Environmental Commissioner of Ontario

Engaging Solutions

2010/2011 Annual Report Supplement

ABBREVIATIONS

Legislation

BCA *Building Code Act, 1992*
CEAA *Canadian Environmental Assessment Act*
CFSA *Crown Forest Sustainability Act, 1994*
CIPA *Capital Investment Plan Act, 1993*
CWA *Clean Water Act, 2006*
EAA *Environmental Assessment Act*
EBR *Environmental Bill of Rights, 1993*
EPA *Environmental Protection Act*
ESA *Endangered Species Act, 2007*
FLSA *French Language Services Act*
FWCA *Fish and Wildlife Conservation Act, 1997*
GEA *Green Energy Act, 2009*
LSPA *Lake Simcoe Protection Act, 2008*
OFTMA *Ontario Forest Tenure Modernization Act*
ORMCA *Oak Ridges Moraine Conservation Act, 2001*
OWRA *Ontario Water Resources Act*
PPCRA *Provincial Parks and Conservation Reserves Act, 2006*
PSSDA *Public Sector Salary Disclosure Act, 1996*
SARA *Species at Risk Act*
SDWA *Safe Drinking Water Act, 2002*
SWSSA *Sustainable Water and Sewage Systems Act, 2002*
TRA *Toxics Reduction Act, 2009*
WOA *Water Opportunities Act, 2010*
WOWCA *Water Opportunities and Water Conservation Act, 2010*

Provincial Ministries

ENG Ministry of Energy
MMAH Ministry of Municipal Affairs and Housing
MNDM Ministry of Northern Development and Mines (former)
MNR Ministry of Natural Resources
MOE Ministry of the Environment
MOF Ministry of Finance
MRI Ministry of Research and Innovation

Terms and Titles

ADM Assistant Deputy Minister
AFA Algonquin Forest Authority
ANSI Area of Natural and Scientific Interest
BATEA best available technology economically achievable
CCL Community Conservation Lands
CCL Guide Conservation Land Tax Incentive Program Community Conservation Lands Guide
CCME Canadian Council of Ministers of the Environment
CDW Committee on Drinking Water
Class EA Class Environmental Assessment
Class EA RSFD Class Environmental Assessment for MNR Resource Stewardship and Facility Development
CLTIP Conservation Land Tax Incentive Program
CLTRP Conservation Land Tax Reduction Program
C of A Certificate of Approval
COA Canada-Ontario Agreement Respecting the Great Lakes Basin Ecosystem
COMRIF Canada-Ontario Municipal Rural Infrastructure Fund
COSEWIC Committee on the Status of Endangered Wildlife in Canada
COSSARO Committee on the Status of Species at Risk in Ontario
dBa decibels
ECO Environmental Commissioner of Ontario
EIS Environmental Impact Study
ENGO Environmental Non-Governmental Organization
ERT Environmental Review Tribunal
ESSFL Enhanced Shareholder Sustainable Forest License
FFT Forestry Futures Trust
FMP Forest management plan
FMU Forest Management Unit
FRL Forest Resource License
FRT Forest Renewal Trust
IPAT Industrial Pollution Action Team
LFMC Local Forest Management Corporation
LSPP Lake Simcoe Protection Plan
LTA leave to appeal
MA Management Area
MFTIP Managed Forest Tax Incentive Program

MISA Municipal Industrial Strategy for Abatement
MPAC Municipal Property Assessment Corporation
MPP Member of Provincial Parliament
NH_3 ammonia
NHIC Natural Heritage Information Centre
NHRM Natural Heritage Reference Manual
OCWA Ontario Clean Water Agency
ODWSP Ontario Drinking Water Stewardship Program
OMB Ontario Municipal Board
OMPF Ontario Municipal Parnership Fund
O. Reg. Ontario Regulation
ORMCP Oak Ridges Moraine Conservation Plan
OWC Ontario Wildlife Coalition
PPS Provincial Policy Statement
PSW Provincially significant wetland
PTTW Permit to Take Water
PWQO Provincial Water Quality Objective(s)
SARFIP Species at Risk Farm Incentive Program
SEV Statement of Environmental Values
SFL Sustainable Forest License
SP area source protection area
SP region source protection region
SP committee source protection committee
SP authority source protection authority
STP Sewage Treatment Plant
ToR Terms of Reference
U.S. United States
USFWS U.S. Fish and Wildlife Service

PREFACE: INTRODUCTION TO THE SUPPLEMENT

Welcome to the Supplement to the Environmental Commissioner of Ontario's 2010/2011 Annual Report. This year's Supplement consists of nine sections. It addresses the reporting year of April 1, 2010 to March 31, 2011. The following summary provides a short guide to the various sections of the Supplement, and discusses their contents and context within the reporting responsibilities of the Environmental Commissioner of Ontario.

Section 1 – Unposted Proposals and Decisions

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

Section 2 – Ministries' Use of Information Notices

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

As presented in Section 2, seven ministries posted information notices during the 2010/2011 reporting year. The ECO's review found that while some of these postings were constituted acceptable and even commendable uses of information notices, sharing important information with the public, others were unacceptable and should have been posted as regular proposal notices for full public consultation.

Section 3 – Ministries' Use of Exception Notices

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

Section 4 – Decision Reviews

Each year the ECO reviews a sampling of the environmentally significant decisions made by ministries prescribed under the *EBR*. During the 2010/2011 reporting year, 1,504 decision notices were posted on the Environmental Registry, most of them for site-specific permits or approvals. Sixty-eight of these decision notices were for policies, acts and regulations. Whether the ECO conducts a detailed review on a ministry decision depends on the decision's environmental significance and on the public's interest in

the decision. Section 4 of this report consists of detailed reviews undertaken by the ECO for 16 selected decisions by five ministries.

Sections 5 & 6 – Applications for Review and Investigation

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

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

In the 2010/2011 reporting year, the ECO completed reviews of 27 applications for review and 9 applications for investigation. The ministries agreed to carry out *EBR* reviews or investigations for 9 of these 36 applications. In eight cases where ministries denied the request for a review or an investigation, the ECO disagreed with the ministry decision, believing that the issues deserved scrutiny under the *EBR*.

Section 7 – *EBR* Leave to Appeal Applications

For certain instruments issued by ministries, e.g., certain certificates of approval or permits to take water, Ontario residents have 15 days to seek leave to appeal the decision after it is posted on the Environmental Registry. If leave is granted, the dispute can proceed to a full tribunal hearing. The ECO posts notices on the Registry of these leave to appeal applications, and updates them once the appropriate appeal tribunals have made their decisions. This section provides a summary of the five new leave to appeal applications under the *EBR* that were filed during the 2010/2011 reporting year.

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

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

Section 9 - Undecided Proposals

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

SECTION 1

ECO REVIEWS OF UNPOSTED PROPOSALS AND DECISIONS

SECTION 1: ECO REVIEWS OF UNPOSTED PROPOSALS AND DECISIONS

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

When it comes to the attention of the Environmental Commissioner of Ontario (ECO) that a ministry subject to the *EBR* has made an environmentally significant proposal or decision without posting a proposal notice on the Environmental Registry, the ECO reviews that proposal or decision to determine whether the public's participation rights have been respected. The ECO's review may include sending an inquiry to the relevant ministry, in order to understand its rationale in not posting a proposal.

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

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

While the ECO monitors decision-making in all prescribed ministries, in 2010/2011, we made inquiries on specific proposals and decisions made by the Ministry of Agriculture, Food and Rural Affairs, the Ministry of Energy and Infrastructure, the Ministry of the Environment, the Ministry of Natural Resources, the Ministry of Northern Development, Mines and Forestry and the Ministry of Transportation. Eleven policies, Acts and regulations, summarized below, were identified by the ECO as unposted proposals or decisions. Each summary provides information on the proposal or decision, explains the ministry's response to the ECO's inquiry, and discusses whether this response was adequate under the *EBR*.

Ministry of Agriculture, Food and Rural Affairs

- Amendments to the *Drainage Act* under the omnibus *Open for Business Act, 2010*
- Proposed changes to the *Livestock, Poultry and Honey Bee Protection Act* in OMAFRA's Managing Agriculture-Wildlife Conflicts Discussion Paper

Ministry of Energy and Infrastructure*

- Minister's Directive to the Ontario Power Authority to develop a low-income electricity conservation initiative
- Smart Grid Fund

Ministry of the Environment

- Amendments to the *Ontario Water Resources Act* and *Environmental Protection Act* under the omnibus *Open for Business Act, 2010*

Ministry of Natural Resources
- Menzel Centennial Provincial Park boundary expansion
- *Endangered Species Act, 2007* implementation policies
- Provincial Wildlife Population Monitoring Program Plan

Ministry of Northern Development, Mines and Forestry
- Ontario Regulation 484/10, amending O. Reg. 113/91 – General, made under the *Mining Act*, describing the opening of lands for staking

Ministry of Transportation
- Registration policy for electric vehicle conversions
- Peterborough Area and Highway 7 Corridor Transportation Studies

* In August 2010, the Ministry of Energy and Infrastructure was separated into the Ministry of Energy and the Ministry of Infrastructure.

1.1 Ministry of Agriculture, Food and Rural Affairs – Act

1.1.1 Amendments to the *Drainage Act* under the Omnibus *Open for Business Act, 2010*

Description
- On May 17, 2010, Bill 68, the *Open for Business Act, 2010*, was introduced by the Minister of Economic Development and Trade. This bill included amendments to statutes administered by several prescribed ministries, including the Ministry of Agriculture, Food and Rural Affairs (OMAFRA).
- Bill 68 included proposed amendments to the *Drainage Act*. Some changes were administrative; however, the ECO considered some amendments to be environmentally significant, in particular, the proposal to repeal section 83 of the Act. This section prohibits any person from discharging or depositing "into any drainage works any liquid, material or substance other than unpolluted drainage water" and provides a penalty of a fine to those contravening the law. The ECO believes this should have been posted for notice and public comment on the Registry.
- On June 7, 2010, the ECO wrote to OMAFRA staff to express concern that the ministry did not post a proposal on the Environmental Registry concerning the environmentally significant amendments to the *Drainage Act*, and urged OMAFRA to promptly post an Act proposal notice.

Ministry Response
- On July 6, 2010, OMAFRA posted an Act proposal notice on the Environmental Registry (#011-0248, Amendment to the *Drainage Act* to support the Government's Open for Business Bill) for a 30-day comment period, until August 5, 2010. The proposal notice advised that the Standing Committee on Finance and Economic Affairs would be holding a public hearing on August 3, 2010 to consider Bill 68, so "while the Environmental Registry posting closes on August 5th, those wishing to comment are encouraged to do so by July 30th in order to allow sufficient time for the comments to be considered as part of the Open for Business Bill process."

ECO Comment
- The ECO is pleased that OMAFRA agreed to the ECO's request and posted an Act proposal notice on the Environmental Registry. However, OMAFRA should have posted the notice at the time Bill 68 was introduced, or prior to its introduction.

- Although the proposal was technically posted for the required 30-day time period under the *EBR*, in practice, OMAFRA's delay in posting cut short the time for the public to provide meaningful comment before the Standing Committee hearings were held.
- The ECO reminds OMAFRA of its responsibility to post any environmentally significant amendments to its acts, even under omnibus bills introduced by another ministry (for more information, please see Part 8.2.1 of this Annual Report.)

1.1 Ministry of Agriculture, Food and Rural Affairs - Act

1.1.2 Proposed changes under the *Livestock, Poultry and Honey Bee Protection Act* in OMAFRA's Managing Agriculture-Wildlife Conflicts Discussion Paper

Description

- In October 2010, the ECO was made aware that OMAFRA was soliciting feedback and conducting stakeholder consultation on changes to its compensation policy for livestock killed or injured by wildlife. A document for consultation purposes had been posted on the ministry's website (Managing Agriculture-Wildlife Conflicts: Discussion Paper). However, OMAFRA had not posted the discussion paper or any other information on the Environmental Registry for public consultation.
- The ECO considers the proposed livestock compensation program an environmentally significant policy for the purposes of the *EBR*, because of its implications for wildlife management, and that the public should have the opportunity to provide comment on the proposal, including on the types of wildlife that may be included in the program.
- On November 5, 2010, ECO staff sent a letter to OMAFRA urging the ministry to post a proposal on the Environmental Registry for these proposed changes, reminding the ministry that under Section 15 of the *EBR*, OMAFRA is required to post a proposal notice to allow for public comment on environmentally significant policies or acts being considered by the ministry.
- On February 2, 2011, and again on February 15, 2011, the ECO followed up with OMAFRA staff to inquire when a proposal would be posted.

Ministry Response

- On February 15, 2011, OMAFRA staff informed the ECO by email that a proposal notice had been prepared and was in the process of being approved. OMAFRA stated that the proposal would be posted on the Environmental Registry within the next few days or weeks.
- On February 25, 2011, OMAFRA posted a regulation proposal on the Environmental Registry (#011-2677, Agriculture-Wildlife Conflict Strategy).

ECO Comment

- The ECO is pleased that OMAFRA agreed to the ECO's request and posted a regulation proposal notice on the Environmental Registry. However, it took nearly four months after the ECO's request for the ministry to post the suggested proposal.
- OMAFRA should have posted the notice when the discussion paper was first introduced and posted on the ministry's website. Fortunately, in this case OMAFRA's delay did not impede the public's ability to receive notice of and provide meaningful comment on the proposal.

1.2 Ministry of Energy and Infrastructure – Policy

1.2.1 Minister's Directive to the Ontario Power Authority to Develop a Low-income Electricity Conservation Initiative

Description

- On July 5, 2010, the Minister of Energy and Infrastructure issued direction to the Ontario Power Authority (OPA) to develop a low-income conservation initiative.
- The initiative constituted an environmentally significant policy under the *EBR*. The Minister's direction states that the program for low-income residential consumers would be guided by six policy objectives, none of which were posted for public consultation on the Environmental Registry.
- The ECO has previously recommended in our Annual Energy Conservation Progress Report – 2009 (Volume 1) that the ministry "provide an opportunity for public input in the development of policy directives to electricity sector institutions, as required by the [*EBR*]."
- On July 12, 2010, the ECO sent a letter reminding the ministry of its obligation to post future environmentally significant policy proposals, including Minister's directives, on the Environmental Registry.

Ministry Response

- On August 13, 2010, the ministry responded to the ECO. The letter described the "rigorous" consultation process undertaken by the Ontario Energy Board in the development of direction and measures being undertaken, as well as the public consultation and working groups established by the OPA examining low-income energy assistance.
- The letter also noted that ministry staff were reminded "that the *EBR* is a valuable tool for seeking public comment on policy proposals and to embrace this process of consultation for future environmentally significant policies and programs."

ECO Comment

- The ECO expects that future environmentally significant directives by the Minister of Energy to the OPA will be posted on the Environmental Registry for public comment and compliance with the *EBR*, and will continue to monitor the ministry's use of the Environmental Registry in this regard.

1.2 Ministry of Energy and Infrastructure - Policy

1.2.2 Smart Grid Fund

Description

- On January 7, 2011, the Ministry of Energy (ENG) issued a Request For Information to "inform the development of the new Smart Grid Fund." The Smart Grid Fund was announced in the 2009 Ontario Budget and aims to "provide targeted financial support for projects that will advance the Smart Grid and bring a lasting benefit to Ontario," as well as create economic development opportunities and green jobs.

- Creation of the fund clearly constitutes an undertaking of environmental significance. Although the ministry is at the early stages of requesting information, program funding rules or policies under development should be posted as a proposal notice on the Environmental Registry as required by the *EBR*.
- On January 31, 2011, the ECO wrote a letter to the ministry, inquiring about public consultation in place to determine the funding rules or policies under the fund, and urging the ministry to post a proposal notice if such policies were under development.

Ministry Response

- The ministry responded to the ECO in a letter dated March 10, 2011. The letter noted that the development of a smart grid was enabled under the *Green Energy and Green Economy Act*, which was posted on the Environmental Registry for public consultation.
- The letter also noted that the Fund would be launched in spring 2011, and that "the Ministry is happy to post an Information Notice on the Environmental Registry to inform Ontarians about the launch of the fund."
- ENG posted an information notice regarding the Smart Grid Fund on April 5, 2011 (Environmental Registry #011-3004).

ECO Comment

- The ECO is satisfied with the ministry's information notice for the launch of the fund, but urges the ministry to post all environmentally significant policy proposals on the Environmental Registry, including any that may be developed under the Smart Grid Fund.

1.3 Ministry of the Environment - Act

1.3.1 Amendments to the *Ontario Water Resources Act* and *Environmental Protection Act* under the Omnibus *Open for Business Act, 2010*

Description

- On May 17, 2010, Bill 68, the *Open for Business Act, 2010*, was introduced by the Minister of Economic Development and Trade. This bill included amendments to statutes administered by several prescribed ministries, including the Ministry of the Environment (MOE).
- Bill 68 included major amendments to the *Ontario Water Resources Act* (*OWRA*) and the *Environmental Protection Act* (*EPA*), related to MOE's initiative to modernize the process for environmental approvals (for more information, see Section 4.6 of this Supplement).
- Although MOE had posted an Act proposal notice on March 2, 2010 (#010-9143, Legislative Framework for Modernizing Environmental Approvals), it did not re-post to reflect the specific details of the proposed amendments introduced in the *Open for Business Act, 2010*. The ECO believes that the public should have the right to comment on these specific amendments.
- On May 27, 2010, the ECO sent a letter to MOE, urging the ministry to post additional information on the Environmental Registry to allow for public consultation on the specifics of the proposed amendments.

Ministry Response

- The ECO received a letter from MOE dated June 24, 2010 assuring the ECO that a new proposal notice would be posted on the Environmental Registry for public comment, noting that "the

ministry is committed to an open and transparent process and welcomes insights from all stakeholders in order to inform the development of a new modernized approvals process."

- On June 24, 2010, the ministry posted an Act proposal notice on the Environmental Registry (#011-0317, *Open for Business Act, 2010*, Schedule 7 (Modernization of Approvals)). The decision notice was posted for the original proposal (#010-9143) on June 22, 2010, and was later linked to this new Act proposal notice.

ECO Comment

- The ECO is pleased that MOE agreed with the ECO's request and posted this Act proposal.
- In previous years, the ECO has encouraged the ministry to make use of the Environmental Registry at multiple stages in the development of environmentally significant policies, acts and regulations. The ECO is pleased that MOE posted a notice on the Environmental Registry at an initial stage of consultation, followed by this additional posting on the specific details of the Act amendments.

1.4 Ministry of Natural Resources – Regulation

1.4.1 Menzel Centennial Provincial Park Boundary Expansion

Description

- In October 2010, the ECO became aware of a plan by the Ministry of Natural Resources (MNR) to add 269 hectares of additional land to the regulated boundaries of Menzel Centennial Provincial Park.
- This project was being considered as a Category A project under the ministry's class Environmental Assessment (EA) for Provincial Parks and Conservation Reserves for altering park boundaries. Category A projects are effectively allowed to proceed immediately. However, altering the boundaries of a protected area requires amendments to O. Reg. 316/07 under the *Provincial Parks and Conservation Reserves Act, 2006*. This statute and its regulations are prescribed under the *EBR* for the purposes of posting proposal notices on the Environmental Registry. Altering the boundaries of a provincial park is an environmentally significant undertaking, even if the proposal is to increase the regulated area.
- The ECO was concerned that the ministry appears to be exclusively relying on its Class EA, while ignoring its obligations under the *EBR*. They are not mutually exclusive nor are they substantially equivalent. By only using its Class EA, the ministry deprives the public of key participation and transparency rights under the *EBR*. Specifically, under the Class EA: the ministry is not required to consider public comments; the public will not be notified when the ministry makes a decision; the public will not know how their comments have been considered; and, MNR does not have to consider its Statement of Environmental Values (SEV) in the decision-making process.
- On October 5, 2010, the ECO sent a letter to MNR urging the ministry to post a regulation proposal notice on the amendments to the park boundaries.

Ministry Response

- On November 3, 2010, MNR responded to the ECO in a letter explaining that the ministry intends to post the regulation proposal "sometime in 2011." The letter stated that MNR is committed to using the Environmental Registry for proposals to establish or amend protected area boundaries that are environmentally significant.

- On April 19, 2011, MNR posted a regulation proposal notice on the Registry (#011-2859, Proposed addition to Menzel Centennial Provincial Park – Amendment to Ontario Regulation 316/07 under the *Provincial Parks and Conservation Reserves Act, 2006*).

ECO Comment

- The ECO believes that the process described within MNR's Class EA for altering park boundaries is flawed, as it fails to address compliance with the *EBR*.
- The ECO hopes the ministry will post proposal notices on the Environmental Registry as required for all such proposed changes.

1.4 Ministry of Natural Resources – Policy

1.4.2 *Endangered Species Act, 2007* Implementation Policies

Description

- In January 2011, it came to the ECO's attention that MNR was applying policies related to species at risk prior to posting them on the Environmental Registry for public consultation.
- The ECO has previously cautioned the ministry on this broad issue of non-compliance in both our 2009 Special Report and in our 2009/2010 Annual Report. However, MNR continued to apply "draft" or "interim" policies to implement measures under the *Endangered Species Act, 2007* (*ESA*) without the necessary public consultation, consideration of the public comments, or consideration of the ministry's Statement of Environmental Values.
- Some unposted MNR policies include: the ministry's processes for request for consulting services in development of recovery strategies; guidance for recovery teams in preparing recovery strategies; policies to guide recovery team activities; finalized policies for general habitat protection procedures, habitat regulation-setting procedures, habitat protection orders, and stop-work orders; and, policy interpretation of "damage or destruction", "harm or harass", and "overall benefit".
- On January 13, 2011, the ECO sent a letter to MNR urging the ministry to promptly post all outstanding policies.

Ministry Response

- MNR responded to the ECO in a letter dated March 3, 2011. This letter did not directly address the policies in question, except for the ministry's "overall benefit" policy interpretation, which the letter noted would be posted on the Environmental Registry in spring 2011. The letter also described waterpower agreements that would be posted, and a caribou habitat regulation that would be posted as an information notice.
- The letter noted that the ministry was "committed to developing our policies and procedures under the *ESA* in accordance with our obligations under the [*EBR*] while working diligently, if not feverishly, to meet the legislative and policy requirements under the *ESA*."
- On April 29, 2011, MNR posted two policy proposals on the Registry: proposed policy interpretations for "overall benefit" (#011-2842, *Endangered Species Act* (*ESA*) Submission Standards for Activity Review and 17(2)(c) Overall Benefit Permits); and "damage or destroy" (#011-2841, Guidance to support the application of subsection 10(1) (the habitat protection provision) of Ontario's *Endangered Species Act, 2007*).

ECO Comment

- The ECO is pleased that the ministry has now posted at least some of its *ESA* implementation policies. However, the ECO is disappointed overall with MNR's response. It remains unclear when the ministry will post the remaining policies for public consultation on the Registry, as required by the *EBR*.
- The ECO urges the ministry to administer the *ESA* in a manner consistent with MNR's legal responsibilities, and to ensure public accountability and transparency in the protection and recovery of species at risk. The ECO will continue to monitor the ministry's progress in posting *ESA* implementation policies on the Registry.

1.4 Ministry of Natural Resources - Policy

1.4.3 Provincial Wildlife Population Monitoring Program Plan

Description

- In March 2011, it came to the attention of the ECO that MNR's Provincial Wildlife Population Monitoring Program Plan has been finalized, but was not posted for public consultation on the Environmental Registry as required under the *EBR*. The program plan was posted on MNR's website in June 2010.
- Under MNR's Declaration Order (Class Environmental Assessment [EA] Approval for Forest Management on Crown Lands in Ontario), Condition 30(b) requires the ministry to maintain the Provincial Wildlife Population Monitoring Program Plan and to update it no later than one year following the release of each Five-Year EA Report (last released in June 2009). The purpose of the plan is to "describe the Provincial Wildlife Population Monitoring Program and outline the priorities, representative species to be monitored and proposed activities and schedules." This program includes "research, monitoring, and assessment activities and addresses a host of species such as moose, deer, caribou, black bear, forest birds, waterfowl, small game, furbearers, and species at risk."
- The ECO previously wrote to MNR about this policy in summer 2004, when the first program plan was in development, and indicated that it should be posted on the Environmental Registry for public comment. At the time, MNR acknowledged the benefit of posting the program plan on the Environmental Registry and committed to the ECO to doing so. However, MNR posted the plan as an Information Notice in December 2004 with a 90-day comment period, with no rationale for its decision to post an information notice in lieu of a proposal (for additional detail, please see the Supplement to the ECO's 2004/2005 Annual Report).
- On March 9, 2011, the ECO sent a letter to MNR staff asking for the ministry's rationale for not posting the 2010 program plan as a policy proposal. The ECO also inquired how the ministry determined the environmental significance of the policy; how the ministry's Statement of Environmental Values was considered during the decision-making process that led to the policy's development; and whether the ministry undertook any other public consultation on the development of the policy.

Ministry Response

- On March 21, 2011, MNR staff contacted the ECO by phone to confirm that the ECO's inquiry would be passed on to the appropriate program area.
- On May 9, 2011, MNR sent a formal response the ECO, indicating it would be posting the 2010 plan on the Registry as part of its review of the program, in fall 2011. The ministry further stated

that it will propose amendments to its Declaration Order to explicitly require future versions of the plan to be posted for comment on the Registry.

ECO Comment

- The ECO believes MNR's failure to post this policy on the Registry during its development is unacceptable. The public has the right to comment on this environmentally significant plan, and to learn how their comments were considered in the policy's creation. The ECO is extremely disappointed that the public did not have the opportunity to provide input on important changes: for example, MNR's new approach for the broad-scale monitoring of multiple species that will affect how the ministry will collect and interpret data over the long term.
- Further, the ECO is disheartened that MNR failed to fulfill its promise to the ECO in 2004 that the program plan would be posted on the Registry as a policy proposal.
- The ECO urges MNR to follow through with amendments to its Declaration Order, to ensure future versions of this plan will be posted appropriately as a policy on the Registry, as required under the *EBR*.

1.5 Ministry of Northern Development, Mines and Forestry – Regulation

1.5.1 Ontario Regulation 484/10, Amending O. Reg. 113/91 – General, made under the *Mining Act* Describing the Opening of Lands for Staking

Description

- On December 25, 2010, amendments to a regulation under the *Mining Act* were published in the Ontario Gazette. The amendments set the process for a Minister's opening of lands in Northern Ontario as per section 35.1(8-11) of the *Mining Act* ("Land open for staking under s. 35.1 (11) of Act"). Regulations under the *Mining Act* are prescribed for the purposes of the *EBR*.
- On January 13, 2011, the ECO sent a letter to MNDMF reminding the ministry that all environmentally significant regulations under the *Mining Act* need to be posted on the Environmental Registry, in compliance with the *EBR*. The ECO also inquired how the ministry determined the environmental significance of the regulation; how the ministry's Statement of Environmental Values was considered during the decision-making process that led to the development of the regulation; and whether the ministry undertook any other public consultation on the development of the regulation.
- On March 24, 2011, the ECO followed up with the ministry, inquiring when the ECO could expect a response to its January letter.

Ministry Response

- On March 24, 2011, MNDMF staff stated in an email to the ECO that a response was being drafted and would be sent shortly.
- On April 11, 2011, MNDMF responded with a letter to the ECO. The ministry explained it had considered its Statement of Environmental Values in its decision and had already done equivalent public consultation under a previous policy proposal (#010-8656, Ontario's New *Mining Act*: Workbook on Development of Regulations). This workbook, which was posted for 130 days, posed a question to commenters regarding private surface rights.

ECO Comment

- The ECO is disappointed in MNDMF's response. The ECO maintains that the regulatory amendments should have been posted as a regulation proposal notice on the Registry. By

MNDMF's rationale, any regulatory amendments under the *Mining Act* that were open for discussion in the Workbook need not be posted. However, no details on the specific amendments were included at that time and should have been open for public comment.

- The ECO notes the ministry could have used the Registry at multiple stages in the development of these environmentally significant regulatory amendments. The ECO urges the ministry to administer the *Mining Act* in a manner consistent with MNDMF's legal responsibilities under the *EBR*, and to post any further environmentally significant regulations under this Act on the Registry.
- The ECO will continue to follow up on the ministry's use of the Registry to post environmentally significant regulations under the *Mining Act*.

1.6 Ministry of Transportation – Policy

1.6.1 Registration Policy for Electric Vehicle Conversions

Description

- In September 2010, the ECO became aware of a temporary moratorium imposed by the Ministry of Transportation (MTO) on the registration of electric vehicle (EV) conversions from February to June 2010, without any formal announcements or Environmental Registry posting. Subsequent changes were also made to EV conversion registration requirements, including limitations on the locations where registration for these vehicles is possible, without any proposal posted on the Environmental Registry.
- As converted EVs are zero-emission alternative fuel vehicles, this moratorium and the changes to the registration policy for these vehicles are environmentally significant. Under the *EBR*, MTO is required to post environmentally significant policies on the Registry to allow for public comment.
- On September 10, 2010, the ECO sent a letter to the Ministry of Transportation to confirm the changes in the electric vehicle conversion registration policies, and asked for clarification regarding the ministry's rationale for not posting these policies and how the ministry considered its Statement of Environmental Values. The ECO further urged the ministry to post these policies for consultation. The ECO also urged the ministry to use the Registry as part of its review and consultation process on the registration and safety requirements for vehicles that have been converted to electric power, as required under the *EBR*.

Ministry Response

- On October 29, 2010, the ministry responded by a letter. MTO explained that as no national safety standards or vehicle registration requirements had been set for EV conversions, the ministry believed it necessary to employ a "two-phase approach – prioritizing road safety in the short-term and then looking at broader solutions with opportunities for public and stakeholder input."
- The ministry noted that the second phase would include consultation with key EV conversion industry stakeholders as well as broader automotive stakeholders, and that "once a proposed policy has been drafted, MTO will seek opportunities for further public input, including use of the Environmental Registry if we receive approval to proceed."

ECO Comment

- The ECO urges the ministry to post all environmentally significant policy proposals on the Environmental Registry, including any policies for electric vehicle conversion registration.

1.6 Ministry of Transportation - Policy

1.6.2 Peterborough Area and Highway 7 Corridor Transportation Studies

Description

- In August 2010, the MTO posted an information notice regarding its transportation study of the Peterborough Area and of the Highway 7 Corridor from Peterborough to Carleton Place. The ministry's stated purpose for the study was "to provide a long-term perspective on the movement of people and goods in these areas, and to assess the current and future transportation system needs, issues and options," noting that the information collected would provide "strategic direction and technical information" for future "environmental assessment studies, provincial plans, policy, programs and investment priorities." The ministry was conducting surveys and consulting local representatives and stakeholders, and had set up an independent website for the study.
- The ECO has previously informed MTO that such preliminary transportation needs assessment studies are environmentally significant policies for the purposes of the *EBR*, as a preliminary study likely predetermines the scope and mode considered under a subsequent class Environmental Assessment. This study proposal should be posted on the Environmental Registry as a regular proposal notice to comply with the *EBR*.
- On October 5, 2010, the ECO wrote to MTO urging the ministry to post this policy proposal on the Environmental Registry. The ECO's letter noted that MTO's current approach deprives the public of key participation and transparency rights under the *EBR*, as the ministry is not required to consider public comments; the public will not be notified when the ministry makes a decision and will not know how their comments have been considered; and, MTO does not have to consider its Statement of Environmental Values in the decision-making process.

Ministry Response

- In late October 2010, MTO staff contacted the ECO by telephone to clarify that the study was in very preliminary stages, and did not need to be posted at this time. The ministry further explained that it had posted an information notice to let the public know that the study was commencing. (See 'Section 2: ECO Reviews of Information Notices' of this Supplement).
- MTO followed up with a formal letter dated November 1, 2010. MTO explained in its letter that the project was in early stages of development and that a proposal would be posted on the Registry at a later date.

ECO Comment

- The ECO is disappointed with MTO's response. The ministry's rationale exhibits a fundamental misunderstanding of its obligations under the *EBR*, with regards to the rights of the public to participate completely and from initial stages of policy development.
- The ministry should have undertaken this study and consultation process using a policy proposal notice in accordance with the *EBR*, so that the ECO could review MTO's use of the public's comments and compliance with the Act.
- The ECO has repeatedly encouraged ministries to make use of the Environmental Registry at multiple stages in the development of environmentally significant policies, acts and regulations. MTO could have posted a regular notice on the Registry for this initial stage of consultation, and then posted additional proposal notices as specific policies were developed.

SECTION 2

ECO REVIEWS OF INFORMATION NOTICES

SECTION 2: ECO REVIEWS OF INFORMATION NOTICES

2.1 Use of Information Notices

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

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

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

During the 2010/2011 reporting year, 7 ministries posted a total of 114 information notices. However, for the purposes of reporting on year-to-year trends, the ECO does not include previously posted notices (as ministries often post updates on information notices) or notices that relate to forest management plans. In 2010/2011, ministries updated 25 previously posted notices and posted 11 new notices relating to forest management plans. Accordingly, for ECO's reporting purposes, the ministries posted 78 new information notices in 2010/2011.

Ministry	Number of Information Postings
Agriculture Food and Rural Affairs (OMAFRA)	1
Energy (ENG)	1
Environment (MOE)	20
Municipal Affairs and Housing (MMAH)	16
Natural Resources (MNR)	32
Northern Development, Mines and Forestry (MNDMF)	5
Transportation (MTO)	3

Good Uses of Information Notices

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

- MOE posted a notice to inform the public that Ontario Regulation 212/02 has been revoked (Environmental Registry #011-1576). The regulation set out interim sulphur reporting and record

retention requirements for Ontario gasoline manufacturers, blenders and importers until the federal standards for the average level of sulphur in gasoline became law in 2005.

- The Environmental Review Tribunal (ERT) asked MOE to post a notice informing the public that it was seeking public input on a proposed hearing process for renewable energy approvals, which are new instruments under the *Environmental Protection Act* (Environmental Registry #011-0013). The ERT is not a prescribed agency under the *EBR* and is not required to post. On behalf of the ERT, MOE posted a notification of the Tribunal's intention to revise its Rules of Practice and Practice Directions and produce a new Guide to Appeals by Members of the Public regarding renewable energy approvals under section 142.1 of the *Environmental Protection Act*.

- OMAFRA posted a notice in September 2010 informing the public that Giant Hogweed had been added to the list of noxious weeds under the *Weed Control Act* (Environmental Registry #011-0908). The addition means that municipalities whose agricultural or horticultural lands are affected by the weed will not need to enact their own local weed by-law under the Act designating Giant Hogweed a local weed. The *Weed Control Act* and its regulations are not prescribed under the *EBR*. OMAFRA committed to open public consultation while it will be developing a broader strategy for the management of this weed.

- MTO posted a notice informing the public that an amendment to the High Occupancy Vehicle (HOV) regulation was posted on Ontario's Regulatory Registry for public comment (Environmental Registry #010-9750). The amendment will allow eligible electric vehicles with one passenger to use high occupancy vehicle lanes on Ontario's highways. The HOV is a regulation made under the *Highway Traffic Act*, which is not prescribed under the *EBR* for posting regulation proposals.

- MNR posted a notice informing the public of the results of a major study on aggregate resources in Ontario (Environmental Registry #011-0473). The ministry posted links to six papers of the State of the Aggregate Resource in Ontario Study (SAROS). MNR also posted the recommendations of the Aggregate Resource Advisory Committee, which reviewed the six papers. MNR stated that the recommendations are not binding, and that the ministry is currently reviewing the six reports and the recommendations within the context of current policy. MNR committed to public consultation and appropriate postings on the Environmental Registry for any future government response.

Inappropriate Uses of Information Notices

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

- MNR should have posted a regular proposal notice for the ministry's proposed approach for a caribou habitat regulation under the *Endangered Species Act, 2007* (Environmental Registry #011-2303).The information notice actively solicited public comment for a period of 45 days. MNR described its proposal as the ministry's preferred approach for a caribou habitat regulation. The ECO believes that MNR should have posted a regulation proposal notice and, therefore, failed to adhere to the *EBR*.

- MTO should have posted a regular proposal notice for its transportation studies for the Peterborough Area and Highway 7 Corridor from Peterborough to Carleton Place (Environmental Registry #011-0634). MTO asserted that the proposed studies are not considered policies under the *EBR* and are therefore not required to be posted for public comment. The ECO considers such studies as environmentally significant policies as they affect the content of subsequent class environmental assessments. (For a discussion of the ECO's suggestions on the particular issues of this notice and MTO's response see 'Section 1: ECO Reviews of Unposted Decisions' of this Supplement.)

Use of the Environmental Registry for Class Environmental Assessment 'Parent' Documents and Terms of Reference

This reporting year, several information notices were posted to inform the public about class environmental assessment (Class EA) 'parent' documents or about their Terms of Reference (ToR):

- Proposed Changes to the Ministry of Transportation's Class EA for Provincial Transportation Facilities (Environmental Registry #010-9138, posted April 19, 2010)
- Amendment of the Declaration Orders regarding the Ministry of Natural Resources' Class EA Approval for Forest Management on Crown Lands in Ontario (Environmental Registry #010-9448, posted May 4, 2010)
- Amendments to the Municipal Engineers Association's Municipal Class EA (Environmental Registry #011-1391, posted Jan. 11, 2011)
- Draft ToR for a Class EA for Activities of the Ministry of Northern Development, Mines and Forestry under the *Mining Act* (Environmental Registry #011-2369, posted Feb. 3, 2011)

Class EA parent documents are a tool used under the *Environmental Assessment Act* (*EAA*), which is administered by the Ministry of Environment (MOE). Class EA parent documents allow for streamlined approvals of projects, and provide a template of common rules to groups of similar projects, such as provincial highways or municipal water and sewer projects. They are important as approximately 90 per cent of projects subject to the *EAA* are approved through the Class EA process.

High quality public consultation on Class EA parent documents is essential because these documents set the overarching approval rules for so many projects, and because they are amended only infrequently. The use of the Environmental Registry for posting ToRs or Class EA parent documents has been highly inconsistent over time – sometimes information notices have been used and sometimes regular policy proposal notices. MOE's Code of Practice on preparing Class EA documents, finalized in October 2009, does not include a reference to the Environmental Registry or the *EBR*, and MOE's website states that posting on the Environmental Registry is not required. The ECO is currently evaluating the adequacy of public consultation on Class EA parent documents, and will report on its findings in the future.

Ministry Decisions that are Not Prescribed

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

- MOE posted a notice in April 2010, informing the public of the ministry's intention to amend O. Reg. 455/09 made under the newly passed *Toxics Reduction Act, 2009* (Environmental Registry #010-9349). The Act was not prescribed under the *EBR* until July 1, 2010. MOE stated that it provided a 47-day comment period to ensure that the public's questions and opinions are considered. The ECO urges MOE to post a notice explaining how the ministry considered the comments it received in finalizing the amendments to the regulation.

- MNR posted 17 information notices for proposed permits and agreements issued under the *Endangered Species Act, 2007* (*ESA*). Permits and agreements were not classified under the *EBR* until the end of June 2010.

- During this reporting year, MNDMF posted three information notices for amendments to mine closure plans. Although new mine closure plans are classified as instruments under the *EBR*, in 2001 MNDMF decided not to classify amendments to mine closure plans proposed by the licensee. The ECO has repeatedly noted that closure plan amendments can be as environmentally significant as the original closure plans and they must be approved by MNDMF. The ECO continues to encourage MNDMF to classify environmentally significant mine closure

plans amendments as instruments under the *EBR* in order to provide opportunities for public participation through regular proposal notices.

