to be completed in 2002." The ministry went on to explain that "most of the recommendations in 'Improving Practices, Reducing Harm' address topics that are covered by these particular guidelines." The ministry also noted that draft documents will be posted on the Registry for public review and comment.

With regard to inspection and compliance issues, the ministry said that no new review was required because the Forest Compliance Handbook has been periodically reviewed and revised. In addition, MNR carried out a formal program review of the compliance program in 1999 and another internal program review is currently under way. MNR described ways in which their current review would address the applicants' concerns. MNR also mentioned that it is committed to incorporating into its compliance planning program a new compliance framework developed by the multi-ministry Inspection, Investigation and Enforcement Secretariat spearheaded by the Ministry of Labour.

MNR said that it was willing to investigate any of the allegations of contraventions described in the applicants' report, but could not do so without more information, such as the site locations of the alleged infractions.

ECO Comment

The ministry did not clearly describe the relationship between the revision of individual guidelines initiated prior to the comprehensive guidelines review and the major restructuring and

revision of all the guides that followed. We asked the ministry for clarification, because the two different processes appeared to be working toward different end products. MNR staff told us that a decision was made to complete the revisions to the individual guidelines and apply them, at least in the short term, because so much work had already been done.

The ECO supports the decision to continue with the review of individual guidelines affecting water and fish habitat, among others, because it may take several years for the ministry to complete the proposed Site Guide. The ministry did not provide a proposed completion date for the Site Guide in this application response, but has said in the past that the six new guides would be completed by March 31, 2003.

Many reports have described the need for the existing guidelines to be strengthened and clarified as soon as possible, but progress has been slow. In early 2000, MNR informed the ECO that, in part because of the 1998 application for investigation, revised guidelines for protecting streams and fish habitat would be posted on the Registry for public comment in 2000. The ministry said in its response to this application that it anticipated completion of these three guidelines in 2002, but the recent labour disruption may result in further delay.

The comprehensive guidelines review and the proposed set of six guides are also described on page 50 - 56 of the annual report. Independent consultants carried out the comprehensive review under the direction of the Provincial Forest Technical Committee. They suggested the guideline consolidation, to update old science, remove conflicting rules and make the guides less ambiguous. But they also made important recommendations to improve several aspects of current practices including: the planning process; provision of information, training and support; monitoring; and clarifying legal status of standards to ensure their enforceability. The applicants raised many of the same issues in their recommendations. MNR's response to the applicants was narrowly focussed on guideline revision. Some of the issues raised by the applicants are outside the mandate or influence of individual MNR guideline writing teams, and it is unclear how MNR will address these larger issues such as training and monitoring.

The ECO has expressed concern about MNR's forest compliance program in a number of past annual reports. On page 146 of this year's annual report, we summarize MNR's latest update on the progress of its forest compliance review. MNR says it will address the areas noted in the ECO and Provincial Auditor Reports as well as issues identified in its own 1999 forest compliance program review and will assess the forest operations compliance inspection and reporting system. MNR said a final report was scheduled for release in June 2002 with implementation of the recommendations during 2002/03. MNR informed the ECO in July 2002 that the recent labour disruption had delayed release of the report, now expected to be released in September 2002.

The ECO will continue to follow MNR's progress on these important projects.

Review of Application: R2001013
Certificate of Approval for J. W. Sheldrick Sanitation
Waste Transfer and Processing Facility

Background/Summary of Issues Raised by Applicants

The applicants believe that the current certificate of approval (C of A) for J. W. Sheldrick Sanitation Ltd. (Sheldrick Sanitation) is inadequate to protect the environment. According to the applicants, the C of A does not require:

- an enforced, designated truck hauling route;
- an outdoor containment system for possible contaminants or storm water collection;
- odour safeguards;
- a paved yard to minimize the effects from dust or mud;
- added protection against nuisance vectors;
- a landscaped buffer between the facility and surrounding land uses;
- strict, regular monitoring by the MOEE; and
- enough financial assurance to cover risk.

The applicants would like the C of A to be amended to include safeguards related to the issues listed above.

In support of their request for review, the applicants asserted that proximity of Sheldrick Sanitation to an elementary school, a residential area and vacant lands (slated for a residential subdivision) creates the need for the waste processing facility to operate under very prescriptive controls. The applicants also state that inappropriate siting of the facility has caused serious impacts to local roads and the residents using them.

Ministry Response

MOEE conducted a preliminary review of the C of A based on the application. The ministry concluded that a full review was not warranted.

According to MOEE's response to the applicants, existing conditions of the C of A address issues related to storm water collection, dust, nuisance vectors and financial assurance. The ministry provided a brief explanation of how the C of A conditions apply to each of these matters.

MOEE acknowledges that there have been past incidents at the facility related to odour and excessive storage of waste. The ministry asserts that it was involved in inspections related to these occurrences, and that staff characterized them as minor and promptly remedied. With respect to the applicants concerns, MOEE notes that it conducted inspections at the transfer station in 1995, 1998, 1999, 2000 and 2002. The applicants have subsequently informed the ECO that the current transfer station was built in early 1997. Therefore, the applicants presume that the ministry's 1995 inspection related to an earlier business at that location.

The applicants would also like MOEE to amend Sheldrick Sanitation's C of A to require strict and regular monitoring by the ministry of the facility and its operation. MOEE responded that a C of A is a site-specific document that regulates the certificate holder's operation, not ministry practices. While the certificate does not bind the ministry, the *Environmental Protection Act* give MOEE the authority to conduct facility inspections at any time.

Issues related to the need for a designated truck route, facility landscaping, and inappropriate facility siting are land use planning matters that fall within municipal jurisdiction. As such, the ministry indicated that these issues could not be remedied by changes to the conditions in the C of A. However, the ministry noted that Sheldrick Sanitation is proposing to expand its operation and that this expansion will be subject to the requirements of the *Environmental Assessment Act* (*EAA*). As public consultation is a component of the environmental studies required under the *EAA*, the applicants will have an opportunity to raise their concerns, including those related to land use compatibility. In its letter to Sheldrick Sanitation, informing the company of the outcome of its partial review, MOEE urged the company "to involve the community and attempt to resolve concerns regarding both the existing operation and plans to expand the waste transfer/processing facility."

Sheldrick Sanitation's request to be made subject to the requirements of the *EAA* was posted on the Environmental Registry as a proposal notice in May 2001. The decision notice posted on the Registry in December 2001, informs the public that no comments were received on the proposal, and that a regulation was made in October 2001.

ECO Comment

MOEE's preliminary review of the application provided a response to all of the issues raised by the applicants regarding Sheldrick Sanitation's C of A.

The ministry informed the applicants that Sheldrick Sanitation was planning on expanding its operation and that the company had requested that its proposal be made subject to the *Environmental Assessment Act* (*EAA*). The ministry also explained that a regulation was made, requiring Sheldrick Sanitation to conduct an environmental assessment. MOEE's response to the applicants:

- provided the name and phone number of a ministry staff person who could provide further information on the *EAA* requirements for the proposed expansion; and
- a link to MOEE's EA Activities Web site that contains a brief summary of the expansion proposal and general information about *EAA* requirements.

Since receiving the ministry's decision on their request for review, the applicants have expressed concern that Sheldrick Sanitation has not reviewed concerns they raised directly with the company in the past year. The applicants also state that their attempt to become involved in the early stages of the EA process was declined. The ECO urges MOEE to facilitate productive communication between the applicants, the company and the ministry, as public consultation is an important and required component of the *EAA*.

Given the applicants' concerns regarding Sheldrick Sanitation's operation and past occurrences related to waste storage and odour, the ECO encourages the ministry to be vigilant in its monitoring of this facility and ensure that the company complies with all relevant laws and regulations. MOEE does have the power to conduct site visits on a proactive basis and more frequently than once per year.

Review of Application R2001014: Review of Two D-series Guidelines and One F-series Guideline (Review Denied by MOEE)

Background/Summary of Issues
The applicants requested a review of two MOEE D-series guidelines and one F-series guideline relating to land use planning and water and sewage servicing. The guidelines in question were:

- Guideline D-5, Planning for Sewage and Water Services (August 1996)*;*
- Guideline D-5-2, Application of Municipal Responsibility for Communal Water and Sewage Services (March 1995)*;* and
- Guideline F-15, Financial Assurance (April 1994).

In addition to the request to MOEE, portions of the application for review raised issues about policies developed and applied by the Ministry of Municipal Affairs and Housing (MAH) and the Ministry of Consumer and Business Services (MCBS). Thus, the application also was forwarded to these two ministries.

Contextual 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 "state-of-the-art" sewage treatment plant (STP), as 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) designates the majority of the subject property as recreational and secondary agricultural. These designations in the County Official Plan (OP) 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 had remained undeveloped for decades, and lies near the headwaters for environmentally sensitive wetlands that are important to Mill Creek. In 1999, the Grand River Conservation Authority (GRCA) 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, the township will assume responsibility. According to MOEE guideline D-5-2, 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 systems or waterworks without an executed RA between the developer and the municipality. This is consistent with MAH policies, as described below. Moreover, the developer indicated to the ECO that the Mill Creek Watershed Study conducted for the township supports communal servicing.

In this case, the township passed a resolution that it would not sign an RA with the developer. The resolution was based upon the expert advice the township had received. In sum, the township believes that signing an RA is too risky in this case, and it does not want to be liable for the communal system in question. Moreover, the township submits that the Official Plan is discretionary and does not impose a statutory obligation on it. Therefore, while the township has entered into RAs in the past, it believes it has the power to refuse to enter into this particular RA.

The developer brought its case to the Ontario Municipal Board (OMB), as it felt that the Township was being arbitrary in its decision to not sign an RA. At several hearings held in the summer and early fall of 2001, the OMB explored the availability of options beyond an RA between the Ttwnship and the developer. An Environmental Planning Officer (EPO) from MOEE, testifying at one of the OMB hearings, said that making an agreement between the developer and MOEE, even with financial assurance, in case of future failure of the sewage system, was not an alternative to an RA.

Upon considering all the testimony heard at the hearing, the OMB found that:

1. MOEE cannot and will not enter into a RA as a party with the owner.
2. MOEE does not have the authority to require or ask the OMB to ask a municipality to

sign a RA.
3. MOEE will not overrule a municipality's refusal to sign a RA even if the Board approves some form of development on the subject lands.
4. Municipal consent is required in the form of an executed RA for this development.

The OMB also found that case law suggests that municipalities have discretion to refuse to enter into an RA. As well, if a municipality has made a decision on a matter such as this, it is not within the OMB's jurisdiction to overturn the municipality's decision. Therefore, the OMB refused the appeal by the developer. The developer appealed to the Superior Court, but the motion was dismissed as the judge found the OMB made no error of law.

The Nature of the Requested Review:
The *EBR* application called for MOEE to undertake the review because the current MOEE policies favour individual on-site septic systems in rural areas of Ontario, contrary to the intention of the current Ontario government policy and the Provincial Policy Statement (PPS). In sum, the applicants contend that current MOEE policies give municipalities the opportunity to arbitrarily veto rural developments that could be serviced by communal systems. Consequently, these municipalities can frustrate the right of landowners, and could drive landowners to develop individual lots that are serviced by private septic systems.

In support of their application, the applicants provided evidence that:

- Individual on-site septic systems are not maintained or monitored in a systematic manner and are more harmful to the environment.
- Developments serviced by communal systems achieve a higher effluent quality and are maintained by a licensed operator. These benefits are lost under private servicing relying on individual septic systems.
- The current MOEE policies mean that viable options for ensuring proper maintenance and operation of privately owned communal systems are unavailable. For example, the applicants argued that condominium corporations planning to operate privately owned communal systems cannot enter into operation and maintenance agreements with the Ontario Clean Water Agency (OCWA) and only in special cases can they enter into financial assurance agreements with MOEE. The applicants contend that this means that safeguards in the *Condominium Act, 1998* cannot be invoked to ensure proper maintenance and operation of privately owned communal systems for certain rural projects.

The applicants further submitted that the preferred hierarchy for sewer servicing of development in Ontario is soundly based and that its implementation should be supported by provincial policy. They contended that proponents of rural developments on communal services should be entitled to have their applications judged on their planning and technical merits by the provincial agencies and tribunals with the necessary expertise and experience to balance public and private interests.

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 approximately 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 the following percentages of groundwater complaints that MOEE investigated in 1991-1992:

Southeastern Region: 7.9 per cent
Central Region: 3 per cent
Southwestern Region: 6 per cent
West Central Region: 5 per cent
Northwestern Region: 5 per cent
Northeastern Region: no data available

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 septics systems in Ontario. The Sewell Commission findings in these areas are linked to the issues raised by the applicants; thus, a quick review of the Commission's findings provides useful background on the issues related to this application.

The Sewell Commission estimated that one million conventional septic systems were in operation in the early 1990s in locations across the province. The Commission reported increasing evidence of contamination of both ground and surface water as a result of their use. The Commission also stated that while septic tanks are "generally good at treating moderate amounts of human waste, reliability depends on proper use, maintenance and pump-outs", and also noted that groundwater pollution problems occurred when too many septics are located close together. The Commission cited an alarming statistic from MOEE: in 1990, MOEE and delegated agencies such as District Health Units and conservation authorities inspected 9,067 systems and inspectors estimated that 34 per cent of these were malfunctioning. However, in 1997, an MOEE Official estimated that the failure rate of approved systems is less than 2 per cent across the whole province.

In its interim report, the Sewell Commission recommended that the ministries discourage municipalities and developers from allowing large numbers of septic systems to be sited in development projects on "greenfield" properties. In its final report, the Commission softened its approach, and merely suggested that alternatives to septic systems such as communal treatment facilities, which serve a number of users, should be explored.

Based on its findings, the Commission recommended that the ministries should develop information and policy options on the level of financial guarantees needed to address issues of capital replacement, maintenance and liability for communal systems. The Sewell Commission also suggested that the municipalities should be allocated duties regarding sewage and septic

systems only if they had the technical knowledge to run them safely. Alternatives to septic systems such as communal treatment facilities that serve a number of users, were strongly endorsed by the Sewell Commission.

The Sewell Commission also felt that education is one of the major issues that must be addressed to improve the problem of malfunctioning septic systems. The Commission argued that more needs to be done to educate the owners of systems in order that the systems are maintained in a proper and safe manner.

In sum, the Sewell Commission brought attention to the serious issue of septic and sewage treatment in Ontario. The statistics reported by the Commission illustrated the importance of revising the way the province deals with septic systems. Within two years of the Commission's report, MOEE and MAH had developed the basic policy framework that remains in place today.

Ministry Response

The ministry 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." The ministry went on to explain that these policies are used in the issuance of certificates of approval (Cs of A) for private water and wastewater works, and stated "this is particularly the case for [guidelines] D-5-2 and F-15 which deal with responsibility for these services and financial assurance."

MOEE stated that there are a number of initiatives under way relating to land use planning and sewage and water servicing in Ontario including:

- Provincial Policy Statement Review: The Ontario government is currently undertaking a review of the PPS.
- Smart Growth Strategy Implementation: The PPS review will also help to determine whether Ontario's land use planning policies are consistent with Smart Growth.
- Ontario SuperBuild Corporation Strategy: SuperBuild is working with MOEE, MAH and other ministries to guide development of a long-term strategy to finance Ontario's water and sewer investment needs.
- Bill 155, *Proposed Sustainable Water and Sewage Systems Act*: MOEE stated the proposed Act would require all owners of water and sewer systems to undertake a detailed analysis of their water and sewer systems. This would include a full-cost accounting of all operating and capital costs, all sources of revenue, and the investment required to maintain and expand their systems. This would include the development of a comprehensive asset management plan, including plans for moving to full-cost recovery.
- Drinking Water Initiatives: MOEE explained that there are various initiatives under way related to drinking water. The ministry stated that Operation Clean Water, a comprehensive strategy to ensure safe drinking water, contemplates that MOEE will consult with private water works owner and others to "find the most feasible ways to meet the requirements of the Drinking Water Protection Regulation (O. Reg. 459/00)."