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

Summary of all New Information Notices Posted during the 2010/2011 Reporting Year

Registry Number	Type	Title	Ministry's Rationale for Information Notice	Date Published
Ministry of Agriculture, Food and Rural Affairs (OMAFRA)				
011-0908	OMAFRA Act	Addition of Giant Hogweed (*Heracleum mantegazzianum*) to the list of noxious weeds under the *Weed Control Act*.	Act and its regulations are not prescribed under the *EBR*	September 2, 2010
Ministry of Energy (ENG)				
010-9983	ENG Regulation	Removing Local Barriers to Renewable Energy Installations: Regulation Decision	Act and its regulations are not prescribed under the *EBR*	May 14, 2010
Ministry of the Environment (MOE)				
011-2528	MOE Policy	Revision of the Ministry of the Environment's Handbooks for Dredging and Dredged Material Disposal in Ontario and Fill Quality Guide and Good Management Practices for Shore Infilling in Ontario (formerly Fill Quality Guidelines for Lakefilling in Ontario)	The revisions are administrative and do not change policy or the guidance provided in the documents	March 31, 2011
011-2499	MOE Report	Approval of the Assessment Report for the Lower Thames Valley Source Protection Area	Section 18 of the *Clean Water Act, 2006* requires that a notice of an assessment report approval shall be published on the Environmental Registry	March 25, 2011
011-2696	MOE Instrument	Renewable Energy Approval application for Next Era's Conestogo Wind Energy Centre Project	MOE informs the public that proponent has proposed changes to the project since the final public meeting	February 23, 2011

Registry Number	Type	Title	Ministry's Rationale for Information Notice	Date Published
011-1718	MOE Regulation	Technical Update: Laboratory Accreditation under the Records of Site Condition Regulation (O. Reg. 153/04) January 2011	Administrative amendment with no environmental impact	February 18, 2011
011-2007	MOE Regulation	Consequential amendment to Ontario Regulation 675/98 - Classification and Exemption of Spills and Reporting of Discharges made under the *Environmental Protection Act, 1990*	Administrative amendment	January 28, 2011
011-1203	MOE Minister's Order	Renewable Energy Approval (REA) Fees	Fees will be established through a Minister's Order and are therefore exempt from public posting under the *EBR*	January 14, 2011
011-1391	MOE Policy	Proposed Amendments to the Municipal Engineers Association's Municipal Class Environmental Assessment	Not prescribed by O. Reg. 681/94 under the *EBR*	January 11, 2011
011-1579	MOE Act	Proclamation of section 2 of the *Environmental Approvals Improvement Act ,1997* which repealed section 102-121 of the *EPA*.	No impact on environmental compensation	December 15, 2010
011-1577	MOE Regulation	Revocation of O. Reg 94/96 – Exemption – City Of Toronto's Western Beaches Storage Tunnel – TOR-C-5 under the *Environmental Assessment Act* no longer considered to have any legal or practical effect.	O. Reg.94/96 has no longer any practical or legal effect and has been revoked.	December 15, 2010
011-1576	MOE Regulation	Revocation of O. Reg. 212/02 Reporting Requirements - Sulphur Levels in Gasoline under the *Environmental Protection Act* no longer considered to have any legal or practical effect.	O. Reg.212/02 has no longer any practical or legal effect and has been revoked.	December 15, 2010
011-1470	MOE Report	Approval of the Assessment Report for the Mattagami Region Source Protection Area	Section 18 of the *Clean Water Act* requires that a notice of an assessment report approval shall be published on the Environmental Registry	November 29, 2010
011-1468	MOE Report	Approval of the Assessment Report for the Catfish Creek	Section 18 of the *Clean Water Act* requires that a	November 29, 2010

Registry Number	Type	Title	Ministry's Rationale for Information Notice	Date Published
		Source Protection Area	notice of an assessment report approval shall be published on the Environmental Registry	
011-1398	MOE Report	Approval of the Assessment Report for the Kettle Creek Source Protection Area	Section 18 of the *Clean Water Act* requires that a notice of an assessment report approval shall be published on the Environmental Registry	November 29, 2010
011-1027	MOE Instrument	Section 61 Direction to Bruce Power Inc.	Temporary amendment to Certificate of Approval with environmentally insignificant effect	September 8, 2010
011-0013	ERT Policy	The Environmental Review Tribunal, Environment and Land Tribunals Ontario, is seeking comments on its revised Rules of Practice and a new "Guide" regarding appeals by members of the public of renewable energy approvals.	ERT not a prescribed agency. MOE is using the Registry to draw attention to ERT's consultation process	August 23, 2010
011-0099	MOE Protocol	Protocol of Accepted Drinking Water Testing Methods Version 2.0	Protocol updated to version 2.0	June 30, 2010
010-9981	MOE Instrument	Approval for Temporary Certificates of Approval for St. Mary's Cement Canada Inc. to conduct an alternative fuels research project at the St. Mary's Plant	Instrument implementing a research undertaking is exempt from notice requirements under the *EBR*	June 21, 2010
010-9338	MOE Policy	Operational Change for Issuing Aquatic Herbicide Permits to Waterfront Property Owners	Administrative change with no significant impact on the environment	April 16, 2010
010-9349	MOE Regulation	Proposed Amendments to Ontario Regulation 455/09 and Policy Options for Enhanced Planning	Provide general notice that the Ministry is proposing regulatory amendments	April 1, 2010
010-9139	MOE Regulation	Technical Amendment made to Ontario Regulation 455/09	Act not prescribed under the *EBR*	April 1, 2010
Ministry of Municipal Affairs and Housing (MMAH)				
011-2771	MMAH Regulation	Ontario Regulation 36/11	*EBR* does not apply to a proposal to make a Minister's Zoning Order under subsection 47(1) of	March 9, 2011

Registry Number	Type	Title	Ministry's Rationale for Information Notice	Date Published
			the *Planning Act*.	
011-2770	MMAH Regulation	Ontario Regulation 36/11	*EBR* does not apply to a proposal to make a Minister's Zoning Order under subsection 47(1) of the *Planning Act*.	March 9, 2011
011-2530	MMAH Regulation	Ontario Regulation 7/11	*EBR* does not apply to a proposal to make a Minister's Zoning Order under subsection 47(1) of the *Planning Act*.	February 24, 2011
011-2450	MMAH Regulation	Ontario Regulation 11/11	*EBR* does not apply to a proposal to make a Minister's Zoning Order under subsection 47(1) of the *Planning Act*.	February 24, 2011
011-2253	MMAH Regulation	Ontario Regulation 526/10	*EBR* does not apply to a proposal to make a Minister's Zoning Order under subsection 47(1) of the *Planning Act*.	February 2, 2011
011-2252	MMAH Regulation	Ontario Regulation 531/10	*EBR* does not apply to a proposal to make a Minister's Zoning Order under subsection 47(1) of the *Planning Act*.	February 2, 2011
011-1814	MMAH Regulation	Ontario Regulation 433/10	*EBR* does not apply to a proposal to make a Minister's Zoning Order under subsection 47(1) of the *Planning Act*.	December 20, 2010
011-1800	MMAH Regulation	Ontario Regulation 432/10	*EBR* does not apply to a proposal to make a Minister's Zoning Order under subsection 47(1) of the *Planning Act*.	December 13, 2010
010-9010	MMAH Regulation	Ontario Regulation 510/09	*EBR* does not apply to a proposal to make a Minister's Zoning Order under subsection 47(1) of the *Planning Act*.	October 22, 2010
011-1414	MMAH Regulation	Ontario Regulation 362/10	*EBR* does not apply to a proposal to make a Minister's Zoning Order under subsection 47(1) of the *Planning Act*.	October 18, 2010
011-0530	MMAH Regulation	Ontario Regulation 272/10	*EBR* does not apply to a proposal to make a	August 11, 2010

Registry Number	Type	Title	Ministry's Rationale for Information Notice	Date Published
			Minister's Zoning Order under subsection 47(1) of the *Planning Act*.	
011-0529	MMAH Regulation	Ontario Regulation 271/10	*EBR* does not apply to a proposal to make a Minister's Zoning Order under subsection 47(1) of the *Planning Act*.	August 10, 2010
011-0468	MMAH Regulation	Ontario Regulations 269/10 and 270/10	*EBR* does not apply to a proposal to make a Minister's Zoning Order under subsection 47(1) of the *Planning Act*.	July 7, 2010
011-0452	MMAH Regulation	Ontario Regulation 254/10	*EBR* does not apply to a proposal to make a Minister's Zoning Order under subsection 47(1) of the *Planning Act*.	July 5, 2010
010-9699	MMAH Regulation	Ontario Regulation 138/10	*EBR* does not apply to a proposal to make a Minister's Zoning Order under subsection 47(1) of the *Planning Act*.	April 21, 2010
010-9670	MMAH Regulation	Ontario Regulation 135/10	*EBR* does not apply to a proposal to make a Minister's Zoning Order under subsection 47(1) of the *Planning Act*.	April 19, 2010
Ministry of Natural Resources (MNR)				
011-2951	MNR Policy	2011 Prescribed Burns	To provide general notice to the public	March 25, 2011
011-2427	MNR Regulation	Regulation of the Southern Boundary of the Far North of Ontario, O. Reg. 21/11	Act not yet prescribed under the *EBR*	March 10, 2011
011-2472	MNR Regulation	Additional time required to prepare the habitat regulations for Eastern Pondmussel and Red Knot rufa subspecies under the *Endangered Species Act, 2007*	To provide general notice to the public	February 18, 2011
011-1051	MNR Regulation	Amend Part 7 of O. Reg. 663/98 (Areas South of the French and Mattawa Rivers where Sunday Gun Hunting is Permitted) under the *Fish and Wildlife Conservation Act*	There has been a regulation proposal notice previously in which environmentally significant aspects of the regulation were	January 28, 2011

Registry Number	Type	Title	Ministry's Rationale for Information Notice	Date Published
			considered	
011-2303	MNR Regulation	A proposed approach for habitat protection for Woodland Caribou (Forest-dwelling boreal population) under the *Endangered Species Act, 2007*	To inform the public of the Ministry's proposed approach to protecting the habitat of Woodland Caribou by regulation	January 24, 2011
011-1607	MNR Policy	Additional time required to prepare the recovery strategy for Eastern Sand Darter under the *Endangered Species Act, 2007*	To provide general notice to the public	November 12, 2010
011-1606	MNR Policy	Request for additional scientific information to be considered in the development of recovery strategies for 12 species under the *Endangered Species Act, 2007*	To seek scientific and monitoring information	November 12, 2010
011-1245	MNR Regulation	Amendment O. Reg. 667/98 – Trapping, made under the *Fish and Wildlife Conservation Act*, consistent with provisions of the Agreement on International Humane Trapping Standards, by adding two additional traps to schedule for leg-hold restraining traps.	There has been a regulation proposal notice previously in which environmentally significant aspects of the regulation were considered	September 27, 2010
011-1258	MNR Regulation	Amend Part 7 of O.Reg. 663/98 (Areas South of the French and Mattawa Rivers where Sunday Gun Hunting is Permitted) under the *Fish and Wildlife Conservation Act*	There has been a regulation proposal notice previously in which environmentally significant aspects of the regulation were considered	September 23, 2010
010-9600	MNR Reports	Annual Reports on Forest Management 2006/07 and 2007/08	To provide general notice about the availability of the reports	September 10, 2010
011-1048	MNR Regulation	Impending amendment of O. Reg. 230/08 (Species at Risk in Ontario List) in response to COSSARO report received June 29, 2010	To provide general notice of impending amendments	August 30, 2010
011-0473	MNR Reports	State of the Aggregate Resource in Ontario Study reports and Aggregate Resource Advisory Committee recommendations	To advise the public of the release of the reports	July 9, 2010

Registry Number	Type	Title	Ministry's Rationale for Information Notice	Date Published
011-0426	MNR Policy	2010 Prescribed Burns	To provide general notice to the public	July 7, 2010
011-0316	MNR Instrument	Permit under clause 17(2)(c) of *the Endangered Species Act, 2007* for removal of three Butternut trees by Renfrew Power Generation Incorporated	Not prescribed under the *EBR*	June 24, 2010
011-0283	MNR Instrument	Permit under section 17 of the *Endangered Species Act, 2007* to allow Duffins Heights Landowners Group Ltd. to damage habitat of and to potentially kill, harm or harass Redside Dace for the purpose of constructing a trunk sanitary sewer in Pickering, ON	Not prescribed under the *EBR*	June 16, 2010
010-9938	MNR Policy	Request for additional scientific information to be considered in the development of recovery strategies for 14 species under the *Endangered Species Act, 2007*	To seek scientific and monitoring information	May 21, 2010
010-9937	MNR Policy	Additional time required to prepare the recovery strategy for Fawnsfoot under the *Endangered Species Act, 2007*	To provide general notice to the public	May 21, 2010
010-9448	MNR Regulation	Amendment of the Declaration Orders regarding the Ministry of Natural Resources' (MNR) Class Environmental Assessment Approval for Forest Management on Crown Lands in Ontario (MNR-71 and MNR-74)	Make the public aware of MNR's intent to seek changes to the Declaration Orders and seek public comment on suggested amendments	May 10, 2010
010-9810	MNR Instrument	Permit under clause 17(2) (c) of the *Endangered Species Act, 2007* for Removal of one Butternut tree by Hydro One	Not prescribed under the *EBR*	May 5, 2010
010-9579	MNR Instrument	Agreement under section 23 of Ontario Regulation 242/08 under the *Endangered Species Act, 2007* for removal of two Butternut trees by Kimvar Enterprises Incorporated at Big Bay Point	Not prescribed under the *EBR*	April 9, 2010

Registry Number	Type	Title	Ministry's Rationale for Information Notice	Date Published
		Resort Development draft approved plan, Part of Lots 26, 27, 28, 29 and 30, Concession 13 in the Town of Innisfil, County of Simcoe		
010-9577	MNR Instrument	Agreement under section 23 of Ontario Regulation 242/08, made under the *Endangered Species Act, 2007* for removal of 14 Butternut trees by the City of Ottawa	Not prescribed under the *EBR*	April 9, 2010
010-9575	MNR Instrument	Agreement under section 23 of Ontario Regulation 242/08 under the *Endangered Species Act, 2007* for transplanting of two Butternut trees by the City of Ottawa	Not prescribed under the *EBR*	April 9, 2010
010-9573	MNR Instrument	Agreement under section 23 of Ontario Regulation 242/08 under the *Endangered Species Act, 2007* for the purpose of impacting the habitat of Redside Dace in order to widen a road (Stouffville Road) in the Regional Municipality of York	Not prescribed under the *EBR*	April 9, 2010
010-9560	MNR Instrument	Agreement under section 23 of Ontario Regulation 242/08 under the *Endangered Species Act, 2007* to authorize contraventions of sections 9 and 10 of *ESA 2007* with respect to Jefferson Salamander by the City of Guelph, Belmont Equity (HCBP) Holdings Ltd. and Guelph Land Holdings for the purpose of developing the Hanlon Creek Business Park, a new subdivision in the City of Guelph	Not prescribed under the *EBR*	April 9, 2010
010-9559	MNR Instrument	Agreement under section 23 of Ontario Regulation 242/08 under the *Endangered Species Act, 2007* related to Redside Dace habitat impacts as a result of the proposed construction of a stormwater pond as part of a residential subdivision at Major Mackenzie Drive and Bathurst	Not prescribed under the *EBR*	April 9, 2010

Registry Number	Type	Title	Ministry's Rationale for Information Notice	Date Published
		Street in the City of Vaughan		
010-9555	MNR Instrument	Agreement under Section 23 of Ontario Regulation 242/08 under the *Endangered Species Act, 2007* with Oak Bay Development Inc. to authorize activities associated with subdivision development	Not prescribed under the *EBR*	April 9, 2010
010-9556	MNR Instrument	Ministry of Transportation agreement with the Ministry of Natural Resources under section 23 of Ontario Regulation 242/08 under the *Endangered Species Act, 2007* (*ESA*)for authorization to contravene clause 9(1)(a) and (b) and subsection 10 (1) of the *ESA* during the construction of segments of Highway 400 between Parry Sound and Sudbury	Not prescribed under the *EBR*	April 9, 2010
010-9553	MNR Instrument	Agreement under section 23 of Ontario Regulation 242/08 under the *Endangered Species Act, 2007* for relocation of Wavy-rayed Lampmussel and Rainbow Mussel by the Regional Municipality of Waterloo for the purpose of constructing bridge footings for a new crossing of the Grand River at Fairway Road in the City of Kitchener	Not prescribed under the *EBR*	April 9, 2010
010-9551	MNR Instrument	Agreement under section 23 of Ontario Regulation 242/08 under the *Endangered Species Act, 2007* for removal of Butternut trees by the Ontario Ministry of Transportation for construction of Highway 404 extension through the Town of East Gwillimbury, Region of York	Not prescribed under the *EBR*	April 9, 2010
010-9067	MNR Instrument	Agreement under section 23 of Ontario Regulation 242/08 under the *Endangered Species Act, 2007* for the Capture and Relocation of Wavy-rayed Lampmussel,	Not prescribed under the *EBR*	April 9, 2010

Registry Number	Type	Title	Ministry's Rationale for Information Notice	Date Published
		Kidneyshell, Round Hickorynut, Round Pigtoe, Snuffbox, Mudpuppy and Rainbow Mussels, and the Salvage of Black Redhorse, by the Corporation of the City of London at the Medway Creek Sanitary Sewer Phase 2B Site (Lot 19, Conc. 5), London		
010-9527	MNR Instrument	Agreements for constructing, improving, maintaining or repairing municipal drainage works under section 23 of Ontario Regulation 242/08 of the *Endangered Species Act, 2007* with 83 municipalities, primarily in southern and central Ontario	Not prescribed under the *EBR*	April 8, 2010
010-9526	MNR Instrument	Agreements for existing aggregate operations under section 22 of Ontario Regulation 242/08 of the *Endangered Species Act, 2007*, in southern, central and northern Ontario	Not prescribed under the *EBR*	April 8, 2010
MNR Forest Management Plans				
011-1898	MNR Instrument	Contingency Plan for the Kenogami Forest for the 1-year period April 1, 2011 to March 31, 2012 – Inspection of MNR Approved Contingency Plan	Not prescribed under the *EBR*	March 16, 2011
011-2332	MNR Instrument	Contingency Plan for the Lake Nipigon Forest for the 1-year period April 1, 2011 to March 31, 2012 - Public Inspection of the Final Contingency Plan	Not prescribed under the *EBR*	March 15, 2011
011-2733	MNR Instrument	Forest Management Plan for the Hearst Forest for the 10 year period April 1, 2007 to March 31, 2017 - Review of Proposed Operations	Not prescribed under the *EBR*	March 4, 2011
011-1479	MNR Instrument	Contingency Forest Management Plan for the Kenora Forest for the 1-year period April 1, 2011 to March 31, 2012 – Inspection of MNR Approved Contingency Forest Management Plan	Not prescribed under the *EBR*	January 20, 2011

Registry Number	Type	Title	Ministry's Rationale for Information Notice	Date Published
011-1527	MNR Instrument	Major Amendment to the 2006-2026 Forest Management Plan for the Black Sturgeon Forest	Not prescribed under the *EBR*	November 12, 2010
011-1309	MNR Instrument	Forest Management Plan for the Abitibi River Forest for the 10-year period April 1, 2012 to March 31, 2022 - Invitation to Participate	Not prescribed under the *EBR*	October 12, 2010
010-8495	MNR Instrument	Contingency Forest Management Plan for the Gordon Cosens Forest for the two-year period April 1, 2010 to March 31, 2012 - Public inspection of approved Contingency Forest Management Plan	Not prescribed under the *EBR*	September 8, 2010
011-1073	MNR Instrument	Major Amendment to the Forest Management Plan for the Dog River Matawin Forest for the 10-year period April 1, 2009 to March 31, 2019	Not prescribed under the *EBR*	August 30, 2010
011-0913	MNR Instrument	Major Amendment to the Contingency Forest Management Plan for the Whiskey Jack Forest for the three-year period April 1, 2009 to March 31, 2012 – Public Inspection of Approved Amendment	Not prescribed under the *EBR*	August 13, 2010
011-0720	MNR Instrument	Major Amendment to the Forest Management Plan for the Spruce River Forest for period April 1, 2006 to March 31, 2011– Public Inspection of the Approved Major Amendment	Not prescribed under the *EBR*	July 27, 2010
010-9239	MNR Instrument	Major Amendment to the Forest Management Plan for the Lake Nipigon Forest for period April 1, 2006 to March 31, 2011– Public Inspection of the Approved Major Amendment	Not prescribed under the *EBR*	June 22, 2010
Ministry of Northern Development Mines and Forestry (MNDMF)				
011-2972	MNDMF Instrument	Amendment to the Macassa Mine and Lakeshore Tailings Closure Plan	This is a proposed amendment to the closure plan	March 31, 2011

Registry Number	Type	Title	Ministry's Rationale for Information Notice	Date Published
011-2895	MNDMF Instrument	Alexo Project Production Closure Plan Amendment	This is a proposed amendment to the closure plan	March 18, 2011
011-2369	MNDMF Policy	Notice of Opportunity for Review – Draft Terms of Reference for a Class Environmental Assessment for Activities of the Ministry of Northern Development, Mines and Forestry under *the Mining Act* that are subject to the *Environmental Assessment Act*.	Inform public that a draft TofR for this Class EA is available for public review and comment	February 3, 2011
011-1948	MNDMF Policy	Notice of Commencement – Terms of Reference for a Class Environmental Assessment for Activities of the Ministry of Northern Development, Mines and Forestry under the *Mining Act*	Inform public of MNDMF's intent to develop a ToR for a Class EA for the Ministry's activities under the *Mining Act*	December 15, 2010
011-1466	MNDMF Instrument	Amendment to the 2002 Closure Plan, Advanced Exploration	This is a proposed amendment to the 2002 Closure Plan	October 26, 2010
Ministry of Transportation (MTO)				
011-0634	MTO Policy	Peterborough Area and Highway 7 Corridor Transportation Studies	Studies are not required to be posted for public comment under the *EBR*.	August 5, 2010
010-9750	MTO Regulation	Amendment to the High Occupancy Vehicle (HOV) regulation (O.Reg. 620/05) to permit single-occupant electric vehicle access to HOV lanes for a period of five years	MTO is proposing to amend the HOV Regulation	April 28, 2010
010-9138	MTO Policy	Proposed Changes to the Ministry of Transportation's Class Environmental Assessment for Provincial Transportation Facilities	Proposed changes MTO's Class EA document are not required to be posted for public comment under the *EBR*.	April 19, 2010

SECTION 3

ECO REVIEWS OF EXCEPTION NOTICES

SECTION 3: ECO REVIEWS OF EXCEPTION NOTICES

3.1 Use of Exception Notices

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

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

During the 2010/2011 reporting year, four exception notices were posted on the Environmental Registry by the Ministry of the Environment (MOE). All four were exception notices for instruments. In all but one case, MOE relied on the "emergency" exception. The Environmental Commissioner of Ontario (ECO) believes that all notices posted on the Environmental Registry in 2010/2011 were acceptable uses of the exception provisions provided in the *EBR*, even though MOE mistakenly referred to an information notice to justify its "equivalent public participation" exception notice.

MOE's Use of the "Emergency" Exception:
In May 2010, MOE posted an exception notice for Orders issued under the *Environmental Protection Act* to Marathon Pulp Inc. and Tembec Industries (Environmental Registry #010-9846). The ministry issued a Director's Order to the companies on April 29, 2010, two days after it received lab results confirming the presence of polychlorinated biphenyls (PCBs) in groundwater in excess of the Provincial Water Quality Objectives at the Marathon Pulp Inc. mill site in Marathon. The Orders specified that the companies must sample groundwater in tanks and sumps at the site for PCBs; report the results to MOE; submit a plan to prevent the migration of PCB contaminated groundwater to Lake Superior; and safely dispose of the contaminated groundwater. The ECO believes that MOE's use of an exception notice for the Orders issued to Marathon Pulp Inc. and Tembec Industries was acceptable.

In January 2011, MOE approved an amendment to the Certificate of Approval for Waste Management of Canada Corporation's (WMCC) Ottawa site to allow the continued disposal of waste at the site (Environmental Registry #011-2391). The amendment allowed WMCC to continue disposing of waste at the site until March 15, 2011 in order to remediate settlement in part of the landfill. MOE stated that if the settlement area was not remediated promptly, leachate could break out and the site could be structurally compromised. The ECO believes that the use of this exception notice is acceptable.

In March 2011, MOE issued a Certificate of Approval (C of A) for sewage works under the *Ontario Water Resources Act* (Environmental Registry #011-2789). Following the discovery of a leak in an oil storage tank for an Ottawa residence in September 2010, free-floating petroleum products were discovered in monitoring wells near the site. In November 2010, after issuing a public notice to neighbouring residences, MOE approved a temporary groundwater treatment system for the site. Upon the completion of the design of the permanent system, MOE granted a C of A for its installation and use on March 1, 2011, invoking section 29 of the *EBR*. The ECO believes that the use of this exception notice is acceptable.

MOE's Use of the "Equivalent Public Participation" Exception:
In December 2010, MOE posted an exception notice for an Order amending a 2002-issued Order that controlled sulphur dioxide emissions from Vale Inco Limited's Copper Cliff and Nickel Refinery complexes near Sudbury (Environmental Registry #011-1991). MOE invoked the "equivalent public participation"

exception by pointing out that an information notice with a 30-day comment period (Environmental Registry #010-5781) was posted in February 2009 regarding another amendment to the 2002 original Control Order. The ECO notes that MOE erroneously indicated that an information notice can be considered as equivalent public participation. Information notices do not require the posting of a decision notice explaining the effects of public comments on the ministry's decision; nor are any appeal rights available for instruments if they are posted as information notices. (For a discussion of the use of information notices, see "Section 2: ECO Reviews of Information Notices" of this Supplement.) MOE should have referenced the instrument decision notice (Environmental Registry #IA01E1207) that it used to announce the issuance of the original Control Order after posting an instrument proposal notice with a 60-day consultation period in September 2001.

All Exception Notices Posted During the 2010/2011 Reporting Year

Registry Number	Type	Title	Ministry's Rationale for Exception Notice	Date Published
Ministry of the Environment				
011-2789	MOE Instrument	Keith Douglas Lawr and Lee-Ann Ruth Campbell (*OWRA* s. 53(1)) - Approval for sewage works	A delay in giving notice to the public and allowing for public participation would result in, (a) danger to the health or safety of any person; (b) harm or serious risk of harm to the environment; or; (c) injury or damage or serious risk of injury or damage to any property.	March 4, 2011
011-2391	MOE Instrument	Waste Management of Canada Corporation (*EPA* s. 27) - Approval for a waste disposal site.	A delay in giving notice to the public and allowing for public participation would result in, (a) danger to the health or safety of any person; (b) harm or serious risk of harm to the environment; or; (c) injury or damage or serious risk of injury or damage to any property.	January 25, 2011
011-1991	MOE Instrument	Vale Inco Limited (*EPA* s. 17) - Order for remedial work. (*EPA* s. 18) - Order for preventative measures. (*EPA* s. 7) - Order for controlling contaminant discharge.	Exception under section 30 (1) of the *EBR*	December 23, 2010
010-9846	MOE Instrument	Tembec Industries Inc. (*EPA* s. 17) - Order for remedial work. (*EPA* s. 18) - Order for preventative measures.	A delay in giving notice to the public and allowing for public participation would result in, (a) danger to the health or safety of any person; (b) harm or serious risk of harm to the environment; or; (c) injury or damage or serious risk of injury or damage to any property.	May 3, 2010

SECTION 4

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

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

Review of Posted Decision:

4.1 *Animal Health Act, 2009* (Bill 204)

Decision Information

Registry Number: 010-6896
Proposal Posted: June 18, 2009
Decision Posted: March 30, 2010
Comment Period: 32 days
Number of Comments: 36
Decision Implemented: January 21, 2010

Keywords: *Animal Health Act*; farmed animal disease; deadstock disposal

Description

Overview

On March 30, 2010, the Ontario Ministry of Agriculture, Food and Rural Affairs (OMAFRA) posted a decision notice on the Environmental Registry (#010-6896) informing Ontarians that the government had passed the *Animal Health Act, 2009*.

The *Animal Health Act, 2009* (the "Act") appears to be a proactive measure that aims to prevent animal disease outbreaks and their associated economic, public health and environmental consequences. Animal disease outbreaks often spread rapidly across long distances and involve large numbers of animals. The H5N1 avian influenza virus, for instance, was first confirmed as the cause of poultry deaths on three farms in the Republic of Korea on December 19, 2003. In less than 50 days, by February 4, 2004, seven neighbouring countries had all reported the presence of the virus in poultry. During the course of the foot-and-mouth disease outbreak in the UK in 2001, about 6 million sheep, cattle, and pigs had to be destroyed. Almost 15 million poultry had to be put down and disposed of during the H7N3 avian flu virus outbreak in British Columbia in 2004, amidst residents blocking entrance to local landfills to halt plans to dispose of diseased deadstock near their communities and municipal officials criticizing the provincial government for lack of consultation with local authorities.

Natural disasters, such as floods, fires or earthquakes, can also test the limits of existing routine deadstock disposal options. Hurricane Floyd, for example, hit North Carolina in 1999 with torrential rains causing catastrophic floods that resulted in the drowning of 28,000 swine, 600 cattle and close to 3 million poultry. It is not uncommon, in cases like this, to be faced with dead cattle in trees, and other livestock mortalities on roadsides, on people's porches, or – literally – in their back yards. Contamination of drinking water sources and animal-to-human disease introduction are very likely under such circumstances.

Disposal of large amounts of deadstock due to animal disease outbreaks or natural disasters can pose serious threats to the environmental well-being of the province. While OMAFRA has a framework for the disposal of routine farm animal mortalities (see below), a disease outbreak or other emergency may mean that carcass disposal needs exceed producers' disposal capacity. Disposing of large carcass volumes by on-site burial, for instance, may affect groundwater or surface water quality or increase soil contamination levels. Leachate of organic matter from mass burial pits may cause eutrophication of nearby streams or groundwater and lead to algal blooms. Because not all existing municipal landfills are equipped with systems that collect and treat leachate, landfilling of deadstock may result in contamination of

groundwater supplies. Mass-composting of dead animal, if not done properly, can result in contaminated run-off that can affect water sources. Smoke and particulates from on-site or off-site burning of animal biomass raises air quality concerns. In addition, residual ash can be a potential groundwater contaminant.

The *Animal Health Act, 2009* was enacted by the Ontario government in January 2010 as part of its greater Animal Health Strategy to support Ontario's agri-food industry. The agri-food industry encompasses primary agriculture and supporting industries and services including the farm input and service supplier industries, food, beverage and tobacco processing, wholesale, distribution and retail food industries and food service. Some examples are animal feed producers, food processors, food wholesalers and retailers, and the food service sector, such as restaurants.

Ontario is home to approximately 215 million farm animals. Ontario's agri-food industry, the sector beyond the farm gate providing food products, contributes approximately $30 billion to the province's economy every year. Ontario's livestock and poultry sectors alone generate close to $4.5 billion in economic activity. It is important therefore that there are safeguards to ensure the health of these animals that are a source of income for close to 700,000 Ontarians in the industry.

OMAFRA's Animal Health Strategy consists of four key components to help enhance the competitiveness of the agri-food industry and safeguard the province against negative health and economic consequences of animal health issues:

- animal health system co-ordination with identified leadership, roles and responsibilities;
- supportive legislation, complementing national efforts;
- strong infrastructure, strategic investment and flexible emergency management; and
- research.

The Act provides the overarching framework that will guide OMAFRA to develop regulations related to reporting, traceability, quarantines, and other animal practices to protect Ontario's farm animal sector. Although its emphasis is on emergency management, the stated purposes of the Act are to:

- establish measures to prevent, detect, respond to, control and recover from animal disease outbreaks in the province;
- regulate animal-related activities that may affect animal and/or human health; and
- enhance animal product and food safety.

The Act covers all animals – from companion to zoo, research and farm animals – but it focuses mainly on livestock and poultry. It covers a broad spectrum of hazards that could affect animal health, from diseases to chemical, nuclear or physical contamination of animal feeds.

OMAFRA anticipates the following three statutes may be repealed in the future and that subject matter under them may be brought under the Act:

- *Bees Act* – this Act provides for the treatment or destruction of infected bees or beekeeping equipment, the quarantine of bees and the disposal of dead bee colonies. Regulation 57 under the *Bees Act* prescribes certain diseases for the purposes of that Act.
- *Livestock Community Sales Act* – this Act and Regulation 729 under this Act provide for the licensing of community sales of consigned livestock in the province, as well as the cleaning and disinfection of premises where livestock is assembled for sale, and the detention of livestock that appears to be diseased.
- *Livestock Medicines Act* – this Act allows licensed vendors to sell livestock medicines prescribed under Regulation 730 of this Act to livestock owners.

The *Animal Health Act, 2009* also amends the *Drug and Pharmacies Regulation Act,* the *Farm Products Payments Act,* the *Food Safety and Quality Act, 2001* and the *Veterinarian Act* to bring several definitions in those statutes in line with the new *Animal Health Act, 2009*.

Components of the Act

The Act establishes a mechanism for reporting hazards: anyone who knows, reasonably suspects, or ought to know of a "reportable hazard" must report to the Chief Veterinarian for Ontario (appointed by the Minister). In addition, laboratory operators must report an "immediately notifiable hazard" and/or a "periodically notifiable hazard" to the Chief Veterinarian for Ontario. Veterinarians must also report prescribed incidents or findings to the Chief Veterinarian for Ontario. The Chief Veterinarian for Ontario reports any matter posing a significant risk to public health to the Provincial Chief Medical Officer of Health.

The Act also gives powers to the Minister, Chief Veterinarian for Ontario and inspectors (appointed by the Chief Veterinarian for Ontario) to issue Orders. For example, an inspector may issue a Compliance Order requiring a farmer to destroy an animal or issue a Quarantine Order in an effort to contain a disease outbreak. The Chief Veterinarian for Ontario may issue a Surveillance Zone Order around the quarantined premises, not exceeding 10 kilometres in radius. Lastly, the Minister may issue an Animal Health Control Area Order for one or more parts of the province or for the entire province to either prevent the spread of disease from one part of the province to another or prevent the disease from entering the province. Persons who are issued Orders are provided review and appeal rights.

The Act creates a framework for a system of licences, certificates, registrations and permits that can be issued. The ministry may issue licences for commercial operations that receive and handle animals for sale or distribution, or that operate as temporary feeding, watering or resting stations for animal in transit, as well as licences to control and regulate the sale of livestock medicines. The ministry may also issue certificates and permits to qualifying individuals to perform duties or undertake prescribed activities under the Act. The Act also establishes discretionary compensation to owners of animals destroyed and to others responsible for cleaning, disinfecting, destroying, and disposing of an animal.

The Act gives the Minister the authority to establish and oversee the operation of a provincial traceability system for animals, animal products (such as meat, butter and eggs) and animal by-products (such as blood, feathers and hides).

The Act offers Cabinet and ministerial discretion as to which persons, animals, things or places can be exempt from provisions of the Act or regulations made under the Act. For instance, Cabinet or the Minister may exempt persons, premises, conveyances, animals, animal products and by-products and any other thing from licensing and reporting requirements as well as any or all of the requirements of the traceability system.

Animal Health in Ontario before the Act

Up until the new legislation was enacted, for the maintenance of animal health, a safe and secure food system and emergency management, Ontario producers relied on rules found in a number of federal statutes, provisions and regulations under various Ontario acts, and industry initiatives and programs.

Federal:
In cases of animal disease, the federal *Health of Animals Act*, administered by the Canadian Food Inspection Agency, allows the federal government to designate control areas or quarantines, prohibit or regulate the movement of animal, animal products or by-products in Canada, and prohibit or regulate providing the animals with animal feed that could introduce disease or toxic substances to them. The federal statute designates 52 nationally 'reportable' diseases, including bovine spongiform encephalopathy (mad cow disease), foot and mouth disease, and anthrax that must be reported to the federal District Veterinarian upon detection.

The federal Act also requires veterinarians to immediately notify the federal District Veterinarian of reasonable suspicion of any serious Foreign Animal Disease (FAD), a disease that has not gained entry in Canada, regardless of whether it is reportable. Samples will be forwarded to federal diagnostic laboratories to verify the disease. One of the biggest challenges with a FAD is the grey period when a

disease is suspected but not diagnosed. The federal government will assume control when a disease is confirmed. The confirmation period, however, can take up to 72 hours.

Provincial:
The *Emergency Management and Civil Protection Act* authorizes the Premier or Lieutenant Governor in Council to declare an emergency caused by, among other factors, a disease or other health risk. The *Health Protection and Promotion Act* authorizes a medical officer of health or public health inspector to make an order prohibiting or regulating the use of any premises or fomite (i.e., inanimate carrier of a disease, such as clothing) or quarantining a premise—a farm included. The statute also authorizes a medical officer of health to make an order requiring a person to take or avoid taking any action in respect of a communicable disease—animal diseases included. The *Environmental Protection Act* gives the authority to the Minister of the Environment to act in the public interest and require municipalities to accept dead farm animals at their disposal sites in the event of a major scale emergency if the deadstock disposal options provided under existing regulations are not sufficient to cover the potentially large number of animals that may have to be disposed.

Under normal circumstances, O. Reg. 105/09 under the *Food Safety and Quality Act, 2001* sets out the standards and requirements for transport, management, and disposal of deadstock off-farm and O. Reg. 106/09 under the *Nutrient Management Act, 2002* sets out the requirements for on-farm management and disposal of dead animals (see Section 4 of the Supplement to the ECO's 2009/2010 Annual Report, pages 37-45).

Industry:
Existing provincial regulations leave it up to the industry to voluntarily adopt animal welfare standards specifying the way that animals are taken care of in agricultural settings. Ontario Regulation 60/09 under the *Ontario Society for the Prevention of Cruelty to Animals Act (OSPCA)* sets out the basic standards of care for all animals in Ontario and stipulates that every animal must be provided with adequate and appropriate food, water, space, protection from the elements and medical care. Section 11 of the *OSPCA* though exempts activities carried on in "accordance with reasonable and generally accepted practices of agricultural animal care, management or husbandry." Indeed, to deal with farm animal welfare, industry has adopted voluntary codes of practice — nationally developed guidelines for the care and handling of different types of farm animals.

OnTrace Agri-food Traceability is a not-for-profit industry-led organization incorporated in 2006 with investment by the Government of Ontario. Its mandate is to build and implement a traceabilty framework for the agriculture and agri-food sectors in Ontario and to co-ordinate with other national, provincial, and commodity initiatives. The organization has created a voluntary industry-led repository of agriculture and food premise information. Premises identification, which gives a geographic focus, is only one pillar of a traceability system. Animal identification and animal and animal product or by-product movement are the other two. The Act positions Ontario to work with the federal government and industry to develop a national agriculture and food traceability system.

Implications of the Decision

The Act will mean more autonomy for Ontario and less dependence on federal regulations and rules. Until the introduction of the Act, Ontario was the only province in the country without legislation to specifically address animal health issues and emergencies. One of the pressures on the Ontario government that led it to develop the provincial *Animal Health Act, 2009* is the uncertainty period associated with a FAD. The province will now have a mechanism to rapidly respond to an emergency/disease outbreak within its borders and try to control or mitigate the effects, without the need for a formal emergency declaration by the province.

The Act also allows the province to contribute to the development and implementation of the livestock and poultry components of a national agri-food traceability system, as federal, provincial and territorial agriculture ministers committed to doing in June 2006.

The regulations that will be developed under the statute are intended to reduce farmed animal disease, and consequently decrease the number of animals that will have to be disposed.

If the Act fails to prevent the introduction or contain the outbreak of disease in farm animals, wildlife or other kinds of animals, the loss of biological, ecological and genetic diversity is also possible.

Many details about implementation of the *Animal Health Act, 2009* will be set out in regulations under the Act. Until these regulations are made, it is difficult to evaluate the full implications of the new legislation.

Public Participation and *EBR* Process

OMAFRA states that "the passage of the bill comes after consultation with industry partners and the public on an Animal Health Strategy for the province, which began in 2006." OMAFRA posted a discussion paper on its website and held eight stakeholder meetings, yet it did not use the Environmental Registry to consult the public at large at this stage.

After the province-wide consultations of 2006, OMAFRA posted another discussion paper, this time using the Environmental Registry, on June 18, 2009, which outlined the main parts of a proposed animal health law. This second discussion paper was posted for a 32-day comment period; the ministry received a total of 36 comments from various livestock and poultry producers associations, veterinary associations, and academia among others.

Public Comments:
A summary of some of the comments submitted during the Registry posting from mid-June to mid-July 2009 is provided below.

Overall, commenters were in support of the ministry's decision to introduce legislation respecting animal health in Ontario. Many producer associations felt that "provincial animal health legislation would provide the provincial government and the livestock and poultry industry with the required tools to manage disease outbreaks and other incidents that threaten the integrity of the food supply, animal and human health."

Many commenters expected that they would have the opportunity to review a draft of the proposed legislation and said that a posting of the proposed bill's draft would help them understand and "comment on the specifics of the proposal." OMAFRA did not post a draft of the bill disappointing commenters who asked for ongoing, timely and inclusive consultations as the Act proposal evolved.

Some producer associations felt that the consultation period for the proposed Act was short. A great number of commenters stressed the need for continuous consultation and extended comment periods as the regulations under the Act are developed.

Many livestock producers raised concerns about who was going to bear the implementation costs of the new legislation. They argued that since healthy animals benefit and provide returns to a long chain of stakeholders, from producers and processors to retailers, consumers, allied industry and national import/export traders, cost sharing or cost recovery mechanisms should be investigated.

Animal welfare organizations asked OMAFRA to include animal welfare in the legislation stating that aspects of animal well-being such as proper housing, management, nutrition, responsible care, and humane handling contribute to animal health. OMAFRA recognized the importance of animal welfare but stated that since "it is provided for under various provincial and federal statutes…[it] is not included as a specific additional component of this Act."

Several producers and farmers were worried about the level of compensation in the event of a disease outbreak. The second discussion paper stated that the ministry was restricting compensation only for direct losses. Commenters wanted coverage of a broader range of options, from cleaning and disinfection

to mandatory vaccinations and the destruction and disposal of animals. The Act currently includes compensation provisions to deal with such issues.

Legislative History:
After the 32-day posting of the second discussion paper on the Registry from mid-June to mid-July 2009, Bill 204, an Act to protect animal health and to amend and repeal other Acts, was introduced in the House on October 5, 2009. The bill received Second Reading on October 19, 2009. On November 16, 2009, after three sessional days of debate on Second Reading, the bill was referred to the Standing Committee on the Legislative Assembly. The committee held three meetings, only one of which was open to the public for deputations. The bill received Third Reading on December 7, 2009 and Royal Assent a week later, on December 15, 2009.

Animal Health Act, 2009 Amendments:
The Standing Committee on the Legislative Assembly made few amendments to the Act following public hearings on the bill. For example, the bill was amended to require the Chief Veterinarian for Ontario to have a minimum of five years' experience in veterinary medicine in addition to holding a veterinarian licence without conditions or limitations.

In response to deputation comments, the legislation was amended to require the Minister to establish committees, as he/she considers appropriate, to advise the Ministry on animal health matters and matters regulated under the Act.

The representative of the World Society for the Protection of Animals raised concerns before the Standing Committee about the omission from the bill of the entire 'Animal health promotion' section, even though it had appeared in OMAFRA's second discussion paper posted on the Registry in June 2009. As she said "[t]he section would have allowed for the establishment of regulations governing animal care and handling on the farm." She expressed her belief that the section was taken out of the bill because of pressures from the egg industry who oppose the introduction of regulatory standards of such care.

SEV

In the consideration of its Statement of Environmental Values (SEV), OMAFRA stated that the Act is designed to help prevent and quickly control animal health diseases when they occur, thereby minimizing the negative impacts to animal health, human health and the environment. The ministry also stated that the Act will also ensure the proper disposal of animals ordered destroyed by an order specific to the diseases to minimize the negative impact on the environment.

ECO Comment

The ECO is generally pleased to see that OMAFRA has passed legislation addressing emergency management of disease outbreaks in agricultural livestock.

The ECO urges OMAFRA to prescribe the *Animal Health Act, 2009* under the *Environmental Bill of Rights, 1993* (*EBR*) for posting environmentally significant regulations under the Act for notice and comment on the Environmental Registry to ensure that Ontarians have the means to be involved in the process of developing future regulations under the new Act. The ECO also believes that the Act should be prescribed for applications for review and investigation.

The ECO believes that OMAFRA could have made better use of the Environmental Registry for a more thorough public consultation process on the Act. It appears that much of the consultation was exclusively with industry stakeholders. The ministry should have posted a decision notice following the consultation on the second discussion paper explaining how the public comments were taken into consideration when it drafted the bill. OMAFRA should then have also posted a new proposal notice for Bill 204 the day it was introduced in the legislature with a new comment period. (For a discussion of the need for multiple comment periods for proposals that lead to new legislation see page 171 of the ECO's 2005/2006 Annual Report.)

The ECO also reminds OMAFRA that the 30-day posting period stipulated under subsection 15(1) of the *EBR* should be construed as the minimum, not the standard or recommended posting timeframe. The ECO believes OMAFRA should have posted the proposal on the Registry for a longer period.

The ECO urges OMAFRA again, as we have done in the past, to work with industry and municipalities to ensure roles and responsibilities are clearly defined under a mass-carcass disposal plan. Public health, as well as the protection of ecologically sensitive areas, can be jeopardized if there is inadequate planning for the disposal of large numbers of animals in case of a major disease outbreak.

OMAFRA's argument that animal welfare should not be included in the Act because it is provided for under various other provincial and federal statutes is concerning. As the analysis above has shown, animal disease outbreak management was also provided for by a number of federal and provincial statutes. OMAFRA celebrated the consolidation of provincial legislation under the *Animal Health Act, 2009* and the increased autonomy of the provincial government the Act fostered. The ECO believes that the government has a role to play in ensuring that the intensification of agricultural production does not come at the expense of animals' ability to cope with their environment. The treatment and quality of life of farm animals are inextricably linked to animal health, which in turn is linked to sustainable farming practices, public health and the environment.

The ECO expects that OMAFRA will make use of its powers under the Act to adopt and require compliance with the existing codes on farm animal welfare. The public has limited participation rights in the process of updating a code of practice. Turning the codes of practice into regulations under the Act would ensure that they are reviewed in a more transparent and inclusive way. Formally adopting the codes will not only ensure that farm animal welfare standards are developed based on broad public consultation but that they are followed by all stakeholders as well.

The ECO urges the ministry to not delay the development of the regulations to implement the Act, and to use the Environmental Registry as a main platform for public consultations during the development of such regulations. The ECO will monitor the process.

Review of Posted Decision:

4.2 Lakeshore Capacity Assessment Handbook: Protecting Water Quality in Inland Lakes on Ontario's Precambrian Shield

Decision Information

Registry Number: 010-0690
Proposal Posted: May 7, 2008
Decision Posted: July 8, 2010

Comment Period: 60 days
Number of Comments: 58
Decision Implemented: July 8, 2010

Keywords: water quality; phosphorus; eutrophication; shoreline development; land use planning

Description

Overview

In July 2010, the Ministry of the Environment (MOE) released its Lakeshore Capacity Assessment Handbook (the "handbook"). This document is the result of a decades-long collaborative research and policy development program led by MOE, in partnership with the Ministry of Natural Resources (MNR) and the Ministry of Municipal Affairs and Housing (MMAH). The handbook aims to provide a practical

planning tool for municipalities to control the amount of phosphorus entering inland lakes in Ontario's Precambrian Shield as a result of shoreline development.

The Precambrian Shield

The Precambrian Shield is Ontario's largest ecozone. It covers about 60 per cent of the province's land area (Figure 1) and there are over 250,000 inland lakes in the area. Many lakes on the Precambrian Shield are characterized as oligotrophic, or low in nutrients. As phosphorus is the nutrient most often limiting primary productivity, these lakes are sensitive to its introduction. Increases in total phosphorus concentrations are associated with higher levels of algae and plant growth, which can lead to decreases in oxygen concentrations in a lake's deep waters (i.e., the process of eutrophication). Low oxygen conditions in the hypolimnion, or bottom of the lake, are harmful to coldwater fish such as lake trout.

In Precambrian Shield lakes, septic systems of residences, cottages and other shoreline developments are the primary human sources of phosphorus. MOE notes that "about 45 per cent of the lakes that have been determined to be at capacity to date are lake trout lakes in which a cold, well-oxygenated fish habitat is threatened by further shoreline development."

Lakeshore Capacity Study and Interim Water Quality Objectives

In 1975, MOE scientists published a research study that specifically identified the relationship between inland lake shoreline development and eutrophication in Ontario. The insights from this publication led to the Lakeshore Capacity Study, a provincial government research program that ran from 1976 to 1980 in the Muskoka area. The study aimed to "measure the impacts of cottages on the natural environment" and examined a range of predictive relationships between development and environmental impacts.

Figure 1: Ontario's Precambrian Shield (shaded area).
Source: MOE 2010. Lakeshore Capacity Assessment Handbook.

In 1979, MOE developed the Provincial Water Quality Objective (PWQO) for total phosphorus concentrations in Ontario. The ministry took a "two-tiered" approach in its guideline, limiting phosphorus at under 20µg/L to avoid "nuisance" concentrations of algae in lakes with naturally moderate productivity, and under 10µg/L to protect against "aesthetic deterioration" in lakes with naturally low productivity. The ministry gave the objective "interim" status in 1992 due to insufficient scientific evidence to develop firm standards.

In 1986, the then Ministry of Municipal Affairs released a Lakeshore Capacity Study integration report, in collaboration with MOE and MNR. The report described the lakeshore capacity assessment approach as a "comprehensive management and planning tool for assessing the impact of cottage development on inland lakes in Ontario." The 1986 model examined a range of indicators to predict the environmental

change resulting from development, including: land use (MMAH), fisheries exploitation and wildlife (MNR), microbiology (MOE) and water quality (MOE).

The comprehensive lakeshore capacity model was not adopted into regular use in the province. MOE notes that its water quality model, now known as the Lakeshore Capacity Model, was the only portion regularly used by management agencies as an assessment tool. Over recent decades, municipalities and land use planners have informally modified and implemented the water quality model for local use. This led to inconsistencies in its methods and applications across the province. In 1993, with the MOE's "corporate adoption of watershed planning," the ministry began to formalize lakeshore capacity assessment into province-wide policy. In 2006, a research study by MOE scientists was published, outlining updates and improvements on the original model.

MOE posted a draft of the handbook on the Environmental Registry in May 2008 for public comment. In addition, MOE provided district municipalities, conservation authorities, environmental consultants and others with an opportunity to review and comment on the draft document. MOE released the final handbook in July 2010.

Lakeshore Capacity Assessment Handbook:
The Lakeshore Capacity Assessment Handbook aims to "predict the level of development sustained along the shoreline of an inland lake on the Precambrian Shield without exhibiting any adverse effects related to high phosphorus levels." In its current form, lakeshore capacity assessment is a planning tool aimed at "controlling the amount of one key pollutant – phosphorus – entering a lake by controlling shoreline development."

The mathematical model described in the handbook, the Lakeshore Capacity Model, is used to determine a maximum amount of phosphorus from human sources (in addition to underlying atmospheric deposition and natural sources from the watershed) to be loaded to a particular water body in the Precambrian Shield. The model also predicts the level of additional development that can be sustained around a particular water body without adverse effects due to phosphorus. Municipalities and planning authorities can use this information to determine how many lots should be permitted along the shoreline of a lake. MOE recommends that the Lakeshore Capacity Model be used by municipalities "on a routine basis as part of their ongoing land-use planning process."

MOE states that lakeshore capacity assessment is necessary for a number of reasons: 1) to help protect environmental resources and water quality; 2) to help protect recreational and economic resources, such as tourism and fisheries; and 3) to help municipal planning authorities meet their obligations under the *Planning Act* and Provincial Policy Statement to protect water quality, fish habitat, and natural heritage features. The ministry further states that the lakeshore capacity assessment described in the handbook is consistent with watershed planning, encourages scientifically-sound decision making, streamlines shoreline planning across the province, and is cost-effective for municipalities.

The Lakeshore Capacity Model:
To run the model, there are several minimum inputs required (see Table 1), as well as an optional secondary phosphorus attenuation input. Input data are available from a number of different sources with varying levels of data quality. Staff technical expertise is required to run the model.

Table 1: Minimum inputs required to run the Lakeshore Capacity Model.

- Lake name
- Lake latitude and longitude
- Lake area
- Local catchment or watershed area
- Current shoreline development status of all lots (i.e., the number of cottages and resort units and the nature of their usage: permanent/seasonal/extended seasonal)
- Land-use data for the watershed (e.g., wetlands, agricultural, urban)
- Categorization of the hypolimnion (bottom water of lake) as anoxic (low oxygen) or oxic (oxygenated)
- Observed or measured total phosphorus concentrations to evaluate the model

Source: MOE

To determine whether or not a lake is at capacity, municipalities or planning authorities compare the total phosphorus levels predicted by the Lakeshore Capacity Model to those observed by on-the-ground water quality monitoring. The volunteer-driven Lake Partner Program conducts monitoring for phosphorus and lake clarity in more than 1,000 locations across the province. This program is a partnership between MOE, the Federation of Ontario Cottagers' Associations and other organizations. During summer months, volunteers take water clarity observations and collect water samples to send to MOE's Dorset Environmental Science Centre for analysis, using sampling protocols developed by MOE in 1992.

For lakes that are determined to be at or around capacity, MOE suggests flexibility to account for error in model predictions, while taking into account the historic sensitivity of the lake. If lakes are already above capacity (i.e., if the lake is 60 per cent or more over the predevelopment baseline, or, the lake has modeled or measured dissolved oxygen concentrations less than MNR's criterion for lake trout), MOE calls for limits on new development, and suggests that municipalities limit planning approvals to:

- Projects that do not increase net phosphorus loadings to the lake (e.g., those that separate existing habitable dwellings into multiple units);
- New developments that ensure septic system tile fields drain into a basin that is not yet at capacity; or
- New developments that set back new tile fields at least 300 metres from shoreline.

Implementation and Municipal Land Use Planning:
Municipalities are not required by law to carry out lakeshore capacity assessment. However, an assessment is "strongly recommended" by the Ontario government as an "effective means of being consistent with the *Planning Act*, the Provincial Policy Statement (2005), the *Ontario Water Resources Act* and the federal *Fisheries Act*." The handbook states that an assessment "may" be triggered when developing or updating official plans, considering new planning approvals within 300 metres of a lake, when residents raise concerns over water quality or when lake trout are present.

MOE recommends that municipalities and planning authorities update their policies and incorporate information from lakeshore capacity assessment into their official plans and zoning by-laws. For example, MOE suggests that municipalities incorporate information regarding: where assessments have been completed; where lake capacity limits have been established; where assessment needs to be completed prior to additional development approvals; and which lakes, if any, have already reached capacity.

MOE is not directly involved with the implementation of the guidance provided in the handbook, as municipalities and planning authorities are ultimately responsible for carrying out modeling, setting capacity limits and allocating development capacity. However, MOE states that "implementation of effective lakeshore capacity assessment will require a co-ordinated and cooperative approach by the various agencies involved to develop and implement the planning and regulatory tools that are needed."

MMAH is the lead agency in direct contact with municipalities for land use planning issues and will contact MOE district offices for specific technical assistance with water quality issues if necessary. MOE

and MNR will provide technical support to municipalities when asked, including educational materials and technical advice. In areas without municipal organization, MOE states that "the Province will continue to apply the Lakeshore Capacity Model and establish lakeshore capacity limits."

Implications of the Decision

More Stringent Phosphorus Objectives

In this document, MOE has redefined the maximum allowable levels of phosphorus in Precambrian Shield lakes to a 50 per cent increase in phosphorus levels for each lake, calculated from a modelled baseline of "water quality in the absence of human presence." MOE states that the existing province-wide interim PWQO for phosphorus, in use for over two decades, "fail[s] to protect against the cumulative effects of development and do[es] not protect the existing diversity in water quality across the province and the associated biodiversity."

In the new approach for Precambrian Shield lakes, the allowable phosphorus level is determined by running the Lakeshore Capacity Model for each individual water body. This model considers downstream phosphorus transport in the context of the watershed. This is in contrast to the interim PWQO for phosphorus in Ontario, which set maximum concentrations for the province without regard to specific baseline or atmospheric levels for individual lakes or watersheds. Under the new approach, each water body has its own phosphorus objective so sensitive lakes will be treated more appropriately than in the "one size fits all" type approach previously taken. As MOE states, the new development capacity is "proportional to a lake's original trophic status."

The ministry acknowledges that the same principles used to determine the phosphorus standards in the handbook "should be considered in a future review of the PWQO for phosphorus in off-Shield lakes and rivers." However, the updated phosphorus objectives are currently limited to water bodies on the Precambrian Shield.

Since the new guidelines for phosphorus apply even for those lakes with previous development, there is the possibility that a number of lakes would not meet the new more stringent phosphorus objectives, with unknown consequences.

Movement of Development to Undeveloped Areas

If municipalities and planning authorities adhere to the guidelines in the handbook, lakes will eventually reach capacity and new development would be restricted for that shoreline. Thus, MOE notes that "the net effect of lakeshore capacity assessment will likely be to shift development from lakes that are already well developed to those that are less developed."

Also, the handbook's advice may lead to more development further back from the shore. The handbook recommends that development around lakes over capacity ensure that new tile fields are set back at least 300 metres – so new developments may occur beyond that 300 metre limit.

Limitations of the Lakeshore Capacity Model

Lakeshore capacity assessment as described in the handbook addresses only one pollutant – phosphorus. It does not account for any other factors that contribute to a lake's capacity: pollutants other than phosphorus (e.g., mercury, bacteria, petroleum products); specific sources of pollution (i.e., whether from industry, agriculture, residential sources); or any factors outside of water quality (e.g., shoreline hardening, forested edge, wildlife impacts, soils, topography, crowding and boating limits).

MOE calibrated the Lakeshore Capacity Model for lakes in the Muskoka and Haliburton areas on the Precambrian Shield, during the last few decades. MOE scientists noted that caution should be used when applying the model elsewhere, particularly with regards to its estimation of atmospheric deposition of phosphorus. As well, MOE may need to change the coefficients in the model over time as local conditions

undergo long-term changes. MOE suggests that a collaborative working group be established to periodically review the model, but the handbook does not provide any timelines.

Lack of Incentive for Best Management Practices

The modelling program is conservative in that it does not take into account any types of best management practices that encourage retention of phosphorus before reaching the lake. Several practices are understood to lower the phosphorus loading by particular lots to the lake, including the use of vegetated buffer strips as nutrient sinks. However, few long-term studies have been published providing quantitative evidence of these best management practices. MOE therefore did not include these voluntary practices in the model, calling for further research. Although phosphorus retention factors can technically be used within the Lakeshore Capacity Model, MOE does not recommend their incorporation into the model until research can be provided on a site-specific basis to support a change in phosphorous retention by soils or vegetation within 300 metres of the shoreline.

Since best management practices are not regularly included as a model input, and require additional site-specific research to be applied, there is little incentive for municipalities to encourage these practices by residents. Regardless of the actions to reduce phosphorus output that cottagers or residents undertake, the modelled capacity output will not change.

Continuation of Lake Partner Program

The handbook assumes the continued funding and support for the Lake Partner Program as a primary method of collecting data to validate a lake's predicted response to development. These collected samples will be the primary data source to verify predicted phosphorus levels for lakes. As noted in a recent study of the program and its 25-year long data sets, a large amount of variability in the data reaffirms the need to ensure training or information is available to volunteers, and to include sampling bias in any analyses using the data. Biases can be introduced by the containers used to collect samples, and if coarse sediments such as zooplankton are not properly filtered. Ensuring high data quality is particularly important under new guidance in the handbook, as planning decisions may be based on the results of these volunteer-collected samples.

Lack of Financial and Technical Support for Implementation by Municipalities

The handbook makes it clear that the onus is on each planning authority to implement lakeshore capacity planning, and MOE will provide technical or educational support when asked. The handbook does not outline any new responsibilities or financial assistance from ministries. The handbook notes that some municipalities may not have experts on staff, but that "most resource managers, planners and environmental engineers with a basic understanding of aquatic science can be trained to use the Lakeshore Capacity Model in less than a week." Some municipalities may have less technical and financial capacity to carry out the modelling exercise, so some conservation authorities may need to provide assistance with implementation – particularly when several small municipalities span a single watershed. However, few conservation authorities operate in the Precambrian Shield.

Public Participation & *EBR* Process

MOE took an unusual approach in counting public comments for this decision. The general convention is for ministries to count the number of commenters who submitted feedback. In this case, MOE instead numbered the specific itemized comments outlined by those submitting – there were 58 distinct points made by only three commenters. It is clear MOE thoroughly reviewed the responses.

A municipality noted that the Lakeshore Capacity Model is too imprecise to defend the restrictive policy outcomes that might result from its use. The municipality noted that the "background plus fifty per cent" approach was first suggested by the federal government, but that MOE's solution of halting development was much more restrictive than the Environment Canada guidance to undertake further assessment before making a management decision. A conservation authority pointed out that without a strong lead

from MOE, the restrictions resulting from modelling could lead to an agency "shouldering a considerable liability." The conservation authority further suggested that "there will need to be support provided at least regarding the science of the model …in the event of a challenge of a decision that is based on the [Lakeshore Capacity Assessment Model.]" The district municipality also noted that there was a lack of discussion about remediation after a lake was over capacity.

All commenters mentioned that the Lakeshore Capacity Model should better incorporate the attenuation of phosphorus by soils and vegetative buffers. One commenter pointed out that by excluding soil attenuation from the model, municipalities will face difficulties in providing incentives or encouragement for best management practices for reducing phosphorus outflow from homes and cottages – as any of these actions would not improve the overall modelled capacity of the lake. A municipality expressed interest in participating in further research on vegetative buffers in attenuation, to assist in improving the model. Further, the municipality called for further research on stormwater impacts on lakeshore capacity, including on stormwater management planning measures and best management practices.

SEV

MOE considered its Statement of Environmental Values (SEV) in developing this handbook. The ministry echoed statements from the handbook's executive summary in its SEV consideration form. MOE stated that the "use of lakeshore capacity assessment by municipalities and enforcement of water-regulated regulations and by-laws will help to ensure that the quality of water in Ontario's inland lakes is preserved." The ministry also noted that the conservative approach taken in the model and its assumptions are consistent with its SEV and will "protect the environment when there is uncertainty in the science."

Other Information

Long-Term Declines in Total Phosphorus Export from Catchments

As the Lakeshore Capacity Model is a "steady state mass balance model," it assumes each lake is completely mixed and that the lake's influx and efflux are constant over time. However, lakes are not necessarily in a steady state. Recent studies by university and MOE researchers have reported long-term declines in total phosphorus concentrations, even in areas in the Precambrian Shield that have had general increases in cottage usage.

A 2010 analysis examined this phenomenon from a twenty-year data set and found that annual stream export of phosphorus decreased in 8 of the 11 sites examined – in some cases up to 89 per cent decline. The declines were not associated with stream flow, but with lower total phosphorus concentrations in water. The study authors stated "long-term declines in lake [total phosphorus] concentrations are as yet unexplained, although this study indicates that decreases in catchment export are a contributing factor." Export of phosphorus from catchments to lakes is affected by a number of factors, including acid rain and climatic changes. The issue of decreasing total phosphorus was not discussed in the handbook; nor was climate change and its potential impacts on phosphorus export.

Lake Simcoe Phosphorus Reduction Strategy

In Lake Simcoe, a phosphorus reduction strategy has been introduced (for more information, please see Section 4.5 of this Supplement to the ECO's 2010/2011 Annual Report). While the Lakeshore Capacity Assessment Handbook encourages municipalities to prevent overloading of phosphorus in the planning stage before development occurs – but does not provide guidance for remediation, Lake Simcoe's strategy may provide a more helpful example for lakes in the Precambrian Shield that are already over capacity. The Lake Simcoe Phosphorus Reduction Strategy is a long-term plan focused on reducing phosphorus loadings from specific input sources, with a target for total phosphorus load for the lake. The strategy further aims to increase dissolved oxygen levels to above the MNR guidelines of 7 mg/L, the level recommended for the restoration of a self-sustaining native coldwater fish community.

ECO Comment

The ECO is pleased that MOE released this handbook, which was several decades in the making. The handbook clearly explains the Lakeshore Capacity Model and when and where municipalities and planning authorities should apply it. Further, the ECO is pleased that the model provides a quantitative tool for watershed-level planning.

The ECO commends MOE for developing new, more stringent limits for phosphorus concentrations for inland lakes on the Precambrian Shield. The previous provincial target of 10 µg/L was higher than appropriate for some sensitive northern lakes, and the new methodology should correct this problem. The ECO encourages MOE to consider updating the water quality objective for total phosphorus across the province, with full public consultation on the Environmental Registry.

Over recent decades, the ECO has observed a substantive retreat by the government from the previous comprehensive method of shoreline capacity planning. The ECO believes that the current approach, focused solely on a single nutrient, takes a narrow approach to the concept of "capacity." Despite the importance of phosphorus as a key indicator of lake water quality, it should not be the only factor in determining the level of development allowable on a lake. It appears that although provincial guidance is available, the provincial government has downloaded key responsibilities for lakeshore capacity assessment to municipalities with limited funding and technical support. The ECO encourages the three ministries involved in lakeshore capacity assessment to provide training opportunities for planning agencies and volunteer organizations.

The ECO agrees with MOE that further research on best management practices for phosphorus attenuation is necessary before automatic inclusion in the mathematical model. The ECO suggests that MOE, MNR and MMAH go one step further and commit to carrying out that research and incorporating best management practices in updated versions of the model – so that in the meantime, municipalities can encourage best management practices for residents and cottage owners, knowing efforts to reduce phosphorus inputs will be taken into account in the future.

The ECO also believes the ministries should commit to periodic reviews of the Lakeshore Capacity Model and associated handbook, to address new research, practice adaptive management, and above all, to track effectiveness of the program. Unanswered questions in the current handbook, such as rehabilitation of lakes over capacity, should be addressed in future versions of the handbook.

It does not appear that there is currently a mechanism in place to monitor the uptake and effectiveness of the lakeshore capacity assessment. Without legal requirement, funding, or assurance of ministry support at the Ontario Municipal Board, many municipalities may choose to go slow or ignore the new guidance. The ECO believes that ministries have a clear responsibility to support municipalities in their uptake of lakeshore capacity assessment, and urges MOE, MMAH and MNR to establish a working group and specify a timeline for reviewing the handbook and its effectiveness on a going-forward basis. For example, ministries should commit to report to the public on municipalities that have adopted this form of lakeshore capacity assessment, within 3 to 5 years.

Review of Posted Decision:

4.3 Drive Clean Regulatory Amendment

Decision Information

Registry Number: 010-8137
Proposal Posted: January 28, 2010
Decision Posted: June 7, 2010

Comment Period: 30 days
Number of Comments: 128
Decision Implemented: June 4, 2010

Keywords: O. Reg. 316/98; Drive Clean; smog

Description

Overview

In June 2010, the Ministry of the Environment (MOE) used the Environmental Registry to announce upcoming changes to its Drive Clean program. The ministry said that it amended Ontario Regulation 361/98 – Motor Vehicles (O. Reg. 361/98) under the *Environmental Protection Act* (*EPA*) to modernize the emissions test for light-duty vehicles and to enhance its oversight of the program's repair technicians. The changes will take effect on January 1, 2013.

MOE is following the lead of close to 30 American states and British Columbia (the only other Canadian jurisdiction) that use on-board diagnostic testing in their vehicle inspection and maintenance programs. MOE explained that the modernization of the program will result in more accurate vehicle inspections and more effective repairs. Due to the tighter emission standards of the new testing technology, MOE said there will be greater reductions of smog-causing pollutants from Ontario's vehicle fleet. Requiring poorly performing repair technicians to undergo additional training will also benefit the environment, MOE added.

Background

Vehicles and Smog:
Every time a fossil-fuel burning vehicle is operated, smog precursors, such as nitrogen oxides (NOx), volatile organic compounds (VOCs), airborne particulate matter (PM) and other pollutants are emitted to the air. NOx and VOCs react together in the presence of sunlight and heat to form ground-level ozone which, when combined with PM, gives rise to smog. Smog can cause respiratory irritation and put people with heart or lung disorders, children and the elderly at risk. Depending on the severity of a smog incident, even healthy adults may experience discomfort. People spending time or living near roadways are particularly affected by vehicle-related pollution. In addition to human health effects, smog can decrease crop productivity, contribute to forest decline, and damage synthetic materials and textiles. Ontario's 10 million registered vehicles are a major anthropogenic source of smog and air pollution.

Ontario's Drive Clean Program:
In 1999, to reduce smog-causing emissions from cars, trucks and buses, MOE introduced Drive Clean, the province's compulsory vehicle emissions inspection and maintenance program for light- and heavy-duty vehicles. Light-duty vehicles in the Greater Toronto and Hamilton-Wentworth areas and diesel heavy-duty vehicles in the entire province became subject to mandatory emissions inspections and maintenance requirements. In 2001 and 2002 the light-vehicle component of the program was expanded twice to ultimately cover the south-central, southwest and southern Ontario smog zone, from Windsor to Ottawa. Non-diesel heavy-duty vehicles were phased in in the same fashion as light-duty vehicles.

Light-duty vehicles more than five years old require biennial emissions tests to renew their registration. Heavy-duty vehicles over five years old require annual emissions tests. Used vehicles older than the

current model year require a test for ownership transfer. Emissions standards are laid out in the *Drive Clean Guide* referred to in O. Reg. 361/98. MOE has gradually tightened these standards over the lifespan of the program.

Between its inception and May 16, 2011, the program performed over 32 million inspections of light duty vehicles, over 1.5 million inspections of heavy duty diesel vehicles, and more than 100,000 inspections of heavy duty non-diesel vehicles.

The 2010 Regulatory Amendments

The Dynamometer Test:
The amendments to O. Reg. 361/98 revoke the use of the dynamometer for emissions testing under the Drive Clean program, replacing it with on-board diagnostic (OBD) testing. A dynamometer is a treadmill-like device on which vehicles are placed to simulate on-road driving conditions. The vehicle is driven at a moderate speed and exhaust emissions are recorded. Dynamometers are bulky, expensive devices that are used by Ontario's accredited Drive Clean facilities. At the time the Drive Clean program was initiated, dynamometers ranged in price from $50,000 to $100,000.

On-Board Diagnostic (OBD) Systems:
OBD emissions standards and testing equipment will replace the dynamometer for emissions testing for light-duty vehicles with model years of 1998 or later.

OBD systems in road vehicles have been gradually made mandatory by governments in North America and Europe over the past 25 years or so. OBD systems monitor components that can affect vehicles' emissions performance and assist repair technicians in diagnosing and fixing problems with a vehicle's engine. If a problem is detected, the OBD system illuminates a warning lamp, also known as Malfunction Indicator Light (MIL), on the vehicle's dashboard to alert the driver. Other than providing notice to the driver that emissions are exceeding specified standards, OBD systems store information on the detected malfunctions that can be retrieved by repair technicians. Ideally, when drivers see the MIL flashing, they would get their vehicles repaired. However, because vehicle performance is not usually affected by compromised anti-pollution systems, drivers may often ignore the MIL and keep on using their vehicles without repairing them. Thus, an inspection and maintenance (I/M) program is still needed.

According to MOE, the OBD test equipment cost is not known yet. Citing experiences in other jurisdictions that already use OBD testing technology, MOE expects the annual costs of OBD equipment to be equivalent or less than the annual maintenance costs of the dynamometer and associated equipment.

Two-Speed Idle Tailpipe Test:
Under the amendments to O. Reg. 361/98, emissions testing for vehicles with model years from 1988-1997 will be conducted using the Two-Speed Idle Tailpipe Test. In this test, a probe inserted in the vehicle's tailpipe measures exhaust emissions with the engine idling at a high and then low speed.

Technician Courses:
Drive Clean repair technicians must hold a certificate of qualification as an automotive service technician issued under the *Apprenticeship and Certification Act, 1998* and complete additional training to receive the repair technician certification. Should a prospective repair technician fail the online emissions certification course, he or she is required to take classroom training courses on the modules of the exam that they failed. He or she will be required to rewrite only those exam modules that they failed. Certified repair technicians are required to retake the certification exam every three years.

MOE explains that up until the current amendments to O. Reg. 361/98 were made, when a repair technician performed inappropriate or faulty repairs the ministry could only suspend or terminate the Drive Clean facility from the program. If MOE now detects that a repair technician is incompetent in completing work that is intended to make a vehicle meet the emissions standards for Drive Clean, it can require that the technician successfully complete additional training in order to remain in the program.

Implications of the Decision

NOx and VOCs released from passenger vehicles were reduced by about 38,600 tonnes in 2007 due to the Drive Clean program (that MOE stated). For the same year, MOE added, PM emissions from heavy duty diesel vehicles were reduced by 254 tonnes. MOE expects that the use of tighter OBD emissions test standards and more accurate emissions testing equipment should help reduce smog-causing emissions from motor vehicles by an additional 20 per cent. Responding to an ECO inquiry, MOE stated that it based this estimate on a 2007 report prepared for the Drive Clean program, which predicts emissions results using emissions modelling tools; MOE also cited a 2005 report prepared for British Columbia's vehicle I/M program which predicts similar results for that province using the same modelling tools. MOE also stated that the improvement in emissions reductions is expected in 2013, once OBD is fully implemented.

The lower cost of the new emissions testing equipment could potentially encourage more facilities to enter the Drive Clean program. However, MOE advised the ECO that based on experience from other jurisdictions it does not expect an influx of new entrants into the program. MOE also indicated that because of the more comprehensive scrutiny that is afforded by OBD testing some existing facilities may actually opt out of the program. If MOE does accredit more facilities, this could result in greater decentralized program delivery (for a discussion of centralized and decentralized vehicle inspection and maintenance programs see the "Other Information" section below). While more facilities may be more convenient for vehicle owners and may provide greater visibility for the program, for MOE it could mean that oversight of the facilities becomes more cumbersome.

The environmental implications of disposing of close to 1,400 dynamometers could be significant. If, for instance, disposed dynamometer lubricants and other fluids leak, they may contaminate soil and water resources. Recycling their metallic parts can save landfill space, reduce greenhouse gas emissions and avoid aesthetic nuisance. Recovering their electronic parts can prevent the release of toxins into the environment. Some existing Drive Clean facility owners expressed concern about the costs of disposing the equipment. MOE states on its Drive Clean website that "[t]he Drive Clean Office…will work with Drive Clean facilities to offer services for disposal of dynamometers to the Drive Clean facilities at a set cost and will be committed to disposing of this equipment in an environmentally responsible manner."

Public Participation & *EBR* Process

In January 2010, MOE provided for a 30-day public comment period on its proposed changes to the Drive Clean program. The ministry took a commendable step of notifying all Drive Clean facilities of the proposal. Given that changes to the regulation will not be implemented until 2013, the ECO believes that MOE could have provided a longer consultation period. This would have given street-level implementers and other stakeholders a better chance to read and understand the proposed changes and formulate informed responses.

The ministry received 128 comments, almost all from existing Drive Clean facility owners. Less than one quarter of all commenters stated their support for the proposal. The majority of commenters raised a number of concerns summarized below.

Obsolescence of Existing Equipment:
Some facility owners who have invested in dynamometers expressed concerns about the return on their investments. They said that high purchase, installation and maintenance costs of the devices will not be recovered by the date the dynamometer test will be phased out.

Diminished Economic Returns for Facilities:
A number of commenters were worried that the less costly new testing equipment may result in a big influx of new facilities into the program. This, they said, may have a negative impact on existing businesses and it may also jeopardize program reliability. MOE did not respond to these concerns.

Increase Test Cost:
A number of existing facility owners asked that the government increase the $35 test fee so that facilities can cover their costs. Some commenters suggested that testing fees should not be controlled by the government but by the market. MOE did not remark on these comments.

New Test will not Measure VOCs and NOx:
A number of existing facility owners said that the new test's capability of detecting VOCs and NOx is limited and, as a result, there will be an increase in such emissions. MOE responded that the standards for OBD vehicles are stricter than the current standards and they will benefit the environment through VOCs, NOx and other emissions reductions.

New Test Makes it Easy to Cheat:
Some commenters expressed concerns about the commercial availability of devices that can render the new testing method ineffective. As one emission inspector and repair technician noted, "…any person, for $100, can buy a code reader and clear any codes before coming to test, leaving no trace of codes. This would totally fool the system and be [of] no benefit to the environment." MOE did not address these concerns.

MOE Should have Provided more Information:
Some commenters, even among those who supported the amendments, would have liked to have seen more information on the proposed changes. As one commenter aptly stated: "In order to provide proper feedback or comments we need to better understand what are [*sic*] the proposed test parameters." Another commenter said: "The letter we received informing us of the proposed changes is incredibly vague."

SEV

In its SEV consideration form, MOE explained that it adopted a science-based approach in decision-making as it based the regulation changes on a science-based review of the program by an independent consultant in 2005. MOE also said that it considered current and future generations of Ontarians, as it is predicted that in 2020, 2.5 million vehicles will still require a Drive Clean test to ensure their emissions systems are maintained. MOE also said that the introduction of OBD can end costly maintenance of aging dynamometers, reduce staff time involved in testing and increase repair revenue for Drive Clean facilities.

Other Information

Vehicle Inspection and Maintenance (I/M) Programs – Global Context:
To control vehicle emissions, governments have attempted to regulate vehicle manufacturers, fuel suppliers, and millions of drivers. Vehicle I/M programs, which aim at influencing the behaviour of vehicle owners, have gained worldwide acceptance over recent decades and are a common policy tool to control transportation sector air emissions.

Vehicle Inspection and Maintenance (I/M) Programs – The USA and Canadian Context:
In 1990, amendments to the U.S. *Clean Air Act* made I/M programs mandatory for several areas in the country. To assist policy makers in launching or strengthening I/M programs, in October 2004, the U.S. Agency for International Development released a report outlining eight essential best management practices: I/M program inspections should be conducted at "test-only" facilities; governments should supply the policy framework and overall management while private contractors perform actual inspections; strong government oversight and quality assurance programs are needed; phase-in I/M programs to allow for learning, adaptation and capacity building; base emissions standards on sound science and cost and emissions reduction analysis; make I/M program compliance a requirement for operating a vehicle; set appropriate inspection fees; and ensure building capacity to provide the maintenance and repair component of I/M programs.

In Canada, the federal government has jurisdiction over emissions performance of new vehicles and fuel standards. Unlike the U.S., in Canada the federal government does not mandate I/M programs but leaves

the implementation of in-use vehicle emissions programs to the provincial governments. British Columbia, Ontario and Quebec are the only Canadian provinces with I/M programs. The Canadian Council of Ministers of the Environment has published reports outlining non-binding suggested program parameters (similar to those set out above) for provincial, regional, or even municipal agencies that consider implementing motor vehicle I/M programs.

Drive Clean Program Delivery and Integrity:
Ontario's Drive Clean program is a mainly decentralized I/M program, where vehicles are both inspected and repaired at private service stations and garages licensed and authorized by the government. Centralized I/M programs, on the other hand, keep the testing and repair functions separate. Vehicles must be inspected at one of a small number of facilities, regulated by the government and run by public employees or independent contractors. MOE has accredited close to 2,100 facilities. Test-only, test and repair, and repair-only centres deliver the program for light-duty vehicles, with combined test and repair centres constituting the majority of such Drive Clean facilities. Heavy-duty vehicles are served exclusively at test-only stations.

MOE has employed a variety of measures, such as training and certification, standardization and automation of the process, extensive overt and covert audits, and direct connection to a central computerized database to counter the higher opportunities for fraud and other program inconsistencies associated with decentralized I/M programs.

Still, a 2004 Auditor General of Ontario review of MOE's administration of the Drive Clean program identified a number of issues: almost 230 heavy-duty vehicles had been issued conditional passes since the inception of the program although they are not eligible for such passes; close to 150 vehicle owners complained that their cars failed at one testing centre and then passed at another without any repairs; at least 120,000 vehicles not on the ministry's exception list for the dynamometer test had been tested using the idle method; in 2003, 85 per cent of 1,000 vehicles not on the exception list that failed the dynamometer test were retested using the idle method and passed; more than 1,400 facilities engaged in off-line testing, which risks loss of data; and 3,200 uniquely numbered emission certificates had been presented at licence plate issuing offices more than five times each, resulting in untested vehicles on the road.

In 2005, MOE amended O. Reg. 361/98 to make it an offence to create, distribute or use a false inspection report. The effect of this amendment is hard to quantify. It certainly has not eliminated incidences of fraud. For instance, following recent MOE investigations, a Drive Clean facility was fined a total of $20,000 for taking orders for and delivering falsified emissions inspection reports. Another facility was fined $5,000 for entering the information for one vehicle into the emissions testing equipment but actually testing another vehicle. For the years 2008 to 2010, MOE terminated 50 facilities from the program.

2005 Drive Clean Review – What Happened?:
The current Regulation Decision Notice comes five years after MOE posted a Policy Proposal Notice for a Drive Clean Program Review on the Environmental Registry (#PA05E0019). The November 18, 2005 proposal suggested changes that would increase the age of the vehicle from three to five years before mandatory emissions-testing is required, eliminate the rolling exemption of 20-year-old light-duty vehicles, require annual testing for vehicles 12 years old or older, increase the repair cost limit from $450 to $600, strengthen anti-fraud provisions and implement new security features, and implement OBD testing for 1998 and newer light-duty vehicles. MOE has yet to post a policy decision notice on the 2005 proposal.

ECO Comment

Ontario appears to be well-positioned to implement OBD technologies in its Drive Clean program, now that the growing pains of the technology's design or system faults have wound down after their introduction in most American states and British Columbia. Like Ontario, these jurisdictions use a computer-based model and vehicle fleet data to estimate vehicle emission inventories and expected emissions reductions. Thus, overall program effectiveness is very dependent on how closely the

computer model and its assumptions reflect real world emissions. In practice, North American jurisdictions have relied on the U.S. Environmental Protection Agency (U.S. EPA) modelling approach. The U.S. *Clean Air Act* requires the U.S. EPA to regularly update its mobile source emission models, and in fact the agency has recently upgraded to model MOVES2010a, which all U.S. states are now adopting. The model incorporates new car and light truck energy and greenhouse gas rates, among other improvements. MOE should ensure that Drive Clean's environmental effectiveness benefits from the new science and expertise available through the U.S. EPA. The ECO encourages MOE to use the new model to estimate Ontario vehicle emission inventories and the emission reductions attributable to Drive Clean, and to report the findings to the public.

MOE should develop clear policies to guide its discretion on requiring additional training for Drive Clean repair technicians who perform inadequately. The ECO urges MOE to maintain its strong oversight and robust quality assurance program to ensure emissions reductions are achieved and public confidence in the program is maintained.

The ECO is pleased that MOE has committed to work with Drive Clean facilities to ensure environmentally responsible disposal of dynamometers.

MOE indicated that the proposal received overall support, but a careful review of the submitted comments by the ECO shows that the ministry overemphasized the support the proposal received. In the interest of openness and fairness, the ECO expects the ministry to more accurately portray the public's reaction to proposals posted on the Environmental Registry.

Finally, MOE should deal with the long-languishing policy proposal notice of 2005 and post a policy decision notice explaining the outcomes of that review, whether it implemented the changes it proposed, and how public comments were taken into consideration. As of May 16, 2011, MOE has yet to respond to the ECO's request for the ministry's plans on updating the Environmental Registry.

Review of Posted Decision:

4.4 Rules for Source Protection Planning under Ontario's *Clean Water Act, 2006*

Decision Information

Registry Number: 010-8766
Proposal Posted: January 25, 2010
Decision Posted: August 11, 2010

Comment Period: 60 days
Number of Comments: 86
Decision Implemented: June 17, 2010 (in force July 1, 2010)

Keywords: *Clean Water Act, 2006*; drinking water; source protection; source protection plan

Description

Overview

"Source protection" is the protection of drinking water from contamination and depletion at its source. This means safeguarding the quality and quantity of both the surface water (lakes, rivers, streams and wetlands) and groundwater (water beneath the earth's surface that flows into wells and springs) from which we obtain our drinking water.

On June 17, 2010, Ontario Regulation 287/07, the general regulation under the *Clean Water Act, 2006* (*CWA*) was amended to set out the content and consultation requirements for preparing source protection plans for Ontario's watersheds. The amendments also establish the provisions necessary to implement Part IV of the *CWA*, which provides additional tools to address significant drinking water threats in vulnerable areas. With these much-anticipated rules in place, source protection committees across the province may begin to prepare their source protection plans – the defining component of Ontario's "drinking water safety net."

Background

Eleven years ago, the contaminated drinking water tragedy in Walkerton, Ontario killed seven people and made over 2,300 ill. It also changed the landscape of drinking water regulation in Ontario forever. Following the terrible events in Walkerton, the government embarked on a mission to overhaul Ontario's approach to drinking water safety, vowing to implement all of the recommendations made in the Report of the Walkerton Inquiry prepared by Mr. Justice Dennis O'Connor.

What followed was the creation of a new regime for drinking water protection in Ontario – a "safety net" that would be based on: "a strong legislative and regulatory framework; health-based standards for drinking water; regular and reliable testing; swift, strong action on adverse water quality incidents; mandatory licensing, operator certification and training requirements; a multifaceted compliance improvement toolkit; [and] partnership, transparency and public engagement." Perhaps most importantly, the safety net would have a "source-to-tap focus" – one of the key recommendations of the Walkerton Inquiry Report.

One of the first major initiatives to stem from the Walkerton Inquiry Report was the *Safe Drinking Water Act, 2002* (*SDWA*), which came into force on June 1, 2003. The *SDWA* sets out the framework governing the treatment and distribution of drinking water in Ontario (the ECO reviewed the *SDWA* in detail in our 2002/2003 Annual Report, pages 80-85). However, Ontario still needed specific legislation and policy aimed at protecting the sources of our drinking water. Specifically, the Walkerton Inquiry Report recommended that "drinking water sources be protected by developing watershed-based source protection plans…for all watersheds in Ontario."

After much consultation and deliberation, including the establishment of an Advisory Committee on Watershed-based Source Protection Planning in 2002 and the publication of a White Paper on Ontario's proposed approach to source water protection in 2004, Ontario's *Clean Water Act, 2006* (*CWA*) received Royal Assent on October 19, 2006.

The *CWA* establishes the legal framework for source protection planning in Ontario, described by the Ministry of the Environment (MOE) as the first barrier in "a multi-barrier approach" to providing a safe supply of water for Ontario. The source protection planning process, described below, imposes on Ontario communities the responsibility for protecting their municipal water supplies, first by identifying potential threats to the watersheds serving those systems, and then by developing and implementing locally based plans to reduce or eliminate those threats.

Generally, source protection under the *CWA* only applies to drinking water systems in areas within the jurisdictional boundaries of conservation authorities. The Minister of the Environment may designate other watersheds for *CWA* protection, but is not required to do so. Moreover, only municipal drinking water systems are included in the source protection planning process – private wells and other non-municipal water supplies are generally not included. However, drinking water systems other than municipal residential drinking water systems can be included if a municipality includes such a system in the source protection area's terms of reference through a council resolution. In addition, if specifically requested, existing or planned drinking water systems that serve or will serve a First Nations reserve may be included in the source protection planning process (for additional details about this latter exception, see "Other Information," below).

The ECO reviewed the *CWA* in detail in our 2006/2007 Annual Report, pages 118-124.

The Source Protection Planning Process

The *CWA* provides for the creation of local watershed-based planning areas called source protection areas ("SP areas"), usually corresponding to one or more conservation authority watersheds or jurisdictional boundaries; some of these SP areas are grouped into source protection regions ("SP regions"). To date, 38 SP areas (36 areas defined by conservation authority jurisdictional boundaries and two additional areas) and 10 SP regions have been established under the *CWA* regulations. According to MOE, these SP areas cover approximately 480 municipal residential drinking water systems that "serve the bulk of Ontario's population."