The ministry decided a review of the policies was not warranted because it "is involved in all of the above initiatives. Therefore, undertaking a review at this time would duplicate several ongoing reviews and ongoing policy development relating to the subject matter of the application." MOEE went on to note that these initiatives, in particular the review of the PPS, will have an impact on the MOEE guidelines cited in the application for review. Moreover, MOEE goes on to state that once the PPS review has been completed, staff will "undertake a review of related policies." However, MOEE did not commit to considering the applicants' concerns as a part of any of the ongoing reviews.

ECO Comment

The ECO finds MOEE's 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 Provincial Policy Statement. ECO will monitor how ministries respond in the PPS review to the issues raised by this application, and will provide updates on changes in future annual reports.

The issues raised by this application are extremely complex. On the one hand, the municipality and many local residents want to protect the natural features of the Mill Creek watershed, and want to prevent new development near the headwaters of the creek. The ECO has 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 Provincial Policy Statement. On the other hand, however, planning decisions that indirectly favour septic systems over communal systems are bad for the environment.

Despite the ECO's support for MOEE's 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 provincial policies should support the legislative schemes created by the *Planning Act*, the *Condominium Act, 1998* and the *Ontario Water Resources Act*. Moreover, 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 systems should be preferred over individual septic systems, and the ECO remains concerned about the environmental implications associated with increasing reliance on private septic systems in rural areas.

The ECO is concerned that municipalities appear to have latitude to ignore recommendations about the advantages of communal systems contained in OPs, the PPS and local watershed studies. Thus, the ECO urges MOEE to undertake a review of the issues raised by this application because the current MOEE policies on operation and maintenance of communal sewage systems appear to favour individual on-site services in rural areas of Ontario, contrary to the stated goals of the current Ontario government and the PPS. In particular, there is a need to fine-tune some of the policies related to land development in order to ensure that municipalities respect the principles on communal servicing established by the ministries by the mid-1990s.

The ECO also believes that the definition of Communal Services in the PPS need not be so narrow and restrictive, and could be expanded to address the concerns of the applicants. The ECO agrees with the applicants that alternatives are available to ensure that Communal Services are operated and maintained appropriately. The benefits of communal systems can be realized, while ensuring that legitimate concerns regarding long-term security of such systems are met. A number of these alternatives are outlined in the application, but do not appear to have been seriously considered by the ministries. In particular, because of the numerous safeguards in the new *Condominium Act, 1998* and the ability of such condominium corporations to enter into financial assurance agreements with MOEE and long-term operation and maintenance agreements with OCWA, provincial policy could recognize this alternative. In particular, the ECO urges MOEE to consider amending relevant MOEE and government policies and laws to allow the OCWA to enter into agreements with developers for operating communal treatment systems.

This example of conflicting policy directions is further evidence that the PPS is in need of reform. The ECO recommended in his 2001/2001 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."

Review of Application R2001015: Review of the definition of "Communal Services" Provincial Policy Statement (Review Denied by MAH)

Background/Summary of Issues

The applicants requested that the definition of "Communal Services" in the Provincial Policy Statement (PPS) be revised and that related MAH policies be revised. In addition to the request to MAH, portions of the application for review raised issues about policies applied by the Ministry of Environment and Energy (MOEE) and the Ministry of Consumer and Business Services (MCBS). Thus, the application also was forwarded to these two ministries. Additional background on this application is provided in R2001014 (MOEE) and R2001016 (MCBS).

The applicants also asked that the MAH accept the application as a comment on the existing Provincial Policy Statement that was then under review by the ministry at the time the applicants submitted their *EBR* applications in early 2002.

Additional background on this case is outlined in the Background section for Application R2001014.

The Nature of the Requested Review:

The applicants requested that the definition of "Communal Services" in the Provincial Policy

Statement (PPS) be revised and that related MAH policies be revised. The PPS was largely drafted and approved by MAH in 1996, although some amendments were made to it in 1997. The term Communal Services is defined in the 1997 edition of the PPS as follows:

*Communal Services**:***
means sewage works and sewage systems, and water works that provide for the distribution, collection or treatment of sewage or water but which:

- *are not connected to full municipal sewage and water services;*
- *are for the common use of more than five residential units/lots; and*
- *are owned, operated, and managed by:*
- *the municipality; or*
    - *another public body; or*
    - *a condominium corporation or single owner which has entered into an agreement with the municipality or public body, pursuant to Section 51 of the Planning Act, providing for municipal/public body assumption of the communal services in the event of default by the owner.*

The applicants contend that this definition requires revision because, in combination with the Ministry of Environment and Energy (MOEE) policies that are referenced in the application, 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 such communal systems are not being realized. Furthermore, they contend that the existing policy regime is potentially subject to abuse by municipalities and unfair to proponents of rural developments in Ontario.

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 sewer works). The applicants feel that such a veto over development is contrary to the scheme of the *Planning Act* that provides landowners with a right to appeal to the Ontario Municipal Board from planning decisions and contrary to the scheme and intent of the *Ontario Water Resources Act* that authorizes MOEE Directors to grant sewage and water approvals, subject to appeal to the Environmental Review Tribunal. It appears that the municipality was able to use its power not to enter into a RA in order to stop development in the area and deny the developer a right to a full hearing about the project at the OMB.

The applicants also noted that the Ontario Clean Water Agency, the provincial Crown Agency with the specific mandate to provide sewage and water works and services to protect human health and the environment, cannot assume operating responsibility for such communal systems and will not enter into an agreement with a condominium corporation or a private owner to assume the communal services in the event of default by the owner. Therefore, from a practical perspective, the only option available to a condominium corporation or other private entity under the existing definition is to enter into a responsibility agreement with the municipality.

As a result, the applicants believe that municipalities may arbitrarily oppose any rural development on communal services, effectively reversing the preferred hierarchy of servicing options that is established in Section 1.3 of the PPS. They feel that municipalities may do this for reasons that have nothing to do with the technical merits of the servicing proposal. Section 1.3 of the PPS provides:

1.3 Infrastructure

1.3.1 SEWAGE AND WATER SYSTEMS

1.3.1.1 Planning for sewage and water systems will recognize that:

a. *full municipal sewage and water services are the preferred form of servicing for urban areas and rural settlement areas. In areas serviced by full municipal sewage and water services, lot creation will be permitted only if sufficient reserve water and sewage plant capacity will be available to accommodate it;*
b. *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; and*
c. *lot/unit creation may be serviced by individual on-site systems where the use of communal systems is not feasible and where site conditions are suitable over the long term; but*
d. *partial services will be discouraged except where necessary to address failed services, or because of physical constraints. [emphasis added]*

As set out in the ECO's description of R2001014, one of the applicants appealed the municipality's decision to the OMB. In fall 2001 the OMB determined that neither the OMB nor MOEE could require the municipality to sign the RA. Leave to appeal this decision to the Divisional Court was refused by the Court in January 2002.

The applicants contend that the definition of Communal Services in the PPS need not be as narrow and restrictive as it is at present. Alternatives are available to ensure that Communal Services are operated and maintained appropriately. The benefits of communal systems can be realized, while ensuring that legitimate concerns regarding long-term security of such systems are met.

For all of these reasons, the applicants requested that the definition of Communal Services in the PPS be amended to correct this situation and provide land developers with a mechanism to challenge municipal decisions to block land development.

Ministry Response

The ministry decided a review of the policy was not warranted as the Provincial Policy Statement is currently under review. MAH states that the PPS review includes a review of servicing policies and the definitions related to sewage and water systems. The ministry believes these are the same issues that the applicants submitted for review by the MAH. Therefore, MAH decided that a

"separate review would have the potential to result in duplication and to fragment the current review process." The ministry decided that the issues which the applicants want addressed will be covered by the PPS review, with input from ministries such as MOEE.

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. As well, the ministry stated that any additional information or submissions that the applicants want to make would be considered as part of the review.

ECO Comment

The ECO believes that current ministry policies create perverse outcomes and allow municipalities to frustrate the planning process and not fully consider their Official Plan and the Provincial Policy Statement in regard to the advantages of communal septic systems. In this case, the existing zoning for some land parcels allows developers to propose large developments. When municipalities then decide to block these developments without altering the zoning, the developer is forced to promote lower density developments on lots that rely on private septic systems.

Considerable evidence shows that communal systems should be preferred over individual septic systems. The ECO is concerned that municipalities appear to have latitude to ignore recommendations about communal systems contained in OPs, the PPS and local watershed studies. Thus, the ECO believes that the concerns raised by the applicants are valid and must eventually be addressed by MCBS, MAH and MOEE. In particular, there is a need to fine-tune some of the policies related to land development in order to ensure that municipalities respect the principles on communal servicing established by the ministries by the mid 1990s. Moreover, the ECO remains concerned about the environmental implications associated with increasing reliance on private septic systems in rural areas.

The ECO finds MAH's 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 Provincial Policy Statement. 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 that was released by MAH in mid-May 2002.

Review of Application R2001016:
Review of Need for New Policy under the *Condominium Act, 1998*
(Review Denied by MCBS)

Background/Summary of Issues

The applicants requested a review of the current Ministry of Consumer and Business Services (MCBS) policies with respect to the application of the definition of Communal Services in the Provincial Policy Statement (PPS) to condominium projects in rural areas. The applicants allege that current Ministry of Municipal Affairs and Housing (MAH) and Ministry of Environment and Energy (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 certain rural 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 (OCWA).

In addition to the request to MCBS, portions of the application for review raised issues about policies applied by the Ministry of Municipal Affairs and Housing (MAH) and the Ministry of the Environment (MOEE). Thus, the application also was forwarded to these two ministries.

The applicants point out that condominium law in Ontario was comprehensively reformed in 1998 and updated in 2001. The changes made in 1998 meant that "vacant land condominiums" can be developed. To undertake these projects, the *Condominium Act, 1998*,requires that condominium corporations manage the common elements, such as communal and water systems, in a responsible and accountable manner. However, existing MOEE and MAH policies do not distinguish between condominium corporations and "single residential owners," and fail to recognize the important components of the *Condominium Act, 1998.*

The applicants go on to explain that vacant land condominiums are similar to traditional rural plans of subdivision, except that the additional safeguards of the *Condominium Act, 1998* do not apply to traditional plans for subdivisions. Moreover, the applicants argue that condominium corporations are required to undertake significant long-term obligations on behalf of the owners of units while "developers of subdivisions have no long-term obligations."

Additional background on this case is outlined in the Background section for application review R2001014.

Ministry Response

The ministry decided a review of the policy was not warranted because the issues brought up for review by the applicants are not under the jurisdiction of the MCBS. In addition, the ministry states that a review will not be conducted "to avoid regulatory duplication", as the ministry states that the policies and guidelines identified by the applicants fall under the jurisdiction of MAH and MOEE.

The ministry explains that while the *Condominium Act, 1998* is not prescribed for review under the *EBR*, MCBS is a prescribed ministry and therefore the ministry will consider the review. However, the ministry goes on to state that none of the documents listed by the applicants for review pertain to the *Condominium Act, 1998*. The ministry notes that there is no statutory authority under the *Act* to establish a policy with respect to communal sewage and water systems. The ministry goes on to state that the regulation of communal sewage and water systems is not within the jurisdiction of MCBS.

The ministry also explains in its response that while an applicant is entitled to register a condominium if the requirements of the *Condominium Act, 1998* are met, the *Act* and regulations do not outline what services must be in place or whether they must be communally or individually owned in vacant land condominiums.

Finally, the ministry states that the review is not warranted for the reasons above as well as to avoid regulatory duplication. However, the ministry gives no explanation of what it means by the term "regulatory duplication."

ECO Comment

The ECO believes that the concerns raised by the applicants are valid and must eventually be addressed by MCBS, MAH and MOEE. In particular, there is a need to fine-tune some of the policies related to land development in order to ensure that municipalities respect the principles on communal servicing established by the ministries by the mid 1990s. Moreover, the ECO remains concerned about the environmental implications associated with increasing reliance on private septic systems in rural areas. The ECO believes that the ministries involved should explore whether current laws and policies should be amended to allow condominium corporations to enter into agreements with the OCWA.

The ECO finds MCBS's 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 Provincial Policy Statement. The ECO will monitor how ministries respond to this application, and will provide updates on this issue in future annual reports.

Application for Review: R2001017
Need for New Waste Management Regulations Under the *Environmental Protection Act*

Background/Summary of Issues Raised by Applicants

The applicants have requested that MOEE undertake a review of the need for new regulations under the *Environmental Protection Act* (*EPA*). The applicants believe the province's current regulations for private sector waste management facilities:

- are vague with respect to facility siting requirements and do not require a company to consider community characteristics or the presence of existing facilities in the

surrounding area;
- do not require a company to consider the impacts their operation may have on the community (including the traffic volumes or patterns); and,
- do not reflect changes to waste management practices (especially increased waste diversion targets) and the potential for an increased number of waste management facilities operating in the province.

The applicants have requested that new regulations require strict facility monitoring; a correlation between the capacity of the facility and the size and character of the community; strict siting requirements related to land use compatibility; and permit renewal on a five-year basis coupled with mandatory public input.

Ministry Response
A response from MOEE was due March 30, 2002. However, it was not received by that date.

ECO Comment
The ECO expects to review the application during the 2002-2003 fiscal year.

Review of Application R2001018:
Review of the existing Cleanup Guidelines for use at Contaminated Sites (MOEE)
(Review denied by MOEE)

Description
The applicants requested a review of the Cleanup Guidelines for Use at Contaminated Sites because they believe the requirements for rehabilitating a contaminated site are too lax and no one is accountable to ensure a site is adequately remediated. The applicants are particularly concerned with the site of a former gas station in Bentinck Township, Grey County, where they allege that dumping of oil, paint thinner and paint occurred in the past.

The applicants believe a review is warranted because they allege the proponent failed to undertake a systematic site assessment, and no remedial plan has been developed to restore the site to an appropriate condition.

Ministry Response
MOEE denied this application in April 2002.

ECO Findings/Comment
The ECO will review MOEE's handling of this application in our 2002-2003 annual report.

Review of Investigation I99008: Alleged violations of the *OWRA, EPA* and *EAA* by Snow Valley Ski Resort through road and sewage system construction (Investigation Conducted by MOEE)

Investigation Due 4/01

Description

In March 1999 the ECO received an application for investigation from two Minesing residents concerned with the road construction and sewage disposal system installation at the nearby Snow Valley Ski Resort, north of Barrie. In particular the applicants alleged that the Snow Valley Ski Resort and its owner violated the *Environmental Assessment Act (EAA)*, the *Environmental Protection Act (EPA)* and the *Ontario Water Resources Act (OWRA)* in the following ways:

- no Environmental Assessment performed prior to construction of a road in a Class I-III wetland, in alleged violation of Ontario Regulations 334 and 345 of the *EAA*;
- failed to register on title an easement established by the Simcoe County District Health Unit, in alleged violation of Ontario Regulation 358 of the *EPA* for an instrument created under subsection 27(1) of the *OWRA;*
- undertook building expansions without septic approvals, in alleged violation of Section 30 and subsection 53(1) of the *OWRA* and Section 14 of the *EPA*; and
- withdrew more than 50,000 L/day of water without a permit, in alleged violation of subsection 34(3) of the *OWRA*.

Ministry Response

MOEE undertook the investigation. In a letter dated July 13, 1999, MOEE indicated that its Abatement section had completed its investigation, and had forwarded the matter to the Investigations and Enforcement Branch for their consideration. MOEE expected the investigation to be completed by July 22, 2000. Meanwhile, MOEE notes that it issued a Field Order to require certain work to be done to address some of the concerns raised in this application for investigation. MOEE may order further work, pending results from the initial field order. MOEE recently advised the ECO that Snow Valley management have now carried out studies of groundwater impacts and have voluntarily applied for and received *OWR Act* approval for a new sewage works.

In November 2000 MOEE advised the applicants and the ECO that the Investigations and Enforcement Branch was still investigating the matter, and that the anticipated completion date was March 31, 2001. ECO staff confirmed on May 17, 2001 that the investigation had not been completed, and also confirmed that no follow-up letter to the November 2000 correspondence had yet been sent to the applicants. In July, 2002, ECO staff were advised that the investigation had been completed and that charges were laid on February 20, 2002. A trial date has been set for fall of 2002.

ECO Comment
The ECO will review this application once reports have been received from MOEE as to the outcome of the investigation and trial.

I2000001: Investigation into the alleged discharge of sound by Cook's mill causing an adverse effect (MOEE)

Investigation Due 3/02

Description
The applicants allege a discharge by Cook's mill of a contaminant (sound) into the natural environment, causing an adverse effect in contravention of the *Environmental Protection Act* and two certificates of approval issued to the company. The applicants' residence is next door to the mill operation, which has grown in size over the past 30 years, continually getting closer to the applicants' residence.

The applicants claim that the violations have caused and continue to cause serious adverse health impacts to themselves and their children, including severe cumulative health impacts such as hearing loss, psychological stress, depression, memory loss, inability to concentrate, irritability, anxiety, loss of sleep and learning difficulties. They also claim that the contraventions have caused and continue to cause loss of normal enjoyment of their property, including inability to use their garden and deck in a normal fashion, and the need to keep their windows closed in the summer and wear ear plugs.

ECO Findings/Comments:

Ministry Response
The ministry undertook an investigation that resulted in the laying of charges under section 14(1) of the *Environmental Protection Act*, alleging that between October 15, 1999, and November 12, 1999,and October 29, 2000, and November 7, 2000, Cook's Mill caused or permitted the discharge of noise that caused or was likely to cause an adverse effect. The trial as a result of the charges has not yet taken place.

ECO Findings/Comments
The ECO will review this application once the outcome of the trial is known.

Investigation I2000005 Alleged Failure to comply with requirements under the *EA Act* (MOEE) (Investigation Undertaken by MOEE)

Description
The applicants alleged that the Ontario Realty Corporation (ORC) contravened the

Environmental Assessment Act by failing to comply with the requirements of the Class Environmental Assessment for ORC Realty Activities (Class EA). The ORC is the agency responsible for lands and property owned by the provincial government. The Class EA sets out requirements for environmental study and public consultation for a number of ORC activities, including land sales. Sales of lands affecting environmentally sensitive lands require environmental study and public consultation.

The applicants said that ORC had sold or was proposing to sell properties within the "Markham-Pickering Agriculture Land Preserve" (also called the Pickering-Markham Land Assembly or the Rouge-Duffins Agricultural Preserve) for development without the proper environmental assessment. The applicants listed five specific properties of concern: four properties in Markham within the land assembly and one property on the Oak Ridges Moraine. The applicants also stated that ORC had "steadfastly refused" to consult with them in any deliberations concerning the possible sale of lands affecting the Rouge Valley ecosystem.

Ministry Response
The ministry decided to conduct an investigation.

Interim ECO Findings/Comments
The application was submitted in January 2001 and MOEE has informed the applicants that the results of the investigation will not be available until the end of May 2002. The applicants are understandably troubled that at least one of the proposed land sales noted in the application for investigation was completed during MOE's investigation. The ECO will review and report on the results of the investigation in the 2002/2003 annual report.

Review of Application for Investigation I2000006: Alleged Contamination at or Near 157 Edith Avenue, City of Thunder Bay (Investigation Denied by MOEE)

Description
The applicants requested an investigation alleging that groundwater in the vicinity of a snow dump (located at the corner of Balsam Street and Highway 11-17 in the City of Thunder Bay, hereafter referred to as the "snow dump") had been contaminated by operations at the site conducted by the City of Thunder Bay (the "City"). The Ministry of Transportation (MTO) was identified as the owner of the property on which the snow dump operated. According to the applicants, snow was collected from city streets from the early 1970s to 1992 and deposited at the site. The applicants alleged that:

(1) The Ministry of Transportation allowed the City of Thunder Bay to deposit contaminated and toxic snow at the site from approximately 1975 to 1992.
(2) The City of Thunder Bay allowed contaminated and toxic run-off from the snow dump to enter the water table from the MTO property.
(3) No studies were done to determine the impact on neighbouring wells, and no permits were issued related to the snow dump's operations and its impact.

(4) MTO allowed contaminated soil from a road improvement project (at the intersection of Highway 11-17 and Balsam Street) to be deposited at the identified dump site in 1996.

In so doing, the Ministry of Transportation and the City of Thunder Bay are alleged to have contravened Sections 30 (1), (2), 116 (1) of the *Ontario Water Resource Act*, and Sections 14 (1), 15 (1), 92 (1), 93 (1) of the *Environmental Protection Act*.

Detailed Background, MOEE Involvement and Previous Litigation:
In 1993, one of the applicants ("the affected applicant") complained to MOEE about salt contamination in his drilled well. In response, MOEE abatement staff investigated the alleged contamination and concluded that "the contamination cannot be attributed to any one source" (originally, MOEE thought the snow dump was the most probable contaminant source, but MOEE could not eliminate the possibility that the contamination was from a natural source). The complaint was isolated – no other local homeowners reported similar concerns. MOEE classified this complaint as a situation where "the contamination cannot be attributed to any one source" as natural sources of sodium and other chlorides (salts) can contaminate groundwater.

In 1994, the City of Thunder Bay (the operator of the snow dump) made a "without prejudice" proposal to the complainant which included a monitoring program for the well and treatment for the affected applicants' well water. MOEE concurred with this approach as their Guideline B-9 "Resolution of Groundwater Interference Problems" (used to deal with situations like this) calls for the development of an action plan by the ministry or a third party with ministry approval. As a result, MOEE subsequently closed its investigation into this matter.

According to MOEE, the affected applicant rejected the City's proposal and chose to pursue court action against the City and Her Majesty the Queen in the Right of Ontario thereafter. The city was successful in refuting the allegations made against it. On June 22, 2000, the Honourable Mr. Justice L.C. Kozak, in the name of the Superior Court of Justice, ordered that the action be "dismissed without costs, with the same legal result as if the action had been tried on its merits." Prior to this, the city hired groundwater experts who "conducted extensive [h]ydrogeological studies which showed that his well water problems were caused by natural salt deposits" and subsequently withdrew its "without prejudice" offer according to a memorandum by MOEE concerning the matter. MOEE was not involved in the civil litigation nor the associated withdrawal of the city's proposed "without prejudice" action plan.

A 1996 study submitted by the applicants with their *EBR* application, and presumably prepared to counter the evidence prepared by the city for litigation, drew conclusions completely opposite to the city's study. The affected applicant's study, prepared by a professional hydrogeologist, concluded that the most probable source of contamination was the snow dump. The water table at the point of the affected applicant's well has been assessed as being level to slightly up-gradient relative to the water table position below the snow dump. According to this expert account, fractures in the underlying bedrock provide the pathway to conduct water to the affected applicant's well. The local groundwater gradient, under natural circumstances, should cause groundwater beneath the snow dump to move away from the affected applicant's well, not toward it. However, the expert explains

that "moderate lowering of the water table by pumping" could readily draw water in the direction of the affected applicant's well and from the vicinity of the snow dump. It is the "strong belief" of the expert that the "snow dump represents the primary cause of contamination in the affected applicant's well." He concludes that the well which was "once fresh, is now unacceptably saline." This study was carried out by a review of records, literature and reports provided to, or available to, the expert.

The application alleges that "salt contaminated run off from the dump site has polluted ground water affecting area wells" (reported in early 2001). But MOEE notes that if salt levels in the affected applicant's well remain high, then the source of salt contamination is unlikely to be the snow dump as the snow dump has not operated for almost a decade (as evidence in the application indicates). MOEE notes that continued high salt levels would be more consistent with the City's claim that the source of contamination is natural, not the snow dump (as claimed by the applicants). If the snow dump were the source of contamination, chloride levels would be expected to diminish over time as the slug of contaminated groundwater beneath the snow dump gradually attenuated through infiltration of precipitation and movement down gradient.

Ministry Response

MOEE's principal reason for denying the investigation was that the limitation period for bringing any charges had expired. MOEE notes that both the *OWRA* and the *EPA* contain limitation periods of two years for this type of offense. The *OWRA* indicates that:

"Proceedings for an offence under this Act or the regulations made under this Act shall not be commenced later than two years after the date of,

a) the day on which the offense was committed; and
b) the day on which evidence of the offence first came to the attention of a person appointed under section 5."

On the basis of previous MOEE involvement in this matter, the subsequent civil litigation and most of all, the limitation periods in key pieces of legislation, MOEE decided that an investigation under Part V of the *EBR* was not warranted.

ECO Comment

Litigation in advance of this *EBR* application had a significant bearing on the matter that is the subject of the application. The litigation was launched by the affected applicant after refusing a "without prejudice" offer from the City of Thunder Bay to establish a water well sampling and water treatment system for the affected applicants' water supply (such an offer concurs with MOEE policy). The city and the Ministry of Transportation then became enmeshed in complex litigation related to the alleged contamination. In preparation for the litigation, the City of Thunder Bay undertook a detailed hydrogeological investigation which appears to have been successful in refuting the allegation that the operation of its snow dump at Highway 17-11 and Balsam Road was principally responsible for contaminating the complainant's water well. In 2000, the without prejudice offer from the city to the affected applicant was withdrawn and the action brought against the city dismissed.

MOEE denied the request for an investigation, noting that it was constrained by the amount of time which had transpired between the receipt of evidence of the alleged incident and the point at which an investigation was being sought. (The snow dump no longer received snow after 1992, according to the applicants, MOEE initiated an investigation in 1993, the civil action involving the City of Thunder Bay was filed in 1995 and dismissed in 2000, the alleged deposition of contaminated soil occurred in 1996; meanwhile, the application for investigation was launched in January 2001.) MOEE indicated that it would not be able to resort to the provisions of either the *OWRA* or *EPA* both of which contain limitation periods, i.e., they specify that actions must take place within two years of an incident, or the appearance of evidence, to be pursued. MOEE's overall response was adequate, but could have been more thorough. Their rationale for not conducting an investigation should have included an explanation as to why permits and studies are not required for snow dumps and why the alleged deposition of contaminated soil in 1996 was of no concern to MOEE (as sought by the applicants). Furthermore, MOEE should consider whether it is appropriate to rely on a limitation period of two years, in instances when contaminant discharge is of a continuous and long-term nature, as in this instance. In its 1998 report, the ECO recommended that MNR adjust its use of limitation periods to avoid limiting the enforcement of violations of the *Crown Forest Sustainability Act*, and MNR subsequently made adjustments. It is noteworthy that in late 2000, the Ontario government proposed significant revisions to limitations periods for environmental actions brought under the common law causes of action.

The ECO notes that the identified snow dump may nonetheless have been a source of groundwater contamination and perhaps even led to some amount of contamination reaching the affected applicant's well. The ECO recognizes that the use of road salt and other de-icing agents clearly can have significant local environmental consequences, particularly on water quality and aquatic life (for more on road salt's ecological impacts, see page 9 of the annual report). The applicants' assertion that studies and permits should be required to establish snow dumps is a valid concern and one not addressed by MOEE. The ECO feels that the suggestion that MOEE monitor the fate of de-icing agents and study their impact warrants consideration by MOEE. Further, more effective programs to reduce the quantities of de-icing agents used in Ontario each winter would also certainly have merit.

Review of Application I2001001: Alleged Contravention of *Fisheries Act,* Section 36(3), *Environmental Protection Act,* Section 14(1), and *Ontario Water Resources Act,* Section 30(1) in Little Cauchon Lake, Algonquin Park (MOEE Investigation Denied)

Background/Summary of Issues

The ECO received an application requesting the investigation of alleged contraventions of Sections 35(1) and 36(3) of the *Fisheries Act*, Section 14(1) of the *Environmental Protection Act,* and Section 30(1) of the *Ontario Water Resources* Act by Canadian National Real Estate Management and Cando Contracting Limited. The alleged contraventions were caused by the maintenance and decommissioning of the Canadian National Railway line in Algonquin Park.

Shortly after the ECO received the application, ECO staff advised the applicants that the Ministry of Natural Resources (MNR) had returned responsibility for enforcing Section 35(1) of the *Fisheries Act* to the federal Department of Fisheries and Oceans (DFO) in September 1997, and suggested that the applicants forward a copy of their application to the federal Commissioner for Environment and Sustainable Development to ensure that contraventions of s. 35(1) were reviewed by DFO. The ECO further advised that, under the *Fish Habitat in Ontario: Compliance Protocol* ("Compliance Protocol") published in February 2000 by MNR, DFO, Environment Canada and the Ontario Ministry of Environment and Energy (MOEE), MOEE was responsible for enforcing Section 36(3) of the *Fisheries Act* when alleged pollutants were chemical in nature. Accordingly, ECO forwarded the application to MOEE only. Prior to the development of the February 2000 Compliance Protocol, ECO practice was to forward applications alleging *Fisheries Act* contraventions to MNR only.

The alleged contraventions relate to the introduction, use and relocation of railbed ballast material. The applicants submitted that slag from smelters in the Sudbury Basin, which contains heavy metals, has been used in the maintenance of the railbed for at least the past 30 years. The applicants provided a laboratory analysis of the railbed ballast material they had collected, which showed relatively high levels of iron, cobalt, nickel, copper and lead.

The applicants observed that wildfowl collect grit and particles of rock in their gizzards in order to grind tough foods. They expressed concern that ingesting contaminated railbed ballast could result in chronic heavy metal exposure and adverse health effects in bird populations. The applicants provided abstracts of two journal articles, one explaining how grit ingestion could be a source of metal exposure, and the other describing the effects of chronic dietary metal exposure on young birds. The applicants alleged that by using heavy-metal contaminated slag as railbed ballast, Canadian National Real Estate Management had discharged a contaminant that causes or is likely to cause an adverse effect, and had therefore contravened Section 14(1) of the *Environmental Protection Act.*

The applicants stated that Cando Contracting, in the process of removing tracks and ties from the decommissioned railway, caused railbed ballast to be spilled onto a lake trout spawning bed in Little Cauchon Lake, and into a connecting brook trout nursery stream. The applicants alleged that the deposit of heavy-metal contaminated ballast into fish spawning areas constituted a contravention of Section 36(3) of the *Fisheries Act*, which prohibits the deposit of a deleterious substance into water frequented by fish, and of Section 30(1) of the *Ontario Water Resources Act*, which prohibits the discharge of any material that may impair water quality.

The alleged contraventions were of particular concern because of the location of Little Cauchon Lake. Immediately upstream from Little Cauchon is Cauchon Lake, the headwaters of a stream system that flows into Cedar Lake. The applicants noted that headwaters typically have low volume water flow, and are consequently less able to dilute the effects of deleterious substances. The applicants also observed that brook trout streams and lake trout lakes are increasingly rare in southcentral Ontario, and are both valuable ecosystems and important tourist attractions.

One of the applicants had written to the Algonquin Park Superintendent several times to inform him of concerns related to the CNR decommissioning. The applicants advised the Park Superintendent that they intended to submit this application for investigation.

MOEE Response
MOEE stated that it would not undertake an investigation of alleged contraventions of Section 36(3) of the *Fisheries Act* because DFO was responsible for administering all provisions of the Act.

MOEE also stated that it decided not to conduct an *OWRA* investigation because of the lack of substantiating evidence. Specifically, MOEE found that although the applicants provided analysis of ballast material, they did not provide water quality data, or any evidence of water quality impairment. According to MOE, the applicants also failed to provide or refer to any data that demonstrated adverse effects or elevated heavy metal concentrations in Algonquin Park wildfowl necessary to prove a contravention of Section 14(1) of the *EPA.* MOEE concluded that it was unlikely any harm to the environment had occurred, and therefore unlikely that the ministry would find evidence to reasonably believe that a violation had occurred.

ECO Comment
In 1989, the Ontario government signed an agreement with the DFO which recognized that MNR is the lead enforcement agency for investigations of alleged contraventions of the *Fisheries Act*. While responsibility for s. 35(1) was transferred back to DFO in 1997, this agreement remains in place with respect to alleged contraventions of s. 36(3). Thus, MNR remains legally responsible for enforcement of s. 36(3) of the *Fisheries Act*.

The February 2000 Compliance Protocol that sets out roles and responsibilities for *Fisheries Act* enforcement clearly states that MOEE is the lead enforcement agency for Section 36(3) where alleged pollutants are chemical in nature. In correspondence with the ECO, MOEE has claimed that the Protocol is incorrect. Although a letter to the Commissioner from MNR in February 2002 suggested that Environment Canada, Department of Fisheries and Oceans, Parks Canada, MOEE and MNR had agreed to amend the Protocol, as of April 2002 no official revised version of the Protocol had been provided to the ECO. It is therefore arguable that at present MOEE remains the lead enforcement agency in Ontario for Section 36(3) contraventions involving deposits of chemicals to waters frequented by fish.