Each SP area is assigned a source protection authority ("SP authority") – usually the local conservation authority – tasked with source protection planning for the SP area. To that end, the SP authority (or the lead authority, if part of an SP region) must establish a multi-stakeholder source protection committee ("SP committee"), comprised of appointed municipal, agricultural, commercial, environmental and other representatives to carry out the source protection planning work for each SP area. To date, 19 SP committees have been established under the *CWA* regulations.

SP committees are charged with preparing three key documents for their SP area(s): the terms of reference, the assessment report, and the source protection plan. The *CWA* establishes the basic requirements for the preparation and content of each document, while specific details must be prescribed by regulation. Each stage of the source protection planning process includes public notice and consultation requirements. Once each document is prepared, it must be submitted first to the applicable SP authority and then to MOE for final approval.

1. **Terms of Reference (ToRs):** ToRs guide the preparation of assessment reports and source protection plans. ToRs must include specific information about the SP area (e.g., list of municipalities affected; planned or existing drinking water systems), as well as a work plan setting out: the major tasks required to complete the assessment report and source protection plan; the person or body responsible for completing each task; and estimated date of completion. The specific requirements for the content of ToRs are set out in O. Reg. 287/07.

   MOE has approved the ToRs for all 38 SP areas.

2. **Assessment Reports:** At this stage, SP committees must identify potential drinking water threats in the SP area. Assessment reports are science-based technical documents that identify and characterize the watersheds in the SP area, create water budgets, and identify, for each SP area:

   - the "vulnerable areas" within each watershed;
   - the "drinking water threats" in each vulnerable area; and
   - which drinking water threats constitute "significant drinking water threats."

   The specific requirements for the content of assessment reports are set out in O. Reg. 287/07. "Technical Rules" created under the *CWA* (discussed under "Other Information," below) also guide the preparation of assessment reports.

   The assessment report for an SP area must be submitted to the MOE Director for approval within 12 months of approval of the ToR for that SP area. As of March 31, 2011, MOE had approved assessment reports for four SP areas.

3. **Source Protection Plans:** The role of a source protection plan is to establish the strategy for reducing or eliminating drinking water threats in the SP area. In particular, the *CWA* requires that a source protection plan include:

   - "significant threat policies" to address activities that are or would be a significant drinking water threat;
   - policies for monitoring drinking water threats;

- if directed by the Minister, policies to achieve targets for Great Lakes drinking water; and
- any other policies prescribed by regulation.

The *CWA* also identifies optional policies that may be included in source protection plans, including, for example, policies that address activities that are or would be moderate or low drinking water threats, and policies that address conditions resulting from past activities.

Under Part IV of the *CWA,* source protection plans may also designate, in limited circumstances: prohibited activities; activities that require a risk management plan (also known as "regulated activities"); and restricted land uses. This last tool, which may only be used where the proposed land use relates to a prohibited activity or an activity requiring a risk management plan, is intended to deal with drinking water threats "at the front-end of the land use planning process," by enabling municipalities to avoid inadvertently approving land use applications involving potential drinking water threats without the necessary risk management measure safeguards in place.

Source protection plans must be submitted to the Minister no later than August 20, 2012. To date, no source protection plans have been approved; until recently, the specific instructions needed by SP committees to prepare source protection plans had not been prescribed. The amendments to O. Reg. 287/07 that came into force in July 2010 established the rules for preparing source protection plans, and are described below.

Activity or Condition?

There are numerous provisions throughout the *CWA* and O. Reg. 287/07 referring to "activities" and "conditions" that represent drinking water threats. But what do these terms mean?

In the context of Ontario's source protection planning process, the term "activity" refers to *existing* or *future* actions that constitute or may constitute a drinking water threat. The operation of a waste disposal site, the application of road salt, and the handling and storage of pesticides are all examples of "activities."

The term "condition" is used in reference to the pre-existing state of land, as a result of *past* activity, that constitutes a drinking water threat. For example, contamination of a site due to previous industrial use represents a "condition."

Activities and conditions can both contribute to "drinking water issues," which are described as "known problems with water quality for a source of drinking water." The distinction between activities and conditions is important, because not all policy tools that may be included in a source protection plan apply to both. For example, while significant threat policies may address both activities and conditions, the *CWA* Part IV policy tools (i.e., prohibitions, requirements for risk management plans and restrictions on land use) may only be used to restrict activities.

Generally, municipalities are responsible for enforcing the Part IV powers of the *CWA*, and are required to appoint a risk management official and risk management inspectors to carry out that duty. Risk management officials are also charged with overseeing the implementation and enforcement of risk management plans required for regulated activities within SP areas.

Rules for Preparing Source Protection Plans – Amendments to O. Reg. 287/07

On June 17, 2010, O. Reg. 287/07 was amended by O. Reg. 246/10. Those amendments, which came into force on July 1, 2010, establish the specific requirements and content of source protection plans and include provisions that are necessary to implement certain components of those plans.

New Policies:
The amendments to O. Reg. 287/07 describe the additional policy tools to deal with drinking water threats that may be included in a source protection plan. These include policies that establish stewardship programs, best management practices, pilot programs, that govern research, or that specify certain actions to be taken. Other policies that are permitted include: incentive, education and outreach programs related to municipal residential drinking water systems as well as private wells and other non-municipal water supplies; collection of data related to climate conditions in an SP area; and updating spill prevention and spill contingency plans along highways, railway or shipping lanes to protect drinking water sources.

The regulation also now specifies that source protection plans may include policies intended to protect "transport pathways" (i.e., conditions resulting from human activity that increase the vulnerability of a drinking water system's raw water supply).

Legal Effect of Source Protection Plan Policies:
Under Part III of the *CWA,* source protection plans can carry considerable legal weight. For example, municipalities, local boards and the SP authority have a duty to comply with any obligations that are imposed on them by a significant threat policy or designated Great Lakes policy in a source protection plan. Decisions relating to SP areas made under the *Planning Act* or the *Condominium Act, 1998*, as well as prescribed provincial instruments (discussed below) must conform to significant threat policies and designated Great Lakes policies and "have regard to" other policies in the source protection plan. Official plans and zoning by-laws must also be amended to conform to significant threat policies and designated Great Lakes policies by the date specified in the source protection plan. Further, in most cases of a conflict between the source protection plan and another plan or policy, the source protection policy prevails.

The amendments to O. Reg. 287/07 set out a list of the types of policies in a source protection plan that may have legal effect under Part III of the *CWA* (e.g., significant threat policies, monitoring policies). Any policy not listed (i.e., that is non-legally binding) is to be identified as a "strategic action policy." Further, to clearly identify when a legal duty under the *CWA* is being imposed in a source protection plan, the plan must specifically state that this duty applies to the policy in question.

Prescribed Instruments:
The *CWA* stipulates that prescribed provincial instruments must conform to significant threat policies and Great Lakes policies in source protection plans, and have regard to other policies. Not only does this apply to new or amended instruments, but ministries that issued prescribed instruments before a source protection plan took effect must amend them to conform to those policies by the date specified in the source protection plan. By prescribing these and other instruments under the *CWA*, those instruments may be used to implement policies in source protection plans.

The amendments made by O. Reg. 246/10 set out a long list of provincial instruments that are prescribed for purposes of this requirement. These include, to name a few: certificates of approval for waste disposal sites under the *Environmental Protection Act,* wayside permits and associated site plans under the *Aggregate Resources Act*, certificates of approval for sewage works and permits to take water issued under the *Ontario Water Resource Act*, nutrient management plans and strategies under the *Nutrient Management Act*, *2002*; extermination permits under the *Pesticides Act*, and municipal drinking water licences under the *SDWA*.

Prohibitions, Regulated Activities and Restricted Land Uses:
As mentioned above, Part IV of the *CWA* provides SP committees with additional policy tools to regulate drinking water threats in source protection plans, in the form of:

1) prohibited activities (i.e., forbidding certain activities altogether);
2) regulated activities (i.e., allowing certain activities in a designated area only if the actions set out in a risk management plan are taken to reduce the level of risk); and

3) restrictions on land use (i.e., preventing certain activities that are prohibited or regulated from being approved under the planning process without the necessary risk management measure safeguards in place).

These rather strong tools may only be applied to designated activities that are identified as significant drinking water threats, and only to activities and land uses in designated areas within wellhead protection areas and intake protection zones.

The amendments to O. Reg. 287/07 establish the drinking water threats for which Part IV tools may be used. In particular, the regulation prescribes the drinking water threats that may be designated as prohibited or regulated activities, including: drinking water threats already listed in section 1.1 of the regulation (e.g., the management of materials such as manure and sewage sludge; the application of pesticide to land; the handling and storage of fuel, etc.); and activities that have been identified as drinking water threats for vulnerable areas in the assessment report. For an area that a source protection plan designates for restrictions on land use, the regulation prescribes the land uses that may be restricted as any land uses described in a zoning by-law or official plan that applies to the municipality or planning area in which the designated area is located.

Although the *CWA* would allow source protection plans to prohibit pre-existing activities following a minimum transition period, the regulation specifies that a pre-existing activity shall not be prohibited unless there are no other means to manage the threat effectively.

The regulation exempts certain activities from the prohibition and risk management requirements. Waste disposal sites approved under the *Environmental Protection Act* and sewage works approved under the *Ontario Water Resources Act* are exempt. For activities that would normally require a risk management plan, a person who holds a prescribed provincial instrument that regulates the activity can seek an exemption, if certain conditions are met.

Finally, the regulatory amendments also prescribe the contents of risk management plans and address circumstances in which interim risk management plans may be required in advance of source protection plan approval.

Notice and Consultation:
The amendments to O. Reg. 287/07 include new provisions governing notice and consultation requirements during the source protection planning process. In particular, the regulation requires an SP committee to give notice to and receive and consider comments from persons or bodies who would be affected by certain provisions of a source protection plan (e.g., municipalities, First Nations bands, persons engaging in an activity that is a significant drinking water threat, persons holding prescribed instruments that would be affected by the plan) before the draft plan can be published. The regulation also sets out detailed requirements for multi-step public notice and consultation on draft source protection plans.

Objectives:
The regulation includes a list of objectives that must be included in every source protection plan. The first objective, "to protect existing and future drinking water sources in the source protection area" is illustrative of these broad objectives.

The regulation specifically prohibits SP committees from including any objective other than those listed in the regulation in source protection plans. MOE explained that this should ensure "that the objectives of the Plan remain within the confines of the *Clean Water Act.*"

Explanatory Document:
Before a draft source protection plan is released, the SP committee must prepare an "explanatory document" that describes the reasoning behind various components of the source protection plan. For example, the explanatory document must include, among other things: the rationale for the policies included in the plan and any designation of prohibited activities; an explanation of how potential financial

implications influenced the development of the policies in the plan; and a summary of how climate change issues identified in the assessment report were considered. The explanatory document must be published on the internet and be accessible for the public to inspect.

Other Changes:
In addition to the changes described above, other matters addressed in the amendments to O. Reg. 287/07 include:

- The form of source protection plans;
- Training and qualifications of risk management officials and inspectors;
- Records retention;
- Notice of hearings regarding proposed source protection plans;
- The process for amending source protection plans; and
- Reporting obligations.

Implications of the Decision

With these regulatory amendments, SP committees now have the necessary tools to move forward with preparing the critical final document in Ontario's three-part source protection planning process – the source protection plan itself. Once source protection plans are in effect, the risks to municipal drinking water posed by threats to source water quality and quantity in program areas should be significantly reduced.

Increased Certainty and Transparency:
Having detailed rules for source protection plan preparation and content should, overall, provide certainty for everyone involved in the source protection planning process: certainty for the SP committees responsible for drafting source protection plans; certainty for municipalities, planning boards and bodies that administer planning documents and make planning decisions in SP areas; certainty for provincial ministries responsible for prescribed instruments; and certainty for landowners and others who may be affected in myriad ways by source protection plan policies. The notice and consultation requirements should help to ensure that affected persons and bodies are kept both apprised of and involved in the planning process.

While the regulation should yield a certain level of predictability and consistency within and between source protection plans, it also provides flexibility to find local solutions to specific drinking water issues in an SP area. However, the limits on permitted plan objectives should ensure that source protection plans do not stray from their overarching purpose: to protect existing and future drinking water sources in SP areas. The requirement to provide an explanatory document, together with extensive and early consultation, should also lend transparency to the process.

Effect on Municipalities, Conservation Authorities, Provincial Ministries and Others:
Source protection plans will have a ripple effect on many other planning and regulatory tools and on existing or planned activities in SP areas. Those who will be affected (e.g., municipalities, planning authorities and boards, persons or bodies responsible for issuing prescribed instruments, persons or bodies who engage in activities that are or would be significant drinking water threats, and others) will have a lot of work to do.

Municipalities will have to review and amend official plans, zoning by-laws and other documents to conform to policies in source protection plans; provincial ministries will be required to do the same for prescribed instruments. Municipalities will also need to prepare to take on enforcement responsibilities under Part IV of the *CWA*, including hiring and training risk management officials and inspectors. People engaged in designated activities in SP areas may need to commence risk management planning.

This and other work required to give effect to source protection plans will command significant financial resources. In January 2011, the Ontario government reported that it has invested more than $175 million

to protect drinking water sources since 2005. Considerable additional funding will be required moving forward.

Reliance on Provincial Instruments:
By prescribing provincial instruments under the *CWA*, those instruments may be used to implement policies in source protection plans. Relying on those instruments (and the ministries responsible for issuing them) to implement source protection policies should be an effective and efficient way to manage local drinking water threats without regulatory duplication. How policies are actually given effect will depend on the level of discretion or direction provided in the source protection plan policy itself.

"Spin-off Benefits" – Protection of Other Drinking Water Sources and the Environment:
Although the *CWA* is only intended to protect water sources that feed municipal drinking water systems, policies in source protection plans that prevent or reduce the release of pollutants and pathogens in municipal drinking water sources – Ontario's lakes, streams, rivers, wetlands and underground aquifers – could also benefit those who obtain their drinking water from non-municipal supplies (e.g., private wells) in those areas. Source protection measures, generally, should have a positive influence on water quality, soil quality and biodiversity in program areas.

Public Participation & *EBR* Process

MOE undertook a two-step approach to consultation on these important regulatory amendments. The ministry first engaged in consultation at the policy level in June 2009 by posting a detailed discussion paper on the Environmental Registry (#010-6726) for a 90-day comment period. The discussion paper sought feedback on the ministry's proposed requirements for the content and preparation of source protection plans. MOE received 64 comments in response to that policy proposal. MOE reported that it considered that input while developing the draft regulation for further consultation; however, the ministry has not posted a decision notice on the Registry to explain how those comments were considered in reaching its decision.

On January 25, 2010, MOE posted the draft regulation on the Environmental Registry for a 60-day comment period. MOE also reported that it held a series of multi-stakeholder information sessions across the province, and engaged in additional discussions with specific sectors and stakeholder groups. The ministry received 86 comments in response to the regulation proposal, from: municipalities, conservation authorities, SP committees and authorities, farmers and agricultural organizations, First Nations, environmental non-governmental organizations, industry, private individuals and others.

Many of the commenters provided lengthy and detailed analyses of the proposal, with recommendations and requests for specific changes to the proposed regulation. While most commenters were generally supportive of the larger concepts underlying source protection plans (e.g., providing for local flexibility in developing the plans; avoiding regulatory duplication with provincial instruments; allowing the prohibition of existing activities only as a last resort; requiring early consultation with affected parties), opinions were mixed on more specific aspects of the regulation (e.g., the list of proposed prescribed provincial instruments; the requirement to prepare an explanatory document; the requirement for municipal notification to SP authorities of activities that would increase system vulnerability). Commenters expressed a high level of concern about the need for sustainable, long-term funding for municipalities and conservation authorities to make this process work.

Commenters also requested clarification on a number of specific aspects of the regulation, including, for example: definitions of terms used in the regulation; provisions regarding "transport pathways"; requirements regarding the collection of climate change data; provisions regarding the use of risk management plans; and training and qualification requirements for risk management officials.

In its decision notice, MOE provided a good summary of the comments received and briefly described some changes that were made as a result of the comments. For example, in the final regulation MOE enhanced the provisions regarding consultation with First Nations on draft source protection plans. Unfortunately, the decision notice lacked the detail and clarity found in the proposal notice and could have

been more informative. Nevertheless, it is clear that MOE genuinely considered the public's input in finalizing the amendments to the regulation.

***EBR* Process Issue**

On June 23, 2004, MOE posted a proposal notice on the Environmental Registry (#AA04E0002) for a "Drinking Water Source Protection Act." MOE never posted a decision notice for this proposal; it appears to have been abandoned when the government proceeded with the enactment of the *CWA* instead. In our 2007/2008 Annual Report, the ECO stated that "MOE should update this notice to indicate a different approach was taken." Disappointingly, MOE has still not done so.

By neglecting to post a decision notice for that proposal, MOE has failed to explain how any public comments received in response to the proposal were considered in making its decision. The ongoing presence of this outstanding proposal on the Registry is also potentially confusing to a member of the public who may be researching or tracking Ontario's source protection planning regime. To avoid potential confusion, the ECO again urges MOE to post a decision notice without delay, indicating that the proposal was superseded by subsequent developments.

Similarly, despite a reminder from the ECO in January 2011, as of March 31, 2011, MOE has yet to post a decision notice related to its discussion paper on source protection plan content and preparation (Registry #010-6726). A decision notice for that proposal is now long overdue, given that the regulation was filed in June 2010.

The ECO is concerned that these and other "orphaned" notices on the Environmental Registry demonstrate that MOE is not exercising sufficient care to ensure that the public is kept apprised, in a timely fashion, of developments regarding environmentally significant decisions being made by that ministry.

SEV

MOE reported that in developing these regulatory amendments, it considered the following principles of environmental protection as outlined in the ministry's Statement of Environmental Values: Environmental Management; Pollution Reduction/Environmental Restoration; and Strategic Management. MOE also stated that it took into consideration financial and social factors applicable to local communities in which source protection plan policies apply.

In particular, MOE emphasized the precautionary nature of the *CWA* source protection program, stating that source protection plans "will address all threats to drinking water, both existing and future, to minimize the risk of threat becoming reality." MOE also contends that source protection plan policies will allow SP committees to address cumulative effects of multiple threats to drinking water.

Other Information

Two First Nations Drinking Water Systems Included in Source Protection Planning

In addition to municipal drinking water systems, existing or planned drinking water systems that serve or will serve a First Nations reserve may, if specifically requested, be included in the source protection planning process for the applicable SP area.

In response to Band Council resolutions received from Kettle and Stony Point First Nation and from Six Nations of the Grand River, MOE posted a notice on the Environmental Registry (#010-7903) on October 21, 2009, proposing to include those First Nations' drinking water systems in the source protection planning process. MOE reported that it received only one comment on the proposal during the 30-day comment period, and that the comment was supportive of the proposal.

On March 8, 2010, O. Reg. 287/07 was amended to prescribe the drinking water systems for Kettle and Stony Point First Nation and Six Nations of the Grand River. By including these First Nations drinking water systems in the source protection planning process, existing and potential threats to drinking water in those systems will be identified and addressed alongside threats to municipal drinking water systems.

Updated Technical Rules for Preparing Assessment Reports

In addition to the general provisions in the *CWA*, directions for preparing assessment reports are found in two places: in O. Reg. 287/07 and in "Technical Rules" made by the MOE Director in accordance with section 107 of the *CWA*. The Technical Rules were first established in November 2008.

The Technical Rules set out specific requirements and methodologies for preparing assessment reports. For example, they include technical directions for: preparing water budgets; characterizing a watershed; assessing groundwater vulnerability; delineating wellhead protection areas and surface water intake protection zones; and identifying areas for significant, moderate and low drinking water threats (activities and conditions). The Technical Rules also reference another technical document entitled Tables of Drinking Water Threats.

In November 2009, following a 30-day public consultation period on the Environmental Registry (#010-7573), the Technical Rules, together with the Tables of Drinking Water Threats, were significantly amended. These amendments were made as a result of input from stakeholders, including SP committees, who expressed concern about the feasibility of some of the rules and timelines for completing assessment reports. The amendments included, for example:

- new flexibility to use an alternative methodology for gathering information or performing a task, if a rationale is provided and approved by the MOE director;
- a new risk-based approach to evaluating potential significant drinking water threats in different types of drinking water systems; and
- corrections and updates to the Tables of Drinking Water Threats.

MOE stated that the amendments were intended to "provide more clarity with respect to the contents of the assessment report and to provide more flexibility to source protection committees to address local conditions."

In March 2011, MOE proposed additional amendments to the Technical Rules regarding the preparation of water budgets and the use of climate data in assessment reports (Registry #011-2168). Public consultation was ongoing at the close of the ECO's reporting year.

Ontario Drinking Water Stewardship Program

The *CWA* establishes the Ontario Drinking Water Stewardship Program ("ODWSP") to provide financial assistance to landowners and businesses who take action to reduce threats to sources of municipal drinking water. In 2007, the Ontario government committed $28 million over four years to support this program. In the first three years of the program, aimed at early actions, education and outreach and special projects, ODWSP provided $21 million in funding to approximately 2,100 local projects involving activities such as well decommissioning and upgrades, improvements to septic systems, runoff and erosion controls, and pollution prevention assessments for businesses.

An additional $7 million was allocated for the fourth year of the program, which will focus on "early response," providing funding for projects to address specific drinking water threats identified by SP committees in assessment reports for particular SP areas.

ECO Comment

MOE has described these regulatory amendments as allowing for "the ultimate realization of Justice O'Connor's vision for source-to-tap drinking water protection." While this may be an overstatement – for

instance, Justice O'Connor envisioned source protection plans for *all* watersheds in Ontario – having a robust and comprehensive set of rules for source protection planning is indeed critical to achieving the purposes of the *CWA*.

The ECO commends MOE for developing a source protection strategy that aims to reduce drinking water threats posed by past, present and future activities, and for enacting the legislation, regulations and technical guidance required to breathe life into that strategy. Ontario is leading the country in this regard. The recent improvements to drinking water regulation and protection in the province should not only give many Ontarians greater confidence that the water flowing from their taps is safe to drink, but will also benefit the environment as a whole. It is discouraging, however, that more Ontarians will not benefit from these improvements. At present, the source protection regime leaves most of the northern part of Ontario, as well as the significant segment of the population that relies on private drinking wells, without protection. While the Minister has the authority to designate additional SP areas, only two such areas – both included under the umbrella of SP regions – have been designated since the *CWA* came into force. The ECO hopes that the benefits of source protection will be extended to other areas of the province in the near future.

The successes and ongoing challenges of Ontario's source protection strategy will not be fully apparent until source protection plans have been approved and implemented. However, MOE has done a good job creating a comprehensive and thoughtful policy toolkit for SP committees to tackle various drinking water threats in different but appropriate ways. O. Reg. 287/07 establishes reasonable conditions on the use of the *CWA* section IV powers; however, effective training of risk management officials and inspectors will be crucial to implementing and enforcing the use of these tools. Clear guidance will also be necessary to assist municipalities, provincial ministries and others responsible for bringing various instruments, official plans and zoning by-laws into conformity with source protection plan policies. Further, MOE should periodically review the lists of prescribed drinking water threats and prescribed instruments to ensure the regulation – and the source protection planning process itself – stays current.

The ECO is pleased that source protection plans may include policies for collecting climate change data, which could provide critical input to future source protection in an SP area. Although the Great Lakes are an important source of drinking water for many Ontarians, setting Great Lakes targets and including Great Lakes policies in source protection plans unfortunately remains discretionary. The ECO encourages the Minister to prioritize the development of Great Lakes targets so that SP committees include policies to achieve those targets in their source protection plans.

The ECO is also pleased that MOE has built early, multi-stage consultation into the source protection planning process. It is disappointing, though, that the regulation does not take better advantage of the Environmental Registry to facilitate public consultation. At present, the Minister is only required to give notice of ToRs, assessment reports and source protection plans on the Environmental Registry once they have already been approved. The ECO continues to urge MOE to classify source protection planning documents as instruments under the *EBR*, which would provide the public with greater opportunity to participate in source protection planning.

The regulation is dense, complex and rife with cross-references. With 38 source protection plans being prepared in the coming months, there will likely be temporary uncertainty – and, with it, considerable turmoil – as SP committees, public bodies and stakeholders navigate the rules for the first time. The process will also continue to be costly for municipalities, conservation authorities and others charged with responsibilities for implementing and enforcing source protection plans. The ECO urges the Ontario government and MOE to ensure sufficient, stable, long-term funding is in place to support all aspects of the source protection program.

There is no question that source protection planning is complicated, inconvenient and expensive. However, we should not allow this to eclipse the sheer importance of the program; of not only ensuring a safe drinking water supply but, just as important, of instilling public confidence in it. The suffering that happened in Walkerton in 2000 should be a constant reminder that the benefits to human health and the environment that come from protecting the province's aquatic resources are priceless.

Review of Posted Decision:

4.5 Lake Simcoe Phosphorus Reduction Strategy

Decision Information

Registry Number: 010-8986
Proposal Posted: February 17, 2010
Decision Posted: July 7, 2010

Comment Period: 45 days
Number of Comments: 40
Decision Implemented: June 2010

Keywords: Lake Simcoe; water quality; biodiversity; watershed planning

Description

Overview

The water quality in Lake Simcoe and its watershed has steeply declined due to numerous anthropogenic activities, like farming and land development. Phosphorus loadings into the lake and its tributaries are a particularly problematic contributor to this decline. The Phosphorus Reduction Strategy, developed under the *Lake Simcoe Protection Act, 2008* and the resulting Lake Simcoe Protection Plan, is a long-term plan aimed at reducing phosphorus loadings into the lake and watershed.

Background

Lake Simcoe is the largest lake in southern Ontario, after the Great Lakes. The Lake Simcoe watershed is also habitat for countless species, including 32 species at risk. Twenty three municipalities are situated in the watershed. Eight of these municipalities rely on the watershed for their drinking water. Economically, the watershed hosts outdoor recreational activities that provide thousands of jobs, and supports agricultural production worth millions of dollars annually. More than 350,000 permanent residents and an additional 50,000 seasonal residents currently reside in this watershed, and the population will continue to grow as a direct result of the Growth Plan for the Greater Golden Horseshoe, under the *Places to Grow Act, 2005*.

Land development in the Lake Simcoe watershed has changed the natural landscape and disturbed the lake's ecosystem. There are numerous related stressors affecting Lake Simcoe including: discharge of nutrients (e.g., phosphorus), pollutants (e.g., pharmaceuticals, organics, metals and sediments) and pathogens into the lake; invasive species; climate change; land use change; water extraction; and other human pressures (e.g., fishing and boating). These stressors are having a detrimental impact on the lake's native species including coldwater species of fish (e.g. Redside Dace, Lake (Simcoe) Whitefish), which are sensitive to changes in water quality (i.e., increased phosphorus and decreased dissolved oxygen).

Phosphorus loading is considered a primary cause of Lake Simcoe's water quality problems. Phosphorus is a naturally occurring nutrient, however significant amounts of this nutrient enters the lake by atmospheric deposition or water run-off from anthropogenic sources such as fertilizers, detergents, human and animal waste, and industrial processes. In the 1800s, before significant human settlement occurred in the area, the phosphorus load entering the Lake was approximately 32 tonnes per year (T/yr) (baseline level). In the 1980s, the phosphorus load climbed to a high of more than 100 T/yr. Currently, the load averages approximately 72 T/yr.

The added phosphorus nurtures greater plant and algae growth. The plant biomass then consumes oxygen in the respiration and decomposition processes and depletes the dissolved oxygen concentration in deeper parts of the Lake, creating anoxic conditions. As a result, by the 1960s, Lake Simcoe was no longer able to support self-sustaining natural populations of cold-water fish, such as lake trout, that inhabit the bottom of the lake. Instead, the lake is being stocked to maintain these species.

Since the early 1980s, the Ontario government has been involved in activities to improve Lake Simcoe's water quality. The Lake Simcoe Environmental Management Strategy program, started in 1981, was a multi-agency partnership (municipalities, federal and provincial ministries, Lake Simcoe Region Conservation Authority and the Chippewas of Georgina Island First Nation), established to reduce phosphorus inputs into Lake Simcoe. This program is credited with reducing the phosphorus load to its current level and several occurrences of naturally reproducing lake trout. The research and results from this program were used by the Lake Simcoe Science Advisory Committee and informed the priorities set out in the Lake Simcoe Protection Plan (LSPP) released in June 2009.

Another multi-agency partnership, the Intergovernmental Action Plan for Simcoe, Barrie and Orillia, was formed in 2006 and completed an Assimilative Capacity Study and modelling tools for the Lake Simcoe watershed. These models were used in the Phosphorus Reduction Strategy.

In December 2008, the Ministry of the Environment (MOE) passed the *Lake Simcoe Protection Act, 2008* (*LSPA*). The Act, created to protect and restore the ecological health of the Lake Simcoe watershed, resulted in the development of the LSPP and established a Lake Simcoe Science Advisory Committee and a Lake Simcoe Coordinating Committee. Furthermore, the Act empowers the province to regulate activities that may adversely affect the ecology of the watershed. For more information on the *LSPA,* see Part 3.2 of the ECO's 2008/2009 Annual Report.

The LSPP, released in 2009 under the *LSPA,* sets out a range of targets, indicators and 119 policies to address key concerns including: stresses from human activities; excessive phosphorus; loss or disruption of sensitive natural areas and habitats; and changes to water quality and quantity. This multi-partner plan also commits the province and other agencies to conduct research and monitoring in the watershed and promote stewardship activities. The LSPP required the government to develop a phosphorus reduction strategy for the watershed by June 2010 and identified components to be included in the strategy. (For more information on the LSPP, refer to Part 4.5 of the ECO's 2009/2010 Annual Report.)

Lake Simcoe Phosphorus Reduction Strategy

The Lake Simcoe Phosphorus Reduction Strategy (the "Strategy"), finalized in June 2010, is an important part of the LSPP. The Strategy is a multi-partner, 35-year phased approach for identifying and reducing major sources of phosphorus entering Lake Simcoe and its watershed. The Strategy relies on and builds upon the scientific research, initiatives and planning conducted by the government and various partner groups over the past several decades. The Strategy shares the $20 million provincial investment for Lake Simcoe initiatives, although no details on how this money will be spent were provided.

The proposal notice for the Strategy also included proposed amendments to policies under the LSPP related to the implementation of the Strategy, revised the timing for strategic actions under the LSPP, and providing additional clarity or administrative changes.

The Strategy sets out a goal to restore the dissolved oxygen concentration in Lake Simcoe to 7 mg/L, which is the concentration needed to support self-sustaining coldwater fish species in the Lake. This translates into a reduction of total phosphorus loadings from all major sources from 72 T/yr to 44 T/yr by 2045. Without any action to reduce phosphorus in the watershed, phosphorus loadings are predicted to increase to 94 T/yr by 2045.

The Strategy identifies major sources of phosphorus targeted with specific reduction goals. The largest contributors of phosphorus are urban runoff and stormwater, atmospheric deposition (including air-born soils) and rural and agricultural runoff. Other sources targeted by the Strategy include: sewage treatment

plants; agricultural polders (former wetlands drained for agricultural use); and private septic systems within 100 metres of the lake.

In order to meet the phosphorus reduction goals, the Strategy incorporates several key concepts from the LSPP including:

- Adaptive Management: The Strategy emphasises the importance of learning from past actions, adjusting future plans based on the best available scientific information, and evaluating and measuring progress. The Strategy will be reviewed and updated every five years and a progress report will be issued by MOE as required under subsection 12(2) of the *LSPA*.
- Watershed Approach: This approach examines sources of phosphorus loadings and pursues solutions across the entire watershed including Lake Simcoe, rivers and streams draining into the Lake and the natural heritage features surrounding it. Under this approach, the province and its partners will develop "sub-watershed" phosphorus loading targets to achieve the overall target of 44 T/yr.
- Stewardship and Community Action: Since the majority of the watershed is privately owned land, the Strategy deems stewardship as integral to meeting its objectives. Voluntary stewardship activities include education, community engagement and cost-share incentives that support the reduction of phosphorus loads. The province also commits to removing barriers that prevent landowners from participating in stewardship activities and improving co-ordination and research efforts between neighbouring communities. Stewardship programming will be reported on every two years.
- Source-Specific Actions: Some phosphorus comes from specific point sources such as sewage treatment plants, while other phosphorus comes from more diffuse sources such as runoff or dust. The Strategy includes numerous actions to reduce phosphorus from both point sources and non-point sources in the watershed, as outlined in Table 1.
- Monitoring and Compliance: Monitoring will measure the effectiveness of phosphorus reduction initiatives and progress made in meeting the 7 mg/L target for dissolved oxygen. Monitoring will involve MOE, Ministry of Natural Resources, Environment Canada and Parks Canada and the Lake Simcoe Conservation Authority. With respect to compliance, the Strategy supports the requirements of the *LSPA* and LSPP and relies on compliance with existing legislative and regulatory frameworks under provincial ministries, municipalities, federal agencies, and the conservation authority.
- Research, Modelling and Innovation: Essential to adaptive management, this work is collaborative among many partners and research is currently being conducted on:

    - the ongoing evaluation of the phosphorus loading goal of 44 T/yr;
    - the development of sub-watershed phosphorus loading targets;
    - improving lake water quality models related to phosphorus and dissolved oxygen;
    - studies of atmospheric pollution and its relation to phosphorus loading; and
    - studies on stormwater management.

Modelling will examine the amount of phosphorus expected to enter the lake under future conditions; as well as developing a model of Lake Simcoe itself. Furthermore, the Strategy outlines several phosphorus reduction projects underway including: a study on Low Impact Development; identification of 160 stormwater retrofit opportunities; agricultural and rural stewardship programs; best management practices to reduce phosphorus load from polders; atmospheric deposition studies; ongoing research and modelling projects; a pilot project to test a phosphorus reduction product; a pilot project on a red sand filtration chamber; and an evaluation of feasibility of reusing treated wastewater effluent and stormwater runoff.

Table 1: Phosphorus Reduction Strategy Summary

Sources of Phosphorus (% of total loading / Current load from source)	**Strategy Reduction Target**	**Initiatives proposed by the Strategy**
Urban runoff and stormwater (31% or 23 T/yr) Rain and melting snow mobilizes phosphorus found in fertilizers, animal waste, detergents and soil into Lake Simcoe. Since 1994, MOE requires stormwater quality control facilities to service all new urban development. Analysis suggests that new developments could add 15.3 T/yr of phosphorus to the watershed.	No target outlined.	- implement the 10 LSPP policies mainly related to stormwater management plans. - retrofit existing stormwater facilities and put in facilities in uncontrolled areas within the next 5-7 years (studies reveal 160 retrofit opportunities could result in a reduction of 4.2 T/yr at a cost of $63 million). - conduct a study on Low Impact Development, which earlier studies show could remove 2.7 T/yr of phosphorus. -develop guidance documents on moving towards no net increase in phosphorus from new development - MOE is conducting a policy review of municipal stormwater management. - support innovation and implementation of new technology - stewardship, education and outreach.
Atmospheric deposition (27% or 19 T/yr) Atmospheric phosphorus comes from sources such as pollen, burning fossil fuels, and wind transport of disturbed soils, some of which is deposited in Lake Simcoe. Over the next 5 years, atmospheric loading is a major research priority.	A reduction of 3 T/yr in atmospheric deposition is required, in addition to agricultural stewardship reductions, for a total reduction of 7 T/yr.	- implement the 6 LSPP policies on aggregates, development and research. -LSPP requires measures to minimize soil erosion be included in subdivision and site plan agreements. - continuing and enhancing agricultural stewardship programs. - implement best management practices such as soil conservation by-laws; preserving vegetation; controlling speed on gravel roads; no till techniques; windbreaks; crop covers. - University of Guelph research underway to learn more about sources of atmospheric deposited phosphorus. - work with aggregate and development industries to build scientific knowledge and best management practices.
Rural and agricultural runoff (25% or 17 T/yr) Agricultural sources of phosphorus include hay, pasture, cropland, biosolids, fertilizers. Past agricultural and rural stewardship activities have been successful at reducing phosphorus from entering Lake (e.g., Landowner Environmental Assistance Program; Canada-Ontario Environmental Farm Plan).	No target outlined.	- implement 7 LPSS policies related to stewardship activities. - stewardship and best management practices programs estimated to remove 5 T/yr of phosphorus. -research to assess effectiveness and monitor stewardship programs and focus on priorities such as seasonal impacts, landscape approaches and effectiveness of best management practices. -2 T/yr phosphorus reduction estimated from conversion of agricultural lands to urban uses.

Sources of Phosphorus (% of total loading / Current load from source)	**Strategy Reduction Target**	**Initiatives proposed by the Strategy**
Sewage treatment plants (STP) (7% or 5 T/yr) There are 14 municipal and 1 industrial STP in the watershed. Seven discharge into Lake and 8 discharge into rivers flowing into Lake. Municipal STPs have had a phosphorus cap since late 1980s. Estimates indicate that by 2031 STPs will need to service an additional 150,000 people.	An aggregate baseline load of 7.2 T/yr applied to all STPs by 2015 or at their next expansion. Post-2015, the target is an aggregate loading of 3.2 T/yr by 2045. NB: Baseline calculated to accommodate the projected growth by 2031, which is why load is higher than current load. NB: Total STP load must be reduced to 3.2 T/yr to meet the 44 T/yr target, and presently it is not technologically feasible to achieve.	- implement the 4 LSPP policies limiting STPs in the watershed, environmental assessments for proposed settlement areas and approvals. - cap of 7.2 T/yr for all STPs. - cap will be the compliance limit in each STP's Certificate of Approval by 2015 or the next expansion. -voluntary measures (i.e. reduce bypasses, biosolids management, water conservation, new technologies).
Private septic systems (6% or 4 T/yr) Strategy examines phosphorus load from residential and industrial on-site septic systems located within 100m of Lake Simcoe. The phosphorus contributions from septic systems further than 100 metres from the Lake are captured through monitoring of tributaries that feed the Lake.	No target outlined.	- implement the 3 LSPP policies regarding Building Code amendments, zoning and standards. - provincial release of a proposed draft shoreline protection regulation that sets restrictions on specified activities i.e., removal of vegetation, fertilizer applications, setbacks on septic systems and enhanced protection of wetlands. - ongoing research into phosphorus migration in soil to determine the extent septic systems contribute to total phosphorus loadings. - stewardship initiatives.
Holland Marsh and smaller polders (4% or 3 T/yr) The Holland Marsh is 27 km^2 and is the largest of 4 polders (Keswick, Colbar, Bradford Marshes) that are dyked and drained for growing vegetables. Several best management practices are being used through agricultural stewardship programs.	Reduce total phosphorus load from polders by an estimated 1 T/yr.	- implement 7 LPSS policies related to stewardship activities (same as agricultural and rural runoff). - enhance stewardship programs to implement 1 T/yr reduction target. - research the development of new best management practices for polder agriculture. - implement innovative solutions to bank stabilization and drainage issues in a canal reconstruction project.

Implications of the Decision

Meeting the Strategy's dissolved oxygen target of 7 mg/L in 35 years will require a significant commitment by the government, public and industry in order to implement the initiatives outlined in the Strategy (refer to Table 1). Because the strategy relies heavily on voluntary measures, new technology and research, and lacks concrete targets, enforcement mechanisms, accountability and funding, it is uncertain whether implementing the outlined initiatives will achieve the desired results.

The municipalities in the Lake Simcoe watershed – Simcoe County, City of Kawartha Lakes, Peel Region and York County – are facing intense development pressures. For example, under the Growth Plan for the Greater Golden Horseshoe, the population in the Simcoe area (Simcoe County, City of Barrie, City of Orillia and lower tier municipalities) is projected to increase from 437,100 (2006 Census) to 667,000 by 2031. Economically over the same period, the Simcoe area projects an increase in employment from 180,700 (2006 Census) to 254,000. The vision document for the area outlines this added growth will be sustainable and will ensure the protection of Lake Simcoe, as well as promote development intensification, economic opportunities and a growth in infrastructure. However, it does not specify how these principles will be implemented.

Urban runoff, atmospheric deposition and sewage treatment plants are significant sources of phosphorus. The projected urban intensification and expansion to accommodate population and employment growth will result in more phosphorus being released into the watershed. This added phosphorus loading conflicts with the goals of the Strategy to reduce phosphorus from these sources. Technological solutions take time to develop and implement, and even if efficiencies are achieved, there are still more phosphorus contributors in the watershed adding to the total loadings.

In order to meet its dissolved oxygen target, the Strategy will need to counteract and overcome the increases to phosphorus in the watershed. Failure to do so will result in a further deterioration of the Lake Simcoe watershed. However, the initiatives outlined in the Strategy (summarized in Table 1) suggest that at least for the next five years, the Strategy will be primarily focused on research on the sources of phosphorus, completing stormwater management plans (as required under the LSPP) and a range of voluntary stewardship activities for the largest phosphorus sources. This Strategy does not set short-term targets or goals or objectives, nor does it propose proactive and preventive measures such as regulations related to new and existing developments that will make it mandatory to institute new technologies. Also, it does not include net phosphorus practices in order to target the developmental pressures that will exacerbate the situation.

Although the Strategy calls for stormwater retrofits for existing development and includes a strategic direction to move towards no net phosphorus from new development, this strategic direction will not come into effect until MOE finalizes guidance documents on the information required (i.e., phosphorus budgets) to demonstrate how the intent of no net phosphorus is to be met. If developers, municipalities and the province do not meet the goal of no net phosphorus increase from new development, then phosphorus loadings from urban runoff and atmospheric deposition could erase any gains made from reductions from other sources.

Moreover, most of the Strategy's initiatives, such as infrastructure upgrades, research, monitoring, technological innovations, and stewardship programs, are capital intensive and require ongoing co-ordination and funding for it to meet its objectives. However, the Strategy does not outline who will be responsible for financing and co-ordinating these programs or carrying out the initiatives outlined. To achieve significant reductions from stewardship activities, there must be full participation from the public, developers and agricultural industry to alter their behaviours or operations, and where necessary, make the necessary investments. The provincial government and its partners will need to support these initiatives with regulations, funding, education, outreach and co-ordination.

Other Information

The Water Quality Trading Feasibility Study (Registry #010-8989):
In early 2010, MOE released for consultation the Feasibility Study for Water Quality Trading in the Lake Simcoe Watershed. Water quality trading relies on economic instruments such as trading "reduction credits" to achieve favourable environmental outcomes. The study concluded that such a program was technically feasible and could play an important role in reducing phosphorus inputs into Lake Simcoe. However, in response to public comments, MOE decided to further evaluate water quality trading in consultation with watershed stakeholders before making a final decision on whether to develop a trading program.

Lake Simcoe Shoreline Protection Discussion Paper (Registry #010-9107):
In February 2010, MOE released for comment a discussion paper that outlines conceptual approaches to regulating certain activities that may adversely affect the ecological health of the Lake Simcoe watershed. The concepts included in this paper may be incorporated into a future shoreline protection regulation under the *LSPA*. Activities in shoreline areas examined in the discussion paper include: restrictions on vegetation removal and establishing vegetated buffers; restrictions on septic systems within 100 metres of shoreline; and restrictions on fertilizer use. Activities in wetlands areas considered in the paper include: enhanced enforcement for interfering with wetlands; restrictions on vegetation removal around wetlands; and examining the need to clarify aspects of the LSPP, including significant shoreline alteration and wetland drainage.

Proposed Amendments to the Growth Plan for Simcoe Area (Registry #010-6860 and #011-1528):
In October 2010, the Ministry of Energy posted a decision notice for the Simcoe Area: A Strategic Vision for Growth (Registry #010-6860). The document laid out a strategy and directions to plan for growth in the Simcoe area that aims to: curb urban sprawl; create new jobs; protect greenspaces, agricultural areas and Lake Simcoe; and outline a clear future for the City of Barrie, the area's largest urban centre.

Comments and submissions on the strategy informed the development of the Proposed Amendment 1 (2010) to the Growth Plan for the Greater Golden Horseshoe, 2006 posted on the registry in October 2010 (Registry #011-1528). The Proposed Amendment, prepared under the *Places to Grow Act, 2005*, provides more specific direction to the Simcoe sub-area on the objectives, policies, and targets of the Growth Plan. It also builds on other government initiatives including the LSPP, the Provincial Policy Statement and the *Barrie-Innisfil Boundary Adjustment Act, 2009*.

Public Participation & *EBR* Process

The ministry posted a proposal notice on the Environment Registry (#010-8986) on February 17, 2010, for a 45-day comment period. MOE also held information sessions in Newmarket, Barrie, Uxbridge and Ramara where the public and municipalities had opportunities to provide comment on the Strategy and the Water Quality Feasibility Study.

Forty comments were submitted to the ministry by individuals, municipalities, environmental non-government organizations, and developers. While most commenters supported the Strategy, many were concerned with: the lack of funding for infrastructure projects and stewardship activities; meeting the Strategy's targets in the absence of technological certainty; targeting the sources of atmospheric loading; and the implementation of a Water Quality Trading program.

MOE stated in its decision notice that after considering the comments it amended the Strategy and removed the incremental load reductions for sewage treatment plants and would reassess that approach in 2015. Furthermore, it strengthened the language in relation to approved growth as it relates to actions under the Strategy. Lastly, MOE decided it would not incorporate water quality trading as a tool within the Strategy.

Municipalities/Region:
Overall, municipal/regional commenters supported the Strategy and the need to reduce phosphorus in the watershed. However, they had concerns with several aspects of the Strategy. Municipalities argued that sewage treatment plants were disproportionately targeted in the Strategy despite the fact they only account for seven per cent of phosphorus loadings. They suggested that specific targets should be outlined for all sources in a more equitable manner. Moreover, municipalities stated the support for new technology is positive, however, sewage treatment plant innovations will not be cost-effective at reducing phosphorus and the reduction timeline does not correspond with planned sewage treatment plant expansions to accommodate growth projections.

Also of concern was the province's Growth Plan for the Greater Golden Horseshoe. Municipalities questioned how growth centres would be able to reduce phosphorus while accommodating urban growth and its increased phosphorus loadings. The municipalities claimed that water quality trading was too uncertain to rely on and too costly to implement, however some offered recommendations to clarify the program. Additionally, municipalities found the septic restrictions to be problematic and believed the restrictions could hinder the decommissioning of old systems.

Municipalities also expressed fear that they would bear the cost burden of phosphorus reductions and sought further consultation with the province on the above-mentioned aspects of the Strategy.

Environmental Groups and Conservation Authorities:
Environmental organizations and conservation authorities supported the Strategy but felt it should go further. Commenters stated the Strategy's emphasis was heavy on research and not on action. They urged the province to build on established stewardship programs that have reduced phosphorus in the watershed. Commenters also believed that proportional loading targets should be determined on a sub-watershed basis rather than by contributing sources of phosphorus. They also asserted that livestock farms and associated operations should be included in the reduction targets. Some commenters suggested that the Strategy should prioritize areas of reductions because some initiatives are capital and time intensive whereas others can be implemented more easily in the short-term. A few commenters wanted the Strategy to: consider the effects of climate change in greater detail; differentiate between soluble and particulate phosphorus; and have stronger enforcement provisions.

There was little support for Water Quality Trading, with most feeling it was too complicated, costly and would take too long to implement. If the trading scheme were to happen, some groups urged the province to connect it to stewardship activities.

Many groups felt the Strategy and its principles should apply to the entire province because other watersheds are facing similar pressures. They wanted to see better designed development, reduced growth in sensitive areas, and the implementation of low impact development for present and future projects. In addition, groups called on the province to regulate the phosphate concentration in detergents and to incorporate sustainable funding, cost-sharing and incentives into the Strategy.

Developers/Industry Associations:
Developers and related industry associations supported phosphorus reduction in the watershed. However, they were critical over how the Strategy calculated targets, the studies the Strategy relied upon and the emphasis on development, septic systems and sewage treatment plants. Developers wanted recognition for their work in reducing phosphorus loadings and were concerned that MOE was over-estimating loading from future developments. Furthermore, developers were concerned with the uncertainty of the no net increase of phosphorus in future development, and the adaptive management approach outlined in the Strategy. They wanted additional consultation and clarification on the parameters of these objectives.

Developers also wanted credit for servicing septic systems to promote the decommissioning of old septic systems. Moreover, many stated that sewage treatment plants are a small source of loading and the Strategy should focus on cheaper and easier reductions that can be achieved from larger phosphorus contributors. Instead, all sources of phosphorous should be better defined and their targets should be

more specific. This includes retrofitting older developments and requiring agriculture operations to share responsibility in the Strategy. Developers supported water quality trading in principle, however they were concerned with how trading limits might affect conditions in class environmental assessments. Developers also wanted to see adequate funding for initiatives outlined in the Strategy including cost-incentives.

Agricultural Association:
An agricultural association stated that the 45-day comment period was too short a time to consult on three technical and complex Environmental Registry postings. The association questioned the source of data used in the Strategy, stating that it was flawed and should be updated. It urged the province to remember the importance of food security when planning its phosphorus reduction initiatives. The association was pleased that the Strategy recognized successful agricultural stewardship programs but requested the province provide continued funding for these programs. Furthermore, the association recommended the province pursue a study on harvesting algae.

SEV

MOE outlined how it considered its Statement of Environmental Values (SEV) in making its decision. The document listed the SEV environmental principles found in the Strategy including the adoption of the ecosystem approach to the watershed; cumulative effects of several sources of phosphorus; the precautionary and science-based approach of the targets; the reduction of phosphorus pollution; adaptive management updates and revisions to the Strategy based on science research; and ministry consultations with stakeholders and First Nations in creating the Strategy.

ECO Comment

The ECO commends the Ontario government for creating a watershed-scale phosphorus reduction strategy that builds upon decades of work undertaken in this watershed. Although the ECO acknowledges that this first Strategy is the foundation for the work to come and will evolve over time, the ECO has some concerns with the Strategy's proposed approach.

Of greatest concern to the ECO is the apparent contradiction in the province's efforts to reduce phosphorus and the province's Growth Plan, which will increase development, and consequently phosphorus, in the Lake Simcoe watershed. Reduction efforts for other phosphorus sources may be negated by increasing phosphorus loads from urban growth. The ECO has repeatedly expressed our concerns in past reports (for example, see Part 3.1 of our 2008/2009 Annual Report) with Ontario's planning regime and its limited protection for ecosystems and their functions. Although, the Strategy anticipates that urban growth will contribute to increased phosphorus loadings, it fails to undertake an aggressive approach to ensure these loadings will not overwhelm the Lake. For instance, the Strategy identifies a move to no net phosphorus from new development, however this will not come into effect until MOE finalizes guidance documents. Stewardship activities and technology alone will not reduce additional phosphorus loadings from projected future development. If the province wants to pursue its Growth Plan for the Greater Horseshoe then its planning and environmental policies should be strengthened to mitigate the environmental damage associated with urban development.

The Strategy currently lacks sufficient detail and accountability to ensure that phosphorus reduction efforts in the Lake Simcoe watershed will be successful. As experienced with other provincial watershed-based initiatives such as the remediation of areas of concern around the Great Lakes (see Part 2.1 of this Annual Report), these large-scale efforts are expensive, take decades to achieve desired results, involve multiple partners, require extensive monitoring, public participation and co-ordinated information sharing. However, these key elements are not well-defined in the Strategy. The province should not only build upon past phosphorus reduction results but also apply the lessons learned from other remediation efforts to determine appropriate funding, timelines and strategies.

Furthermore, the strategy does not outline detailed actions, timelines (both short-term and long-term), and in some cases targets, for most sources of phosphorus, particularly the largest sources: urban and

agricultural run-off and atmospheric deposition. The LSPP required that sub-watershed targets should be incorporated into the Strategy, however these and other source targets were not included in the first version of the Strategy. Decades worth of past phosphorus reduction activities could have been relied on by the ministry to assign short-term and long-term reduction targets. Targets and deadlines will foster greater accountability for the many Strategy partners and will help the province, stakeholders and the public assess the effectiveness of the Strategy at its scheduled five year review.

Although the ECO supports stewardship activities, the ECO is concerned by the heavy reliance placed on voluntary measures as the primary method for reducing phosphorus loadings from the largest sources. Moreover, the Strategy relies on pre-existing legislation and regulations for compliance, despite the fact they have not been effective in protecting Lake Simcoe, necessitating the development of the LSPP. The ministry should couple stewardship programs with tools such as regulations, enforcement activities and financial incentives to ensure concrete actions are taken to reduce phosphorus.

Similarly, the ECO notes that the Strategy emphasises research activities and technological innovations as key initiatives for the large sources of phosphorus. However, the ECO notes that, in some cases, technological advancements may not be achieved or may be too costly to implement. Furthermore, the ECO believes MOE has access to a strong knowledge base that allows for proactive initiatives to be implemented at the present time rather than waiting for further research to be conducted.

The environmental and developmental pressures facing Lake Simcoe are occurring in other watersheds across the province. The province should apply the lessons of Lake Simcoe – and the watershed management approach – province-wide to prevent the deterioration of water quality in other watersheds. The ECO will stay informed of the Strategy's progress and its affect on the Lake Simcoe watershed.

Review of Posted Decision:

4.6 Modernizing Environmental Approvals

Decision Information

Registry Number: 010-9143
Proposal Posted: March 2, 2010
Decision Posted: June 22, 2010

Comment Period: 45 days
Number of Comments: 54

Registry Number: 011-0317
Proposal Posted: June 24, 2010
Decision Posted: Not posted (as of July 2011)

Comment Period: 60 days
Number of Comments: Unknown
Received Royal Assent: Oct. 25, 2010 (Most sections came into force on October 31, 2011)

Keywords: Certificate of Approval; Modernization of Approvals; Open for Business

Background

Overview

The Ministry of the Environment's (MOE) core responsibility is protecting the air, land and water in Ontario to ensure healthy communities and long-term ecological sustainability. As one of the key tools for administering this responsibility, the ministry issues Certificates of Approval (Cs of A) to regulate activities that may have an impact on the environment. However, for many years, MOE has been struggling to handle the overwhelming volume of applications for Cs of A.

In March 2010, MOE published a proposal on the Environmental Registry to modernize its approvals process. In May 2010, this proposal to amend MOE's approvals framework was incorporated into Bill 68 – the province's *Open for Business Act, 2010* – which included amendments to the *Environmental Protection Act* (*EPA*) and the *Ontario Water Resources Act* (*OWRA*). The *Open for Business Act, 2010*, was passed on October 25, 2010, and most of the amendments to the *EPA* and *OWRA* came into force on October 31, 2011.

MOE's Current Approvals Framework

Under MOE's existing approvals framework, anyone who proposes to engage in any of the following activities is required to submit an application for a C of A to MOE prior to commencing, expanding or altering their operations:

- Constructing or operating equipment or processes that may emit contaminants into the air (under section 9 of the *EPA*);
- Establishing or operating a "waste disposal site" (such as a landfill or incinerator) or a "waste management system" (such as a waste collection, hauling or processing facility) (under section 27 of the *EPA*); and
- Establishing or operating "sewage works" that collect, treat or discharge wastewater (under section 53 of the *OWRA*).

MOE staff review each application and if, based on this review, the designated MOE Director is satisfied that the proposed activity complies with all environmental laws and will not adversely affect the environment, the Director will issue the applicant a C of A.

Ministry staff may impose conditions in the C of A to minimize potential adverse impacts from the activity on human health and the environment. These conditions may be tailored to the individual circumstances and characteristics of the activity and the local environment, and can include a broad range of requirements (e.g., design, operation, maintenance, monitoring, reporting, emission limits, etc.). Proponents are legally required to comply with all terms and conditions in their C of A, and failure to do so can result in ministry enforcement action.

Application Backlog and Processing Delays:
MOE receives about 6,500 applications for new or amended Cs of A each year. Under the existing approvals framework, MOE has struggled to process this large volume of applications within a reasonable timeframe. Several audits by the Auditor General of Ontario between 2000 and 2009 found that the ministry had accrued a major backlog of applications waiting to be processed, and that this backlog was causing unacceptably long delays in MOE's C of A review process.

Over the past decade, MOE has introduced several measures aimed at reducing the backlogs and delays. For example, in 2000, MOE began issuing "comprehensive Cs of A," which are single Cs of A that can cover all of a facility's sources of emissions, and which allow facilities to make limited operational modifications without requiring a C of A amendment. MOE stated in 2006 that this step alone reduced the Air Approval Unit's workload by about 50 per cent. More recently, MOE has introduced a series of measures to help address incomplete applications sooner and thus reduce delays, including: developing guidance documents and model terms and conditions to better clarify what information and supporting documents must be included with an application; developing an interactive, online application form that alerts applicants if they have failed to complete all mandatory fields; and introducing a pre-screening step.

As a result of these various initiatives, in 2010, MOE announced that the ministry had eliminated its backlog of 1,700 applications and reduced turnaround times. Despite this progress, however, the Auditor General of Ontario noted in its 2010 report that applicants continue to face long wait-times for approvals. For example, the Auditor noted that MOE took, on average, 10 months to issue a waste C of A.

Outdated Certificates of Approvals:
MOE has issued an estimated 250,000 Cs of A since the ministry was first established 40 years ago. While about 20 per cent of these approvals are assumed to relate to facilities no longer operating, and others have been issued or amended more recently, a significant number of facilities in Ontario continue to operate under the authority of approvals that were issued long ago. Some of the oldest Cs of A (i.e., from the 1970s) contain no conditions at all. Many others (i.e., from the 1980s) contain minimal conditions that reflect outdated environmental standards and requirements from decades ago. These older Cs of A, which lack expiry dates, allow proponents to continue activities indefinitely without regard for scientific or policy changes and with little incentive to improve operations in accordance with new environmental and technological developments.

MOE has long identified the need for a systematic review and update of older Cs of A, roughly estimating that there may be 50,000-70,000 Cs of A that require updating. However, this presents a huge resource challenge for the ministry. Over the past couple of years, MOE has developed some strategies to proactively update Cs of A (such as: developing protocols for updating Cs of A; incorporating a C of A review into the inspection process; introducing mandatory renewal requirements in some newer Cs of A; and implementing a risk-based approach for identifying Cs of A to be updated). While these measures have made some headway in updating approvals, they only scratch the surface of the overall work required.

Facilities Operating without Approvals:
In addition to the huge number of approvals that have been issued, it is believed that there are a significant number of facilities (particularly smaller businesses) that are currently operating in Ontario with no C of A at all. While it is extremely difficult to gauge the actual number, in 2005, MOE estimated that up to 40 per cent of all Ontario facilities may be operating without proper environmental approvals.

Amendments to MOE's Approvals Framework

In March 2010, MOE released a policy paper, entitled "Modernization of Approvals: Proposed Legislative Framework for Modernizing Environmental Approvals" (Environmental Registry #010-9143), which set out the ministry's proposed framework for changing its approvals process through amendments to the *EPA* and *OWRA*. The modernized framework was formally adopted through Schedule 7 of the *Open for Business Act, 2010*.

MOE stated that the new approvals framework would build on the success of the existing approvals process, while "[making] it easier for the Ministry to deliver its services in a timely and effective manner – which in turn makes it easier for businesses in Ontario to plan and finance projects." In addition to "enhancing the delivery of services to businesses in Ontario," MOE also identified "maintaining and, where possible, enhancing protection of the environment and human health" and "improving public transparency and availability of information" as the key goals for the modernized framework.

Creation of a New, Two-Path Process:
The *Open for Business Act, 2010* amended the *EPA* and *OWRA* to replace the current C of A process with the following two-path process:

1. A simplified **Registration Process** for prescribed activities that MOE considers to be "lower-risk, standard or less complex"; and

2. Continuation of the **Approvals Process** for all other activities (although the "Certificates of Approval" are renamed "Environmental Compliance Approvals").

This new framework applies to activities currently subject to sections 9 and 27 of the *EPA* and section 53 of the *OWRA*. It does not apply to the various other instruments issued by MOE, such as permits to take water, licenses for drinking water systems and renewable energy approvals.

New Registration Process:
The *Open for Business Act, 2010* creates a new Part II.2 of the *EPA*, which requires MOE to establish an online registry called the "Environmental Activity and Sector Registry" and sets out the rules and processes for registering prescribed activities.

The *EPA* authorizes Cabinet to prescribe activities currently subject to sections 9 and 27 of the *EPA* and section 53 of the *OWRA* as subject to the new registration process. In determining which particular activities will be prescribed, MOE stated that activities will be evaluated for suitability for the registration process based on an analysis of several factors, including: an objective evaluation of the potential impacts of the activity on the environment and human health (considering multiple risk factors, such as the complexity of the activity, the types of emissions, the proximity to sensitive receptors such as daycares, residences, wetlands, etc.); and the probability that impacts might occur.

Once an activity has been prescribed by regulation, any person engaging in such activity must register the activity by the date specified in the regulation. A C of A will no longer be required for prescribed activities, and existing Cs of A for such activities will cease to be valid after the regulated date. However, where it is in the interest of the environment or administrative effectiveness, MOE may require that a facility's C of A continue to apply instead of requiring registration.

The *EPA* allows Cabinet to prescribe conditions for registration in the regulations, but is silent as to what (if any) requirements should be included. MOE's policy paper proposes that the regulations will include clear eligibility criteria (such as location, proximity to sensitive environmental features, size of operation, types and quantity of emissions, etc.) that will identify which activities qualify for registration. Registrants will be required to declare that they meet the specified eligibility requirements as part of the registration process. Any activity that does not meet the eligibility criteria will continue to require an approval. The regulations may also include requirements for registrants to submit additional information, reports and documentation to support the declaration.

Once the registration is complete (i.e., the registrant has declared that they meet the regulatory requirements, paid the required fee, and provided financial assurance where required), the online registry will provide the registrant with immediate confirmation of the registration. Upon receipt of the confirmation, the person may engage in the activity in accordance with the regulations. The *EPA* authorizes Cabinet to include mandatory operating requirements for the prescribed activities (such as maintenance procedures, monitoring and reporting requirements, operating parameters, best management practices, etc.) in the regulations.

The *EPA* also specifies that registrants must ensure that their registration is updated as required. If a facility changes its operations in a manner that affects the accuracy of the registration, the facility would need to update the registration to reflect the change. In addition, the regulations may include timelines for periodic updating of registrations.

If a facility fails to register a prescribed activity by the regulated date, fails to maintain and update a registration as required, or fails to comply with the operating requirements for an activity as set out in the regulation, MOE may take action to seek compliance. In addition to the ministry's usual compliance and enforcement tools (e.g., education and outreach, voluntary abatement, provincial officer's orders and prosecution), the amendments also authorize provincial officers to issue a "notice" that would require the person to address the non-compliance, or issue an order to pay an "administrative penalty" in accordance with the regulations. In addition, if the Director discovers that a registration is based on false or inaccurate information or if a person has contravened the *EPA*, *OWRA* or the regulations, the Director may suspend the registration. A facility whose registration is suspended cannot legally operate.

MOE has affirmed that the development of all regulations prescribing activities and requirements for registration will be subject to extensive public and stakeholder consultation under the *Environmental Bill of Rights, 1993* (*EBR*). See the box entitled "MOE Consultation on Prescribing Activities."

MOE Consultation on Prescribing Activities

MOE has committed to implementing a multi-stage consultation process for each prescribed activity or sector. First, the ministry will conduct a detailed technical analysis of each potential sector/activity; then MOE will use the Environmental Registry to consult with the public on the summary of the technical analysis and any proposed registry requirements. Based on the comments received, MOE will consider both the suitability of the sector/activity and the proposed registry requirements. If MOE decides to proceed with prescribing the sector/activity, it will post draft regulations for another round of public comment; input received will be considered when finalizing the regulations.

In January 2011, MOE posted a proposal notice on the Environmental Registry (#011-1959) for consultation on the first round of activities/sectors. The proposal included a technical analysis report and the rationale for prescribing each of the following activities/sectors under the new registration process:

- Automotive Body, Paint and Interior Repair and Maintenance Sector;
- Provision of Comfort Heating in Buildings;
- Printing Sector; and
- Standby Power Generation Equipment in Buildings.

On April 13, 2011, MOE posted a decision notice for that proposal stating that it had decided to proceed with a regulation prescribing the above proposed sectors/activities, except for the printing sector (which will be subject to further analysis). As promised, MOE also posted a second proposal for consultation on the draft regulation on the Registry (#011-2869). On June 14, 2011, O. Reg. 245/11 was filed, prescribing these activities. The new regulation defines the specific eligibility criteria for each activity to be registered, as well as specific operational and record keeping requirements for each registered activity. The regulation also requires registrants to update their registrations every five years.

Environmental Compliance Approvals:
For all other activities that do not fall within the registration process, proponents will continue to be required, as before, to obtain an approval from MOE. However, the provisions in the *EPA* and *OWRA* have been amended to require proponents to obtain an "Environmental Compliance Approval" instead of a "Certificate of Approval." While an Environmental Compliance Approval is essentially the same as a C of A, the *Open for Business Act, 2010* created a new Part II.1 of the *EPA*, which now houses all of the provisions relating to the Environmental Compliance Approvals and includes some changes to the approvals process.

One of these changes is the provision of explicit authority for MOE to establish conditions in an approval that allow for operational flexibility. In practice, MOE has already been issuing approvals, on a limited basis, that allow for some operational flexibility; this amendment merely formalizes this practice. The *EPA* and *OWRA* now expressly state that an approval may include terms and conditions that allow the facility to, among other things: make future specified alterations, extensions or replacements (including increasing the size of the facility); increase the rate of production up to a specified rate; and make other changes as long as the facility meets the specified performance limits and emission standards – all without having to apply for an amendment to the approval.

The amendments to the *EPA* and *OWRA* also allow MOE to issue a "site-wide" approval that can encompass all of the facility's activities and emissions. Currently, applicants are required to apply for a C of A for each media (i.e., air, waste and wastewater) and, in some cases, for each emission source within each media, which often results in a single facility being required to obtain multiple approvals.

In addition, the *EPA* amendments allow MOE to issue a single "multi-site" approval to a business that is operating the same activity at multiple sites. MOE states that a multi-site approval could be issued in circumstances where all of the business' facilities are operating the same activity with similar emissions

and similar requirements. This single approval would cover all media and all associated emissions from all of the business' sites. Similarly, MOE can now issue a single "system-wide" approval for an entire sewage system or waste management system. The system-wide approval would cover all media and associated emissions for the entire inter-connected system.

Transitioning to the New Environmental Compliance Approvals:
Once the *EPA* and *OWRA* amendments are proclaimed into force, all existing Cs of A will automatically be deemed to be Environmental Compliance Approvals (although some of these approvals will subsequently become invalid if they relate to a prescribed activity).

The amendments also provide the Minister of the Environment with the regulation making authority to establish transition dates for each activity. If a transition date is set, all approval holders must submit an application for a review of their existing C of A for the specified activity by the regulated date. MOE would then review each application and amend, revoke or replace the existing approval with a new Environmental Compliance Approval.

Ongoing Review of Approvals:
The amendments provide MOE with the explicit authority to include renewal terms in approvals, requiring facilities to apply for a review of their approvals by a specified date (which, MOE suggests, could be 5 or 10 years). While MOE has always had the broad authority to impose whatever terms or conditions in an approval that the Director deems appropriate, this new provision creates explicit, albeit discretionary, authority for the ministry to establish a process for regular review and updating of approvals.

Amendments to the Hearing Requirements:
Currently, the *EPA* and *OWRA* provide different hearing requirements for each media. Some activities, such as large landfills and municipal sewage works, are subject to a mandatory hearing by the Environmental Review Tribunal prior to the ministry's decision whether to issue the approval. Other waste and sewage works approvals are subject to a discretionary hearing if requested by the ministry. Applications for air approvals are not subject to any hearing provisions.

As part of the modernization process, the *EPA* and *OWRA* were amended to provide more consistent hearing requirements for all approvals. The existing mandatory and discretionary hearing provisions were repealed and replaced with a new provision that gives the MOE Director discretion to order a hearing with respect to any approval prior to making a decision on the application. The Director is also given the authority to refer just a portion of the application to the Tribunal for consideration. As before, the Director must implement the Tribunal's decision.

Implications of the Decision

Modernized Agenda Will Reduce Volume of Applications Submitted for MOE Review

Although not explicitly stated in MOE's policy paper, the key impetus and one of the key goals of the modernization agenda is to reduce the pressure on ministry approvals staff by reducing the number of applications for approvals that staff must review.

The new registration process has the potential to dramatically reduce the number of applications for approvals that are submitted to MOE for review; although the extent of this reduction will depend on how many activities are prescribed. In addition, MOE's plans to incorporate operational flexibility into more approvals should reduce the number of applications for amendments submitted to MOE each year. Similarly, enabling applicants to apply for site-wide, multi-site or system-wide approvals (rather than separate applications for each media, emission source, activity and site) should also reduce the number of applications submitted to MOE, as well as potentially create a more efficient and co-ordinated review process within the ministry.

Furthermore, MOE has filed a new regulation under the *EPA* (see "Other Information" below) that sets out quality and completeness requirements for applications for approvals, and allows the ministry to reject

applications if they fail to meet those requirements. This regulation should help reduce the considerable time and resources that MOE currently spends dealing with incomplete and poor quality application packages.

Combined, all of these measures should significantly reduce pressure on ministry approvals staff, which should in turn reduce backlogs and turn-around times for future applications.

Reforms Focus MOE Resources on Higher-Priority Activities

MOE has limited staff resources to meet the high demands of the approvals application process (see the ECO's 2007 Special Report entitled "Doing Less with Less: How shortfalls in budget, staffing and in-house expertise are hampering the effectiveness of MOE and MNR" as well as Part 5.1 of this Annual Report for a full discussion of MOE's capacity constraints). Under the current framework, all activities go through the same general approval process regardless of the complexity and potential risk posed by the activity. MOE has suggested that this "one-size-fits-all" approach, which requires staff to spend time reviewing and approving straight-forward activities that present little risk, is not the best use of the ministry's resources.

The new risk-based approvals framework enables the ministry to apply different tools to different activities, allocating its resources in a manner that attempts to achieve the greatest benefit. Under the new framework, MOE will focus staff resources on reviewing applications for facilities and activities that pose a greater risk to the environment and human health.

The new registration process also has the potential to create efficiencies and better focus ministry resources. For relatively simple, low-risk activities, MOE can develop a single set of requirements that are designed to be protective of the environment and human health, rather than creating individual requirements for each approval.

Regulations will Dictate Level of Environmental Protection:

MOE has repeatedly stated that the new modernized approvals framework will continue to be protective of the environment and human health. A key determinant of whether this assertion holds true is how broadly the registration process will be applied. MOE's policy paper states that the registration process will only apply to activities that are considered "lower-risk, standard, well-understood or relatively less-complex." The governing legislation (*EPA* and *OWRA*), however, provide no limitations or criteria for which activities may be prescribed for the registration process. As such, there is considerable flexibility, and thus considerable uncertainty, as to how liberally the registration process will be implemented.

The registration process eliminates MOE's proactive review of the individual activities (including a review of any unique features and factors) and instead relies on generic requirements set out in regulation to control the prescribed activities. While this approach may be appropriate for activities that are truly low-risk, simple and standard, this approach can seriously weaken environmental protection if inappropriately applied to the types of activities that merit individual review. Accordingly, the content of future regulations that will prescribe activities is of critical importance.

In addition, the scope of the eligibility criteria and operating requirements for registrants that will be included in the regulation will also greatly determine the extent to which the registration process will maintain environmental protection. Depending on the content of the regulatory requirements for each activity, the registry process could potentially raise the minimum bar in some cases, as well as level the playing field for all registered businesses engaging in the same activity.

The absence of an individual review of the prescribed activities in the registration process, however, makes it very unlikely that the registration process will include any consideration of cumulative effects. Even if the registration process is limited to "low-risk" activities, it must be noted that low-risk facilities still produce impacts to the environment, and the cumulative impact of several low-risk facilities located closely together (as they commonly are) to the environment and human health can potentially be

significant. MOE has stated that it is concurrently working on developing a process for addressing cumulative effects in its approvals process, but was unable to include this issue within the modernization proposal. (As such, the ECO will comment on MOE's procedures for addressing cumulative impacts in the approvals process in a future report.)

Reforms Establish a Framework for Updating Approvals

As noted above, there are estimated to be about 50,000-70,000 older Cs of A that are inconsistent with today's environmental standards and in serious need of updating. As MOE's policy paper states, in order to promote continuous improvement and ongoing protection of the environment and human health, "it is important that [approvals] are based on the latest policies and standards and have requirements that are reflected equitably across all facilities in a given sector." Updating approvals would also help create a more level playing-field for all businesses engaging in the same activity.

New provisions in the *EPA* create a framework for updating all existing Cs of A by transitioning them, sector-by-sector, to the new Environmental Compliance Approvals. MOE intends to develop a regulation that would identify sectors and prescribe a date by which all approval holders within those sectors must submit an application for review of their approval. However, MOE has suggested that these sector-wide updates may take up to 10 to 15 years to complete.

In addition, while MOE has always had the discretion to impose renewal terms in an approval, the *EPA* now includes an explicit provision authorizing the ministry to include renewal dates by which proponents must seek a review of their approval. This power, however, continues to be discretionary. If MOE does include expiry dates into approvals, and thus create a process for ongoing, regular review of approvals, this could enhance environmental protection. However, a process of regular review of approvals would certainly add to MOE's approvals staff's workload.

Modernized Process Should Improve Service to Businesses

One of MOE's key goals of the modernization process is to improve service delivery to business, making "it easier for businesses in Ontario to plan and finance projects," and ultimately make Ontario "more attractive for business development."

The new registration process, which is akin to a "permit-by-rule" system, will provide a much simpler, faster and more certain application process for prescribed activities compared to the C of A process. The registry system is intended to reduce complexity and provide greater certainty of process for businesses in Ontario by: establishing regulatory standards that are consistent for all similar eligible activities; establishing requirements that are proportionate to the risk and complexity of the activity; and enabling registrants to immediately begin operation once all requirements have been met.

Extending operational flexibility to more approvals will also reduce administrative burden for businesses by allowing facilities to make some changes to their operations without having to apply for amendments to their approvals. Similarly, enabling applicants to apply for a single site-wide, multi-site or system-wide approval (rather than multiple approvals for each media, emission source, activity and site) can reduce expense and complexity for applicants (although some businesses have expressed concern that this could *increase* burden in some cases).

To improve service delivery for businesses, MOE has also proposed to provide guarantees (through future policy guidance) for the maximum time the ministry will take to review each type of application (e.g., routine amendments would have a shorter guarantee than applications for new, complex industrial sites). MOE will also establish online tools to make it easier for businesses to both register activities and submit applications for approvals. MOE stated that the online system will improve service delivery by providing businesses with one-window access to both the registration and approvals application processes, to set up and manage accounts, electronically submit all information, remit fees, and track the status of applications.

Simplified Registration Process Could Engage Non-Compliant Businesses

As noted above, many activities that may have an impact on the environment are currently operating illegally without any C of A at all. As such, these facilities are operating without any restrictions or regulatory oversight. MOE believes that the difficulty in obtaining approvals under the current process may be deterring some of these facilities from applying for an approval. As such, MOE hopes that the simpler registration process may entice some of these non-compliant facilities to bring themselves into the regulated system, thereby providing greater environmental protection.

New Approvals Framework Amplifies Need for a Strong Inspection Program

A sound inspection program is essential to fulfilling MOE's mandate to protect the environment, by ensuring that the province's environmental laws, regulations and instruments are being followed. For both the registration and approvals program to be effective, registrants and approval holders must know that there is a reasonable prospect of inspection. However, information recently provided by MOE to the ECO indicates that MOE only inspects about five per cent of all regulated facilities each year (which does not even include those facilities operating without approvals). Thus, regulated facilities can realistically expect to go, on average, twenty years between inspections.

The nature of the registration system calls for a stronger MOE inspection program. The reliance on proponents to self-assess the suitability of their own activities under the registration program and to self-monitor their ongoing compliance with the regulatory environmental standards demands a higher level of ministry oversight. MOE has stated that it will conduct random audits and inspections of registrants to promote compliance; however, MOE has not yet developed any plans or procedures for this new inspection responsibility, nor even identified which ministry branch will be responsible for this task.

Reforms Increase Transparency, but Remove Some Consultation and Appeal Rights

The impact of the modernized approvals framework on public consultation and transparency is a mixed bag. MOE has stated that a key goal of the modernized approvals framework is to provide better transparency to the public. To this end, MOE will post all registrations (excluding confidential and proprietary information) in an easy-to-use, publicly accessible and searchable online format. Similarly, the *EPA* will require MOE to publish information for all new approvals. Going well beyond this requirement, MOE has already uploaded over 45,000 existing Cs of A to a publicly accessible electronic library and has stated that it intends to add thousands more in the coming years.

In the past, members of the public have frequently complained about difficulties trying to obtain information related to approvals through MOE's largely inaccessible paper-based system. As such, MOE's new online databases will provide an important new tool for improving transparency and public access to both registrations and approvals.

While individual registrations will be made publicly available, they will *not* be posted on the Environmental Registry for notice and comment, nor will they be subject to appeals by third parties. Under the *EBR*, proposals for classified instruments must be posted for a minimum 30-day comment period, and for many of these instruments, the public has the right to seek leave to appeal the ministry's decision to issue the approval. These rights will no longer exist for the individual activities subject to the registration process.

The extent of the potential loss of consultation and appeal rights will depend on the number and types of activities prescribed for registration. If only genuinely simple, low-risk activities are prescribed, there will be minimal loss to public consultation and appeal rights; however, if the registration process is applied more broadly, there could be significant loss of rights. It is worth noting that several activities are already exempt from the requirements under the *EBR*, including approvals to: spread nutrients (e.g., sewage sludge) on a farm; discharge air emissions from a fast-food restaurant; operate combustion equipment (i.e., boilers and heaters); operate mobile waste processing equipment; and renew a C of A for air emissions or sewage works provided there will be no increase to the allowable discharges. Again, this issue demonstrates why the development of the future regulations is of critical importance.

Public Participation & *EBR* Process

On March 2, 2010, MOE posted a proposal notice on the Environmental Registry (#010-9143), setting out its proposed framework for modernizing the ministry's approvals process. MOE provided a 30-day comment period on this proposal, but later, at the request of several stakeholders, extended it to 45 days. MOE received 54 comments on this proposal.

On May 17, 2010, the Minister of Economic Development and Trade introduced Bill 68, the *Open for Business Act, 2010,* an omnibus bill that included the proposed amendments to the *EPA* and *OWRA* to implement MOE's modernized approvals process. MOE stated that it considered the comments from the earlier consultation in drafting these legislative amendments. Despite explicit requests from several stakeholders to provide another round of public consultation on the bill itself, MOE did not provide a second consultation opportunity at that time.

On June 24, 2010, almost a month after being prompted by the ECO and after Bill 68 had already received first and second reading in Cabinet, MOE posted a second proposal notice on the Registry (#011-0317), with a 60-day comment period. (For a discussion on of the Environmental Registry consultation issues for this bill, see Part 8.2.1 of this Annual Report.) The *Open for Business Act, 2010* passed third reading on October 21, 2010, and received Royal Assent on October 25, 2010. However, as of July 2011, MOE still had not posted a decision notice on the Registry.

In addition to the consultation opportunities provided through the Environmental Registry, MOE stated that it had also consulted extensively with various stakeholders, representing industry, Aboriginal communities and environmental organizations, through working groups, roundtables and individual meetings, to help inform development of the new process.

Following is a summary of the key comments provided during the consultation period.

Comments from Environmental Non-Governmental Organizations (ENGOs)

Despite MOE's statement in the decision notice that "the submissions were generally supportive of the policy paper," the ENGOs that submitted comments were, in fact, very strongly opposed to the proposal. These groups expressed serious concerns with the proposed changes to MOE's approval system, stating that the changes would reduce environmental protection and the public's right to participate in environmental decision-making. One commenter stated: "The only guaranteed outcome [if this proposal is implemented] is the loss of clean air, clean water, and healthy ecosystems in Ontario … for generations to come."

Lack of Justification for Proposed Changes:
Most of the ENGOs stated that MOE failed to provide a convincing rationale for the need to "modernize" the approvals process, and therefore the proposal simply should not proceed. Specifically, these commenters stated that MOE had not sufficiently explained the underlying causes of the issues being addressed (i.e., processing delays and backlogs). While the ENGOs accepted that MOE needs to fix these problems, they argued that the problems appear to be attributable at least in part to a shortage of ministry staff and resources. Therefore, they stated that the solution should involve increasing funds for MOE to hire additional approvals staff, rather than reducing ministry workload by cutting the required approvals. The ENGOs stated that reducing workloads to solve staff shortages is not a valid justification for weakening one of the ministry's core functions and undermining a program integral to protecting the environment. One commenter stated: "This is an example of the worst kind of bureaucratic problem-solving."

A few ENGOs also expressed a general concern that the government is failing to find an appropriate balance between accommodating industry's needs and protecting the environment.

Public Consultation and Leave to Appeal Rights:
The ENGOs were strongly opposed to MOE's proposal to exclude the individual registrations from the public participation and leave to appeal provisions under the *EBR*. The ENGOs stated that the removal of these rights is unwarranted, undermines the purposes of the *EBR*, and will significantly erode the public's ability to participate in environmental decision-making in Ontario.

Many of these groups strongly urged the government to not only preserve the public participation and appeal rights under the *EBR* for all approval applications and registrations, but to actually strengthen these rights (such as: reducing the number of loopholes exempting projects from consultation under the *EBR*; providing longer comment periods to allow the public adequate time to research and comment on proposals; and providing better quality decision notices that fully explain how public comments were considered by the ministry).

Lack of Ministry Review in Registration Process:
The ENGOs expressed major concerns about removing MOE's proactive review and assessment of individual activities subject to registration. They described these reviews as a key mechanism for identifying unacceptable or problematic activities that may harm the environment. They also noted that, without a proactive review, MOE will be unable to order changes to project design or construction to avoid or minimize adverse effects. They noted that after-the-fact retrofits or reconstruction is much more expensive, and thus, if the need for a design change is later identified, it is more difficult, expensive and less likely to occur.

Failure to Address Cumulative Effects:
The ENGOs were highly critical of MOE's failure to address the issue of cumulative effects in both the registration and approvals processes, describing this as a "glaring omission" and a "fundamental flaw." The ENGOs argued that individual activities operating in close proximity, which may not pose a risk to the environment by themselves, may produce cumulative effects that adversely affect the environment and human health.

Prescribing Activities under the Registration Process:
While the ENGOs were categorically opposed to the registration process, they stated that if the registration process is implemented, it should only be applied to simple, routine activities that have a very small chance of causing adverse effects to the environment or human health. One ENGO specifically cautioned against including activities such as municipal waste transfer or processing sites, the spreading of sewage sludge on agricultural lands, or any activity that emits a substance listed under the *Toxic Reduction Act, 2009*, all of which they asserted have the potential to cause serious adverse impacts, but which they fear MOE may consider "low risk."

Need for a Monitoring, Compliance and Enforcement Strategy:
Several ENGOs commented that MOE has not identified how it will assess industry's compliance with the requirements under the registration process or the registration process' overall environmental performance. These commenters stated that MOE must establish mandatory monitoring and reporting requirements in the regulations, and that such monitoring data must be made publicly available to ensure transparency and accountability. The ENGOs also asserted that MOE needs to develop a strong compliance and enforcement strategy – including details about how staff and resources will be allocated to oversee the registration activities – to ensure that registrants are meeting the regulatory requirements.

Online Tools:
The ENGOs fully supported MOE's proposal to improve public transparency through new online tools. They urged MOE to make *all* information submitted by applicants and registrants, including reports and other supporting documents, publicly available online. Some ENGOs noted, however, that having two "registries" (i.e., the new Environmental Activity and Sector Registry and the existing Environmental Registry) is unfortunate, as it can confuse the public and will require individuals to monitor and search two separate databases.

Changes to the C of A Process:
The ENGOs fully supported MOE's proposal to review and update approvals on a continuous basis. These groups expressed concern, however, about MOE's proposal to allow for "operational flexibility" within the Cs of A. They stated that conditions surrounding a facility may change (e.g., a daycare may be established close to a facility after the C of A is issued), and therefore MOE should be required to re-evaluate any subsequent operational changes that could result in adverse environmental impacts. In particular, they stated that any operational flexibility provided in a C of A should not permit an increase in the quantity or quality of emissions.

The ENGOs stated that "site-wide" approvals could potentially enable MOE to more effectively consider all site-specific and cumulative impacts. However, ENGOs opposed the proposal to implement "multi-site" and "system-wide" approvals, stating that these approvals would hinder MOE's ability to address site-specific considerations and cumulative impacts.

Comments from Industry Groups

Almost all of the industry associations and individual companies that commented on the proposal expressed strong support for the general modernization framework. Many of these commenters cited examples of having experienced long delays trying to obtain Cs of A for relatively simple, low-risk activities, as well as examples of costly and time-consuming application processes even when seeking approval to install pollution control or other equipment that would benefit the environment. For these reasons, these commenters strongly supported the proposal to update and simplify the approvals process.

Requirements under the Registration Process:
Industry commenters were very supportive of the proposed new registration process, which should reduce industry's regulatory burden. However, many of these commenters cautioned that MOE must ensure that the new registration process does not end up being more onerous than the current C of A process. They stated that well-intended reforms designed to simplify existing processes can sometimes end up making the process more complex. As such, they asserted that any operational requirements for registration must be flexible (rather than prescriptive) and commensurate with the relative risks associated with the activity.