The February 2002 letter from MNR also affirmed that MOEE has a lead role in responding to incidents of chemical pollution of water and will be “first on the scene” to investigate alleged chemical discharges and collect evidence. According to MNR, the “first on the scene” approach will be emphasized in the revised Protocol. Even under a revised protocol, MOEE would still be responsible for investigating alleged *Fisheries Act* offences. MNR suggested that since MOEE will continue to have a significant investigative role, ECO should continue to forward applications that allege chemical pollution in water to MOE.

Regardless of whether MOEE was responsible for enforcing Section 36(3) of the *Fisheries Act* when this application for investigation was received, it was responsible for responding to and investigating chemical discharges to water. Accordingly, ECO believes that MOEE should have considered the alleged *Fisheries Act* violations in reviewing this application. However, MOEE continues to disagree on this point. After reviewing this draft review, MOEE reiterated to the ECO that DFO is responsible for administering the *Fisheries Act*.

If MOEE is unwilling to conduct investigations of 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 important that MOEE amend O. Reg. 73/94 to reflect the fact that Ontario residents are unable to submit these types of applications under the *EBR*. Otherwise, residents are being deceived about the extent of their rights under the *EBR* and misled about how to ensure that those rights are upheld by agencies charged with protecting public resources from pollution threats.

Review of Application: I2001002
Trans-Cycle Industries
(Investigation conducted by MOEE)

Background/Summary of Issues

The application for investigation concerned alleged contraventions of the *Environmental Protection Act* by the Trans-Cycle Industries (TCI) facility in Kirkland Lake, Ontario. The facility strips polychlorinated biphenyls (PCBs) from contaminated metal and electrical equipment through a process that involves the use of solvents and heat. According to the applicants, TCI sells the recycled metal after de-contamination, and ships the residual PCB wastes off-site for final destruction.

The applicants stated that a number of hazardous substances are integral to the TCI operations, including: PCBs; perchloroethylene and trichlorobenzene, the solvents used in the TCI process; and arsenic and chromium. The applicants contended that each of these substances is harmful to human health and the environment and each requires careful controls and management to prevent release into the environment. The applicants also noted the hazardous effects that have been attributed to the substances used at TCI, such as: developmental effects (motor deficits, impaired psychomotor index); decreased birth weights and shortened gestational age; headaches; impairment of memory/concentration/intellectual function; liver damage, kidney effects; anemia; cancers; injury to developing fetuses; impaired nerve function; and death.

The applicants alleged that TCI had violated Sections 9 and 27 of the *Environmental Protection Act*, as well as certificates of approval (Cs of A) issued to the site for waste disposal and air discharges. Specifically, the applicants alleged that: TCI had discharged excess amounts of chlorinated organics to the air in 1999 and 2000; there had been failures in the exhaust system resulting in the release of harmful discharges to the workplace environment; and there had been

adverse health effects experienced by TCI employees. In its investigation summary, MOEE noted that the applicants did not make any specific allegations that the C of A relating to waste disposal was contravened.

In support of their allegations, the applicants referenced MOEE's 1999 and 2000 Environmental Compliance Reports, which indicated that there were excess discharges to the air of chlorinated organics. The applicants also noted that MOL has issued at least one stop work order due to failures in the exhaust system resulting in the unplanned and unacceptable release of harmful discharges to the workplace environment. MOL issued a report following its May 30, 2001 visit to the premises which indicated that TCI had been improperly conducting air sample testing, that there were exceedances in the concentrations of 1,2,4-Trichlorobenzene, and that company air sampling showed that 28 per cent of samples were in exceedance. The MOL report also noted that the filters in the plant did not remove the solvent vapour in the air. Orders were issued stopping the use of the baghouse until it could be assured that the solvent vapour levels would not be exceeded. In their evidence, the applicants also referred to numerous verbal and anecdotal accounts, by former TCI workers, of adverse health effects being experienced by the TCI workforce.

In November 2001, MOEE's SWAT team inspected the TCI facility for reasons unrelated to this investigation. Among their findings related to the allegations, the SWAT team reported that: there were no exceedances of the emission limit at the time of the inspection; air samples were below the point of impingement standards set out in the C of A (Air): the internally discharging baghouse was being operated according to MOL procedural guidelines; and MOL was advised that a review of air sampling data found lead levels greater than 3 ppb inside the plant. In November 2001, the EBRO wrote the applicants and the ECO, advising that the investigation would not be completed until the middle of January 2002.

Ministry Response

After a preliminary review of the allegations in the application for investigation, MOEE's Timmins District Office, with support of the Environmental SWAT team, undertook a full investigation into the allegations. The report of the investigation included detailed background information on previous investigations of TCI (this information is contained previously in this review). After completing the investigation, MOEE reported its findings to the applicants as follows:

1. There were documented releases of hydrocarbons into the atmosphere on nine occasions between February 5, 1999, and December 31, 2001. In each case, the cause was malfunctioning monitoring equipment that was immediately repaired by TCI. A release on March 4, 2001, was forwarded to IEB for investigation, but the IEB decided, subsequent to their investigation, not to proceed with enforcement.
2. An inspection by the Environmental SWAT Team did not reveal any exceedances of the C of A (Air) emission limits.
3. MOL issued appropriate Orders under the *Occupational Health and Safety Act* to address the matters under its mandate.

4. TCI has applied for a C of A under ss. 9(1) of the *EPA* to make modifications to permit the baghouse to discharge to the atmosphere. This approval, if issued, would contain emission rates and limits.
5. TCI has also applied for an amendment to its C of A (Waste) for approval of the use of a "floor wash water still." A report from the Ministry of Labour, received January 4, 2002, advised that the emissions from the still would not be a concern as long as they were maintained at below the Time Weighted Average Exposure Value for PCBs and perchloroethylene. The application and report from MOL are still under review and no amendment to the C of A (Waste) has been approved.
6. With respect to the issues concerning industrial hygiene and worker health and safety (the building's internal air quality, the "floor wash water still" and the internally discharging baghouse), the applicants should contact MOL, as these are not within MOEE's mandate.

As a result of its investigation, MOEE concluded that TCI is addressing all matters raised by the applicants that are within the mandate of the MOEE, and that it is not necessary to proceed with charges for the contraventions. MOEE added that MOL is addressing issues of occupational health and safety.

In the summary report of MOEE's investigation, prepared for the applicants, background information was presented that was relevant to the application. TCI operates under two Cs of A. A provisional C of A (Waste) for a waste disposal site permits the processing and transfer of waste electrical equipment classified as PCB waste. The second C of A (Air) allows the installation and operation of equipment that releases vapours into an absorber carbon bed, but sets emission limits and requires that TCI carry out source testing of air emissions.

MOEE noted that TCI has been found to be in compliance with all emission limits during source testing. Also, MOEE provided the findings from inspections of TCI under its air and hazardous waste inspection programs prior to receiving this application for investigation. Among these findings were an exceedance of total hydrocarbon limits, a failure to report an inventory of waste and unapproved discharge into the natural environment. Violation notices were issued to the company in these cases. In response to an incidence of non-compliance with the C of A (Air), the company applied for and received an amendment to the C of A (Air).

MOEE also reported a number of past occasions when the air emission limits set by the C of A (Air) were exceeded due to equipment failure. In response to most of these exceedances, MOEE decided not to take any enforcement action because the cause was equipment failure and the company acted to repair or replace the defective equipment. After one exceedance of six hours in March 1999, the incident was referred to the Investigation and Enforcement Branch (IEB) of MOEE for an investigation. However, the IEB decided not to lay any charges because the company took corrective action.

ECO Comment

Given the circumstances, this was a very good response to an application for investigation. MOEE conducted a thorough investigation of the allegations, responded to the applicants'

concerns, explained the outcome of the investigation clearly and provided adequate detail. MOEE also included background information that provided context for understanding its reasons for not laying charges against the company.

The ministry's reasons for not laying charges appear to be valid. The company has been warned of the violations, and is taking steps to correct the violations without charges being laid. As well, MOEE cannot investigate or lay charges in areas for which MOL is responsible.

MOEE made reference in its investigation findings to two C of A applications made by TCI. Both proposals had been posted for comment on the Registry. While the comment periods had closed, it would have been helpful to provide the Registry numbers to the applicants (IA01E0549 and IA01E1568).

MOEE also noted in its conclusion that it had received a number of requests to designate an expansion of this facility under the *Environmental Assessment Act*. MOEE stated that, if a recommendation is made to make a regulation designating the undertaking, a notice of proposal will be posted on the Registry for consultation. As promised, this regulation proposal was posted on the Registry on March 12, 2002 for a comment period of 30 days (RA02E0005).

The investigation was conducted by the Timmins District Office with support of the MOEE's Environmental SWAT team, which had conducted a previous investigation of TCI. While the SWAT team was not involved in issuing the Cs of A and did not have a direct interest in the outcome of the investigation, the Timmins District Office did have a direct interest in this investigation. In the circumstances, the MOEE took a reasonable approach to this potential conflict of interest by pairing the local district office with SWAT team staff.

Review of Investigation: I2001003
Highway 400/Highway 404 Extension Link (Bradford Bypass)
Environmental Assessment
(Denied by MOEE)

Background/Summary of Issues Raised by Applicants

Ontario's *Environmental Assessment Act* (*EAA*) sets out a decision-making process to provide for the protection, conservation and, wise management of Ontario's environment. Environment is broadly defined, including natural, social, cultural and economic components. *EAA* requirements are in place so that environmental problems or opportunities are considered and their effects planned for prior to development or construction. The *EAA* applies to most public sector undertakings (i.e., the proposed project or activity), including public roads and highways.

Section 34 of the *EAA* makes it an offence to knowingly give false information regarding an environmental assessment matter. The applicants alleged that several persons, companies and provincial politicians contravened Section 34 of the *EAA* by knowingly providing false information about the cultural heritage lands (known as the "Lower Landing") in support of a Ministry of Transportation Environmental Assessment (EA) report. That report contains the ministry's proposal to construct a 16 km rural 4-lane freeway between Highway 400 west of Bradford and the proposed extension of Highway 404 in East Gwillimbury.

The proposed highway would cross several north-south corridors of potential archaeological along the Holland River and glacial lake shoreline. The applicants, members of the public and other stakeholders have disagreed with the Ministry of Transportation (MTO) about whether or not the proposed highway route is north of the Lower Landing, an early 19th century steam boat landing and shipment site. The applicants contend that MTO "knowingly and falsely" represented the Lower Landing as approximately 1.5 miles south of what the applicants believe is the actual location of the preferred highway route. While a 1997 on-site archaeological study prepared for the ministry concluded that the proposed highway route would not impact the Lower Landing site, an internal MTO draft technical report prepared in 1994 reached the opposite conclusion.

The applicants, through their participation with an environmental organization, have had ongoing involvement as MTO was conducting its EA studies and documentation for the proposed highway. The Ministry of Environment and Energy's Government Review of the EA document, published in May 2001, acknowledges that MTO was unable to resolve concerns (some of which were additional to archaeological concerns) to that group's satisfaction.

Ministry Response

Section 77(1) of the *EBR* allows ministries to conduct a preliminary review of an application. According to Section 77(2) of the *EBR*, a minister is not obligated to conduct an investigation if the minister considers that the applicants request is "frivolous or vexatious"; is not serious enough to warrant an investigation; or the alleged contravention is not likely to cause harm to the environment. Nor is the minister required to duplicate an ongoing or completed investigation.

In October 2001, staff from MOEE's Environmental Assessment and Approvals Branch (EAAB) wrote to the applicants and informed them that an investigation was not warranted.

The Branch's letter did not refer to either section of the *EBR* and provided the following explanation:

- A review of information relating to this issue, including MTO's study process and protocol documentation satisfied the ministry that the proponent did not falsify or misrepresent information in order to obtain the minister's approval of the EA.
- The proponent relied on technical expert advice, and followed established procedures for identifying cultural heritage resources impacted by the proposed undertaking. The EA outlines a traceable decision-making process for making conclusions and recommendations about the location of cultural heritage resources.

- More recent studies conducted by MTO conclude that the proposed road alignment will not impact the site of concern by the applicants. The Ministry of Culture (MoC) is satisfied with MTO's EA study and that ministry's proposed commitments to further study and mitigation measures to "conserve…cultural heritage resources where those features are to be impacted by the construction of the alignment."
- MTO is reviewing the most recent public submissions received on the Lower Landing matter and will provide a response to MOEE regarding its findings. MOEE will provide a copy of this information to the applicants.

EAAB acknowledges that the ministry has received (through the EA consultation process) numerous submissions expressing concerns with the proponent's assessment of the location of the Lower Landing site and impacts the alignment will have on that cultural heritage resource. Several groups and individuals, who have various cultural and other concerns, have also made requests for a hearing on this project. The Minister of Environment and Energy will ultimately make a decision on MTO's EA by either granting the hearing requests, referring the matter to mediation, denying *EAA* approval of the proposed highway, or granting *EAA* approval (with or without specific conditions).

In November 2001, the applicants wrote to the Minister of Environment and Energy to express concern with the decision and request a third party review. The applicants noted that MOEE's October 2001 response failed to refer to the reasons set out in the *EBR* for denying an investigation request.

In February 2002, the Minister of Environment and Energy responded to the applicants and indicated that the ministry relied on Section 77(1) of the *EBR*. Specifically, the EAAB Director reviewed the "allegation and concluded that the alleged contravention did not warrant a further investigation at this stage in the review process."

ECO Comment

The applicants' concerns regarding potential impacts to the Lower Landing site are, in part, related to concerns with the validity of information provided by several ministries about cultural heritage resources. This underscores the need for MOEE to provide an independent decision on this application. Therefore, it would have been helpful for MOEE to assign staff from another branch to be involved in making a decision on this application.

The ministry's October 2001 response to the applicants, indicating MOEE's denial of their investigation request, did not refer to any of the specific reasons set out Section 77(2) of the *EBR* regarding a denial decision. After a query by the applicants, the ministry cited Section 77(1) of the *EBR* that allows ministries to conduct a preliminary review of the application or conduct a full investigation. According to MOEE, its reference to Section 77(1) in the subsequent correspondence was consistent with the ministry's original decision. The ECO maintains that the ministry should have taken more care in communicating the reasons for its decision to the applicants.

EAAB staff did provide some assistance to the applicants by providing them with MTO's

responses to the most recent public submissions regarding the location and impact of the proposed highway on the Lower Landing Site. Staff of that Branch have committed to providing the ECO with a copy of the Minister of Environment and Energy's decision on the EA application for the Bradford Bypass Extension. The ECO will continue to monitor the issues and events associated with this environmentally significant issue.

Investigation: I2001004: Alleged dumping of contaminated soil in contravention of C of A for township landfill, Municipality of West Grey
(Investigation Undertaken by MOEE)

Description:
The applicants allege contaminated soil was removed from a site in Bentinck Township and deposited at the Bentinck landfill in contravention of s. 41 of the *Environmental Protection Act*. The soil was removed from the site of a former gas station and auto body shop. The applicants allege that gasoline, oil, paint thinner and paints were dumped on the site.

Ministry Response
MOEE has committed to undertake an investigation with an estimated completion date of November 2002.

ECO Findings/Comment
The ECO will review this application once the MOEE investigation is complete.

Review of Application I2001005: (Investigation Denied)
(Canac Kitchens)

Description

Two companies (Canac Kitchens and Raywal Ltd.) manufacture kitchen cabinets in Thornhill, north of Toronto. The local MOEE office has received odour complaints 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 Pollutants 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 have been gradually increasing their total annual emissions of certain toxic substances like toluene and xylene. Both these substances are easily absorbed through inhalation, and MOEE has recently established new air quality standards for

both substances. MOEE's Air Quality Standard for Toluene notes that toluene has been observed to cause headaches, dizziness, intoxication and eye irritation in humans exposed to 100 ppm for six hours per day for four days. MOEE's xylene standard notes that chronic inhalation exposure to xylene produces irritation of the eyes and respiratory system, headaches, disorientation and the loss of full control of bodily movements.

Canac Kitchens Ltd.

On-site Releases (emissions) in tonnes
Reported by NPRI

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

On-site Releases (emissions) in tonnes
Reported by NPRI

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 one of the companies, Canac Kitchens, requiring the company to identify and install appropriate odour control technology. At the time, the company invited local residents to two meetings to discuss concerns, and met the requirement by installing more efficient spray guns and by outsourcing certain production activities. In the summer of 2000, Canac Kitchens applied to amend its certificate of approval for air discharges to install a new paint spray booth. MOEE added conditions to this C of A, requiring the company to conduct odour source testing annually for three consecutive years following installation of the new equipment. Nevertheless, local residents continued to complain about odours.

In September 2001, the applicants submitted a request for an investigation under the *EBR*, alleging that the two local companies had contravened several sections of the *Environmental Protection Act*, and Regulation 346 under the *Environmental Protection Act*. The applicants alleged that the companies were emitting toxic chemicals beyond the levels permitted in their certificates of approval. They noted that strong chemical odours are present several times a week in the vicinity of the plants, especially in the mornings, and that the odours had gradually been increasing in strength and frequency over the past three years. The applicants alleged that the odours were not only unpleasant, but also contained carcinogens such as dichloromethane, and were being emitted into a densely populated residential area which includes four daycare facilities and several old age homes and schools within a one-kilometre radius of the plants.

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 the Environment. The applicants stated that the ministry had not been able to conduct a thorough investigation of actual discharge levels.

Ministry Response

In late November 2001, the ministry informed the applicants that no investigation under the *EBR* would be conducted, because investigations were already ongoing into the operations of both companies. The ministry also provided the applicants with a brief update on each of the investigations. In the case of Canac Kitchens, the ministry had amended the C of A to require annual source testing to determine the maximum rate of odour emissions for the next three years, but results were not yet available from the first round of testing, which had taken place on October 30, 2001. In the case of Raywal Ltd., the ministry had issued a Provincial Officer's Order to the company following an inspection in May of 2001. The ministry also noted that Raywal Ltd. had applied for two amendments to its certificate of approval for Air, which were posted on the Registry by MOEE in late summer of 2001, and were still under review by the ministry. The company was planning to install two dust collectors and to add two spray booths to existing equipment.

ECO Comment

The ministry provided a very weak response to this request for an *EBR* investigation. The ministry stated that investigations were already ongoing, but provided few details. The ministry's response briefly outlined past and future activities that appear to be components of routine abatement. It is not clear if there are any deadlines for the ongoing investigations or whether reports will be prepared or published. In contrast, an *EBR* investigation would at least have guaranteed the concerned residents both a clear deadline and a final report. The ECO is concerned that MOEE appears to have opted for a continuing abatement approach even though the ministry acknowledged that the two facilities have been the subject of numerous odour complaints and abatement activities over a number of years. MOEE's Compliance Guideline (1995) suggests that the MOEE may require mandatory compliance where non-compliance will have adverse effects on humans and where previous abatement efforts have failed.

The applicants alleged that many people in the neighbourhood frequently experience material discomfort (coughing) from the emissions of two manufacturing sites. The ministry responded that odour incidents were decreasing over time rather than increasing over time as alleged by the applicants, but did not provide any documentation to support this statement. MOEE has since told the ECO that the ministry received approximately 300 complaints in 1995, but only received about 12 complaints in 2001. MOEE also noted that the reduction in complaints might be partly due to one frequent complainant having moved out of the area.

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, local MOEE abatement staff advised the ECO they had not reviewed the NPRI data for these facilities. The fact that one of the companies has recently added a spray-paint booth and the other company is planning to add two spray booths also suggests that emissions may be gradually increasing. Two ECO site visits on March 1 and March 25, 2002 also 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 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 did not respond at all to the applicants' concerns about the lack of information about emission levels or about possible emissions of carcinogens. The ministry did not provide the applicants with any reassurance that their concerns will be resolved through the existing abatement process.

The ministry's decision against an *EBR* investigation was made by the District Manager of the same local MOEE office which has for years been overseeing abatement activities of these two companies. One of the concerns of the applicants was that although MOEE had been contacted numerous times, "they have not been able to improve the situation or conduct a thorough investigation of actual discharge levels, over the past three years." Given these concerns, it would have been preferable if the ministry had assigned the decision to MOEE staff from another region, who might have reviewed the history of this case with greater independence and a fresh viewpoint.

A key component in the abatement approach of the local MOEE office is a condition in a certificate of approval requiring that odours from the facility will not exceed the 10-minute average concentration at the point of impingement of one or more odour units per metre cubed. Although MOEE appears to be relying heavily on this condition, the ministry did not explain in lay terms what the condition requires or what "one odour unit" is.

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 the public generally. Since the applicants complained that they were unable to access a certain certificate of

approval without paying a fee, the ministry should also have clarified that certificates of approval 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 certificates of approval, once they are posted on the Registry.

In certain situations, MOEE has encouraged the establishment of a citizens' liaison committee to allow ongoing three-way discussions between a proponent, residents in the neighbourhood and the ministry. This is one option that the ministry could have considered in this case. Another alternative would have been for the ministry to use s.24 and s. 26 of the *EBR*. These sections allow the ministry to open up instruments such as Cs of A for air emissions to enhanced public participation, including oral deputations by members of the public, public meetings, mediation and other options. These sections of the *EBR* have only rarely been applied, despite recommendations in the ECO's 1998 annual report that they be better publicized and that ministry staff be trained in their use.

Investigation: I2001006
Sarjeant Aggregates Oro, Ont. Alleged contravention of *ARA*
(Ministry Response Pending)

Description
The applicants allege that a gravel pit operator is contravening the site plan for the operation in several ways. They allege that noisy conveyor belts have not been placed behind piles of mineral to screen noise, even though this is stated in the site plan. They also allege that excavated minerals have not been stored on the pit floor for the last three years, even though the site plan states that this should occur as soon as there was enough space on the pit floor. They also note that the site plan foresaw the establishment of a committee for residents and gravel companies to handle concerns. No such committee has been formed. Finally, the applicants allege that the gravel pit operator has failed to clean the haul road when conditions are dry, as stipulated in the site plan.

The applicants allege that they have been requesting assistance from the MNR inspector since 1998, but he has not been responsive to their concerns. They note that MNR's Compliance Assessment Report for 2001 for this facility indicates compliance with dust suppression, noise mitigation and stock piling requirements, despite their complaints.

Ministry Response
A response from the Ministry of Natural Resources is pending.

ECO Comment
ECO will review the handling of this application for investigation in the 2002/2003 fiscal year.

Investigation: I2001007
Sarjeant Aggregates Oro, Ont.
Alleged contraventions of *Environmental Protection Act* and *Ontario Water Resources Act*
(MOEE Response Pending)

Description
The applicants allege that the operations of a gravel pit have been causing noise and dust, despite three years of requests for improvements. The noise is caused in part by conveyor belts which operate all day and lack noise barriers. These conveyor belts carry minerals from the pit floor to the surface. The applicants also allege that the water pump operates 24 hours a day on weekends, and makes an aggravating droning noise. The applicants state that dust is a problem whenever there is a wind, and that in some conditions, it has been difficult to see across the road in the area of the pit.

The applicants also allege that even though the Permit To Take Water for the site allows for water to be taken for only 12 hours a day, water is in fact being drawn for 24 hours a day on weekends.

Ministry Response
A response to the application by MOEE is due in April, 2002.

ECO Comment
The ECO will review the application for investigation in the 2002-/003 fiscal year.

Investigation: I2001008
Alleged contravention of *Public Lands Act, CA Act, Fisheries Act, Lakes and Rivers Improvement Act* re Shoreline Construction Activities (MNR)

Description:
Shoreline activities including land filling, construction of a wall and rock groyne in Lake Huron shoreline property are alleged to be in violation of the *Fisheries Act*, and/or *Lakes and Rivers Improvement Act* and/or *Public Lands Act.*

Ministry Response
Ministry of Natural Resources response is due April 15, 2002.

ECO Comment:
ECO will review the application in the 2002/2003 fiscal year.

Investigation: I2001009
Alleged contravention of *Public Lands Act, CA Act, Fisheries Act, Lakes and Rivers Improvement Act* re Shoreline Construction Activities (MOEE)

Description:
Activities by a L. Huron waterfront landowner including alleged landfilling of waste materials and deposition of materials in shoreline waters are alleged to have violated *EA Act.* and/or *OWR Act* and/or *EP Act.*

Ministry Response
Ministry of Natural Resources response is due April 15, 2002.

ECO Comment:
ECO will review the application in the 2002/2003 fiscal year.

Investigation: I2001010
Alleged contravention of EPAct re Vapour Discharges by Safety-Kleen Inc.

Description
The applicants requested an investigation into a September 2001 chemical vapour release from the hazardous waste incinerator in Corunna, Ontario owned by Safety-Kleen Inc. (now owned by Clean Harbors Inc.). The application says that employees at the plant suffered nausea and headaches. The application asks MOEE to investigate whether the incident was a contravention of Section 14(1) of the *Environmental Protection Act* (*EPA*).

Ministry Response
A response from MOEE is due by April 26, 2002 (delayed by labour disruption).

SECTION 6

EBR LEAVE TO APPEAL APPLICATIONS

EBR LEAVE TO APPEAL APPLICATIONS
April 1, 2001 to March 31, 2002

Parties and Date of Leave Application	Description of Grounds for Leave to Appeal	Decision on Leave Application and Decision Date	Status/Final Outcome
Registry # IA00E0427 **Applicants:** Carol S. Dillon and Melvyn E.J. Dillon; The Council of Canadians; Ken McRae; Michael Cassidy and Maureen Cassidy; Eileen Naboznak; Barbara Zents and Ray Zents; Anne German; Kathleen Corrigan **Ministry:** MOEE **Proponent:** OMYA (Canada) Inc. **Date Application received by ECO:** September 6, 2000 **Instrument:** Permit to Take Water (PTTW), s. 34, *OWRA*	The applicants sought leave to appeal the decision to issue a PTTW increasing the allowable water taking from the Tay River to 4,500 m^3/day by the year 2009. The grounds for seeking leave included the following: the Director failed to protect the quality of the natural environment and foster the efficient use and conservation of resources by granting permission to take more water than the proponent requested; the Director based his decision on insufficient data; there was a lack of independence in the important functions of study, recording, and monitoring; and the Director failed to follow MOEE's Statement of Environmental Values.	The ERT granted the leave to appeal application on the grounds that it was not reasonable for the Director to issue a PTTW for the taking of water in the absence of sufficient, pertinent data on the Tay River watershed. The ERT found that the absence of this information created a degree of uncertainty about impacts on the aquatic habitat of the Tay River which raised the possibility of significant harm to the environment. **Date of Leave Decision:** November 6, 2000	Appeal allowed in part. Approval was given for a PTTW with revised and additional conditions. The Tribunal was not satisfied that MOEE had undertaken sufficient evaluation to assure that the ecosystem, the Tay River watershed, would not be harmed with the taking of 4500 cubic metres per day of water from the Tay River. Given that more detailed and comprehensive work would need to be done to assess the impacts of the much larger taking of water, the Tribunal decided that OMYA should be required to submit a new application to MOEE under the OWRA for Phase 2 of the PTTW. The Tribunal decision also notes that MOEE's SEV indicates that it does not apply to instruments issued by the ministry. However, the Tribunal held that the SEV should be considered each time an application for a PTTW is considered by MOEE. **Date of Appeal Decision:** February 19, 2002

Parties and Date of Leave Application	Description of Grounds for Leave to Appeal	Decision on Leave Application and Decision Date	Status/Final Outcome
Registry #IA00E0584 **Applicants:** Town of Erin **Ministry:** MOEE **Proponent:** Aquaterra Corporation **Date Application received by ECO:** August 1, 2001 **Instrument:** PTTW, s. 34, *OWRA* **Tribunal**: ERT	The applicant sought leave to appeal the decision to issue the PTTW. The grounds for seeking leave included the following: there is inconsistency in how much water-taking is allowed as the posted decision notice indicates 432,000 litres per day while the actual permit indicates 225,000 litres per day; the proponent continued to take water despite the fact its earlier permit had expired; Aquaterra did not participate in a groundwater protection study conducted by the applicant; there was a long delay between the application and the approval; and it is questionable whether MOEE reviewed the application in the full context of water-taking in the Town of Erin and the Credit Valley Watershed.	The Tribunal denied the leave to appeal application after determining that the test for leave to appeal had not been satisfied by the Applicants. The Tribunal determined that there were problems with the Environmental Registry notice with respect to the quantity of water the Ministry of the Environment was permitting the proponent to take. The Tribunal held that this created confusion and that the notice should have been amended to correct the discrepancy. The Tribunal found the Director acted reasonably in renewing the proponent's PTTW, as there had been no "previous experience" of harm to the environment as a result of the previous water taking, and there was no prediction of future environmental harm. Moreover, the Director lacked the authority to ask the proponent to participate in the Town's groundwater protection study or to impose a five cent levy on each litre of water extracted. **Date of Leave Decision:** September 20, 2001	Leave to appeal denied.

Parties and Date of Leave Application	Description of Grounds for Leave to Appeal	Decision on Leave Application and Decision Date	Status/Final Outcome
Registry #IA8E1129 **Applicants:** Charles and Daphne Maurer et al. **Ministry:** MOEE **Proponent:** Lafarge Construction Materials **Date Application received by ECO:** September 12, 2001 **Instrument:** Certificate of Approval (C of A), s. 9, *EPA* **Tribunal**: ERT	The applicants sought leave to appeal the decision to issue a C of A amendment to permit the operation of a portable crushing plant 24 hours a day. The grounds for seeking leave to appeal the approval include the following: no input from the public was sought prior to granting approval to extend the hours of the portable rock crushing plant from 12 to 24 hours a day; and the quarry is located close to residential developments, and the noise and dust from the crusher is very disturbing to the neighbouring homeowners.	The Environmental Review Tribunal decided that it had no jurisdiction to hear the applications for leave to appeal, as the decision notice was posted on the Registry in error, and there was actually no decision available to be appealed. The initial request for the amended Certificate of Approval was withdrawn in October, 1998 by the proponent. Due to ministry oversight, no decision notice indicating that Lafarge had withdrawn its application was placed on the Environmental Registry until August 30, 2001. The decision notice stated that the amendments to the C of A had been granted, rather than stating that the application for the amendment had been withdrawn. The Tribunal noted that it was unfortunate that time and resources were spent on this matter as a result of the erroneous Registry notice. **Date of Leave Decision:** September 20, 2001	No jurisdiction.

Parties and Date of Leave Application	Description of Grounds for Leave to Appeal	Decision on Leave Application and Decision Date	Status/Final Outcome
Registry #IA00E0769 **Applicants:** John Niddery **Ministry:** MOEE **Proponent:** Mark Rich Homes Ltd. c/o Hawk Ridge Golf & Country Club **Date Application received by ECO:** October 18, 2001 **Instrument:** PTTW, s. 34, *OWRA* **Tribunal**: ERT	The applicant sought leave to appeal the decision to issue the PTTW for irrigation of golf course greens. The grounds for seeking leave included the following: Silver Creek is the main headwater tributary of the North River and is experiencing severe environmental harm from urban stormwater, agricultural drains, sewage discharges and leachate from the closed Orillia Township landfill site; MOEE did not have or consider baseline data for Silver Creek, such as discharge rates, temperature variables or biological inventories in deciding to approve the PTTW; and MOEE did not take into consideration the impact of reduced flow rates on water quality standards of landfill leachate and sewage discharges.	The Environmental Review Tribunal denied the Leave to Appeal application. The Tribunal held that MOEE exercised reasonable care and thought in making its decision to renew the PTTW, including a site visit and special conditions related to low flow conditions. Prior to renewing the PTTW, MOEE looked at cumulative effects and the Tribunal was satisfied that there are no discharges to Silver Creek which would impact negatively on its water quality during low flows, and that stormwater and effluent discharges from new developments will be adequately reviewed and controlled by the ministry. This permit was not posted on the Registry in a timely manner: the renewal permit was issued in July 2000 but the decision notice was not posted until Oct.2001. While the Tribunal recognized the exceptional demands on the London office because of the Walkerton tragedy, it noted that this leave application exemplified the negative public reactions to delays, and assumed that corrective measures would be put in place in future. **Date of Leave Decision:** November 27, 2001.	Leave to appeal denied.