Prescribing Activities under the Registration Process:
Industry commenters strongly supported the risk-based approach, but most sought further details regarding how the ministry will determine which activities are "lower-risk." A few industry commenters argued that MOE should ensure that its assessment of risk is not overly conservative; they noted that if MOE prescribes too few activities, MOE will not see a significant improvement in the processing of applications. A couple of commenters specifically suggested that any emission reduction, pollution prevention or restoration project should fall into the registration path, so that these projects can be implemented as quickly as possible.

Co-ordination between Approvals Framework and Other Regulations:
Several industry groups commented that the modernization process should address other inter-related policies. For example, a number of industry commenters noted that the approvals process for air emissions and the requirements under O. Reg. 419/05 (the air quality regulation under the *EPA)* are very closely linked. To ensure overall efficiency, commenters stated that MOE needs to consider these processes together through the modernization framework. Some suggested that the approvals process for air emissions subject to O. Reg. 419/05 should be simplified, while one industry group suggested that facilities that comply with the requirements under O. Reg. 419/05 should be exempted from the approval requirements altogether.

Approvals:
Several commenters noted that MOE's proposal to include multiple media and multiple sites in a single C of A may have benefits for some companies, but may not make sense for all proponents. As such, these commenters strongly urged MOE to allow proponents to choose if they wish to have individual Cs of A

instead of a site-wide or multi-site approval. Similarly, many commenters sought clarity on whether approval holders would be required to register activities that become prescribed, or whether they could choose to have their existing C of A continue to apply to the prescribed activities.

Transition Timeframes:
Many industrial commenters stated that the transition timeframes must be realistic, allowing industry ample time to register under the new regulation and/or submit applications for new approvals. They noted that the registration process may impose requirements that were not included in some existing Cs of A, and therefore may require some work to meet the new regulatory requirements. They suggested that the timelines for sector-wide updating of Cs of A should be staggered over a lengthy period (minimum 5 to 10 years) to prevent overwhelming industry and MOE staff. Some companies noted that they hold dozens or even hundreds of Cs of A, so a realistic transition timeframe for applying for new approvals is critical.

Changes to Hearing Requirements:
A few commenters expressed concern that air approvals would now be subject to discretionary hearings, which could significantly delay the approvals process. A few commenters also expressed concern that, if facilities are required to obtain a "multi-media" approval, a hearing might be applied to all media for a situation where only one media (e.g., air) is at issue.

Lafarge Decision:
Some industry commenters stated that MOE's approvals framework needs to explicitly address the *Lafarge* decision, which found that MOE must consider its Statement of Environmental Values (including consideration of the cumulative impacts of activities on the environment) when issuing approvals. These commenters noted that this court decision has created significant regulatory uncertainty in Ontario's approvals system.

Service Guarantees:
The industry commenters supported MOE's proposal to provide service guarantees, stating that this would provide greater certainty for industry, which is required for businesses to make capital investment decisions. One commenter noted, however, that there does not appear to be any recourse if the service guarantee is not met.

Confidential Information:
Many industry commenters expressed serious concern about the release of confidential information. These commenters stated that MOE must ensure that any confidential and proprietary information submitted through the registration process is protected and must not be disclosed on the public information website.

Municipal Commenters

Municipal commenters, for the most part, echoed the comments made by industry. They generally supported MOE's efforts to simplify and improve the efficiency of the approvals process, similarly citing experiences with lengthy application processes. Like industry, the municipal commenters focused on: the need for a clear definition of what types of activities are "low-risk"; support for operational flexibility in approvals; concerns about the transition periods and requirements to apply for new approvals, especially for large complex operations (like wastewater systems) that are subject to numerous Cs of A; and ensuring that confidential information is protected.

Similar to industry commenters, some municipalities strongly supported single site-wide and multi-site Cs of A, stating that it would be more efficient and consistent; while other municipalities asserted that facilities should have the option of retaining multiple Cs of A rather than a massive, complex multi-media or multi-site C of A. These municipalities also stated that facilities should have the option of retaining a C of A that covers prescribed activities, rather than being required to maintain both registrations and approvals.

Comments from Conservation Ontario

Conservation Ontario stated that the conservation authorities were generally supportive of the proposed framework for modernizing approvals. However, it was disappointed that the proposal did not provide any details on how the new approvals framework will address requirements under the *Clean Water Act*. Under the *Clean Water Act*, certain instruments – including Cs of A for sewage works and waste disposal sites – will be required to be updated to conform with the applicable region's source protection plan. (For a discussion of the requirements under the *Clean Water Act*, see Section 4.4 of this Supplement.) Conservation Ontario recommended that MOE's approvals framework include a clear process for implementing this requirement.

To support source water protection, it also recommended that the approvals process be co-ordinated on a watershed basis, tailoring each C of A to the circumstances and characteristics of the local environment.

Comments from Aboriginal Peoples

One organization representing Aboriginal peoples submitted comments, stating that the approvals system must consider potential cumulative impacts. It asserted that it is inappropriate for MOE to approve a series of "low risk" projects in a particular area without considering the potential for these projects to collectively pose a medium or high risk to the environment or human health. It stated that, by not considering cumulative impacts, the government is "effectively choosing not to protect the traditional ways of life" of the First Nations communities.

Need for Ongoing Consultation

A key reoccurring comment made by stakeholders from every sector was the overriding need for meaningful consultation as MOE develops the future regulations to implement the modernized framework.

SEV

MOE provided a lengthy description of the various ways in which the ministry considered the principles outlined in its Statement of Environmental Values in developing these amendments. Among these points, MOE noted that:

- The ministry's approvals process embodies consideration of the precautionary principle and incorporates pollution prevention ideals by setting out requirements to mitigate risk and monitor effects on the environment and ecosystem;
- Efforts to transition older Cs of A to new approvals will ensure that approvals reflect today's environmental protection standards and may allow staff to consider cumulative effects; and
- Electronic database system improvements will enhance environmental management and enable staff to more easily consider ecosystem and cumulative effects.

Other Information

On April 13, 2011, MOE posted a proposal on the Environmental Registry (#011-2776) to amend O. Reg. 681/94 – Classification of Proposals for Instruments, made under the *EBR* to reflect the recent amendments to the approvals process. The resulting amending regulation was filed on June 14, 2011. Essentially, the amendments revoke the various existing classifications of Cs of A as Class I, II and III instruments, and instead classify all proposals for Environmental Compliance Approvals as Class II instruments. Class II instruments generally provide enhanced public participation and notice opportunities compared to Class I and III instruments. Reclassifying the existing Class III approvals (such as Cs of A for sewage works that do not include mandatory discharge limits for contaminants) to Class II instruments will make these approvals subject to the leave to appeal provisions.

Also on April 13, 2011, MOE posted another proposal notice on the Registry (#011-2957) to establish minimum submission requirements for all new applications for approvals. As a result of this proposal,

MOE filed O. Reg. 255/11 under the *EPA* on June 14, 2011, which sets out minimum application requirements for Environmental Compliance Approvals.

ECO Comment

After over a decade of work by MOE involving several attempts to revise its approvals process, the ECO believes that MOE has ultimately developed a reasonable modernized framework.

The unfortunate reality is that MOE is unable to meet the demands of the current approvals process. The need to reduce its approval burden appears to be the real motivation behind the modernization project, although MOE was disappointingly less than transparent about this purpose. Viewed in this context, it is clear that part of the solution to fixing MOE's approvals process must be allocating greater resources to the ministry to ensure that it has the capacity to process and update all approvals. The ECO continues to urge the province to provide additional resources to MOE to enable the ministry to appropriately administer its core responsibilities (see Part 5.1 of this Annual Report).

However, even if allotted far greater resources, the ECO believes that there would still be a need for MOE to revise its approvals program to operate more effectively. There will always be competing demands for staff and financial resources, and choices need to be made as to how to allocate ministry resources most efficiently. The modernized framework appears to do just that.

The modernized framework should enable MOE to more effectively focus staff resources on reviewing facilities and activities that are novel, complex and/or pose a higher risk to human health and the environment. The anticipated reduction in applications should also enable MOE to reallocate staff resources to undertake much-needed reviews of outdated approvals. In addition, the new registration process could potentially improve efficiencies and environmental protection by enabling the ministry to establish a single set of up-to-date environmental standards for all activities in a sector, and by enabling the ministry to update those operating requirements through a single, periodic regulatory amendment, rather than through numerous amendments to individual Cs of A.

However, there is no certainty that these potential benefits will be realized. The legislative amendments conspicuously fail to provide the mandatory provisions necessary to achieve these objectives, such as provisions that would: require MOE to review all transitioned approvals by a certain date; require MOE to include expiry dates in all new approvals; require the regulations for prescribed activities to include operating, monitoring and reporting conditions; and require MOE to regularly update the regulations for prescribed activities. While MOE has signalled an intention to do all of these things, absent clear direction in the legislation, there is no certainty that these will be done. The ECO urges MOE to fully exercise its discretionary authority to implement each of these elements of the new framework.

The ECO also has serious concerns that the *EPA* and *OWRA* amendments have not provided any parameters to define which activities may fall within the registration process. Given the reduced oversight of registered activities, the ECO strongly urges MOE to apply the registration process judiciously only to activities that are truly low-risk. Furthermore, it is critical that the new regulations include appropriate eligibility criteria that exclude activities or facilities that are not suitable for registration given any special circumstances (e.g., unique features, sensitive local conditions, history of non-compliance, etc.), and that the regulations include rigorous operating requirements that are at least as protective as those currently found in the most stringent corresponding Cs of A.

Furthermore, to ensure environmental protection, the new registration process must be accompanied by a much stronger inspection program. The reliance on proponents' self-assessment under the registration process creates an enhanced need for strong, visible MOE oversight to ensure that registrants comply with all regulatory requirements. Yet, MOE has provided no commitment to increase its inspection presence. The ECO urges MOE to bolster its inspection program for the registration process by developing a detailed compliance and enforcement strategy specific to the registration process and by allocating additional staff and other resources to ensure sufficient ministry oversight of all registrants.

Lastly, the ECO notes that MOE's modernized process provides some important improvements in terms of transparency and access to information. Difficulty accessing approvals-related information has been a long-standing concern of both the public and this office; accordingly, the ECO lauds the ministry on its new publicly accessible approvals database. However, the ECO also notes that the new registration process represents a step backwards in terms of public participation. The total absence of any opportunity for public involvement with regard to individual registrations provides yet one more reason why MOE – on behalf of the public – must very strictly administer and enforce the requirements under the registration process.

Review of Posted Decision:

4.7 *Water Opportunities and Water Conservation Act, 2010*

Decision Information

Registry Number: 010-9940
Proposal Posted: May 18, 2010
Decision Posted: May 18, 2011

Comment Period: 60 days
Number of Comments: 39
Came into force: November 26, 2010 (except Part II of *WOA* came into force on March 2, 2011, and *BCA* amendments on April 1, 2011)

Keywords: water conservation; drinking water; wastewater; stormwater; land use planning; *Ontario Water Resources Act*; *Green Energy Act, 2009*; Building Code; Open Ontario Plan

Description

Background

On May 18, 2010 – one decade after the Walkerton tragedy – the Minister of the Environment introduced Bill 72, the *Water Opportunities and Water Conservation Act, 2010* (*WOWCA*) for first reading. The *WOWCA* created a new stand-alone act – the *Water Opportunities Act, 2010* (*WOA*) – as well as amended four other provincial acts. The purpose of the *WOWCA* is to support the development and export of water and wastewater technologies, and to promote water conservation in Ontario. The *WOWCA* passed third reading on November 23, 2010, and received Royal Assent on November 29, 2010.

Open Ontario Plan

The *WOWCA* was introduced in the spring 2010 budget as part of the province's Open Ontario Plan to strengthen the economy and create more jobs. As a key component of this plan, the *WOWCA* is intended to help foster the growth of an Ontario-based global industry in water and wastewater technologies and services.

The provincial government identified water treatment and water conservation technologies and services as a major opportunity for economic and job growth. The Conference Board of Canada estimates that the annual global market for water and wastewater technologies is more than $400 billion, and is expected to double every five to six years. The government also projects that within the next 20 years, worldwide water demand will be 40 per cent greater than current supply.

Over the past decade, largely in response to the Walkerton crisis, Ontario has developed significant expertise and research talent in clean water technology. The *WOWCA* is intended to build on this existing expertise and help Ontario companies become major suppliers of water technologies and services to the global market. As the primary means of achieving this goal, the *WOA* establishes a new, non-Crown corporation (named the "Water Technology Acceleration Project" or "WaterTAP") that will support the water and wastewater sectors with developing technologies, expanding markets and sharing ideas.

Water Conservation

While the primary motivation for introducing the *WOWCA* was economic and job growth, a secondary, but important objective of the Act is to promote water conservation.

Canadians, including Ontarians, are among the biggest consumers of water in the world. Canadians use, per capita, approximately 4,000 litres of water per day. Although it is difficult to find a precise breakdown of use by sector, it is estimated that approximately 63 per cent of this total volume of water is used for electricity production; 17 per cent by industry (manufacturing and mining); 11 per cent by municipalities; and 9 per cent for agriculture (see Figure 1). Although energy generation is the largest use of water, the vast majority of the water is returned to the watershed immediately after being used (albeit often at a higher temperature).

Residential (i.e., household) water use makes up just over 55 per cent of the municipal water consumed. This means that, for household use alone, the average Ontarian consumes approximately 270 litres of water per day. This is roughly twice as much water consumed as the average European.

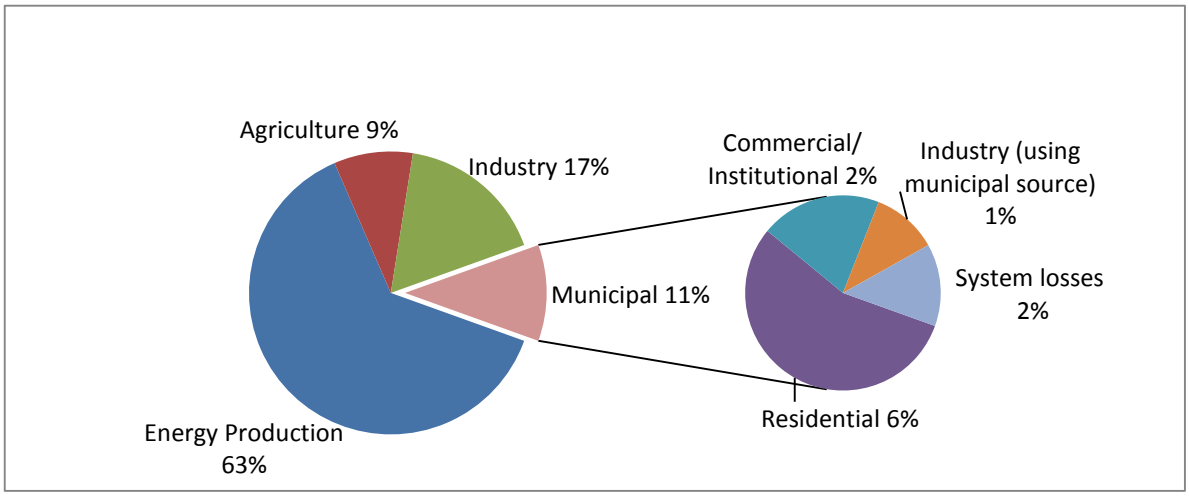

Figure 1: Water Consumption in Canada by Sector

Since Ontario's fresh water reserves are so abundant, many Ontarians put little value on conserving water. Yet, there are real and substantial economic and environmental costs to our excessive water consumption. For example, treated tap water is an expensively manufactured product. Not only are large volumes of water used to generate electricity, but large amounts of electricity are required to provide water services – i.e., for pumping, treating, distributing and heating our water. Water treatment alone can account for up to half of a municipality's total energy consumption, while water heating can account for over 20 per cent of the average household's energy consumption. Treatment of the wastewater after use requires further significant energy use. Accordingly, water conservation can help reduce energy consumption, which can, in turn, reduce greenhouse gas emissions.

In addition, many communities in Ontario are currently experiencing pressure to accommodate expanding populations, which entails ensuring secure drinking water supplies as well as sufficient wastewater assimilation capacities to meet the growing demands. Water conservation measures can reduce the

demands on both the local drinking water treatment plants and the sewage treatment plants, helping to extend the life of existing infrastructure and deferring, or even avoiding, the need for costly expansions and upgrades.

Although Ontario's water supplies are generally vast, there are stressed watersheds in the province, such as the Grand River and Lake Simcoe watersheds, that are already exhibiting sign of water stress from extensive water withdrawals and/or wastewater discharges. Excessive water withdrawals threaten the ability of aquifers to replenish themselves and properly maintain the watershed's hydrological cycle. At the other end of the water use cycle, high water usage means high volumes of wastewater, usually in a degraded form (e.g., through chemicals, pathogens and changes in temperature), returning to the watershed and impairing the quality of the receiving waters and hydrological systems. Changes to the system may result in microclimate changes, altered stream flows and sediment deposition, soil erosion, densimetric stratification (i.e., impaired vertical mixing and oxygenation of bottom water level), impaired water quality (e.g., pollution, thermal enhancement, microorganisms), low groundwater levels and loss of biodiversity from altered habitat and food webs. Water conservation is critical to sustaining a functioning watershed, as well as to improving resilience against other water stressors, such as climate change, pollution and changes in land use.

To help address these issues, the *WOWCA* establishes several measures to promote water conservation in the province. Although the Act's aim is ostensibly to encourage everyone in Ontario – individuals, government and industry – to conserve water, most of the measures in the Act focus on government (provincial and municipal) actions, including provisions for government to set and meet water conservation targets, develop water conservation plans and consider water conservation when building and operating government facilities.

Implications of the Decision

The goal of the *WOWCA* is to help Ontario "become a North American leader in driving innovation and creating new economic opportunities in the water and wastewater sectors". The *WOA* is the primary means of achieving this goal. The stated purposes of the *WOA* are to:

1) foster innovative water, wastewater and stormwater technologies, services and practices in the private and public sectors;
2) create opportunities for economic development and clean-technology jobs in Ontario; and
3) encourage the conservation of water resources.

To what extent the *WOA* will achieve these goals is difficult to predict. Most of the *WOA* is merely permissive – it sets out some overarching principles, and then provides government with the legislative authority to implement various measures to achieve these goals, but does not *require* government to do so. Therefore, the practical implications of the Act will depend greatly on if, when and how the various regulations necessary to implement the measures are developed.

WaterTAP as a Driver of Economic Development

The new WaterTAP corporation is intended to help drive economic development in the water and wastewater sectors. The government states that WaterTAP will be "a technology hub" that will bring together industry, academics and government, as well as "a catalyst for the development and sale of innovative water technologies and services."

To help make Ontario a global leader in developing and selling water and wastewater technologies and services, WaterTAP is tasked with:

- promoting the development of innovative new technologies;
- identifying opportunities for research, commercialization and demonstration;
- helping industry build capacity for research, development and demonstration projects;

- facilitating industry collaboration and encouraging the exchange of ideas between government, universities, and private companies; and
- helping to develop national and international business opportunities.

WaterTAP may also be authorized by the Ministry of Research and Innovation (MRI) to develop a certification program for water and wastewater technologies.

While WaterTAP is a non-Crown corporation, MRI still has the power to direct WaterTAP to exercise certain powers or duties, such as organize a conference on water and wastewater, which WaterTAP must implement "promptly and efficiently." WaterTAP is also required to submit a publicly available annual report to MRI that describes its activities and achievements during the year.

WaterTAP's activities will presumably require considerable funding to achieve its objectives. Although the funding structure for the corporation is not explicitly set out in the *WOA*, the Act does authorize MRI to provide grants to "defray the operating costs" of the corporation. In November 2010, the government announced that it had set aside up to $5 million over three years to allow WaterTAP to achieve its initial goals.

Ontario Clean Water Agency

As a secondary measure to help achieve the *WOWCA*'s goals of innovation and economic development, the Act expands the objectives of the Ontario Clean Water Agency (OCWA), an existing Crown agency that provides water and wastewater services, to include "financing and promoting the development, testing, demonstration and commercialization of technologies and services for the treatment and management of water, wastewater and stormwater" both inside and outside Ontario. Expanding the objectives of OCWA could help to push the agency to become a leader in using and promoting new and innovative water and wastewater technologies and services.

Water Conservation Targets

To support the government's conservation goals, the *WOA* states that the Minister of the Environment may establish provincial "aspirational targets" in respect of the conservation of water and other matters. This provision is merely permissive – i.e., the Minister *may* establish targets, but not *must*. Furthermore, the use of the term "aspirational" indicates that, even if such targets are established, there would be no ramifications if the province failed to meet the targets.

The *WOA* also authorizes Cabinet to establish water conservation targets for prescribed "public agencies" – defined as a provincial ministry or other public entity, including a municipality, that is prescribed by regulation – and to require these agencies to meet the conservation targets. Cabinet can also prescribe environmental standards and other requirements that the public agencies must follow to achieve those targets. Like the province-wide targets, these provisions are merely permissive, and further, they provide no indication of when such water conservation targets might be implemented or what they might be.

Water Conservation Plans

The *WOA* authorizes Cabinet to make a regulation that would require prescribed public agencies to prepare "water conservation plans." If Cabinet establishes such a regulation, the *WOA* states that these conservation plans *must* include the following:

- A summary of annual water use for each of the public agency's prescribed operations;
- A description of current and proposed activities to conserve water, and a forecast of the expected results from these conservation measures; and
- A summary of the agency's progress in conserving water since implementing the plan, including progress in achieving any self-identified or regulated water conservation targets.

This regulation may also include requirements for prescribed public agencies to include water conservation and water protection as evaluation criteria when making capital investments and procurement decisions.

If implemented, this requirement for water conservation plans should encourage government (both provincial and municipal) to lead by example by ensuring that the public sector embraces water conservation. The adoption of water conservation technologies could also help foster markets for innovative new technologies and services.

Municipal Water Sustainability Plans

The *WOA* enables Cabinet to establish a regulation that would require prescribed "municipal service providers" – i.e., municipalities or other persons responsible for municipal services – to prepare and submit to the Ministry of the Environment (MOE) "municipal water sustainability plans" for their municipal drinking water, wastewater and stormwater services as required by regulation. While the specifics – i.e., which municipal service providers would be regulated, the timelines for compliance, the actual plan contents, and details of how the plans would be implemented – is to be set out in regulation, the *WOA* does state that the following components may be a part of the plan:

- an asset management plan for the physical infrastructure;
- a financial plan;
- a water conservation plan for municipal water services;
- a risk assessment (including an assessment of risks posed by climate change); and
- strategies for maintaining and improving the municipal services (such as considering new water technologies and increasing co-operation with other service providers).

This requirement for sustainability plans should encourage municipalities to identify problems with their existing water, wastewater and stormwater infrastructure, evaluate the true costs of providing these services, and properly plan for their long-term infrastructure needs. Long-term sustainability planning is both a financial and an environmental issue. For example, in many older Ontario municipalities, an estimated 10 to 30 per cent of the treated water – representing millions of litres of water – is lost from the distribution system through leaking pipes and crumbling waterworks. And the problem of deteriorating infrastructure extends to other parts of the system as well. A 2005 report commissioned by the province (Watertight: The Case for Change in Ontario's Water and Wastewater Sector) found that many municipalities chronically under-invest in their water and wastewater infrastructure, resulting in an enormous backlog of repairs and replacement, which in 2005 was an estimated $34 billion.

However, it must be noted that requirements for sustainability planning already exist for drinking water systems under the *Safe Drinking Water Act, 2002* (*SDWA*). The Financial Plans regulation under the *SDWA* already requires municipalities to undertake financial planning for their drinking-water systems. (For a review of the Financial Plans regulation, see Part 3.2 of the ECO's 2007/2008 Annual Report.)

Furthermore, requirements for financial planning of municipal water and wastewater systems were previously established almost a decade ago when the government passed the *Sustainable Water and Sewage Systems Act, 2002* (*SWSSA*). The *SWSSA* requires municipalities to prepare full-cost accounting plans for their municipal water and sewer services, and to develop plans for recovering their full costs. However, the *SWSSA* was never proclaimed into force. (For a review of the *SWSSA*, see pages 105-107 of the ECO's 2002/2003 Annual Report.)

It is unclear how these new *WOA* requirements will align with the existing requirements under the *SDWA* or how they will compare with the unproclaimed provisions of the *SWSSA*.

Municipal Performance Targets

The *WOA* authorizes MOE to establish, by direction, performance indicators and targets for prescribed municipal service providers. MOE may then direct the service providers to review and report on the performance of their municipal services with reference to these performance indicators and targets. The *WOA* provides very little detail about what these performance indicators and targets may be, other than generally stating that they may relate to "the financing, operation or maintenance of a municipal service," and may vary by region and municipal size. If a service provider fails to meet its performance targets, MOE may require the provider to explain why the targets were not met, as well as require the provider to amend its municipal water sustainability plan to incorporate strategies and steps to help achieve the performance targets. MOE could potentially use this power to encourage poorly performing municipalities to improve their stormwater or wastewater treatment systems. However, to what extent this new power would be used in place of, or in addition to, MOE's other existing powers to direct improvements of municipal water and wastewater systems (e.g., through a facility's Certificate of Approval) is unknown.

Municipal Water Bills

The *WOA* authorizes MOE to prescribe by regulation standard information that must be included on municipal water bills. The *WOA* does not provide further indication of what this information would be, but it likely could include information about the consumer's consumption levels, and possibly information about how this compares with the provincial or local averages. Information about water use levels could help encourage consumers to conserve water.

Ministry Reporting and Public Notification

The *WOA* requires MOE to produce a report at least every three years that describes the activities and achievements of the province and regulated public agencies (including municipalities) in meeting the various requirements and targets under the Act. In addition, the *WOA* requires MOE to post any provincial aspirational targets, performance indicators and performance targets on the Environmental Registry. Mandatory reporting enables the public to monitor the province's progress on meeting the government targets and other goals of the Act.

Amendments to the Building Code Act, 1992

The *WOWCA* amended the *Building Code Act, 1992* (*BCA*) by adding a requirement for the Ministry of Municipal Affairs and Housing (MMAH) to initiate a review of the Building Code regarding water conservation standards every five years (commencing within six months of this provision coming into force). The *BCA* was also amended to expand the mandate of the re-named Building Code Conservation Advisory Council to include advising the Minister (MMAH) on energy and water conservation standards in the Building Code.

Ensuring that up-to-date water conservation standards are reflected in the Building Code can provide a significant opportunity for advancing water conservation measures (such as installing low-flow bath fixtures and "greywater" reuse systems) in the residential and commercial sectors.

Amendments to the Green Energy Act, 2009

The *WOWCA* amended the guiding principles of the *Green Energy Act, 2009* (*GEA*) to require the provincial government to consider water conservation and water efficiency (in addition to energy efficiency and greenhouse gas emissions) when constructing, acquiring, operating and managing government facilities. Like the conservation plan requirements, this provision could similarly help to ensure that government "walks the walk" in embracing water conservation.

WOWCA also expanded the authority of the Minister of Infrastructure under the *GEA* to issue directives that: require ministries to report on water use; establish water conservation standards for new construction and large renovations of government facilities; and specify other requirements related to the

adoption of technologies and services that promote the efficient use of water and reduce the negative impacts on water resources. If the Minister does issue such directives, this too could help push government conservation efforts.

Amendments to the Ontario Water Resources Act

The *WOWCA* shifted the provisions that authorize the government to establish water efficiency standards for appliances and products out of the *GEA* and into the *Ontario Water Resources Act* (*OWRA*). *WOWCA* also included a complementary section in the *OWRA* that prohibits the sale or lease of appliances and products unless they meet the prescribed water efficiency standards and are labelled to confirm compliance with those efficiency standards. First, however, the prescribed appliances, products, standards and labelling requirements must be set out in regulation. This amendment was essentially administrative, as similar provisions already existed under the *GEA*.

No Privatization

In response to public concerns that the *WOWCA* would support the privatization and bulk export of water from Ontario, the government added a provision to the final draft of Bill 72 to make it abundantly clear that the aim of *WOWCA* is to export clean-water technology and not Ontario's fresh water. The *WOA* now explicitly states "the purposes of this Act do not include the privatization of publicly owned water, wastewater and stormwater services."

Public Participation & *EBR* Process

Bill 72 was introduced for first reading on May 18, 2010. The proposed bill was posted on the Environmental Registry on the same date for a 60-day public comment period (closing July 17, 2010). MOE noted that it had received prior input on related water conservation initiatives through recent engagement on the Great Lakes St. Lawrence River Basin Sustainable Water Resources Agreement. Despite the fact that the *WOWCA* received Royal Assent on November 29, 2010, MOE did not post a decision notice on the Registry until May 18, 2011. MOE's failure to post the decision notice in a timely fashion undermines the function of the Registry as a relevant and reliable source of public information.

Comments by Environmental Groups

Overall, environmental organizations supported Bill 72. However, several environmental groups submitted recommendations seeking to strengthen the proposed legislation. These commenters felt that the government must set clear, measurable provincial targets for water efficiency and conservation that can be tracked and monitored. They also wanted conservation plans and monitoring to be mandatory and to include maximum daily use targets. Environmental groups also wanted to ensure that all municipalities and service providers would be required to prepare municipal water sustainability plans with mandatory targets and incentives.

Furthermore, environmental groups sought to have other important principles – namely, integrated watershed-based management, the interdependent relationship between water and energy consumption, the maintenance of ecological function, and the protection of hydrological natural heritage features – to be explicitly referenced in the *WOA* and the conservation plans. These groups also stated that the province should ensure that the *WOA* complements and improves upon other legislation and policies aimed at protecting water resources. They also urged the government to make "green infrastructure" a policy priority and to apply "blue strings" (i.e., water conservation conditions) to all infrastructure projects in order to receive a government grant or be approved for a permit to take water.

Environmental groups also argued that promoting a culture of conservation through a public education campaign is critical to water conservation. A submission by a coalition of environmental groups recommended that the ECO be mandated to review MOE's reporting on meeting water conservation targets and recommendations. Another group strongly urged the province to implement full-cost pricing for water in order to meet its conservation objectives.

These commenters also stated that the WaterTAP program should be broadened to go beyond just water treatment technologies, to include water conservation and green infrastructure technologies, practices and services. Several noted that First Nations should be provided with the capacity to invest in and take advantage of water opportunities in Ontario. Finally, some environmental groups stated that stormwater should be made a higher priority, and should be addressed separately from wastewater in the *WOA*.

Comments by Municipal Government and Local Utilities

Generally, the municipal commenters supported the broad purpose of the *WOWCA*. However, almost all of them expressed serious concerns about the potential financial impacts of the *WOA* on the municipalities. These commenters noted that preparing the sustainability plans and the water conservation plans will require significant staff and financial resources. These municipal commenters also expressed concerns about the potential costs of implementing water conservation programs and/or infrastructure upgrades that may be required under the plans. Several municipal commenters also stated that future regulatory requirements under the *WOA* that may oblige municipalities to install new water metering technologies and develop new water billing software could involve considerable costs.

Accordingly, many municipalities suggested that the province provide funding to municipalities to assist them with: completing the sustainability and conservation plans; making necessary upgrades and taking other measures to meet performance and conservation targets; adopting new technologies; and installing new water monitoring technologies and billing software. One municipality commented that the province should also provide other supporting tools, such as guidance documents and best practices guidelines to help municipalities implement the different aspects of the *WOA*.

Many municipal stakeholders also made the point that their revenue streams for water and wastewater are tied to consumption. When consumption declines as a result of conservation efforts, municipalities' revenues fall, but operating costs remain largely the same. Accordingly, municipalities warned the province that they will likely need to increase user rates to offset their loss of revenues, as well as need financial support to implement further sustainability goals.

Another major concern was the potential duplication of efforts required by the *WOA*. Municipal stakeholders noted that municipalities are already required to complete financial plans, asset management plans, and risk assessments for drinking water systems under the *SDWA*. To avoid duplication and additional bureaucracy, these commenters stated that the *WOA* requirements must be harmonized with existing requirements under the *SDWA*.

Many municipalities expressed concerns about how the performance indicators, performance targets and conservation targets will be set for municipalities. These commenters argued that the targets must reflect the different circumstances and physical characteristics of each municipality (e.g., location, age, population size, growth patterns, industrial base, etc.), and must also recognize past efforts to ensure that conservation targets do not punish progressive municipalities or reward laggards. Several suggested that municipalities should be responsible for setting the performance and conservation targets. At a minimum, all municipalities stressed the need for significant municipal involvement when setting the targets. More generally, municipal commenters expressed an overriding concern that municipalities must be meaningfully involved in the development of all regulations that will have an impact on them.

A few commenters questioned the value of requiring municipalities to prepare water conservation plans at all. These commenters stated that some municipalities have excess capacity, so the primary benefit of water conservation – i.e., the delay or avoidance of capital expansion – might not be clear. They also noted that municipal service providers have limited capacity to influence the conservation efforts of the public and local industries, and therefore, they should not be held accountable for failure to meet conservation targets.

Several commenters stated that the province is better positioned to influence conservation and should lead a major marketing and public education campaign to promote water conservation issues. One municipality noted that if the province provided public education of the *WOA* requirements, it would be

easier for municipalities to get the budget approvals necessary to implement them. Another municipality critiqued the Act for not requiring municipalities to implement 100 per cent user-pay, full cost recovery, which would help them meet conservation goals.

Comments by Industry Associations

Industry associations were supportive of the bill, and like the environmental groups, they offered recommendations that they thought would make the Act more effective. Many industry associations wanted the government to set clear and aggressive targets for water conservation, with reporting requirements that would promote green business. Various industry associations proposed that the government implement a provincial purchasing program that sets green procurement targets. They also stated that, when developing the regulations, government should prescribe *every* municipality to be required to develop a municipal water sustainability plan.

Many industry commenters felt that WaterTAP is an important initiative, but disagreed about how it should be managed. Several associations felt that creating the WaterTAP corporation to administer the program was unnecessary, costly and redundant with the Ontario Clean Water Agency. Others suggested it should provide strategic guidance but not be an active market participant. Moreover, associations wanted WaterTAP to engage with stakeholders, including industrial and residential users and industry associations.

Industry commenters urged the government to examine existing legislation and policies addressing water conservation and address any duplication where it exists (such as the purpose of the *Ontario Water Resources Act*). They also stressed that water, wastewater and stormwater services should be individually defined and addressed separately.

There were also calls for full cost-pricing of water and wastewater and the establishment of mandatory water metering. Ensuring that there is appropriate funding to carry out these initiatives was repeatedly raised, and one association called for the creation of dedicated reserves to ensure water infrastructure, particularly water delivery pipes, is maintained and operated. Lastly, several associations urged that there be a recognition and co-ordination of the energy-water nexus, and wanted to see the Ministry of Energy involved in the municipal water sustainability plans and performance indicators and targets.

Ministry Consideration of Comments

Following the consultation period and the presentation to the Standing Committee on General Government, several amendments were made to the final version of Bill 72, including:

- To ease fears that the legislation would open the door to privatization, the purpose section of the *WOA* was amended to explicitly exclude the privatization of publicly owned water, wastewater and stormwater services;
- To recognize the potential of innovative services and practices in conserving water, the purpose section of the *WOA* was amended to include fostering innovative water, wastewater and stormwater "practices", in addition to "technologies and services," and similarly, the mandate of WaterTAP was expanded to cover water "services", as well as "technologies";
- In response to concerns raised by municipalities about the onerous proposed requirements of the sustainability plans, the *WOA* was amended to provide greater flexibility with respect to the sustainability plans, such as stating that the plans "may" (rather than "must") include an asset management plan, financial plan, water conservation plan, and risk assessment; and
- The *WOA* was also amended to include a requirement for MOE to publish any performance indicators or targets for municipal services on the Environmental Registry, together with the rationale for each indicator or target.

Beyond these amendments, no other substantive changes were made to the final legislation as a result of the recommendations made by stakeholders during the Registry consultation or at Standing Committee.

Other Information

In March 2011, MOE posted a proposal notice (#011-2697) on the Environmental Registry to prescribe the *WOA* (except Part II) under the *Environmental Bill of Rights, 1993*. If prescribed, all proposals for environmental significant regulations made under the *WOA* (except Part II) must be posted on the Environmental Registry for public comment.

On March 2, 2011, Part II of the *WOA* (the WaterTAP provisions) came into force. On the same date, MOE proclaimed O. Reg. 40/11, the WaterTAP regulation under the *WOA*. This regulation states that the Minister of the Environment will appoint the original members of the board and that the board should include representatives from academia and the private and municipal sectors. The regulation also states that board members will not be remunerated (but will be reimbursed for their expenses).

SEV

MOE stated that the *WOWCA* is consistent with its Statement of Environmental Values (SEV) in the following ways: MOE undertook an ecosystem approach to policy development by considering the interrelationships between the natural and built environment; the development of municipal water sustainability plans is consistent with sustainable development and adaptive management approaches to water; reporting requirements in the Act and consultation opportunities support transparency; many of the initiatives contained in the Act will promote a behavioural change to water use by Ontarians (including the government) in order to preserve water resources for future generations; the Act recognizes that all sectors of the province have a strategic role to play by laying down a framework directed at fostering innovation, green economic development, sustainable water infrastructure and water conservation; and the goal is to make Ontario a leader in water conservation and treatments technology and services.

ECO Comment

The goal of the *WOWCA* to support water conservation and "green" water technologies, practices and infrastructure is laudable. Additionally, the recognition of the importance – and interrelationship – of drinking water, wastewater and stormwater systems in protecting hydrological systems is also commendable. However, most of the *WOA* is merely permissive – it provides government with the authority to implement measures that may promote water conservation, but does not require government to do so. The ECO urges MOE to promptly develop, in consultation with stakeholders and the public, the regulations necessary to implement the various components of this legislation.

While the *WOA* cites water conservation as an important goal, the ECO is disappointed that the Act fails to address one of the key tools for achieving this goal: water pricing. Ontarians' excessive consumption of water can be attributed, at least in part, to the fact that water is grossly underpriced in the province. The cost of treating and delivering clean water right to our taps is high. Yet, most municipal providers in Ontario charge artificially low water and sewer rates that are a small fraction of those in most other countries, and that are a small fraction of the true costs of the services. Instead, most Ontario municipalities heavily subsidize their water and wastewater systems through property taxes and provincial grants. Increasing the cost of water and wastewater services can not only provide a major incentive for conservation, but it can also provide an important means for ensuring the long-term sustainability and financial self-sufficiency of water and wastewater systems.

The *WOA* represents the government's third effort within the last ten years (following the *Sustainable Water and Sewage Systems Act, 2002* and the Financial Plans regulation under the *Safe Drinking Water Act, 2002*) to regulate requirements for financial planning of municipal services. After three successive forays, it is extremely disappointing that the government still has never mandated full-cost pricing. Extensive data demonstrates that water and wastewater users who are metered and charged an appropriate volume-based rate will reduce their water use.

Although the *WOA* does not explicitly mandate full-cost pricing, requirements for municipalities to undertake financial planning and to meet performance and conservation targets could indirectly drive

municipalities to increase water and sewer rates. Municipal councils, however, are typically reluctant to raise water and sewer rates for fear of political backlash. Accordingly, the ECO strongly urges the provincial government to support municipalities in implementing full-cost pricing by conducting a well-articulated public education program that explains the necessity for water and sewer rate-hikes, and that also communicates the expected benefits of long-term sustainability planning. Experience from municipalities that have taken steps to price water more appropriately (such as Guelph and Edmonton and numerous cities in Europe) demonstrate that real environmental and financial benefits, such as reduced pressure on water resources and more sustainable infrastructure, can be achieved with no sacrifice to a high standard of living.

To further support water conservation, the ECO also urges MOE to develop aggressive and measurable conservation targets for both the province and municipalities. Municipal conservation targets should ideally be set on a watershed basis in a manner that supports functioning hydrogeological systems and considers the cumulative pressures on the watershed. Aggressive targets should help drive conservation efforts and create a market for new green technologies, services and practices. In addition, recognizing the energy-water connection, compelling municipalities to achieve water conservation targets should help reach complementary energy conservation targets as well.

Finally, while the *WOWCA* includes measures for promoting water conservation among the provincial and municipal governments, the Ontario government is doing little to address water use in the industrial sectors. The ECO encourages MOE to use its existing powers (e.g., through conditions in Permits to Take Water, the water taking charge regulation under the *OWRA*, etc.) to push industrial water takers to also use water more efficiently.

Review of Posted Decision:

4.8 Consolidation of Ontario's Ozone Depleting Substances (ODS) Regulations and Harmonization with Federal Requirements

Decision Information

Registry Number: 011-0505
Proposal Posted: September 10, 2010
Decision Posted: December 3, 2010
Comment Period: 45 days
Number of Comments: 8
Decision Implemented: January 1, 2011

Keywords: ozone layer; Montreal Protocol; halons; chlorofluorocarbons; hydrochlorofluorocarbons; hydroflourocarbons

Description

Background

The Montreal Protocol (the Protocol) was established in 1987 and now has 196 nations as signatories. It is a notable environmental success story. The Protocol addressed a major environmental problem caused by a family of chemicals known as chlorofluorocarbons ("CFCs") and hydrochlorofluorocarbons ("HCFCs"). These chemicals are used in a variety of industrial and commercial products, including aerosols, solvents, sterilants (sterilizing agents), fire extinguishing equipment, air conditioners, and refrigeration and cooling equipment. Growing releases of these substances to the atmosphere over several decades resulted in substantial damage to the ozone layer – a thin component of the stratosphere that protects life on the planet from damaging ultraviolet B (UV-B) radiation. By 2000, the ozone layer had

decreased by about 4 per cent (averaged over the globe) from the pre-1980 level. Over the Antarctic, the famous "ozone hole" is a result of the layer being depleted in some years by as much as 40 per cent.

CFCs, Halons, HCFCs, and HFCs

Chlorofluorocarbons (CFCs) and halons are the original Ozone Depleting Substances (ODSs). CFCs have commonly been used in refrigeration equipment while halons have been used in fire extinguishers. Over the past two decades, the production of both has been prohibited in Canada, in keeping with the Montreal Protocol.

Hydrochlorofluorocarbons (HCFCs) are derived from CFCs. Their use is allowed as an interim measure as they are less damaging to the ozone layer than CFCs; however, the Protocol calls for HCFCs to be phased-out by 2030.

Hydrofluorocarbons (HFCs) are the favoured replacement for HCFCs, as they do no damage to the ozone layer. As is the case with CFCs and HCFCs, however, they are potent greenhouse gases.