Parties and Date of Leave Application	Description of Grounds for Leave to Appeal	Decision on Leave Application and Decision Date	Status/Final Outcome
Registry #IA00E1721 **Applicants:** Bonnie Mabee et al. **Ministry:** MOEE **Proponent:** Belican Holdings Ltd. **Date Application received by ECO:** October 31, 2001 **Instrument:** C of A, s. 9, *EPA* **Tribunal**: ERT	The applicants, who reside near the quarry operated by the proponent, sought leave to appeal the decision to issue the C of A for silica dust emissions from a mobile rock crushing system. The grounds included the following: the hours of operation included in the proponent's application for approval were 7:00 AM to 7:00 PM Monday to Friday and 7:00 AM to 1:00 PM Saturday, but the hours of operation set in the terms and conditions of the approval are 7:00 AM to 7:00 PM, Monday to Saturday; the approval does not include a condition prohibiting operation on statutory holidays; and the proponent provided a noise impact statement recommending that noise caused by drilling operations be abated but the approval does not include conditions related to drilling.	The Environmental Review Tribunal denied the Leave to Appeal application. The Tribunal held that: the noise experienced at the Applicants' residences does not exceed the provincial guidelines which permit 45 dBA (ambient background levels for noise) during the day and 40 dBA at night; it was not harmful to the environment or unreasonable for the Director to allow six hours of operation on Saturday, but to choose not to exercise his discretion to specify the exact hours of operation; and the Director fulfilled his responsibility to consider MOEE's Statement of Environmental Values by requiring Belican to provide a noise impact assessment and ensuring it followed the guidelines. Also, the Tribunal was not persuaded that the Director acted unreasonably by failing to prohibit operations on statutory holidays or that such operations would result in significant harm to the environment. **Date of Leave Decision:** December 21, 2001	Leave to appeal denied.

Parties and Date of Leave Application	Description of Grounds for Leave to Appeal	Decision on Leave Application and Decision Date	Status/Final Outcome
Registry #IA9E1752 **Applicants:** Selena Walker on behalf of the Goulbourn Wetland Group **Ministry:** MOEE **Proponent:** Thomas Cavanagh Construction Ltd. **Date Application received by ECO:** January 2, 2002 **Instrument:** PTTW, s. 34, *OWRA* **Tribunal**: ERT	The applicant sought leave to appeal the decision to issue a PTTW for a proposed quarry due to concerns about the impact of the proposed development on wetlands in the area. The grounds for seeking leave included the following: the proponent intends to discharge water to an excavated ditch that may adversely affect provincially significant wetlands; the proponent's willingness to participate in voluntary water monitoring is an indication that there is a lack of information on the cumulative impacts to ground and surface water; it is impossible to determine the cumulative effect of water takings in the area; and MOEE has not followed the principles and goals of the *EBR*, or the values outlined in MOEE's and MNR's SEVs.	The Environmental Review Tribunal denied the Leave to Appeal application. The Tribunal held that the permit holder provided sufficient information and specific conditions were included in the PTTW relating to monitoring and triggers to ensure that the environment will be protected. In response to the applicant's contention that MOEE had not adhered to its SEV, the MOEE Director stated that only those portions of the SEV that are incorporated into O. Reg. 285/99, the *OWRA* and the PTTW policies are applicable. While MOEE's SEV, on its face, indicates that it does not apply to "instruments" issued by MOEE, it is the Tribunal's view that this narrow interpretation is inconsistent with the *EBR*. However, the Tribunal believed that the Director had done sufficient work and his decision to issue the permit was reasonable. The Director also included a number of conditions to ensure that the surface water would not pose a significant harm to the environment. **Date of Leave Decision:** February 11, 2002	Leave to appeal denied.

Parties and Date of Leave Application	Description of Grounds for Leave to Appeal	Decision on Leave Application and Decision Date	Status/Final Outcome
Registry #IA00E1795 **Applicants:** Selena Walker on behalf of the Goulbourn Wetland Group, and Ken McRae on behalf of Friends of the Jock River. **Ministry:** MOEE **Proponent:** R. W. Tomlinson Ltd. **Date Application received by ECO:** January 2, 2002 **Instrument:** PTTW, s. 34, *OWRA* **Tribunal**: ERT	The applicants sought leave to appeal the decision to issue a PTTW for a proposed quarry due to concerns about the impact of the proposed development on wetlands in the area. The grounds for seeking leave included the following: the proponent intends to discharge water to an excavated ditch that may adversely affect provincially significant wetlands; the proponent's willingness to participate in voluntary water monitoring is an indication that there is a lack of information on the cumulative impacts to ground and surface water; it is impossible to determine the cumulative effect of water takings in the area; and MOEE has not followed the principles and goals of the EBR, or the values outlined in MOEE's and MNR's SEVs.	The Environmental Review Tribunal denied the Leave to Appeal applications. The Tribunal held that while there are information gaps in the ministry's knowledge of the potential impacts on the watershed, all of the agencies involved in the licensing of the quarry had "endeavored to obtain and use all available information". The Tribunal found that MOEE did not act contrary to existing government policies or its SEV. The reason for the discrepancy between Tomlinson's consultant's report and the maximum water taking allowed in the PTTW is the result of the PTTW being issued for the maximum rate of water taking i.e. the amount taken at the final stage of the quarry's development in the wettest season. The Tribunal held that this was "a conservative or precautionary approach, as it represents the maximum potential impact on the natural environment." **Date of Leave Decision:** February 12, 2002	Leave to appeal denied.

Parties and Date of Leave Application	Description of Grounds for Leave to Appeal	Decision on Leave Application and Decision Date	Status/Final Outcome
Registry # IA01E0231 **Applicants:** Dorothy Greig, Lynda Lukasik, Zen Matwiyiw **Ministry:** MOEE **Proponent:** Horseshoe Carbon Inc. **Date Application received by ECO:** March 28, 2002 **Instrument:** C of A, s. 9, *EPA* **Tribunal**: ERT	The applicants are seeking leave to appeal the decision to issue a C of A to extend its deadline for source testing by 180 days and to allow for the installation of a new wet scrubber. They are seeking leave as a means of raising their concern that approval under Part V of the *EPA* (which applies to waste disposal or management sites) was not required for this site. The applicants submit that they were not given the opportunity to raise concerns about the application of Part V of the *EPA* and that the decision to not require a Part V approval was made by MOEE staff. They also submit that, despite repeated requests, they have not received an adequate response to their inquiries regarding the lack of details relating to the operation of the Horseshoe Carbons facility.	The Environmental Review Tribunal denied the Leave to Appeal application. The Tribunal held that the Director acted unreasonably in drafting conditions to the C of A. The Director failed to consider whether the handling and storage of the spent carbon could be a source of contaminants and should have been the subject of conditions in the C of A. The Tribunal held that the Director should have assessed the risk resulting from the storage and handling of waste, which would have addressed the Applicants' ongoing concerns about the facility. However, the Tribunal held that the Applicants failed to provide evidence that the unreasonableness of the Director would result in significant harm to the environment. As a result, the Applicants did not meet the test established for leave to appeal under the *EBR*. **Date of Leave Decision:** July 16, 2002	Leave to appeal denied.

SECTION 7

EBR COURT ACTIONS

EBR COURT ACTIONS
April 1, 2001 to March 31, 2002

Parties and Date of Claim	Description of Grounds for Claim	Status/Final Outcome
Registry #CQ7E0001.P **Plaintiff:** John Hollick **Defendant:** Corporation of the Municipality of Metropolitan Toronto (now City of Toronto) **Date Statement of Claim Issued:** February 3, 1997 **Type of Action:** Public nuisance action, s. 103, *EBR* **Court Location:** Superior Court of Justice, Whitby	The plaintiff launched a class action against Toronto over pollution caused by the Keele Valley Dump. The plaintiff alleged that residents of Maple and Richmond Hill have been subjected to methane and other noxious gases, debris and noise from the dump for many years. The plaintiff claimed $500 million in compensatory damages, $100 million in punitive damages and an injunction preventing Toronto from continuing to pollute the local environment.	Class action not certified. The court action was originally certified as a class proceeding in the Ontario Court of Justice (General Division) on March 30, 1998. The defendant successfully appealed this decision to the Divisional Court, which ruled on December 17, 1998. The plaintiff then appealed to the Ontario Court of Appeal. The plaintiff's appeal was dismissed in a decision released on December 16, 1999, in which the Court of Appeal held that there was no common issue to justify the certification as a class action because the individuals' "lives have been affected, or not affected, in a different manner and degree." In September 2000, the plaintiff received leave to appeal for this decisions to the Supreme Court of Canada (SCC). The ECO intervened in this appeal before the SCC as a friend of the court. The appeal was heard by the court on June 13, 2001. In October 2001 the Supreme Court of Canada dismissed the appeal, stating that the action could not be certified to proceed as a class action. For more information on the SCC decision see p. 139 in the annual report.

Parties and Date of Claim	Description of Grounds for Claim	Status/Final Outcome
Registry #CQ7E0001.P **Plaintiff:** Shirley Wallington Grace **Defendants:** Corporation of the Town of Fort Erie and the Regional Municipality of Niagara **Date Statement of Claim Issued:** August 22, 1997 **Type of Action:** Public nuisance action, s. 103, *EBR* **Court Location:** Superior Court of Justice, Welland	The plaintiff has begun a class action proceeding against her local municipality, which operates a municipal water system, and her regional municipality, which owns and operates the water treatment plant that supplies Fort Erie's water system. The plaintiff alleges that the water supplied to residents is frequently contaminated by iron rust and is also contaminated by microorganisms present at levels that exceed the Ontario Drinking Water Objectives and the Guidelines for Canadian Drinking Water Quality. The plaintiff claims that the contaminated water is a nuisance, and makes a number of other claims against the defendants. The plaintiff claims $30 million in damages and an injunction preventing the defendants from adding corrosion inhibitors to the water they supply.	Action pending. Certification motion is expected to be heard in August 2002.
Registry #CQ8E0001 **Plaintiffs:** Karl Braeker, Victoria Braeker, Paul Braeker and Percy James **Defendants:** Her Majesty the Queen in Right of Ontario, 999720 Ontario Limited, and Max Heinz Karge	The plaintiffs live next to property owned by the defendant Karge, located in Egremont Township in the County of Grey. The plaintiffs claim that the property is the site of an illegal waste dump and that substances emanating from the site are contaminating or will imminently contaminate the subsoil, groundwater, and surface water in the	Action pending. The parties are currently completing the discovery process. Notice was approved by the court and placed on the Registry on December 23, 1999.

Parties and Date of Claim	Description of Grounds for Claim	Status/Final Outcome
Date Statement of Claim Issued: July 27, 1998 **Type of Action:** Harm to a public resource action, s. 84, *EBR* **Court Location:** Superior Court of Justice, Grey County (West Region)	surrounding vicinity, including the plaintiffs' well water. They claim that the defendants are responsible for this contamination. The damages sought by the plaintiffs include: an injunction preventing the use of the property for any use other than rural uses; an environmental restoration plan to prevent, diminish or eliminate harm to a public resource caused by contaminants emanating from the waste dump and to restore the site to its prior condition; and damages in excess of one million dollars.	
Registry #CQ9E0001 **Plaintiffs:** John Brennan and Lynn Brennan **Defendant:** Board of Health for the Simcoe County District Health Unit **Date Statement of Claim Issued:** June 16, 1999 **Type of Action:** Public nuisance action, s. 103, *EBR* **Court Location:** Superior Court of Justice, Barrie	The plaintiffs claim that the defendant breached its duty of care to them and was negligent by issuing certificates of approval for sewage systems at two chalets at the Snow Valley ski resort when the sewage system designs were substandard and incapable of handling the intended loads on the systems. The plaintiffs maintain that this breach has caused a nuisance and is polluting the plaintiffs' property, resulting in unsafe water, environmental damage and reduced property values. The plaintiffs allege that the defendant should not have issued the Certificate of Approval and rely on the *Ontario Water Resources Act*, the *Environmental Protection Act*, the *Health Promotion and Protection Act* and their	The plaintiffs also made a claim under s. 84 of the *EBR* (harm to a public resource). This has not yet been posted on the Registry, pending court approval of notice of the action under s. 87 of the *EBR*. In July 2002, the ECO did not receive a response to inquiries regarding the status of the action.

Parties and Date of Claim	Description of Grounds for Claim	Status/Final Outcome
	regulations, but do not allege that the defendant has contravened a specific environmental law. The plaintiffs claim full compensation for their losses.	
Registry #CQ01E0001 **Plaintiff:** Wilfred Robert Pearson **Defendants:** Inco Limited, The Corporation of the City of Port Colborne, The Regional Municipality of Niagara, The District School Board of Niagara, and The Niagara Catholic District School Board **Date Statement of Claim Issued:** 2001/03/26 **Type of Action:** Public nuisance action, s. 103, *EBR* **Court Location:** Superior Court of Justice, Welland	The plaintiff maintains that the defendant has and does emit and discharge hazardous contaminants into the natural environment, including the air, water and soil of Port Colborne. The contaminants include oxidic, sulphidic and soluble inorganic nickel compounds, copper, cobalt, chlorine, arsenic and lead. The plaintiff claims that the defendant is liable for the activities at the refinery and the ongoing release of contaminants into the environment and onto the lands of the class members, based on the following causes of action: negligence; nuisance; public nuisance under s. 103 of the *EBR*; trespass; discharging contaminants with adverse effects under s. 14 of the *EPA*; and the doctrine of strict liability in *Rylands and Fletcher*. The plaintiff claims punitive and exemplary damages in the amount of $150 million, and compensatory damages in the amount of $600 million.	The certification motion was heard in June 2002. In a judgment dated July 15, 2002, the Ontario Superior Court of Justice dismissed the plaintiff's certification motion on the following grounds: the plaintiff failed to disclose a reasonable cause of action against the Region, the City or the Crown; there was no identifiable class; and a class proceeding is not the preferable procedure for resolving the issues found to be common among the class members. As of July 2002, counsel for the plaintiffs had not filed an appeal of the decision of the motions judge.

SECTION 8

THE HISTORY OF THE *FISHERIES ACT* IN ONTARIO

The History of the *Fisheries Act* in Ontario

The *Fisheries Act* is one of the most important pieces of environmental legislation in Canada. For environmental managers, two of its provisions are particularly significant: sub-section 35(1), which prohibits any unauthorized work or undertaking that results in the harmful alteration, disruption or destruction of fish habitat, and sub-section 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.

The *Fisheries Act* was enacted by the federal government in 1868. The primary goal of the Act is to protect fish and fish habitat, and the pollution prevention sections are regarded as the federal government's most powerful weapon for protecting the aquatic environment. Indeed, one observer likens the Act to a "gorilla in the closet" that mostly roars in the background, but sometimes is trotted out by federal officials to remind provincial officials that they must properly enforce their own water protection legislation. 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 amount of the substance found in the water actually harmed fish.

The Ontario Government assumed responsibility for *Fisheries Act* enforcement in the 1975 when seven provincial governments negotiated a series of agreements on enforcement of the Act with Environment Canada. The Ministry of Environment and Energy launched its first successful *Fisheries Act* prosecution in 1977. Later that same year, principal administrative responsibility for the pollution prevention provisions of the Act was divided between two federal agencies, Environment Canada and the Department of Fisheries and Oceans (DFO), when the latter agency was created. After implementation of the 1975 Canada-Ontario agreement on *Fisheries Act* enforcement, federal prosecutions declined to "near insignificance" in Ontario. Similar patterns were noted in other provinces.

Throughout the late 1970s and the 1980s, MOEE and the Ministry of Natural Resources sought to ensure that a consistent approach was taken to enforcement of water pollution laws. With respect to chemical discharges, MOEE and MNR appear to have assumed that the *Ontario Water Resources Act (OWRA)* was just as effective as the *Fisheries Act*. This pro-*OWRA* theory was supported by dozens of successful *OWRA* prosecutions launched after MOEE bolstered its enforcement capacity in the mid-1980s and created the Investigations and Enforcement Branch (IEB).

Ontario's agreement with federal agencies on *Fisheries Act* enforcement was renegotiated in 1989. This revised agreement established MNR as the lead enforcer of the Act, but failed to clarify how s. 36(3) would be enforced, given MNR's lack of capacity to monitor and abate chemical pollution. Nevertheless, in signing the agreement MNR took on lead responsibility for enforcing s. 36(3). Shortly after this, MNR undertook more aggressive enforcement of the *Fisheries Act*, as reflected in reports prepared for DFO by

MNR staff. However, the courts often levied small fines for *Fisheries Act* contraventions, and prosecutions proved costly.

Despite the 1989 agreement, the federal government provided no funding to support MNR's enforcement activities. In the wake of cutbacks at all levels of government, MNR decided in August 1997 to return responsibility for enforcing s. 35(1) to the federal government. Nevertheless, MNR stated in a September 1997 press release that it would continue to enforce other provisions of the *Fisheries Act*, including s. 36(3). Shortly after this announcement, the ECO stopped forwarding applications for investigations alleging contraventions of s. 35(1) to MNR. In some cases, applicants were referred to the Federal Commissioner of Environment and Sustainable Development. In others, the ECO referred applicants concerned about contraventions of s. 35(1) to the DFO. To its credit, DFO rebuilt its capacity and hired dozens of biologists to enforce s. 35(1).

(See pages 58 - 59 of the 2001/2002 ECO annual report for a full discussion of the *Fisheries Act* and the *Ontario Water Resources Act* in Ontario.)

SECTION 9

Summary of ECO Reviews of Applications for Investigation Alleging *Fisheries Act* Contraventions 1996-2001

SUMMARY OF ECO REVIEWS OF APPLICATIONS FOR INVESTIGATION ALLEGING *FISHERIES ACT* CONTRAVENTIONS

1996-2001

Updated to August 2001

This table summarizes applications for investigations made under the *EBR* alleging contraventions of the *Fisheries Act*. This table covers the period between April 1, 1996, and March 31, 2001. Applications for investigation alleging contraventions in the 2001/2002 reporting period are reviewed in Section 5 of this Supplement.

In September 1997, the Ministry of Natural Resources transferred lead responsibility for enforcement of s. 35(2) of the *Fisheries Act* back to the federal Department of Fisheries and Oceans (DFO). After this date, the ECO forwarded information about alleged contraventions of s. 35(2) to the DFO or encouraged applicants to forward information to the DFO or petitions established under the federal *Auditor General Act* to the federal Commissioner for Environment and Sustainable Development.

This information is intended to support the analysis of *Fisheries Act* enforcement presented on pages 57-63 of the ECO's 2001/2002 annual report.

NOTE: An allegation contained in an application may or may not have been proven to be an offence under the laws of Ontario or Canada.

Date Filed, Date of Ministry Decision, Investigation Number	Alleged Contravention(s) of the *Fisheries Act*	Investigation Outcome	ECO Comment
Filed: 1996 **Decision: 1997** **#I96011**	The applicants alleged that runoff from an iron ore mine was a deleterious substance, and s. 36(3) of the *Fisheries Act* was contravened by the ongoing discharges. The owner of the site had obtained approval for its mine closure plan from the Ministry of the Environment and Energy (MOEE) and the Ministry of Northern Development and Mines (MNDM) in 1995.	The Ministry of Natural Resources (MNR) did the investigation and concluded that they didn't think that s. 36(3) of the *Fisheries Act* was contravened, solely because sampled effluent has not exceeded the levels of contaminants allowed in the mine closure plan. MNR stated that it has confidence in the ability of the mine closure plan approved in 1995 to protect the environment and further, that the conditions of the closure plan were deemed acceptable to protect fish habitat. As a result, MNR's investigation file was closed.	MNR's conclusion -- that there was no contravention solely because MOEE's sampled effluent had not exceeded the levels of contaminants allowed in the mine closure plan – was improper and legally incorrect. MNR should have carried out its own investigation, over and above MOEE's water quality testing, to determine whether the *Fisheries Act* was contravened.
Filed: 1996 **Decision: 1996** **#I96014**	Alteration of a riverbank causing increased silting, erosion and flooding on the applicants' property and destruction of fish habitat.	MNR investigated and concluded that the alteration is in violation of the federal *Fisheries Act*. MNR decided to prosecute for violations of s. 35(1) and s. 36(3) of the federal *Fisheries Act*.	This was an application success story. MNR initiated a prosecution under the federal *Fisheries Act* and withdrew the charges after the alleged contravener agreed to rehabilitate the stream back to its original condition.

Date Filed, Date of Ministry Decision, Investigation Number	Alleged Contravention(s) of the *Fisheries Act*	Investigation Outcome	ECO Comment
Filed: 1997 **Decision: 1998** **#I97019**	The applicants alleged that a waste site had been improperly expanded, and the proponent had: -Failed to apply for a permit prior to receiving fill. The fill was alleged to have contained contaminants. -Failed to manage other waste sites and these were expanding into a provincially significant wetland	MNR conducted an investigation, and determined that the work conducted did not contravene the federal *Fisheries Act*, as the filling had not impacted on any natural watercourse.	The ministry was justified in denying an investigation of the alleged contraventions of the *Fisheries Act.* MNR's investigation failed to address the allegations about contraventions of the *Conservations Authorities Act*, and the applicants' concerns about other waste sites expanding into wetlands

Date Filed, Date of Ministry Decision, Investigation Number	Alleged Contravention(s) of the *Fisheries Act*	Investigation Outcome	ECO Comment
Filed: 1998 **Decision: 1998** **#I98014 and #I98018**	The applicants alleged that various forest operations were in contravention of the *Crown Forest Sustainability Act*, the *Public Lands Act* and the federal *Fisheries Act*. They alleged that skid trails were constructed close to sensitive headwater watercourses. Note: the applicants alleged the same contraventions in two Townships, Schembri and Sherratt. Therefore MNR conducted only one investigation for both applications.	MNR's investigation confirmed most of the observations of the applicants, and also acknowledged that several contraventions had occurred. MNR staff recommended enforcement action at one of the four sites, and recommended policy/procedural changes to address problems found at the other three sites. MNR concluded that the *Fisheries Act* was not contravened because there were no apparent harmful alterations at the site and changes in the stream were minor. MNR also claimed that it was unlikely that the deposited material was harmful to aquatic life.	It is unclear if MNR was justified in refusing to prosecute these alleged contraventions of the *Fisheries Act.* Similar types of incidents have been prosecuted by MNR in other areas of Ontario, and by DFO in other provinces such as BC. The investigation also raised questions about the adequacy of existing forestry inspection/compliance procedures. MNR's compliance approach assumes that inspection staff has extensive experience and expertise with local forest conditions and with recent forestry practices of the licensee -- assumptions that may be unrealistic, given MNR's reduced staff resources

Date Filed, Date of Ministry Decision, Investigation Number	Alleged Contravention(s) of the *Fisheries Act*	Investigation Outcome	ECO Comment
Filed: 1998 **Decision: 1998** **#I98022**	Ongoing discharges from a graphite mine site adjacent to Algonquin Park	In 1998, MNR denied the application, noting that the Graphite Lake Mine site has undergone extensive review over the past several years by several ministries. MNR also notes that long-range remedial plans are also being developed. In 1999, MOEE issued several control orders against the site owner, International Graphite Inc. of Kearny.	The ministry was justified in denying the application. By doing so it avoided duplicating an ongoing investigation. Note: In late 2000, MOEE launched an *OWRA* prosecution related to the ongoing contraventions at the site. In May 2002, International Graphite was fined $55,000 plus a 25 per cent victim surcharge.
Filed: 1999 **Decision: 1999** **#I99003, #I99007, #I99009**	Construction of a road and diversion of water Also alleged contravention of the *Conservation Authorities Act*, however the *Fisheries Act* is the only one summarized here	MNR decided not to conduct investigations. With regard to the federal *Fisheries Act* violations, MNR notes that it no longer enforces the habitat protection provisions (s.35) of the federal *Fisheries Act* on behalf of the federal government.	MNR's rationale for not investigating the *Fisheries Act* violations is valid.

Date Filed, Date of Ministry Decision, Investigation Number	Alleged Contravention(s) of the *Fisheries Act*	Investigation Outcome	ECO Comment
Filed: 1999 **Decision: 1999/2000** **#I99005, #I99011, #I99013**	Construction of a road and inadequate sewage systems	MNR decided not to conduct an investigation as it no longer enforces the habitat protection provisions, s.35(2), of the federal *Fisheries Act* on behalf of the federal government.	MNR's rationale for not investigating alleged contraventions of s. 35(2) of the *Fisheries Act* is valid. MNR's assurance to the applicants that MNR staff will consider their concerns during approval of the area's Secondary Plan is helpful.
Filed: 1999 **Decision: 1999** **#I99021**	The applicants alleged that the accused companies contravened the *Crown Forest Sustainability Act* and the *Fisheries Act* by causing removal or disruption to forest protection areas and possible damage to fish habitat.	Potential contraventions of the *Fisheries Act* may have occurred. MNR conducted an initial survey of the alleged actions, which indicated that potential contraventions may have occurred. MNR stated in its investigation report that staff would forward this information to the Department of Fisheries and Oceans (DFO). It is unclear why MNR didn't investigate alleged contraventions of s. 36(3) of the *Fisheries Act.*	In this case, MNR carried out a thorough investigation and took appropriate action to address the contraventions that were verified by its investigations unit. The ECO was encouraged that MNR has responded positively to this application for investigation by taking steps to strengthen its Forest Compliance Program. MNR's rationale for not investigating alleged contraventions of s. 35(2) of the *Fisheries Act* was not valid.

Date Filed, Date of Ministry Decision, Investigation Number	Alleged Contravention(s) of the *Fisheries Act*	Investigation Outcome	ECO Comment
Filed: 1999 **Decision: 1999** **#I99019**	Damage to water table, wetland and woodlot	The ministry concluded that there was no contravention of either the *Aggregate Resources Act* or the *Fisheries Act*. MNR concluded that there had been no excavation below the water table Therefore, MNR concluded that no damage had been done to the cold-water streams.	The ECO concluded that MNR's investigation of the alleged *Fisheries Act* violation was commendable, as MNR has recently simply referred such allegations to the federal Department of Fisheries and Oceans.
Filed: 1999 **Decision: 2000** **#I99024**	Mine tailings from the abandoned Kam Kotia mine site causing water pollution.	MNR conducted the investigation but did not answer the fundamental question of whether or not *Fisheries Act* violations are occurring. MNR said it would continue to sit with MOEE and MNDM on the inter-ministerial committee that manages and monitors the Kam Kotia site.	It was unacceptable for MNR to refuse to tell the applicants whether or not the *Fisheries Act* is being contravened. When the ECO followed up with MNR, the ministry also failed to directly answer an ECO question about the alleged contravention. It is interesting to note that had there been a contravention, the ministry would have had to bring charges against itself.

Date Filed, Date of Ministry Decision, Investigation Number	Alleged Contravention(s) of the *Fisheries Act*	Investigation Outcome	ECO Comment
Filed: 1997 **Decision: 2000** **#I97007, #I97009, #I97013**	Deposit of a deleterious substance into water frequented by fish.	MNR's investigation took nearly three years. MNR's investigative report concluded that: 1) copper and zinc do not pose a serious threat to local aquatic organisms; 2) with existing data and scientific knowledge, it would "not be possible to demonstrate, beyond a reasonable doubt, that the discharge of copper and zinc had, or is likely to have a negative effect on local aquatic organisms"; 3) reasonable doubt as to whether the discharged metals constituted a "deleterious substance" as defined by the *Fisheries Act.*	It is the opinion of the ECO that Ontario Hydro should have been prosecuted for contravention of section 36(3) of the *Fisheries Act*. ECO remains concerned with the excessive length of time taken (almost three years) for MNR to complete its investigation. The ECO supports MNR's decision to undertake an investigation, but finds the scope of the investigation and the investigative report produced to be less than adequate.

Date Filed, Date of Ministry Decision, Investigation Number	**Alleged Contravention(s) of the *Fisheries Act***	**Investigation Outcome**	**ECO Comment**
Filed: 2000 **Decision: 2001** **#I2000004**	Permitting the storage and dumping of potentially hazardous waste (including petroleum hydrocarbons) at the Golden Valley landfill site	MNR decided an investigation into the alleged *Fisheries Act* contraventions would not be undertaken by the ministry. For the purposes of Section 75 of the *Environmental Bill of Rights*, MNR is no longer responsible for the administration of the *Act* with respect to pollutants of a chemical nature. Application then was forwarded to MOEE. MOEE denied the investigation request, applying the *EPA* standard for Section 14, which stipulates that an investigation is warranted if the evidence demonstrates "adverse effects beyond a reasonable doubt."	MOEE's handling of this application was inadequate. The ECO has concluded that MOEE misinterpreted the *Fisheries Act* by inappropriately applying the *EPA* standard of proof for Section 14. In contrast, the *Fisheries Act* requires only that prosecutors show that the discharged substance was deleterious and could have harmed fish or fish habitat.

SECTION 10

Summary Charts and Environmental Assessment Information

Supporting Section 2.3 of Main Report

Introduction
Summary Chart to Support Section 2.3
Accountability and Transparency: Gaps in the System

Information on the following pages supports section 2.3 of this year's annual report. The charts on subsequent pages compare important public rights for participating in ministry decision making on environmentally significant instruments. The following terms are defined to help the reader understand the wording used in the comparisons.

Legislation

- ***EBR:*** *Environmental Bill of Rights*
- ***EAA:*** *Environmental Assessment Act*

Ministries and Organizations

- **EAAB**: MOEE's Environmental Assessment and Approvals Branch
- **ECO**: Environmental Commissioner of Ontario
- **MEA**: Municipal Engineers Association
- **MNR**: Ministry of Natural Resources
- **MOEE**: Ministry of Environment and Energy
- **MTO**: Ministry of Transportation
- **Proponent**: according to the *EAA* a person who carries out or proposes to carry out an undertaking, or is the owner or person having charge, management or control of an undertaking

Environmental Assessment (EA) Documents

- **MEA Municipal Class EA**: applies to municipal infrastructure projects including roads, water and waste water projects.
- **MNR Proposed Class EA for MNR Resource Stewardship and Facility Development Projects**: covers projects that MNR carries out on public lands and other resources as well as other activities such as the granting of rights to these public resources.
- **MNR Exemption Order MNR-26/7 – Disposition of Certain or All Rights to Crown Resources**: covers the granting by MNR of rights to public resources such as lands, lakebeds, shorelines and wildlife through such means as permits, licenses, approvals, or sale.
- **MOEE O. Reg. 116/01 and Guide to EA Requirements for Electricity Projects**: various public and private electricity proponents use these documents to plan for projects such as transmission lines, transformer stations, wind turbines, hydroelectric facilities, cogeneration and oil.
- **MTO Class EA**: covers the work of MTO or any proponent of work on the provincial transportation system including: projects on provincial highways and freeways, provincial transit ways and provincial ferry boats; and service, maintenance and operations projects to support provincial transportation facilities.

Streamlined EA Processes

The following definitions are provided since each ministry has developed the various project categories independently. For that reason the categories do not specifically relate to one another.

- **MEA Municipal Class EA – Schedule B Projects**: defined as municipal projects that have potential for some adverse environmental effects (generally improvements and minor expansions to existing facilities; proponent required to undertake a screening process and maintain a project file).
- **MNR Proposed Class EA for MNR Resource Stewardship and Facility Development Projects – Category B Projects**: projects screened into this category with the potential for low to medium negative environmental effects, and/or public or agency concern, must carry out a planning, consultation and documentation process.
- **MNR Exemption Order MNR-26/7 – Disposition of Certain or All Rights to Crown Resources**: unlike the other streamlined EA processes in this list there are no separate categories or schedules provided under the Exemption Order .
- **MOEE Electricity Regulation – Category B Projects**: these projects/activities include those with potentially mitigatable environmental effects; a screening process is used to confirm minimal effects or appropriate mitigation measures.
- **MTO Class EA - Group B Projects**: defined as major improvements to existing provincial transportation facilities.