By acting in concert via the Protocol, the world's governments have managed to gradually reduce the quantity of ozone depleting substances (ODSs) being released into the stratosphere. Although the ozone layer itself has not yet returned to its normal thickness, it has stopped thinning in recent years and scientists predict a full recovery by the middle of the 21st century.

In Canada, the regulatory responsibility for protecting the ozone layer is shared between the federal and provincial governments, with the former responsible for implementing controls on the manufacture, import, and export of ODS, as per the Protocol, and the latter responsible for prevention of uncontrolled releases of ODS, as well as their recovery and recycling. The Canadian Council of Ministers of the Environment (CCME) has co-ordinated the provinces' efforts since 1992, when the first "National Action Plan for Recovery, Recycling and Reclamation of CFCs" was published. This document provided "a national framework for a harmonized approach". The National Action Plan was updated twice, with the most recent version published in 2001.

In Ontario, the Ministry of the Environment (MOE) amended the *Environmental Protection Act* in 1990, adding Part VI, "Ozone Depleting Substances." This amendment provided MOE with the authority to prohibit the manufacture, use, transfer, display, transport, storage and/or disposal of the eight most common ODSs and any other ODS that might be designated in the future. The five original regulations made under Part VI were as follows:

- R.R.O. 1990, Regulation 356, Ozone Depleting Substances – General, last amended in 1993;
- O. Reg. 189/94, Refrigerants, last amended in 2007;
- O. Reg. 413/94, Halon Fire Extinguishing Equipment;
- O. Reg. 717/94, Solvents, last amended in 2001; and
- O. Reg. 718/94, Sterilants.

Overview

MOE tidied up its ODS file in late 2010 by consolidating the five regulations listed above under one new regulation, O. Reg. 463/10, "Ozone Depleting Substances and Other Halocarbons." The new regulation also includes restrictions regarding fire-extinguishing equipment that were not in the original halon regulation. The changes prohibit the refilling of portable fire extinguishers with halon (aircraft and military uses exempted) and provide owners of fixed fire-extinguishing equipment with one halon refill, between 2011 and 2015, before the equipment must be modified or replaced with a non-halon using alternative within one year. As of January 1, 2016, no refills will be permitted. This brings Ontario more closely into line with the CCME's National Action Plan with respect to halons.

Implications of the Decision

The consolidation of all five ODS regulations into one comprehensive regulation will make compliance easier, which should increase compliance and thus reduce environmental impacts over time.

The new halon restrictions will help bring that aspect of MOE's ODS requirements closer to harmonization with the National Action Plan. The CCME Strategy document for implementing the Plan had set a target date of 2003 for the prohibition on refilling portable fire extinguishers with halon. The CCME Strategy had also proposed the period of 2005 to 2010 for the one-refill provision for fixed systems. While MOE had posted a proposal to amend the halon regulation on the Environmental Registry in 2003, it had never finalized a decision, so this new regulation ties up an important loose end.

In terms of refrigerants, however, the new regulation does not bring MOE's ODSs program into full harmony with the NAP. For instance, the 2001 CCME Strategy called for a staged refill ban on all commercial refrigeration units, beginning with small units (less than 5 horsepower, or HP) in 2004, moving on to medium units (5 to 30 HP) in 2005, and ending with large industrial units (>30 HP) in 2006. Ontario's new regulation only deals with the larger units, banning the use of units with a capacity greater than 22 kilowatts (roughly equivalent to 30 HP) as of January 1, 2012. It is difficult to assess what the implications of this omission of small units might be, but Environment Canada has stated that the stock of CFCs still in use in refrigeration units of all types and sizes represents a significant potential source of ODS leaks to the environment.

Another possible implication arises from the fact that most of the HFCs that are gradually replacing CFCs and HCFCs in refrigeration, air-conditioning, and chiller units in Ontario are themselves potent greenhouse gases. This means that even though these substances are not considered harmful to the ozone layer, their uncontrolled release could make a noticeable contribution to climate change.

Public Participation & *EBR* Process

The proposal was posted on the Environmental Registry on September 10, 2010, with a 45-day public review period, which ended October 25, 2010. The decision was posted on December 3, 2010. The ministry received a total of eight comments. In addition, the ministry noted in its September 2010 proposal that it would be considering all of the comments received during its original posting of the proposed halon-regulation amendments in 2003. The ECO assumes that this was done, although no mention of these comments (or direct ministry responses to them) was made in the December 2010 decision notice.

No new comments were received on the halon amendments. The comments fell into four categories. First, all commenters supported the consolidation process. Second, several commenters expressed concern regarding the January 1, 2012 phase-out date for CFCs in large (greater than 22 kilowatts) chillers. They stated that many of the owners and operators of these chillers do not understand or are not aware of the deadline date. The same commenters also felt that the voluntary stewardship organization that manages the collection, storage, and destruction of these substances (see Other Information, below) may not have the capacity to handle the volume of ODSs that could result from the decommissioning of so many chillers in the coming year. The ministry responded that the phase-out date had been introduced in the 2007 amendment to the refrigerants regulation and that chiller owners had been made aware of the deadline through a number of outreach activities since that time. In addition, postponing the date would mean that it might coincide more closely with the phase-out dates of eight other provinces, compounding the problem for the national stewardship organization.

The third issue raised was one of certification. The commenters felt that the handling of ODSs should be limited to individuals with Certificates of Qualification (CofQ), issued by the Ministry of Training, Colleges and Universities (MTCU), and that Ozone Depletion Prevention (ODP) certification (training previously required under O. Reg. 189/94 and now incorporated in O. Reg. 463/10), be limited to those handling unopened and sealed ODS containers. Furthermore, they asserted that technicians with a CofQ should not have to take the additional ODP training. The ministry responded by noting that the CofQ certification offered by MTCU in trades where CofQ certification is mandatory for all workers and where refrigerants

are commonly handled already incorporates ODS training. The ministry also noted that the ODP training required under the regulation is intended to "provide a common level of environmental awareness training regarding ozone depleting substances." In the case of voluntary trades (CoQs not required of all workers), where the handling of refrigerants may occur, ODP training is required. The ministry promised to clarify the differences between CofQ and ODP training on its website.

The fourth issue raised by one stakeholder had to do with the global warming potential of all of the substances with potential for use in refrigeration and cooling equipment. The new regulation covers CFCs, HCFCs, and a designated list of HFCs (see Box). Other substances, including hydrocarbons such as propane and butane, are also being used as refrigerants, primarily in Europe. These substances have no effect on the ozone layer but do have global warming potential. If they were to become more commonly used in Ontario, they would not be covered by the ODS regulation. The commenters argued that this could result in improper release of these substances, exacerbating the process of climate change. They requested a modified and enhanced set of definitions in the regulation to address this issue. The ministry replied that it recognized the global warming potential of these substances but that the suggestion was beyond the scope of the current proposal. It promised to consider updates to the ODS webpage on the MOE website to "highlight the relationship between ODS and climate change."

SEV

The ministry compiled a detailed and thorough Statement of Environmental Values (SEV) Consideration Form. The content of the document was divided into six sections, based on MOE's SEV.

The first section dealt with the SEV's principles of environmental management: use of an ecosystem approach; cumulative effects assessment; consideration of current/future generations; and use of a science-based/precautionary approach. The ministry provided detail as to how the new regulation met all of these principles. Much of the discussion centred on the fact that the restrictions and direction on the use and/or management of ODSs reduces the likelihood of releases to the environment, thus protecting ecosystems, reducing cumulative effects, and protecting current and future generations. In addition, the discussion stated that all of MOE's ODS work is based on the precautionary approach and is science-based.

The second section discussed the principles of pollution reduction and environmental restoration, which include the principles of pollution prevention, polluter-pays, and rehabilitation of environmental harm. In this case, the ministry argued that: the regulation places a high priority on prevention; the costs of this prevention will be borne by the industry (polluter-pays); and the ozone layer will be rehabilitated through the actions mandated by the regulation.

The next section dealt with the principles of strategic management: continuous improvement; consideration of a range of tools; and transparency and engagement. It focused on: the improvements brought about by consolidation (simplification for users); the consideration of a range of tools or options prior to the use of regulatory prohibitions for halons; and the engagement of stakeholders in the consultation process, via both the Environmental Registry and the Ministry of Economic Development and Trade (MEDT) Regulatory Registry. The fourth section, social and economic considerations, discussed primarily the benefits of the consolidation, including the reduction of the burden on business via the simplification of its interaction with government on this issue.

Finally, the last two sections summarized the opportunities for consultation in the process, as well as some additional information. The consultation opportunities mentioned included the 45-day posting on the Environmental Registry, consultation with specific industry groups, and input from several other ministries, including Aboriginal Affairs. The additional information mentioned that the ministry had attempted to bring their ODS file into closer harmonization with the CCME's National Action Plan.

Other Information

Refrigerant Management Canada (RMC) was established in 2000 by the Heating, Refrigeration and Air Conditioning Institute of Canada (www.hrai.ca) and championed by the Canadian stationary refrigeration and air conditioning industry. The RMC Program is an Extended Producer Responsibility (EPR) initiative committed to the responsible disposal of surplus refrigerants from the stationary refrigeration and air conditioning industry. RMC's mission includes: the management of an environmentally responsible disposal process for Canada's surplus stock of ozone-depleting refrigerants; the minimizing of the release of these substances to the atmosphere; and the overall reduction of damage to both the ozone layer and the climate, via greenhouse gas emissions. An environmental levy on the sale of HCFCs is used to fund the program, which to date has been completely voluntary.

The voluntary nature of the RMC program, however, is expected to change in the near future. In May 2009, Environment Canada filed a Notice of Intent in the Canada Gazette, Part I, which stated that the federal Minister of the Environment "intends to establish regulations under the *Canadian Environmental Protection Act, 1999* to manage the end-of-life of ozone-depleting substances and their halocarbon alternatives." The intent of these proposed regulations can be summarized as follows:

- Establish a level playing field for all industry players and assure sufficient revenues for the industry stewardship organization by making stewardship mandatory;
- Expand the scope from stationary refrigeration and air-conditioning equipment (about 35% of market) to include mobile refrigeration, air conditioning, and domestic appliances (the other 65%);
- Include all of the halocarbon alternatives, including HFCs and PFCs (perfluorocarbons), in the stewardship program, so that the global warming potential of these substances is addressed.

Although these regulations have not yet been promulgated, the intent is clear: to bring most of the currently-used refrigerants into the regulatory system and to include them in future stewardship activities, because of their high global-warming potentials.

On another note, MOE drafted the new regulation (O. Reg. 463/10) to be compliant with the *Ontario Labour Mobility Act, 2009*, allowing technicians trained in other Canadian provinces to handle ODSs in Ontario.

ECO Comment

The new ODS regulation represents a welcome tying-up of a few loose ends in the ministry's ODS file. The consolidation of five regulations into one updated version is beneficial to all concerned. The inclusion of the new halon restrictions is also beneficial, if a bit belated. The ECO commends the ministry for standing firm on the deadline date for larger stationary refrigeration equipment. The industry has known about this deadline since 2007 and moving it back would have been a regressive step.

The new regulation, however, leaves some business unfinished. The ECO is concerned that no prohibition for the refilling of smaller stationary refrigeration equipment (22 kilowatts or less) has been scheduled, as per the CCME's National Action Plan. If there is a valid reason for ignoring this fairly large potential source of ODSs, MOE has not communicated it to the public. This matter should be addressed in the near future.

Secondly, as pointed out by one commenter, the issue of the global warming potential of the refrigeration alternatives not specified in the regulation has not been fully addressed. The ministry's position, that doing so would be beyond the regulation's intended scope, is a reasonable one. Nevertheless, the ECO encourages the ministry to monitor this issue and to formally address it if the use of refrigerants with high global warming potential and not specified in the regulation should increase in the future.

Review of Posted Decision:

4.9 Cottage Advisors of Canada Inc. Permit to Take Water

Decision Information

Registry Number: 011-0514
Proposal Posted: July 5, 2010
Decision Posted: October 5, 2010
Comment Period: 30 days
Number of Comments: 29
Decision Implemented: September 21, 2010

Geographic Area: East Lake**,** Prince Edward County

Keywords: PTTW; *OWRA*; cottage development

Description

Overview

In September 2010, the Ministry of the Environment (MOE) issued a Permit to Take Water (PTTW) to Cottage Advisors of Canada Inc. (the "proponent"), a company specializing in the development of cottage communities. The PTTW allows water takings from two wells on the north side of East Lake in Prince Edward County for a maximum of 640,000 litres a day for no more than 215 days per year over the next 10 years. The water will serve the needs of a proposed 237-cottage community, complete with resort amenities, on an 80 acre site, which includes approximately 525 metres of shoreline.

Background

East Lake is a lagoon to the east of Sandbanks Provincial Park in Prince Edward County. The sandbar separating the lake from Lake Ontario is part of the provincial park. The flow in the river that connects it to Lake Ontario travels in either direction, depending on precipitation, atmospheric pressure fluxes, and the St. Lawrence Seaway lock management. Lake water replenishment also depends on a number of local streams that drain into it and local groundwater flow, which mimics surface water drainage patterns.

The 2004 Quinte Regional Groundwater Study, prepared for Quinte Conservation Authority, maps the majority of the area as highly vulnerable to groundwater contamination. Shallow layers of highly permeable sand and gravel do not offer significant protection of underlying bedrock aquifers. The two water-taking wells near East Lake are located in such a shallow sand and gravel overburden complex.

The same study identifies groundwater as a major source of water for domestic, agricultural, and commercial activities in the area, with drinking water supply from individual private wells as the largest groundwater use. Almost 60 per cent of Prince Edward County residents rely on groundwater for their drinking water supply.

Another finding of the study is that over-pumping, if any, has not caused widespread depletion of the regional aquifers; over withdrawal likely affects localized areas for short periods. Also, water levels in aquifers in the study area are expected to fluctuate in sync with precipitation events.

Implications of the Decision

The PTTW allows the proponent to withdraw up to 137,600 cubic meters of groundwater per year, which is approximately 5.4 per cent of the about 2.5 million cubic meters of groundwater used in Prince Edward County. Water budget results for Prince Edward County show that the estimated volume of infiltrating

groundwater (270 million cubic meters per year) greatly exceeds the estimated volume of existing water withdrawal.

The amount of water the proponent is authorized to take is relatively high. As classified in MOE's 2005 PTTW Manual this is a Category 3 groundwater PTTW, meaning that it is both long-term and high-volume. Therefore the proponent had to have a qualified person submit a hydrogeological study, which MOE reviewed.

Although not explicitly stated, MOE seems to indicate in the Environmental Registry posting that water in this case is not being removed from the watershed. The proponent calculates that approximately 5.8 cubic meters of water per day will be lost from the system and will not return to the lake, due to evaporation from swimming pools and sewage sludge removal from the proposed sewage works. This, MOE states, will result in about 1,250 cubic meters of water lost for each 215-day water-taking season.

The PTTW stipulates that the proponent will keep a separate record of all water takings for each well for the duration of the permit, subject to MOE's inspection.

Another permit condition is that, for two years, the proponent will collect daily static water level data from a monitoring well located between the two water-taking wells and the lake to determine whether water withdrawal affects the level of the lake water. At the completion of the two-year monitoring period, the proponent must provide MOE with a results report along with recommendations for future water monitoring.

The proponent is required to notify MOE of any complaint arising from the water taking and report any action taken with regard to such complaints. In case of any negative impact on water sources in use prior to the permit issuance, the proponent is required to either restore a supply of water equivalent to the quantity and quality of normal takings, compensate affected persons, or reduce the rate and amount of taking to prevent or alleviate the observed impact.

The term of the permit gives the proponent some certainty that water will be available for the cottage community for the next 10 years. While it is uncommon for MOE to suspend or reduce a water taking, it has the power to do so. The permit includes a standard provision that states that MOE has the authority to reduce the water taking to an amount it deems appropriate or suspend the permit altogether. The proponent, however, has the ability to appeal such a decision to the Environmental Review Tribunal.

Public Participation & *EBR* Process

On July 5, 2010, MOE posted a proposal notice for the PTTW on the Environmental Registry for a 30-day comment period. During this time, 15 comments were received. MOE also had the proponent engage in additional public consultation. Fourteen additional comments were received shortly after a public open house held on August 4, 2010. Almost all of the total 29 comments submitted were opposed to the proposal. A summary of the issues raised during the public consultation process follows.

Permit will Exacerbate Water Quantity Issues:
The primary concern, for most commenters, was water quantity issues. Many residents were worried that the proposed development would exacerbate current water-related problems homeowners face, such as seasonal low levels of water in their wells and the local lake. They stated that the PTTW for the proposed 237-cottage resort with its swimming pools and other amenities was not consistent with the stringent conditions imposed by the local municipal authorities on water usage and expressed their concerns about the adverse effects of the permit on the quality of life and the values of their properties.

In response to concerns about low water levels in wells, MOE stated that pumping tests showed that the groundwater drawdown from the two wells is expected to be confined to a few meters from the wells. MOE also stated that static water levels in a well between the production wells and the lake will be closely monitored to ensure that no water is drawn from the lake. MOE has advised the proponent that a new application would be required to take water from the lake**.**

Monitor Water Quality:
The Quinte Conservation Authority stated that, after reviewing information provided directly by the consultants who did the hydrogeological study in the area, it had no major concerns or objections to the PTTW application. However, the conservation authority stated that little explanation was provided as to why water from the monitoring well on the property had elevated counts of total dissolved solids and chlorides. It recommended that the PTTW contain a condition to allow monitoring and a contingency response plan in the event the water quality in the other two wells changes. MOE's PTTW does not contain any such provisions to monitor water quality from the wells.

Delay Permit until Shoreline Management Plan is in Place:
Some commenters asked that MOE delay the issuance of the permit until a shoreline management plan (SMP) is in place for East Lake. These commenters said that the local municipal council, the proponent, and a local organization were committed to working to create an initial SMP that should provide insights into what is important for the protection of the lake. MOE replied that there is merit in creating shoreline or lake management plans for lakes that experience development pressures. However, MOE continued, the creation of such plans falls under the jurisdiction of the *Planning Act* and is outside the scope of the *Ontario Water Resources Act* (*OWRA)*.

Concerns for the Lake's Ecosystem:
Other comments were not directly relevant to the PTTW, but focused on the effects that the proposed cottage development would have on the lake. For example, some commenters were worried that increased motorboat traffic would have negative effects on the local wildlife and the cleanliness of the lake. Other commenters were worried that water runoff from flushing the proposed development's water filtration system and from parking lots and paved surfaces would increase phosphorous levels in East Lake. MOE responded that such issues are more appropriately addressed under the development's sewage works approval under section 53 of the *OWRA*.

SEV

MOE stated in the Environmental Registry notice that it considered its Statement of Environmental Values. MOE pointed out that it considered the effect of this decision on current and future generations in terms of being consistent with sustainable development principles.

Other Information

MOE's PTTW Manual, which was updated in 2005 (see pages 144-153 of the Supplement to the ECO's 2005/2006 Annual Report), guides the ministry's decision making process on PTTWs. According to the manual, every time MOE considers a PTTW application, the ministry will consider the following six principles:

1. Use an ecosystem approach that considers both the water takers' reasonable needs and the natural functions of the ecosystem;
2. Control water takings to prevent unacceptable interference with other uses of water, wherever possible, and to resolve such problems if they do occur;
3. Employ adaptive management to better respond to evolving environmental conditions;
4. Consider the cumulative impacts of water takings;
5. Incorporate risk management principles into the permit application/review process;
6. Promote public and local agency involvement.

The manual also notes that category 3 PTTWs are prescribed instruments under O. Reg. 681/04 under the *Environmental Bill of Rights, 1993* and as such, MOE must post these instruments on the Environmental Registry and consider public comments in its decisions. The ministry will notify municipalities, conservation authorities and other local agencies of such designated permit applications, to increase local awareness and consider their advice.

ECO Comment

The ECO thinks that MOE has taken a reasonable approach in issuing the PTTW. MOE appears to have considered the principles outlined in the ministry's PTTW manual, as they are reflected in the terms and conditions of the permit. For example, based on existing water budgets, MOE appears to be managing the specific water taking with an eye to sustainability of the resource. By holding the proponent responsible for restoring water quantity and quality in the event the water taking has negative impacts to other water supplies, MOE encourages the proponent to manage their taking efficiently. By retaining the right to curtail or revoke the permit, MOE recognizes that change in natural systems is possible and, as new information becomes available through continuous monitoring and evaluation, permit conditions may have to be adjusted.

The ECO is pleased that MOE used section 7(4) of O. Reg. 387/04 (the Water Taking regulation under the *OWRA*) to require the proponent to provide additional consultation opportunities. The ECO is also pleased that MOE took into consideration the comments submitted after the open public house and used the Environmental Registry decision notice to explain the procedure it followed.

The ECO believes MOE should have responded to the concerns about the possibility of impaired water quality in the two wells raised by the local conservation authority. MOE should have explained why the PTTW contains no requirements for sampling for contaminant-related parameters before and after water taking begins, even though the manual suggests water sampling to address water quality concerns.

Review of Posted Decision:

4.10 Natural Heritage Reference Manual: Natural Heritage Protection through the Provincial Policy Statement, 2005

Decision Information

Registry Number: 010-5853
Proposal Posted: May 28, 2009
Decision Posted: April 22, 2010
Comment Period: 60 days
Number of Comments: 34
Decision Implemented: April 22, 2010

Keywords: Natural heritage; land use planning; *Planning Act*; Provincial Policy Statement; land use planning; aggregates

Description

Overview

Woodlands, wetlands and wildlife are all integral parts of our natural environment, part of our natural heritage. In Ontario, the Provincial Policy Statement, 2005 (PPS) provides land use planning direction on natural heritage features, areas and systems. The Ministry of Natural Resources (MNR) prepared the second edition of the Natural Heritage Reference Manual for Natural Heritage Policies of the Provincial Policy Statement, 2005 (NHRM or the "Manual"). It is a guidance document for implementing the PPS natural heritage policies and provides technical criteria, approaches, and information to planning authorities such as municipalities, planning boards and conservation authorities who apply these policies on the ground.

Background

Provincial Policy Statement, 2005:
The PPS provides policy direction on matters of provincial interest under the *Planning Act,* the primary law governing land use planning and development in southern Ontario. It is the overarching policy that directs land use patterns, forms of development, and the management of some natural resources. All decisions on planning matters under the *Planning Act* must be "consistent with" the PPS, including decisions made by municipal councils, local boards, planning boards, provincial ministers, provincial government and agency officials, and the Ontario Municipal Board (OMB). For example, a decision to approve a subdivision must be consistent with PPS natural heritage policies.

The PPS defines a number of natural heritage features and areas "which are important for their environmental and social values as a legacy of the natural landscapes of an area." These include significant wetlands and coastal wetlands, fish habitat, significant woodlands and valleylands (south and east of the Canadian Shield), significant habitat of endangered and threatened species, significant wildlife habitat, and significant areas of natural and scientific interest. Under the PPS, development and site alteration are somewhat restricted in these natural heritage features and areas. For example, the PPS does not permit development within significant coastal wetlands and certain provincially significant wetlands (refer to Table 1 for a complete list of natural heritage policies).

The ECO has previously commented that the PPS has conflicting priorities and prioritizes other land uses over natural heritage protection. While it requires that natural features and areas be protected for the long term, it also contains policies to protect prime agricultural land and mineral aggregate resources for the long term. Additionally, it permits infrastructure (i.e., sewage and water systems, waste management systems, electric power generation and transmission, pipelines, transit and roads, and associated facilities) and drainage works within natural heritage features. These activities can conflict with and negatively impact natural heritage. For a complete review of the current PPS, refer to the ECO's 2004/2005 Annual Report.

The *Planning Act* requires that the Ministry of Municipal Affairs and Housing (MMAH) begin a review of the PPS within five years of it being issued. The current PPS came into effect on March 1, 2005 and MMAH announced its five-year review in May 2010 (Environmental Registry #010-9766).

Natural Heritage Systems:
Prior to European settlement, large, connected forests, wetlands and other natural areas covered most of southern Ontario. As the population increased, urban and suburban development, farms, aggregate pits, roads, railways and utility corridors spread across the landscape. Approximately 80 per cent of woodlands, 72 per cent of wetlands and more than 99 per cent of prairies and savannahs have been lost in southern Ontario since pre-settlement times.

Historically, natural heritage land use planning focused on protecting areas on a feature-by-feature basis. Government policy only protected specific features and areas from development. For example, development would not be allowed within the feature (e.g., provincially significant wetland) but allowed around it, potentially isolating it from other natural areas. This resulted in smaller, disconnected natural areas surrounded by houses, buildings and roads, often referred to as islands of green. Ecosystem fragmentation leads to habitat degradation and modifications, edge effects, overcrowding and invasion by non-native species and is considered one of the leading causes of biodiversity decline. It can threaten the survival of many wildlife species because it reduces their ability to migrate between natural areas.

Rather than planning for the protection of individual features, the concept of landscape or natural heritage system planning is a more effective method of maintaining, conserving and restoring fragmented natural landscapes and their biodiversity. The PPS defines a natural heritage system as "a system made up of natural heritage features and areas, linked by natural corridors which are necessary to maintain biological and geological diversity, natural functions, viable populations of indigenous species and ecosystems. These systems can include lands that have been restored and areas with the potential to be restored to a natural state."

A natural heritage systems-based planning approach assesses the natural heritage (e.g., wetlands, woodlands, endangered species, parks and water courses) of a landscape to identify measures to conserve and enhance it. It allows planning authorities to consider the system as a whole rather than solely focusing on features as separate and disconnected entities. Governments worldwide, such as those in British Columbia, Florida, Germany, and the Netherlands are now using this concept to maintain or restore linkages between features and address other issues like climate change, ecosystem health (e.g., resilience), community health and ecosystem services.

The PPS does require that "the diversity and connectivity of natural features in an area, and the long-term ecological function and biodiversity of natural heritage systems, should be maintained, restored or, where possible, improved, recognizing linkages between and among natural heritage features and areas, surface water features and ground water features." The PPS fails to take the next step and *require* municipalities to identify and plan for natural heritage systems. However many municipalities and conservation authorities have prepared or are preparing natural heritage systems (see Figure 1) in southern Ontario.

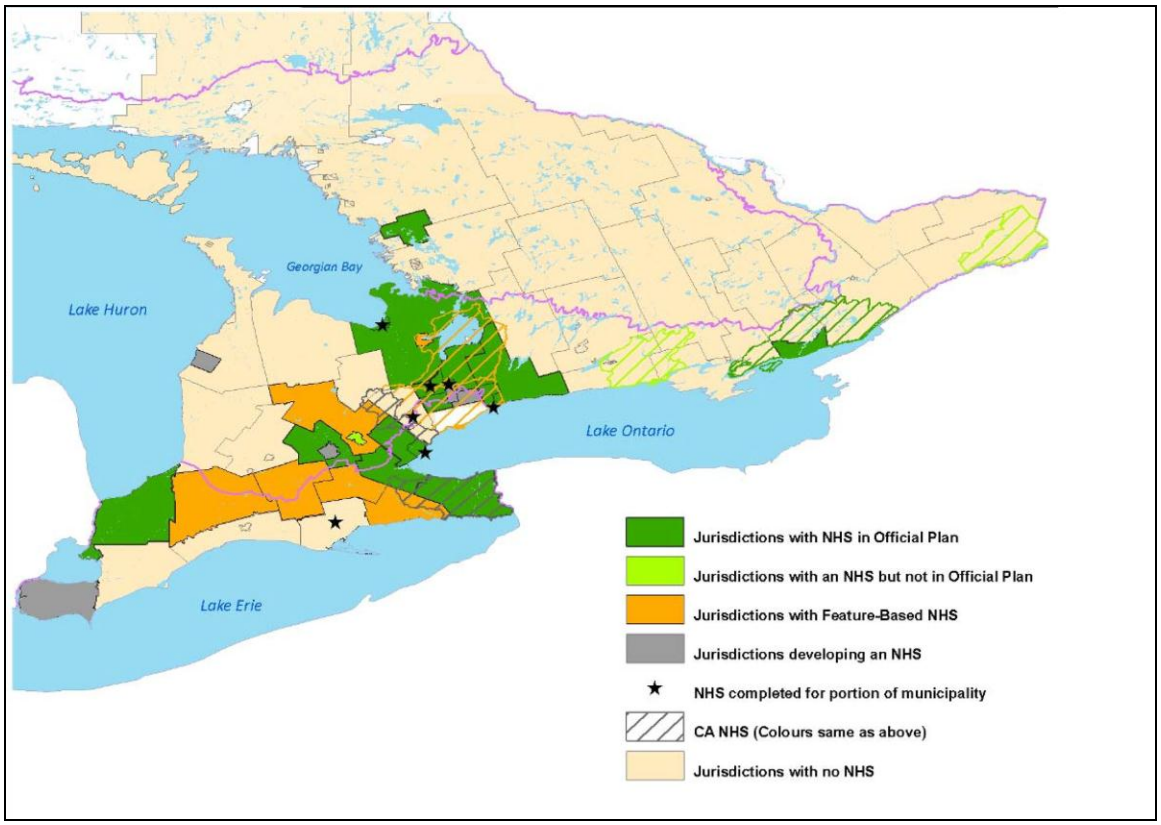

Figure 1: The general status of natural heritage systems developed and incorporated into municipal official plans in southern Ontario. (Source: MNR, 2010)

In southern Ontario, there is a patchwork of natural heritage systems identified at the municipal, watershed and regional levels (e.g., Greenbelt and Oak Ridges Moraine). However, there is not a coarse-scale natural heritage system developed by the provincial government for southern Ontario to connect the local and regional features, functions and linkages. In the absence of a provincially defined system, environmental organizations, occasionally in collaboration with MNR, have taken the lead to fill this gap. For example, in 2002 the Nature Conservancy of Canada, in partnership with MNR's Natural Heritage Information Centre, expanded Carolinian Canada Coalition's Big Picture project to identify key natural areas and linkages in southern Ontario.

Natural Heritage Reference Manual:
The NHRM provides technical guidance for implementing natural heritage policies of the PPS. It also contains the government's recommended approaches and criteria for being consistent with the PPS to protect natural heritage (e.g., significant habitat of endangered and threatened species, significant wetlands, and significant woodlands) in Ontario.

MNR published the first edition of the Manual in 1999 and it provided direction for implementing the natural heritage policies in the 1996 PPS. The current PPS came into effect in 2005 and since then, planning authorities have been relying on the first edition of the Manual, which was written for the 1996 PPS, even though some natural heritage policies in the PPS had changed. MNR revised the Manual to be consistent with current PPS policies.

Implications of the Decision

The NHRM stresses that "the recommendations in the manual are triggered only when there is a requirement to be consistent with the PPS" (e.g., comments and decisions on official plans, zoning by-laws, and development applications). The manual identifies that it should be consulted by individuals who are involved in "the development and review of policy documents, the review and approval of development applications, and matters before provincial boards and tribunals such as the Ontario Municipal Board." Planning authorities should consider the recommended technical criteria and approaches in the manual for land use planning and the review of development applications under the *Planning Act*.

Natural Heritage Systems:
The updated manual provides more guidance than the first edition, within the constraints of a features-based provincial policy. The manual identifies that the fundamental components of a natural heritage system includes core areas and linkages/corridors between them. It describes attributes of these components, general/ functional attributes of systems and other considerations for identification of natural heritage systems. It also suggests that planning authorities should tailor the suggested approaches to the nature of the landscape.

Natural Heritage Features and Areas:
MNR, planning authorities, or in the case of an appeal, the Ontario Municipal Board (OMB) are responsible for identifying and evaluating significant natural heritage features (refer to Table 1). This is important at provincial, regional and local scales in the development of planning documents and in the assessment of possible impacts of proposed development or site alteration on the natural features or the ecological functions. Generally, only natural heritage features identified as "significant" are provided with some protection from development and site alteration under the PPS.

The ECO has previously commented on the lack of evaluation criteria for significant woodlands and recommended in our 2008/2009 Annual Report that MMAH's 2010 review of the PPS introduce effective mechanisms for protecting significant woodlands, including mechanisms for woodland evaluation, designation, tracking and reporting. The second edition of the NHRM now includes recommended evaluation criteria and standards for municipalities to identify significant woodlands and significant valleylands.

Adjacent Lands:
Generally speaking, the PPS directs that "development" or "site alteration" is not permitted on lands adjacent to natural heritage features and areas unless the ecological function of the adjacent lands has been evaluated and it can be demonstrated, through an environmental impact study (EIS) or equivalent study, that there will be no negative impacts on the natural features or the ecological functions. When a developer or proponent proposes development or site alteration within land adjacent to natural heritage features or areas, the municipality can require them to undertake an EIS or equivalent study, usually at the cost of the developer or proponent.

The NHRM identifies recommended adjacent land widths for natural heritage features where development may affect features' ecological functions and in most cases, this width increased from the first edition of the Manual (refer to Table 1). However, the Manual states that planning authorities can choose other approaches or different widths (smaller or larger), provided they are "confident that the application in question cannot produce a negative impact on a significant natural feature or its ecological function from beyond the [NHRM] proposed adjacent land widths."

Table 1: A Summary of Provincial Policy Statement Policies for Natural Heritage Features and Areas, the Agencies Responsible for their Identification and the Adjacent Land Widths

Natural Heritage Feature	Development and Site Alteration Limitations (PPS Policy)	Who Identifies and How	Current Adjacent Land Width (2010)	Previous Adjacent Land Width (1999)
Significant habitat of endangered and threatened species	Development and site alteration not permitted in feature (Policy 2.1.3); Development and site alteration not permitted on adjacent lands, unless the ecological function of the adjacent lands has been evaluated and it has been demonstrated that there will be no negative impacts on the feature or its ecological functions (Policy 2.1.6)	MNR; Delineating/describing, reviewing and approving the work of others or establishing methods	120 m	50 m
Significant wetlands and coastal wetlands	Development and site alteration not permitted in significant wetlands in Ecoregions 5E, 6E and 7E and significant coastal wetlands (Policy 2.1.3); Development and site alteration not permitted in significant wetlands in the Canadian Shield north of Ecoregions 5E, 6E and 7E unless it has been demonstrated that there will be no negative impacts on the feature or its ecological functions (Policy 2.1.4); Development and site alteration not permitted on adjacent lands, unless the ecological function of the adjacent lands has been evaluated and it has been demonstrated that there will be no negative impacts on the feature or its ecological functions (Policy 2.1.6)	MNR; Delineating or reviewing the work of others as per Ontario Wetland Evaluation System	120 m	120 m
Significant woodlands	Development and site alteration not permitted in significant woodlands south and east of the Canadian Shield unless it has been demonstrated that there will be no negative impacts on the feature or its ecological functions (Policy 2.1.4); Development and site alteration not permitted on adjacent lands, unless	Planning authorities; identify or approve work of others using NHRM criteria or municipal approach that achieves or exceeds the NHRM criteria	120 m	50 m

Natural Heritage Feature	Development and Site Alteration Limitations (PPS Policy)	Who Identifies and How	Current Adjacent Land Width (2010)	Previous Adjacent Land Width (1999)
	the ecological function of the adjacent lands has been evaluated and it has been demonstrated that there will be no negative impacts on the feature or its ecological functions (Policy 2.1.6)			
Significant valleylands	Development and site alteration not permitted in significant valleylands south and east of the Canadian Shield unless it has been demonstrated that there will be no negative impacts on the feature or its ecological functions (Policy 2.1.4); Development and site alteration not permitted on adjacent lands, unless the ecological function of the adjacent lands has been evaluated and it has been demonstrated that there will be no negative impacts on the feature or its ecological functions (Policy 2.1.6)	Planning authorities; identify or approve work of others using NHRM criteria or municipal approach that achieves or exceeds the NHRM criteria	120 m	50 m
Significant wildlife habitat	Development and site alteration not permitted in the feature unless it has been demonstrated that there will be no negative impacts on the feature or its ecological functions (Policy 2.1.4); Development and site alteration not permitted on adjacent lands, unless the ecological function of the adjacent lands has been evaluated and it has been demonstrated that there will be no negative impacts on the feature or its ecological functions (Policy 2.1.6)	Planning authorities; identify or approve work of others as per Significant Wildlife Habitat Technical Guide and NHRM or municipal approach that achieve or exceed above criteria	120 m	50 m
Areas of natural and scientific interest (ANSI)	Development and site alteration not permitted in the feature unless it has been demonstrated that there will be no negative impacts on the feature or its ecological functions (Policy 2.1.4); Development and site alteration not permitted on adjacent lands, unless the ecological function of the adjacent lands has been evaluated and it has been demonstrated that there will be no negative impacts on the feature or its ecological functions (Policy 2.1.6)	MNR; as per ANSI process	50 m	50 m

Natural Heritage Feature	Development and Site Alteration Limitations (PPS Policy)	Who Identifies and How	Current Adjacent Land Width (2010)	Previous Adjacent Land Width (1999)
Fish habitat	Development and site alteration not permitted in the feature unless in accordance with provincial and federal requirements (Policy 2.1.5); Development and site alteration not permitted on adjacent lands, unless the ecological function of the adjacent lands has been evaluated and it has been demonstrated that there will be no negative impacts on the feature or its ecological functions (Policy 2.1.6)	Planning authorities, with direction from Fisheries and Oceans Canada; as defined in the *Fisheries Act* and using NHRM guidance	300 m – Inland lake trout lake (at capacity) on the Canadian Shield; 120 m – All other fish habitat	30 m

Adjacent lands in the PPS are not the same as traditional "buffer zones" in which development, site alteration or other high impact land uses are prohibited. Development and site alteration can occur within adjacent lands provided the developer or proponent can demonstrate no negative impacts on the natural features or the ecological function. A buffer zone is typically an area surrounding the central core protection zone (e.g., natural heritage feature), in which activities compatible with protection of the central core are allowed (e.g., low impact land uses, research, outdoor education, and habitat rehabilitation). The Manual suggests that buffer zones or setbacks can be identified, for example through an EIS, within adjacent lands as potential areas to be set aside or left in a natural state to mitigate the predicted impacts of development or site alteration. The PPS does not include any policies that establish traditional buffer zones around natural heritage features or areas and therefore, neither does the Manual.

No Negative Impacts:
Negative impact is defined in the PPS as "degradation that threatens the health and integrity of the natural features or ecological functions for which an area is identified due to single, multiple or successive development or site alteration activities." Planning authorities must determine how to assess "no negative impacts" or what circumstances require this type of assessment because the PPS does not specify such details. However, when a planning authority determines that an assessment is needed, it is common practice to require a developer or proponent to submit an EIS as part of the development application process. In these cases, a developer or proponent usually hires a private consultant to prepare an EIS. In the Supplement to our 2004/2005 Annual Report, the ECO cautioned that this process by its very nature is confrontational rather than providing scientific findings and often results in the municipality or the OMB acting as arbiter. The process may be biased because the consultant is working directly for and getting paid by the developer. In addition, the ECO identified that sometimes these studies lack detail and seem to be of questionable value and suggested that MMAH should, at a minimum, develop guidelines that detail the requirements of an EIS.

The second edition of the Manual is an improvement as it provides more guidance to planning authorities in addressing the impacts of development and site alteration. It provides recommendations on how planning authorities can determine whether an assessment is required and the appropriate level of assessment. For example, in areas without information on natural heritage features, an ecological site assessment may be required to identify potential significant natural heritage features and if identified, should be then be evaluated for significance, and finally, if evaluated as significant, an EIS may be required. For planning authorities who have not developed their own EIS requirements, the NHRM also includes suggestions about what should be included in an EIS, examples of potential development impacts and possible mitigation measures.

Aggregates:
Aggregate operations tend to remove all vegetation, topsoil and subsoil to reach the sand, gravel or bedrock and the *Aggregate Resources Act* requires that pit and quarry operators rehabilitate the site once the operation is finished. In 2006, MNR conducted an *Environmental Bill of Rights, 1993* review of the *Aggregate Resources Act* in response *to* concerns that the aggregate industry was not adequately rehabilitating Ontario's pits and quarries. In its review, MNR agreed that inadequate rehabilitation is widespread. The ECO recommended that MNR improve the rehabilitation rates of Ontario pits and quarries by introducing stronger legislation with targets and timelines; by applying up-to-date rules to grandparented licences, and by further strengthening the ministry's own field capacity for inspections. For additional information, refer to our 2006/2007 Annual Report.

The Manual states that rehabilitation of mineral aggregates operations "may be taken into consideration for the demonstration of no negative impacts where rehabilitation of ecological function is scientifically feasible" and is conducted consistent with the aggregate rehabilitation policy in the PPS and other government standards. The Manual also suggests that a planning authority would have to make the decision to use rehabilitation as demonstration of no negative impacts on a case-by-case basis, in consultation with the local MNR district office. The Manual is consistent with the aggregate industry and provincial government's position that pits and quarries are an "interim land use," because aggregate operators must rehabilitate the sites. However, the ECO has previously cautioned the categorization of aggregate extraction as "interim land use" because it may take decades to completely rehabilitate a site and sites are rarely returned to their original condition.

Official Plans and Other Municipal Planning Tools:
The *Planning Act* requires that municipalities update their official plans at least every five years to ensure conformity with provincial plans, consistency with the PPS, and that they have regard to current matters of provincial interest. Municipal official plans are the primary means of implementing land use planning policies on the ground. Municipalities must update zoning by-laws no later than three years after an official plan comes into effect (e.g., after the five year review). The Manual states that municipalities should update their official plans and zoning by-laws to reflect any changes to criteria between the first and the second edition of the NHRM during the next scheduled review (e.g., next five year review of official plan).

The Manual states that planning authorities should include policies in their official plans to:

- identify natural heritage systems and ways in which the biodiversity, connectivity and ecological functions of the system will be maintained, restored or improved;
- identify and protect natural heritage features and areas and their ecological functions;
- protect these features, areas and ecological functions from incompatible land uses and activities; and
- provide a clear and reasonable mechanism for assessing the impact of applications for land use changes on these features, areas, their adjacent lands and ecological functions.

Municipalities can use zoning by-laws to define natural heritage features and areas in a more defined manner than an official plan (e.g., zoning category to prohibit development and site alteration in certain provincially significant wetlands). As for natural heritage systems, the NHRM provides examples of how municipalities can use by-laws to zone them. For example, municipalities could zone a natural heritage system as a special zone or subcategory (e.g., rural natural heritage system) where there are some low-impact activities permitted or zone it entirely in an environmental protection zone where the whole system in protected.

Municipalities have other powers under the *Municipal Act, 2001* and the *City of Toronto Act, 2006* to pass by-laws that can protect natural heritage features such as tree cutting, dumping of fill, and the general environmental wellbeing of the municipality. The Manual simply references these municipal tools and does not provide recommendations on how to integrate them with PPS natural heritage policies, such as significant woodland policies.