Requesting Further Study

- **Elevation Request**: According to MOEE's Guide to EA Requirements for Electricity Projects, members of the public or agencies with outstanding environmental concerns may make written requests to the EAAB Director to elevate the project and thus require further study. This request may be made during the mandatory review period for reports prepared under the Environmental Screening Process. If members of the public are unsatisfied with the Director's decision, they can request that the Minister of the Environment review it.
- **Part II Order (also known as a bump-up)**: when the Minister of the Environment and Energy requires that a proponent must undertake more rigorous requirements of a project-specific ("individual") environmental assessment with more detailed environmental studies, public consultation and documentation. If concerns cannot be addressed during the individual EA process, the *EAA* provides an option for the public to request a hearing by an independent tribunal.

SUMMARY CHART - ACCOUNTABILITY AND TRANSPARENCY: GAPS IN THE SYSTEM

TRIGGER FOR PUBLIC CONSULTATION: When is Consultation Conducted? Who Decides?

Process → / Feature ↓	*EBR*	Municipal Class EA (Schedule B)	MTO Class EA (Group B)	MOEE's Electricity Regulation (Category B)	MNR Exemption Order 26/7	MNR Proposed Class EA (Category B)
Basis of Consultation	**Instrument**	**Project**	**Project**	**Project**	**Instrument or project**	**Instrument or project**
Does the Decision-maker Have Discretion Whether or Not to Consult?	**No**[1]	**No**	**Some Discretion**[2]	**No**	**Yes**[3]	**No**[4]
What is the Trigger(s) for Consultation?	A regulation lists "prescribed instruments" that are subject to consultation through the *EBR*	Consultation is required for the Class EA work but is not guaranteed for specific instruments	Consultation is required for developing project design concepts but is not guaranteed for specific instruments[5]	Commencement of Environmental Screening process for project. No trigger based on instruments	Usually applications for specific instruments – based on potential for significant adverse effects	Consultation may occur for proposed projects and/or specific instruments
Who makes the Decision Whether to Consult?	**Ministry** that is granting the approval[6]	**Proponent** who is planning the project	**Proponent** who is planning/designing the project	**Proponent** follows MOEE's guide; consultation occurs for every project type.	**MNR,** in planning a project or granting the approval (usually a specific instrument)	**MNR**, in planning a project[7] or granting the approval (usually a specific instrument)

[1] The *EBR* does not require consultation on revoking or amending an instrument if the minister considers that the effect of the amendment or revocation on the environment is insignificant.
[2] A Group B Project may be "stepped-down" to a Group C project in some cases. If a Group B Project is "stepped-down", the public consultation and public notice requirements are diminished
[3] Notice is required for a disposition project or instrument which, in the opinion of MNR, may have significant adverse effects on the environment.
[4] MNR evaluates projects based on a list of 44 criteria to determine environmental significance and the project category.
[5] Consultation is mandatory during the consideration of design concepts but may start at the planning stage.
[6] MOEE's instrument application forms request consultation information from the proponent.
[7] Applies to MNR planning a project on its own, or with a partner or partners.

SUMMARY CHART - ACCOUNTABILITY AND TRANSPARENCY: GAPS IN THE SYSTEM

PUBLIC NOTICE CHARACTERISTICS: What Type of Notice? What is the Geographic Extent of the Notice?

Process → / Feature ↓	*EBR*	Municipal Class EA (Schedule B)	MTO Class EA (Group B)	MOEE's Electricity Regulation (Category B)	MNR Exemption Order 26/7	MNR Proposed Class EA (Category B)
Is There Discretion Whether or Not to Provide Public Notice?	**No** – for prescribed instruments[8]	**No –** for project planning	**No –** for developing project design **Yes** – for project planning	**No**	**Yes**	**No**[9]
Type of Public Notice and How it is Provided	**Electronic Registry** – at minimum – available through the Internet[10]	**Newspaper Notice** – at minimum for 1st and 2nd notices **Mailed or Delivered 2nd Notice** – to those who have expressed interest	**Discretionary –** newspaper, brochures, posters, letters, "electronic means" or combination	**Mail** – to stakeholders[11] **Print** – newspaper notice where viable	**Not Specified** MNR procedure says staff will provide proponents with information about notification methods	**Mail** – at minimum for proposal notice and, if applicable, Notice of Completion[12]
Who Must Get Public Notice?	**All Registry Users** – have access to notices; in theory all Ontarians can review them[13]	**Local residents and public who has expressed interest** – at minimum; adjacent property owners and others as appropriate	**Public and Stakeholders most directly affected** – as defined by proponent	**Local residents; key stakeholders**[14]	**Public, ministries and agencies who may be affected or have an interest**, as determined by MNR District Manager	**Persons with known or potential interest** receive the proposal notice **Commenters** receive Notice of Completion if one issued

[8] The *EBR* does not require consultation on revoking or amending an instrument if the minister considers that the effect of the amendment or revocation on the environment is insignificant.
[9] If Category B, at least one public notice is required unless MNR issued a notice during its screening project to determine the EA Category.
[10] For some types of instruments (known as Class II) the *EBR* requires that the Ministry provide additional notice/opportunities to participate in the decision-making process. For Class III instruments a tribunal holds a hearing (additional notice is required).
[11] Stakeholders are: adjacent landlords and tenants; the MOEE EA Coordinator; other affected government agencies and municipalities; other potentially interested or affected parties (such as local interest groups, businesses, and members of the public that may be directly affected by some aspect of the project).
[12] If no concerns were raised, or if MNR considers that the concerns were resolved through conditions of approval, MNR may proceed with implementation.
[13] See footnote 10.
[14] See footnote 11.

SUMMARY CHART - ACCOUNTABILITY AND TRANSPARENCY: GAPS IN THE SYSTEM

CONTENT OF PUBLIC NOTICES: What is in a Notice? How Much Time For Public Comment?

Process → / Feature ↓	*EBR*	Municipal Class EA (Schedule B)	MTO Class EA (Group B)	MOEE's Electricity Regulation (Category B)	MNR Exemption Order 26/7	MNR Proposed Class EA (Category B)
Is Minimum Notice Content Specified?	**Yes –** for 2 notices (proposal and decision)	**Yes –** for the 2 mandatory notices	**Yes** – for any notices issued[15]	**Yes** – for both notices	**No –** Ex. Order **Yes** – in MNR Procedure	**Yes** – list of items a notice should include
Are Public Comments Invited?	**Yes** – for proposal notice	**Yes**	**Yes**	**Yes –** for 2nd notice comment period	**Yes**	**Yes** – for 1st notice and for Notice of Completion, if issued
Length of Comment Period for Required Notices	Proposal notice – **30 days** (minimum)	1st notice – **undefined** 2nd notice – **30 days –** includes option for requesting further study	Initial Notice and any Study Notices – **undefined** Notice of Submission **– 30 days –** can also include request further study	1st notice[16] – **undefined** 2nd notice – **30 days** (raise concerns or make elevation request for further study)	Proposal notice – **30 days** (minimum) No further comment period unless MNR voluntarily refers project to MOE	1st notice – **30 days** Notice of Completion, if issued – **30 days** – to comment or request further study
Is More Detailed Information Available?[17]	**Yes** – some notices include electronic links to proposed permits or approvals	**Yes**[18]	**Yes**[19]	**Yes –** may be mailed with notice, proponent may be contacted, public meeting (if held), or website.	**Not mentioned in Ex. O**., but available upon request according to MNR procedure	**Yes –** upon request

[15] MTO's Class EA specifies the contents of the Initial Notice, Study Notices, and Notice of Submission.
[16] The purpose of the first notice is to notify the public of the Commencement of an Environmental Screening Process for the proponent's project. MOEE's Guide does not require that the notice call for comments; it does however, require a contact name and address. There is no requirement for a duration or period to be specified in this notice.
[17] According to the *EBR*, Registry notices shall include a statement of where and when members of the public may review written information about the proposal. This material could include an application/supporting documents for a Certificate of Approval; baseline reports about air, water, land or community and the potential impacts to them; preliminary design and engineering reports.
[18] The Municipal Class EA states that the notices must contain details of when and where information is available to the public including the location and availability of the project file. The notice may also include references to any public meetings or workshops being held.
[19] MTO's Class EA states that the notices must contain details of how to participate and where information is available. There may be additional opportunities to participate through meetings, newsletters, presentations etc..

SUMMARY CHART - ACCOUNTABILITY AND TRANSPARENCY: GAPS IN THE SYSTEM

EFFECT OF PUBLIC COMMENTS: What Effect Does Public Comment Have on the Final Decision?

Process → / Feature ↓	*EBR*	Municipal Class EA (Schedule B)	MTO Class EA (Group B)	MOEE's Electricity Regulation (Category B)	MNR Exemption Order 26/7	MNR Proposed Class EA (Category B)
What Happens to Public Comments and Who Considers Them?	**Ministry** – to consider all comments relevant to proposal; process overseen by ECO	**Proponent** – to consider comments & attempt issue resolution if necessary	**Proponent** – to consider comments & make "reasonable efforts" to resolve concerns	**Proponent** – to take public input into account during project planning; to address issues and concerns[20]	**Ex. O says MNR District Manager** to discuss concerns **MNR Procedure** says proponent to resolve concerns	**MNR, partner or disposition applicant –** Consider public input; attempt to resolve concerns; consider results
Must the Decision-maker Explain the Effect of Public Comments on the Final Decision?	**Yes** – Decision Notice on the Environmental Registry shall explain effect of public comment on decision[21]	**Yes –** proponent's Project File must explain public consultation/ how any concerns were addressed	**Yes –** proponent's documentation is required to show how input received in earlier stages affected the project	**Yes –** proponent is to detail public consultation efforts in Screening Report[22]	**No –** there is no final notice MNR project files may contain documentation	**Yes - Notice of Completion** (if issued) must explain how comments were addressed. Project files should contain documentation

[20] Guideline is somewhat unclear on the effect of public comments on the decision. It does note that applicant's public consultation program should "address" public concerns and issues raised and "document" (in Screening Report) how public input is taken into account in the screening process and project planning/development. Only in discussing government agency comments does the Guideline state that issues need to be "suitably resolved."

[21] The ECO reviews instruments which receive public comment.

[22] A Screening Report shall include the following information: a summary of public and agency concerns or issues, and how they have been addressed or resolved.

SUMMARY CHART - ACCOUNTABILITY AND TRANSPARENCY: GAPS IN THE SYSTEM

APPEAL RIGHTS: Can the Public Appeal a Decision Before a Project Advances?

Process → / Feature ↓	*EBR*	Municipal Class EA (Schedule B)	MTO Class EA (Group B)	MOEE's Electricity Regulation (Category B)	MNR Exemption Order 26/7	MNR Proposed Class EA (Category B)
Can More Detailed Study be Requested Before a Decision is Made Whether or Not to Proceed?	**Minister has discretion**[23]	**Yes**[24]	**Yes**[25]	**Yes**[26]	**No**[27]	**Yes**[28]
Can the Public Appeal to a Tribunal?	**Yes in some cases**[29]	**Not usually**[30]	**No**[31]	**No**[32]	**No**	**No**

[23] The public can write to the Minister and request that the comment period be extended and that the ministry hold a public meeting or conduct mediation. The Ministry can request additional information from the proponent prior to granting approval.

[24] The public may request that proponent voluntarily conduct more study under Schedule C requirements of the Class EA or an individual EA, or the public may request a Part II Order from the Minister of the Environment.

[25] The public may request that the proponent voluntarily prepare an individual EA or may request that the ministry bump-up the project and require preparation of an individual EA.

[26] During the 30-day comment period provided by the 2nd notice, the public may make an Elevation Request to the EAAB Director; if unsatisfied with the Director's decision, the public may request that the Minister review that decision.

[27] Under *EAA* the public could ask MOEE to require further study or to designate the project (to un-exempt it) but this is not mentioned in the exemption order or included in MNR's notices.

[28] A member of the public may make a request to the Minister of Environment and Energy to elevate a project to a Category C or D.

[29] Where the proponent has an appeal right under another Act, the public has 15 days to request an appeal after the decision notice is posted on the Environmental Registry (appeal heard by bodies such as the Environmental Review Tribunal; Ontario Municipal Board etc.).

[30] Unless Class EA work is integrated with *Planning Act* requirements, in which case an appeal to the Ontario Municipal Board may be possible; or if the Minister of Environment and Energy (as a result of a bump-up request) requires that an individual environmental assessment apply, the public could request a hearing by an independent tribunal at the end of that process if issues remain unresolved.

[31] MTO's Class EA states that there is no mechanism for formal hearings due to consultation requirements and the bump-up provision contained within the Class EA.

[32] The public can request the EAAB Director to elevate the project i.e., for further study, or to an individual EA. Furthermore, the public can request the Minister to review the Director's decision. But the public cannot directly seek to appeal the decision before an independent tribunal.

SUMMARY CHART - ACCOUNTABILITY AND TRANSPARENCY: GAPS IN THE SYSTEM

TRACKING AND MONITORING: Does an Independent Public Authority Track and Compare Decisions After They are Made?

Process → / Feature ↓	*EBR*	MEA Class EA (Schedule B)	MTO Class EA (Group B)	MOEE's Electricity Regulation (Category B)	MNR Exemption Order 26/7	MNR Proposed Class EA (Category B)
How are Decisions Tracked?	**Environmental Registry** – all decisions posted[33]	**Notices of Completion** – submitted to EAAB for each project	**Yearly monitoring report** – submitted by MTO to EAAB	In the process of being established in 2002	Copies of all notices to be sent to MOEE and Central MNR Office[34]	MNR has proposed tracking and reporting mechanisms[35]
How Does One Find Out How Many Decisions Are Issued or Requests for Further Study Have Been Received?	**Search Environmental Registry** – for decisions[36]	**Make a Request to the EAAB** – Branch has information regarding Notices of Completion and request for Part II Orders	**Make a Request to MTO or EAAB** – regarding MTO's yearly monitoring report	**Make a Request to EAAB** – tabulation to be undertaken by EAAB and provided on an as requested basis	**Decisions - Make a Request to MNR or Request records of notices from EAAB** No opportunity for requests for further study	**Make a Request to MNR or MOEE** – Class EA proposes to require retention of records by MNR and submission of an Annual Report to MOEE
How is Compliance Monitored?	**Environmental Commissioner of Ontario** – yearly reports to the Provincial Legislature[37]	**Submission of Annual Reports to the MOEE** (EAAB)[38]	**Submission of Annual Reports**[39]	MOEE's Guide says that procedural requirements and commitments to mitigation will be monitored.	**MOEE** does not monitor compliance **MNR** does internal audits[40]	Class EA proposes to require **Annual Report to MOEE** – **MNR audits** may include checking for compliance with the Class EA

[33] The ECO reports annually on undecided proposals.
[34] Otherwise, documentation for each project found in individual project files at MNR District offices.
[35] Annual Reporting requirements will likely be part of Class EA requirements; Statements of Completion retained in the project file/sent to central MNR & MOEE offices.
[36] The ECO monitors public requests for enhanced public participation and reports to the Legislature.
[37] The ECO conducts a yearly process review to analyze the ministries' use of the Registry. The ECO also reviews in detail a selection of ministry decisions made regarding instruments.
[38] Annual monitoring reports to be submitted by MEA to EAAB beginning Oct./02. EAAB is still developing internal practices for processing this report and other reports submitted for Streamlined Class EA processes.
[39] MTO submitted its first monitoring report to EAAB in Dec/01. EAAB is still developing internal practices for processing this report and other reports submitted for Streamlined EA processes.
[40] MNR carried out audits of some types of dispositions in 2000/01 and 2001/02, which included checking for compliance with the Exemption Order.

SECTION 11
PROPOSALS POSTED APRIL 1, 2001 TO MARCH 31, 2002
WITH DECISION NOTICES PENDING
(AS OF JUNE 3, 2002)

Section 11 Undecided Proposals

As required by Section 58 of the *EBR*, the following are the number, by ministry, of proposal notices posted on the Environmental Registry between April 1, 2001 and March 31, 2002 for which decision notices had not been posted by June 3, 2002. A detailed list of these proposals is available upon request from the ECO as a separate appendix to this Supplement.

	Policies	Acts	Regulations	Instruments
MOEE	9	0	9	735
MEST	0	0	1	0
MNR	34	1	10	39
MTO	0	0	0	0
MCCR	0	0	0	8
MAH	1	3	1	30
OMAF	1	1	0	0
MHLTOC	1	0	0	0
MNDM	1	0	1	3
TSSA	0	0	0	8

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