Monitoring and Performance Indicators:
The Manual provides some advice to municipalities on implementing performance indicators to measure the effectiveness of natural heritage policies. For example, municipal performance indicators may include the change (loss or gain) in area of woodlands or wetlands in relation to land use planning decisions over a specific period. However, the Manual does not address or mention provincial performance indicators for measuring the implementation or effectiveness of the NHRM. In 2010, MMAH developed natural heritage PPS policy performance indicators (see Other Information section for additional information).

Public Participation & *EBR* Process

In May 2009, MNR posted the draft NHRM on the Environmental Registry for a 60-day comment period. MNR received 34 comments on the proposal. MNR stated that it led the development of the second edition of the Manual under the guidance of the Natural Heritage Reference Manual Review Team, which consisted of representatives from a wide range of stakeholder groups. MNR stated that it consulted ministries, municipalities, conservation authorities and stakeholder groups during the NHRM preparation and/or draft review.

Overall, the majority of comments submitted supported MNR's update of the NHRM. The following is a summary of key comments submitted to MNR.

Natural Heritage Systems and Watershed Plans:
While environmental groups praised the increased emphasis on natural heritage systems in the NHRM, a few commenters recommended that MNR take this concept further. One commenter stated that the "NHRM appears to posit natural heritage system planning rather than integrating natural heritage systems (and their features and functions) into land use planning." The same commenter noted that the Manual may place the onus on applicants to undertake an exhaustive, one-off consideration of natural heritage in areas where the municipality has not developed a natural heritage systems in advance. In addition, an environmental organization suggested that PPS policy and subsequently the NHRM, should reflect that a "natural heritage system is a system and all policy protecting features and areas must fit within it. Portraying it as a separate entity creates confusion… protecting the system as a whole is by far the most effective way to obtain long-term sustainability."

Conservation authorities observed that the Manual does not give emphasis to the important role watershed plans and fisheries management plans can, and should play. For example, where a watershed plan has identified a natural heritage system, the municipality should use it as the basis for the municipality's natural heritage system.

Natural Heritage Features and Areas:
A municipality stated that grassland and old field bird species in southern Ontario are in decline and that these vegetation types are located on lands considered "developable" but are not identified as features within natural heritage systems. The municipality requested additional policy direction in the NHRM to highlight and promote greater protection of these sensitive habitats.

An environmental organization remarked that the Manual does not contain an explicit recommended approach or technical guidance for planning authorities on how to deal with the substantial amount of wetland area in southern Ontario which is unevaluated for provincial significance. These unevaluated wetlands are vulnerable to loss of area and function because the PPS significant wetland policies are not applicable. In addition, conservation authorities requested more guidance on significant woodlands, particularly in settlement areas.

Adjacent Lands to Significant Natural Heritage Features and Areas:
Generally, environmental organizations supported the increased recommended adjacent land widths for natural heritage features and areas. In contrast, some municipalities, development organizations and aggregate organizations objected to the increased recommended adjacent land widths for natural heritage features and areas, questioning the scientific basis for the increase (e.g., more American studies were cited than Canadian or Ontario specific ones). A municipality stated that the adjacent land width

recommendations will have considerable impact on the development community because EISs will be required on more applications. Another municipality suggested that adjacent land widths in the first edition of the Manual were adequate.

Municipal Implementation:
Generally, municipalities were supportive of the additional provincial guidance for identifying and planning natural heritage features, areas and systems, but expressed some concern on some specific implementation issues. A municipal association identified that "[w]hile most larger municipalities have the staff expertise to approach this area of policy implementation, most of the smaller, rural and northern municipalities have limited or no staff resources with expertise or experience." They recommended that a team of provincial experts be convened to undertake this policy implementation with those municipalities in need of assistance, initially as pilot projects. One municipality expressed concern with using zoning by-laws for natural heritage systems, because they are generally a fairly rigid implementation tool that is often difficult to apply when dealing with environmental policies (e.g., usually zoning follows property boundaries, whereas natural features do not).

Agriculture:
An agricultural federation stated that the NHRM failed to recognize that "agricultural lands are designated primarily for sustainable and profitable agriculture production and role in preserving, protecting and enhancing natural heritage is secondary" and that agricultural lands are privately owned. They also recommended that the NHRM emphasize that the PPS does not limit farmers to employ only current uses and practices, but refers to agriculture in its broader sense and that the Manual should include a reference to the definition of "normal farm practices," as found in the PPS.

Aggregates:
At least two environmental organizations disagreed with the mineral aggregate resources implementation section in the Manual. They questioned how realistic the recommended mitigation techniques can be when MNR lacks the capacity to effectively monitor and enforce mitigation plans. They identified that since aggregate licences are issued "in perpetuity" with no expiration date, numerous pits and quarries are left to sit idle for many years and are often later abandoned without completing their rehabilitation promises in total disregard of the disturbances caused to local environment. Another environmental organization did not agree that aggregate rehabilitation should be used to demonstrate "no negative impacts" in the NHRM and that "rehabilitation" is more akin to compensation for known negative impacts.

MNR Involvement:
A municipality identified that the NHRM recommends early and ongoing consultation with MNR and that MNR is responsible for approval, among other items, of the delineation of the significant habitat of endangered and threatened species. The municipality stated that although MNR's return to the development review and approval process would be beneficial, it has been their experience that the local MNR office is not appropriately resourced to provide this service. They further stated that, despite the efforts of MNR staff, MNR rarely provides comments within the *Planning Act* timeframes and cautioned that this situation would presumably worsen with the increased level of MNR involvement as recommended in the proposed NHRM.

SEV

MNR provided the ECO with a summary of how the ministry considered and incorporated its Statement of Environmental Values (SEV). For example, the SEV consideration document stated that the update is "based on a[sic] the latest scientific information and further advances a landscape level natural heritage systems approach for addressing the impacts of development." MNR also stated that "[b]y further advancing a natural heritage systems approach for addressing development impacts, MNR staff will be taking precautionary measures to avoid cumulative effects and the creation of 'islands of green'."

Other Information

PPS Performance Indicators:
In our 2001/2002 Annual Report, the ECO recommended that that MMAH and MNR develop performance indicators for natural heritage protection under the PPS and provide their findings to the public. In April 2009, MMAH released a draft set of indicators to assess the performance and effectiveness of the PPS. The ECO commented in our 2008/2009 Annual Report that "[t]o a large extent, these indicators only determine how 'consistent' official plans are with the PPS, rather than assess whether provincial direction is achieving an actual on-the-ground effect in conserving natural heritage." In April 2010, MMAH posted the final set of PPS indicators on the Environmental Registry (#010-5700). With respect to natural heritage policies, the final indicators are identical to the draft indicators.

Natural Heritage Assessment Guide for Renewable Energy Projects:
In December 2010, MNR posted a proposal on the Environmental Registry for the "Natural Heritage Assessment Guide: For natural heritage assessment sections of Ontario Regulation 359/09 (Renewable Energy Approval) issued under the *Environmental Protection Act*" (Registry #011-1845). Under the *Green Energy Act, 2009*, the renewable energy approval regulation (O. Reg. 359/09) describes the natural heritage assessment requirements for renewable energy projects and establishes requirements for environmental effects monitoring where a negative environmental effect is likely to occur. This guide addresses the natural heritage assessment requirements of the regulation and provides technical guidance for renewable energy project applicants.

Procedures for Areas of Natural and Scientific Interest:
In June 2010, MNR posted a proposal on the Environmental Registry (#010-7505) for the Identification and Confirmation Procedure for Areas of Natural and Scientific Interest. MNR invited comments on its current procedures, last published in 2008.

ECO Comment

The ECO commends MNR on its development of the new Natural Heritage Reference Manual, particularly with the increased emphasis on natural heritage systems. The ECO also is pleased that MNR increased the natural heritage feature and area adjacent lands widths, that the Manual now includes recommended evaluation criteria and standards to help municipalities identify significant woodlands and significant valleylands, and provides additional guidance on impact assessment to demonstrate "no negative impacts" to natural heritage features and areas. The Manual should serve as a useful tool for municipalities and other planning authorities who are either beginning or in the process of identifying and planning their local natural heritage systems.

Our understanding of the importance of planning for natural heritage systems and providing connectivity among natural heritage features has evolved considerably in the last decade. While MNR amended the Manual to reflect this progress, the PPS itself remains unchanged and, therefore, the Manual is constrained by its current policies. The ECO has reported on numerous occasions that the PPS fails to adequately protect natural heritage features, areas and systems. For example, the ECO has recommended that the PPS be amended to prohibit new infrastructure such as highways in provincially significant wetlands unless there are no reasonable alternatives and it has been demonstrated that there will be no negative impacts on their ecological functions. The ECO also recommended that MMAH amend the PPS to *require* that the long-term ecological function and biodiversity of natural heritage systems are maintained.

One major flaw with Ontario's current land use planning system, the PPS, and the Manual, is that it ignores the reality that landscape features and functions drive land uses (and their constraints) as much as, if not more than, our economy does. While the PPS states that natural heritage systems should be maintained, restored or, where possible, improved, it fails to require that municipalities identify and plan local systems. Despite this omission, some municipalities and conservation authorities across southern Ontario are developing or have developed plans for protecting or enhancing natural heritage systems and are integrating or have integrated these systems into official plans. The ECO commends these

municipalities and conservation authorities and urges MMAH amend the PPS to require all municipalities to identify and include in their official plans natural heritage systems.

Where they exist, local natural heritage systems are extremely beneficial, but they may lack the direction of big picture thinking. In southern Ontario, the government has not publicly released a complete coarse-scale or overlay natural heritage system. While the government has identified natural heritage systems in specific land use plans like the Greenbelt Plan and the Oak Ridges Moraine Conservation Plan, they only cover a small portion of southern Ontario. To maintain biodiversity, the ECO believes that it is imperative for MNR to develop a coarse-scale southern Ontario natural heritage system for municipalities to build upon when identifying and planning their fine-scale systems.

Despite the improvements to the Manual, the ECO is concerned with several of its recommendations. First, the Manual recommends that municipalities take into consideration the rehabilitation of mineral aggregate operations for the demonstration of no negative impacts under the PPS. The ECO has previously cautioned that aggregate extraction pits are not an "interim land use" and that sites are rarely returned to their original condition. Second, the PPS and Manual do not require protective buffer zones around sensitive and provincially significant natural heritage features, such as wetlands. Developers and proponents must demonstrate "no negative impacts" in land adjacent to natural heritage features, through an EIS or similar study, but only if required by the municipality. The ECO cautions that this approach may not provide the level of protection necessary to protect the quality and longevity of natural heritage features and areas.

The ECO notes that for over five years planning authorities were using an outdated Manual that provided guidance on implementing and interpreting policies from the 1996 PPS. Since the current PPS is now under review, the ECO encourages MNR to swiftly amend the Manual, with full public consultation on the Environmental Registry, should any PPS natural heritage policies or other policies that could impact natural heritage change as a result of this review.

Review of Posted Decision:

4.11 *The Far North Act, 2010*

Decision Information

Registry Number: 010-6624
Proposal Posted: June 3, 2009
Decision Posted: March 10, 2011
Comment Period: 63 days
Number of Comments: 64
Decision Implemented: October. 25, 2010

Keywords: planning; development; forestry; mining; protected areas; First Nations; Far North

Description

Ontario's Far North is among the largest and most intact ecological systems on the planet. This region covers 42 per cent of the total area of the province or approximately 452,000 square kilometres (km^2), which is larger than the entire size of most countries around the world. Covering the northern third of Ontario, it is roughly split between the boreal forest on the Canadian Shield to the south, and the bogs and fens of the Hudson Bay Lowlands to the north. The boreal forest covers approximately 158,000 km^2 of this area, habitat to more than 200 sensitive species, such as the threatened population of woodland caribou. This region also functions as a carbon sink of global significance, absorbing more than 12.5

million tonnes of carbon dioxide annually and storing 97 billion tonnes of carbon, according to the Ontario government.

The Far North is home to 31 First Nations communities whose peoples have resided there for millennia. Approximately 24,000 people live in these communities which are typically accessible only by air or winter roads. Presently, large-scale development is generally limited to mineral exploration and development; the Musselwhite Mine and the Victor Diamond Mine are both in active production, as well as intensive prospecting in the area known as the Ring of Fire. The Far North is not currently open to commercial timber harvesting, which occurs to the south in the middle third of the province in the area of the undertaking (AOU). Protected areas currently cover 8.6 per cent of the Far North; the majority of these lands are in a single site, Polar Bear Provincial Park, on the shores of Hudson and James Bays.

In July 2008, the Premier announced that the government would protect at least 225,000 km^2 of Ontario's Far North. As part of the Far North Planning Initiative, the Premier announced that scientists, First Nations and Métis communities would collaborate to map and permanently protect an interconnected network of conservation lands across the Far North, and that the government would work with all northern communities and resource industries to create a broad plan for sustainable development. New commercial forestry opportunities would be made available through the planning process and the opening of any new mines in the Far North would now require community land use plans, developed in agreement with First Nations communities. An interconnected network of permanently protected lands would give priority to "key ecological features such as habitat for species at risk or important carbon sinks." No such comprehensive land use planning has ever occurred for northern Ontario.

The Ontario government originally cast this initiative as a key part of its plan to fight climate change. The government's 2008-2009 Climate Change Action Plan Annual Report stated that this legislation will be a framework for "sustainable growth" that protects the province's natural resources, and recognizes the carbon storage and sequestration capacity of natural areas. Without question, climate change will have a profound effect on northern Ontario within our lifetimes: annual and seasonal mean temperatures will increase between 2 and 6°C depending on the season and location. It will affect everything from the numbers and types of species to the loss of permafrost causing massive changes in surface hydrology, and the release of significant amounts of methane, a powerful greenhouse gas.

In 2010, the government promoted the *Far North Act, 2010* as part of its five-year Open Ontario Plan to strengthen the economy. It stressed the legislation's importance for future mineral development, especially for the development of a potential chromite mine in the Ring of Fire. Between 2007 and 2010, the number of unpatented mining claims tripled to over 90,000 in the Far North.

In the fall of 2008, the Minister of Natural Resources established a Far North Science Advisory Panel, which later released a series of recommendations to the government. The Minister also created a Far North Planning Advisory Council, composed of conservation groups and resource-based development industries, which completed a report in March 2009. The planning advisory council stated that the Far North initiative has the potential to be a precedent-setting model for the world:

a) To provide the people who live in the region with an active decision-making role over planning their own future.

b) To establish an internationally significant, connected network of culturally and ecologically important protected lands and waters within a still-intact boreal region of our world, which is experiencing global climate change.

c) To accomplish long-term economic prosperity for northern communities based on the best environmental practices by business, and a new government-to-government resource-benefit sharing regime.

In June 2009, the government introduced the legislation for First Reading in the Ontario legislature. It passed Third Reading in September 2010, was given Royal Assent a month later, and was proclaimed in

February 2011. MNR intends to prescribe the *Far North Act, 2010* under the *EBR*, likely in the spring of 2012. In January 2011, O. Reg. 21/11 under the *Far North Act, 2010* was filed, prescribing the geographic boundaries of the Far North.

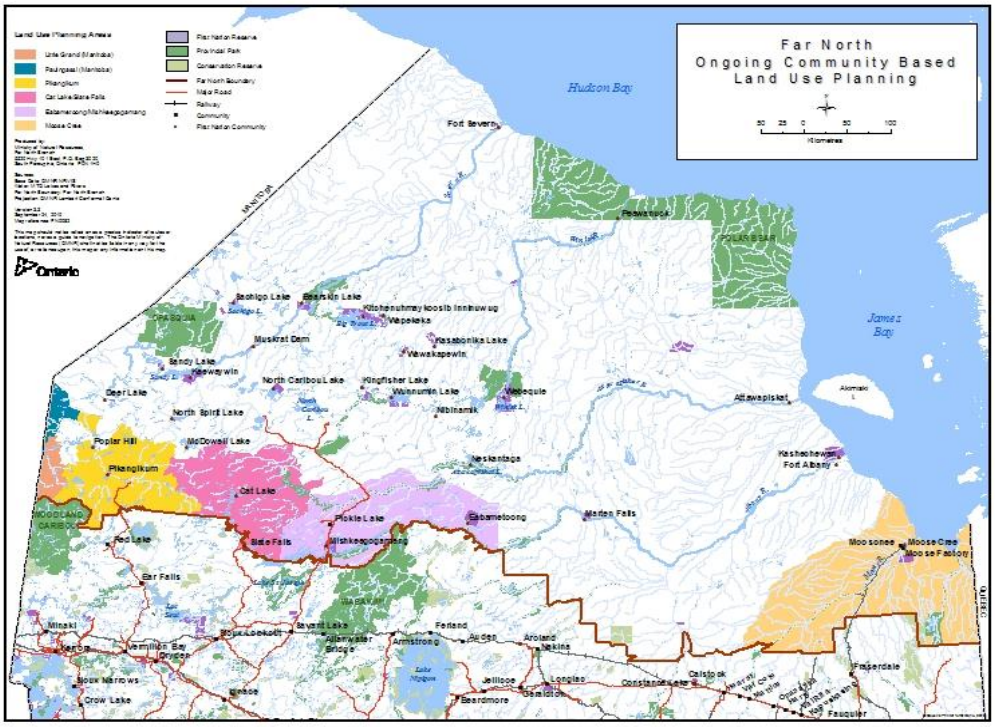

Figure 1. Far North Community Based Land Use Planning. Source: MNR

Implications of the Decision

Purpose and Objectives

The purpose of the legislation is to provide for community based land use planning in the Far North that sets out a joint planning process between First Nations and the Ontario government. It acknowledges that this process will be done in a manner that is consistent with the recognition and affirmation of existing Aboriginal and treaty rights in section 35 of the *Constitution Act, 1982*, including the duty to consult. A broader purpose of the *Far North Act, 2010* is to support "the environmental, social and economic objectives for land use planning" for the peoples of Ontario, which includes the following objectives:

1. A significant role for First Nations in the planning;
2. The protection of areas of cultural value in the Far North and the protection of ecological systems in the Far North by including at least 225,000 square kilometres of the Far North in an interconnected network of protected areas designated in community based land use plans;
3. The maintenance of biological diversity, ecological processes and ecological functions, including the storage and sequestration of carbon in the Far North; and,
4. Enabling sustainable economic development that benefits the First Nations.

Joint Planning Body

Any First Nations with a reserve in the Far North, or with whom the Minister of Natural Resources has agreed to work, may indicate its interest in establishing a joint planning body. Once established by the Minister, the joint planning body's purpose is to "advise on the development, implementation and co-

ordination of land use planning in the Far North" and other agreed-upon advisory functions. Additionally, it can advise the Minister on the allocation of funding to support First Nations in their planning work, as well as make recommendations related to dispute resolution. Membership of the joint planning body is to be equally divided between members of First Nations and the Ontario government.

The joint planning body may make recommendations to the Minister on matters to include in a Far North Land Use Strategy, as well as policy directions to be issued as Far North policy statements. The Minister may submit these policy statements for approval to the Lieutenant Governor in Council (i.e., Cabinet) if they relate to:

1. cultural and heritage values;
2. ecological systems, processes and functions, including considerations for cumulative effects and for climate change adaptation and mitigation;
3. the interconnectedness of protected areas;
4. biological diversity;
5. areas of natural resource value for potential economic development;
6. electricity transmission, roads and other infrastructure;
7. tourism; and
8. other matters that are relevant to land use planning under this Act if the Minister and the joint body agree to the matters.

Far North Land Use Strategy

The *Far North Act, 2010* requires that the Minister develop a broad strategy to assist in the preparation of individual community based land use plans. The strategy must take into account the Act's objectives, as well as any advice from the joint planning body. The land use strategy shall contain all Far North policy statements. It will also detail the requirements for amending community based land use plans, as well as describe the categories of land use designations to specify both allowable and restricted activities. As of July 2011, MNR has not publicly announced when it will begin to develop the strategy.

Community Based Land Use Plans

First Nations initiate the planning process under the *Far North Act, 2010* by expressing their interest to the Minister, who then works with them through the use of a joint planning team to prepare a terms of reference to designate the planning area and prepare the community based land use plan. If the Minister and the council of each of the First Nations have approved the terms of reference, the Minister may then make an order designating the planning area after which a community based land use plan may then be jointly developed.

In preparing the community based land use plan, the First Nations and the Minister must take into account the Act's objectives and the Far North Land Use Strategy. Public notice and the opportunity to comment must be provided during the development of the draft plan.

Each land use plan will: map out a zoning system; detail permitted and prohibited activities; designate one or more protected areas; specify how significant cultural and ecological features are addressed; and deal with any issues adjacent to the planning area that the team has identified. The parties also must specify when the community land use plan is required to be reviewed, which cannot be less than 10 years after its approval. Community based land use plans must be approved by both the Minister and the council of the First Nations.

Unless they were authorized prior to the *Far North Act, 2010* coming into force, specific types of development are prohibited in the Far North until a community based land use plan has been approved. These prohibited activities include: opening a mine in the prescribed circumstances; commercial timber harvesting; oil and gas exploration or production; constructing or expanding an electrical generation facility; constructing or expanding electrical transmission and distribution systems; and constructing or expanding all weather transportation infrastructure. Subject to conditions, the Minister may issue orders

that authorize some of these prohibited activities to proceed, such as electrical generation and transmission or all weather transportation infrastructure. Moreover, Cabinet may issue an order authorizing any of these prohibited activities if it is in "the social and economic interests of Ontario."

The lack of a community based land use plan also does not restrict: feasibility studies or similar assessments, including wind testing; activities associated with environmental clean-up; and prospecting, mining claim staking, mineral exploration or obtaining a mining lease or licence of occupation for mining purposes in accordance with the *Mining Act*.

Authorization of Commercial Timber Harvesting

Once a community land use plan has been approved, MNR can request that the Ministry of the Environment (MOE) provide coverage under the *Environmental Assessment Act*, which is required to authorize commercial timber harvesting in the plan area. Both MNR and MOE are separately required to consult the public using the Environmental Registry on the creation of a new Declaration Order under the Act. Once a plan area is covered by an approved Declaration Order, forest management planning may proceed under the *Crown Forest Sustainability Act*.

Protected Areas

After a community based land use plan is approved, the First Nations' council may request that the Minister make a regulation that establishes the boundaries of protected areas that have been zoned in the plan. The *Far North Act, 2010* allows for "protected areas" to be regulated under this legislation; however, nothing in the Act prevents these lands from being regulated as provincial parks or conservation reserves under the *Provincial Parks and Conservation Reserves Act, 2006*, the legislation that MNR normally uses to protect lands across Ontario. There are substantial legal differences between the level of protection and management afforded by the *Provincial Parks and Conservation Reserves Act, 2006* and the *Far North Act, 2010*.

If a community land use plan has not been approved, a First Nation may request that the Minister make an order designating an area for provisional protection. The Minister also has the authority to issue an order on his or her own initiative. These types of orders can specify land uses and activities that are not permitted in the area, except relating to prospecting, claim staking or mineral exploration.

Leading up to the final regulation of protected areas, the *Far North Act, 2010* obligates the Minister to request that the Minister of Northern Development, Mines and Forestry make an order under the *Mining Act* withdrawing the area from mineral staking. The lack of such provisional protection has been a problematic issue for MNR for more than a decade; the *Provincial Parks and Conservation Reserves Act, 2006* continues to lack such a provision.

The *Far North Act, 2010* establishes clear prohibitions by law, which is a best practice and superior to the approach taken in numerous other jurisdictions. The legislation states that the following types of development, land uses and activities are prohibited in protected areas:

- Prospecting, mining claim staking or mineral exploration;
- Opening a mine;
- Commercial timber harvesting; and
- Oil and gas exploration or production.

The *Far North Act, 2010* also prohibits constructing electrical generation facilities that use wind or water in protected areas. However, it allows the construction if the Minister has approved it under other legislation and the proponent believes that it is an incidental or complementary land use.

Any of these prohibitions for activities within protected areas can be over-ridden by order of Cabinet, subject only to considering the legislation's objectives and if it "is in the social and economic interests of Ontario."

The *Far North Act, 2010* made several consequential amendments to the *Provincial Parks and Conservation Reserves Act, 2006*. These amendments change how provincial parks and conservation reserves in the Far North can be deregulated in order to switch the designation to that of "protected area" under the *Far North Act, 2010*. In other areas of Ontario, the Minister was required to have the endorsement of Legislative Assembly if the disposition was 50 hectares or more or 1 per cent or more of the total area of the provincial park or conservation reserve. This requirement no longer exists for such switching of designations between laws, subject to conditions such as the new protected area must be of equal or greater size than the old provincial park. Cabinet, however, must provide notice to the public of a proposed order and provide an opportunity for the public to comment.

Compared to areas regulated under the *Provincial Parks and Conservation Reserves Act, 2006*, the *Far North Act, 2010* contains inferior provisions for its protected areas on an environmental management basis. The *Provincial Parks and Conservation Reserves Act, 2006* is clear in its planning and management direction that "maintenance of ecological integrity shall be the first priority." In contrast, the *Far North Act, 2010* has a mix of general objectives and only directs what may not be allowed in protected areas. From a practical standpoint, the *Provincial Parks and Conservation Reserves Act, 2006* directs what protected areas should be actively managed for, while the *Far North Act, 2010* simply outlines what is restricted.

Protected areas under the *Far North Act, 2010* are essentially intended to be non-operating areas from a management perspective. By contrast, the *Provincial Parks and Conservation Reserves Act, 2006* requires an active involvement of MNR staff as each regulated area has to have management direction, which involves, at least in principle, ecological monitoring and enforcement activities. From a practical perspective, protected areas under the *Far North Act*, *2010* are essentially lines on a map without any clear obligations on anyone to act in a stewardship role.

There are no requirements to develop specific management direction for protected areas that fall under the *Far North Act, 2010*. Moreover, the community based land use plans to date (one being approved and three being in draft stage) have insufficient detail to be construed as a dedicated protected area management plan. For example, in March 2011, Pikangikum First Nation and MNR initiated the management planning for the Whitefeather Forest Cheemuhnuhcheecheekuhtaykeehn dedicated protected areas, which will be regulated under the *Provincial Parks and Conservation Reserves Act, 2006*. Management effectiveness of protected areas, including that each specific site have a plan, is an accepted international standard that is unfortunately not addressed in the *Far North Act, 2010*. MNR has a long history of planning and managing Ontario's provincial parks and it is unfortunate that this same expertise will not be directly applied in the long term to the protected areas regulated under the *Far North Act, 2010*.

Enforcement

The *Far North Act, 2010* contains no offence provisions nor does it grant such regulation-making powers. While this legislation can be viewed as a planning-related statute, which generally have few if any enforcement provisions, this omission is significant for the protected areas regulated under the *Far North Act, 2010*. Law enforcement is a well-recognized component for the effective management of protected areas. For example, the *Provincial Parks and Conservation Reserves Act, 2006* has numerous offence provisions, including those designed to prevent environmental harm. Correspondingly, MNR enforces the *Provincial Parks and Conservation Reserves Act, 2006* with trained conservation officers and park wardens. In the case of the *Far North Act, 2010*, no indication is given how the Ontario government will actively safeguard protected areas in the Far North.

Community Based Land Use Plans To Date

Four plans have been approved as of July 2011 under the legislation. The *Far North Act, 2010* grandfathered Keeping the Land: A Land Use Strategy for the Whitefeather Forest and Adjacent Areas, developed jointly by Pikangikum First Nation and MNR and approved in June 2006. In July 2011, three more plans were finalized after undergoing public consultation: Cat Lake and Slate Falls First Nations,

Little Grand Rapids First Nation, and Pauingassi First Nation. According to MNR, 25 communities have initiated some stage of planning activities.

Three types of land use designations can be found within each community based land use plan: general use area; enhanced management area; and dedicated protected area. General use areas and enhanced management areas allow for all types of land use activities, but the latter designation may specify additional guidelines to restrict the timing or nature of some activities. Dedicated protected areas prohibit a variety of activities such as mineral prospecting and commercial timber harvesting.

The peoples of Pauingassi First Nation and Little Grand Rapids First Nation reside in Manitoba and have trapline areas in Ontario. These two neighbouring communities chose to undertake the planning process separately, but concurrently and in dialogue. Both First Nations, in conjunction with the Ontario and Manitoba governments, also are in partnership to have this region – known as Pimachiowin Aki – declared a UNESCO World heritage Site. Pauingassi First Nation has proposed that 76.8 per cent of its planning area of 138,763 hectares become a dedicated protected area; Little Grand Rapids First Nation has proposed that all of its 188,738 hectares planning area become a dedicated protected area.

	Plan Area	**Dedicated Protected Area**	**Enhanced Management Area**	**General Use Area**
A Land Use Strategy for the Whitefeather Forest and Adjacent Areas (June 2006)	1,221,717 ha	436,025 ha (35.7%)	426,553 ha (34.9%)	359,141 ha (29.4%)
Pauingassi Community Based Land Use Plan (July 2011)	138,763 ha	106,628 ha (76.8%)	32,135 ha (23.2%)	0
Little Grand Rapids Community Based Land Use Plan (July 2011)	188,738 ha	188,738 ha (100%)	0	0
Cat Lake-Slate Falls Community Based Land Use Plan (July 2011)	1,512,064 ha	506,282 ha (33.5%)	342,345 ha (22.6%)	663,437 ha (43.9%)
Total	3,061,282 ha	1,237,673 ha (40.4%)	801,033 ha (26.2%)	1,022,578 ha (33.4%)

Figure 2: Land use designations in community land use plans under the *Far North Act, 2010* as of July 2011.

The Cat Lake-Slate Falls Community Based Land Use Plan has the largest plan area to date. This plan allows development in about two-thirds of its plan area, similar to the plan approved for the Whitefeather Forest in 2006; it too is directly adjacent to the AOU. Within this plan, the dedicated protected areas are generally located along major waterways and do not typically include areas with the potential for tourism or mineral development. While some parts of the (yet to be regulated) protected areas include significant ecological values, such as mature stands of forest or caribou calving grounds, others do not.

Funding

In March 2008, the Ontario government transferred $1 million to Nishnawbe Aski Nation (NAN) for individual First Nations to build the capacity for land use planning; 38 First Nation communities and Tribal Councils received funding from NAN. At the same time, the Ontario government allocated $30 million over four years for its land use planning in the Far North. In March 2010, the Ontario government set up a $45 million fund over three years for skills training in northern Ontario, which included $2 million annually for training for First Nations communities involved in land use planning. In September 2010, the Ontario government allocated a further $10 million over two years to directly support First Nations working on land use planning.

Public Participation & *EBR* Process

In June 2009, MNR posted a proposal notice for Bill 191 (the *Far North Act, 2010*) on the Environmental Registry for a 63-day public comment period, receiving 64 submissions from the public. In August through October 2009, the Standing Committee on General Government also held seven meetings regarding Bill 191 with 55 organizations and individuals making presentations. Many of these presentations also dealt with Bill 173 (the *Mining Amendment Act, 2009*). A wide range of opinions were expressed on Bill 191, reflected in the selected comments below.

NAN, which represents 49 First Nations communities, opposed Bill 191 and asked that it be withdrawn. NAN stated that the process to develop the legislation was rushed, insensitive to First Nations, and was a violation of the government's legal duties to consult with First Nations. NAN asked that the Premier and Cabinet work with First Nations on their mutual objectives to conserve the land, stimulate the economy, and improve the living conditions of all First Nations peoples. Other First Nations expressed similar concerns, while emphasizing the importance of land use planning within their territories.

A number of non-government organizations, such as the David Suzuki Foundation and the Wildlands League, expressed support for the intent of Bill 191. They commented that the bill should be amended to allow for the creation of an independent board, with at least half its members appointed from First Nations communities, to oversee the process for developing community based land use plans and allocate funding. These organizations also recommended amendments to: prohibit the construction of transmission lines and roads ahead of land use plans being developed; allow for First Nations communities to manage the interconnected network of protected areas; provide financing of approximately $100 million over five years to implement the land use planning system; and establish and outline the responsibilities of an independent science advisory body. Other non-governmental organizations, such as Ontario Nature and Ecojustice, and members of the public submitted similar comments.

The Prospectors and Developers Association of Canada (PDAC) raised many concerns over Bill 191, recommending that it not be enacted into law. Akin to many other commenters, both for and against this proposed legislation, PDAC stated that the consultation process by the government was inadequate. This association also stated that Bill 191 presented a serious impediment to achieving an appropriate balance between development and conservation in northern Ontario, particularly with regard to the proposed minimum target of 50 per cent protected area coverage, which would limit mineral exploration.

The Canadian Boreal Initiative, which works in collaboration with many forestry companies and conservation organizations, supported the intent of Bill 191. This organization stated that protecting at least half of the boreal region and ensuring a First Nations community-led planning process were integral to the success of the proposed legislation. It stated that there was a strong scientific consensus for such an approach, reflected in a petition of approximately 1,500 scientists, as well as evidence from other jurisdictions that it is successful.

The Ontario Forest Industries Association (OFIA) opposed Bill 191, stating that there was no scientific rationale to protect at least 50 per cent of the Far North. It also stated that mitigation of climate change would be better achieved through timber harvesting and renewal activities than through the use of protected areas. The OFIA raised concerns that the *Endangered Species Act, 2007* would further limit development on lands that were not protected areas. It did acknowledge, however, that Bill 191 would not have any immediate direct impacts on fibre costs in the current AOU.

The Ontario Mining Association (OMA) supported the general intent of Bill 191 to strike a balance between conservation and development. The OMA recommended that the proposed legislation include not only protected area targets but also development targets. It also noted that a key factor in the success of this initiative is the sustained availability of adequate resources, requiring greater governmental resources dedicated to building capacity for land use planning in the Far North.

SEV

MNR states that it considered its Statement of Environmental Values (SEV) in reaching its decision. The ministry stated that the legislation provides a significant role for First Nations in planning, protects areas of cultural and ecological value, maintains biodiversity and ecological processes, and enables sustainable economic development that benefits First Nations.

ECO Comment

Developing the *Far North Act, 2010* was controversial and difficult for First Nations, the Ontario government, and many stakeholders. It also was a genuine effort by all involved to better the communities, economy, and environment of northern Ontario. The end result is positive: the *Far North Act, 2010* is a step toward acknowledging and addressing the shared responsibility of the Ontario government and First Nations for planning and safeguarding the land and its peoples. The ECO commends the Ontario government on its efforts to work with First Nations to plan the orderly development and protection of northern Ontario.

MNR merits high praise for the law's objective to protect areas of cultural value and ecological systems in an interconnected network of protected areas that is at least 225,000 km^2. This ambitious target – to protect more than half of the Far North – far exceeds comparisons to international protected area targets. If the Ontario government's target is achieved in the Far North, which may take more than a decade, the current coverage of protected areas across the *entire* province would rise from 9.4 per cent to 26.5 per cent. At least symbolically, this commitment makes the Ontario government worthy of global acclaim. It is critically important, though, that ecological representation of both features and functions be a cornerstone of this planning process.

As with most laws that lay out a planning framework, the devil is in the details. The relative success of the *Far North Act, 2010* relies strongly on the financial capacity of MNR to adequately gather the necessary ecological information to input into the planning process, as well as to collaborate with First Nations in ongoing dialogue. The success of the planning process also hinges on how well the Ontario government supports building the capacity of First Nations to develop community based land use plans and then to sustain the process in how lands are managed in the future. Inadequate government funding, including the lack of the necessary policy development and support, could jeopardize the long-term success of the *Far North Act, 2010*. In the long term, it is unclear what role MNR will take with regard to ecological monitoring, management, enforcement, and public reporting on the implementation of the *Far North Act, 2010*. This lack of clarity and certainty is worrisome given the ministry's current lack of resources.

How the Ontario government exercises its authority under the *Far North Act, 2010* will be an important factor in how well this new planning system works. The legislation gives the Minister of Natural Resources and Cabinet many different powers that could be used to either help the system stay on track or circumvent the process. For example, it was widely promoted that the *Far North Act, 2010* and recent amendments to the *Mining Act* now require that a community based land use plan be in place before any new mine may open in the Far North. However, both laws allow Cabinet to over-ride this restriction if it is "in the social and economic interests of Ontario." It is hard to envision a scenario when a new mine, which could generate billions of dollars over the course of its operation, would not be in the economic interest of Ontario.

The *Far North Act, 2010* is commendable for its explicit objective of "the maintenance of biological diversity, ecological processes and ecological functions, including the storage and sequestration of carbon in the Far North." Beyond its immediate symbolic value, this objective can be used as a metric of success going forward. For example, with regard to biodiversity, MNR has already proposed allowing mining and timber harvesting in the "protected" habitat of threatened woodland caribou in the Far North by means of an exemption under the *Endangered Species Act, 2007*. While the *Far North Act, 2010* strives to achieve a balance between conservation and development, sometimes this type of trade-off will have significant and, possibly, irreversible ecological consequences. Going forward, it is critically

important that the Far North Land Use Strategy establish targets and timelines to guide planning and management.

The Ontario government strongly promoted that a key purpose of the *Far North Act, 2010* was to address the storage and sequestration of carbon in the Far North. However, it is unclear how this purpose will be achieved and it is of concern that little mention of carbon storage, sequestration and management occurs in any of the draft plans to date. For example, the Cat Lake-Slate Falls Draft Community Based Land Use Plan states that further discussion is needed to determine the plan's potential contribution to the mitigation of climate change; yet, it already lays out proposed areas for development and protection. Much like the concerns raised above regarding biodiversity, the Ontario government must treat such commitments in the *Far North Act, 2010* as more than rhetoric if the law truly should be judged as a precedent-setting model for the world in the years ahead.

Review of Posted Decision:

4.12 Policies and Procedures for Conservation Authority Plan Review and Permitting Activities

Decision Information

Registry Number: 010-8243
Proposal Posted: November 25, 2009
Decision Posted: May 28, 2010
Comment Period: 47 days
Number of Comments: 27
Decision Implemented: May 28, 2010

Keywords: conservation authorities; land use planning; natural hazards; flooding; erosion; wetlands; *Conservation Authorities Act*

Description

Overview

Conservation authorities are involved in many aspects of land use planning in Ontario. For example, they issue permits for development in floodplains and wetlands and review official plans for natural hazards. In 2010, the Ministry of Natural Resources (MNR) created a policy to clarify and govern how conservation authorities participate in various aspects of land use planning. The policy focuses on *Conservation Authority Act* permits and conservation authority review of municipal plans and development proposals. The document is titled Policies and Procedures for Conservation Authority Plan Review and Permitting Activities ("Conservation Authority Policy").

Background

Conservation Authorities Act and Conservation Authorities:
There are 36 conservation authorities established under the *Conservation Authorities Act* spread across southern Ontario and some areas of northern Ontario. Conservation authorities are locally organized bodies that manage water resources on a watershed basis. In 1946, the Ausable River Conservation Authority (now the Ausable Bayfield Conservation Authority) and the Etobicoke River Conservation Authority (now the Toronto and Region Conservation Authority) became the first established conservation authorities in Ontario.

Conservation authorities have jurisdiction over one or more watersheds, based on the premise that water resources are best managed at this local scale. They are considered local watershed-based natural resource management agencies. Conservation authorities may develop watershed plans and natural

resources management plans. These plans contain specific approaches to land use planning. Approximately two-thirds of conservation authorities have or are carrying out watershed studies or plans.

Integrated watershed management is the process of managing human activities and natural resources within the watershed. In 2010, Conservation Ontario (the association of conservation authorities), MNR and Fisheries and Oceans Canada produced three reports on integrated watershed management. In our 2009/2010 Annual Report, the ECO recommended that MMAH amend the Provincial Policy Statement, 2005 (PPS) to require integrated watershed management planning. Additionally, in 2010, the Canadian Council of Ministers of the Environment identified that it would develop integrated watershed management principles as part of its Strategic Directions for Water.

Natural hazards are natural, physical environmental processes that may adversely affect human life, property, or other aspects of the environment. Generally speaking, flooding is the most significant natural hazard in Ontario in terms of death, damage and civil disruption. Flood plains are areas that are vulnerable to flooding. Urban development can alter the natural hydrograph of a watershed, causing flooding, erosion and decreased water quality downstream. Stormwater management facilities try to mitigate the impacts associated with developed areas.

In Ontario, natural hazards are primarily addressed through the PPS and through the development, interference and alteration permits issued by conservation authorities under section 28 of the *Conservation Authorities Act* ("section 28 permit") (see the section below for more details). PPS policies direct development away from hazardous lands (e.g., flooding hazards, erosion hazards and dynamic beach hazards) and hazardous sites (i.e., unstable soils such as sensitive marine clays and organic soils and unstable bedrock like karst topography).

Conservation authorities are also involved in various aspects of land use planning in Ontario. Land developers often view conservation authorities as obstacles in the planning approval and permitting process, slowing down or stalling the pace of development. Since conservation authorities have many roles and responsibilities and the capacity varies among them, there is often confusion about what areas in land use planning they should and should not be involved.

Conservation Authorities as Regulatory Agencies:
Every conservation authority in Ontario has a regulation under section 28 of the *Conservation Authorities Act* that requires it to issue section 28 permits to landowners for development, interference and alterations to regulated areas (e.g., floodplains and wetlands). To ensure that the regulations are consistent across the province, each regulation must meet the content requirements set out in O. Reg. 97/04 made under the *Conservation Authorities Act* and be approved by the Minister of Natural Resources.

Landowners may need to obtain a section 28 permit to undertake certain activities or develop in or adjacent to certain regulated areas, including river or stream valleys, Great Lakes and large inland lake shorelines, hazardous lands, watercourses, and wetlands. Permission from the conservation authority is required to confirm that the proposed development or activity does not affect the control of flooding, erosion, dynamic beaches, pollution or the conservation of land. Conservation authorities also regulate the straightening, changing, diverting or interfering in any way with the existing channel of a river, creek, stream, or watercourse, or for changing or interfering in any way with a wetland. Each conservation authority has maps that illustrate the regulated areas (e.g., flood plains) in their watershed. Typical activities that may require a section 28 permit include constructing or reconstructing buildings, dredging waterbodies, temporary or permanent placement of fill, municipal drains, and stormwater management facilities.

In 2009, Conservation Ontario released a report on the status of natural hazard management in Ontario entitled Protecting People and Property, A Business Case for Investing in Flood Prevention and Control. The report found that climate change, development pressures, and underfunding of programs have impaired the conservation authorities' ability to maintain existing levels of flood protection and to deal with emerging threats. The report identified that, by area, approximately 80 per cent of floodplain maps

maintained by conservation authorities are out of date and some are 20 to 30 years old. The report recommended that additional provincial support is needed to update floodplain mapping, maintain existing flood control structures (e.g., dams, dykes and channels) and continue ongoing flood management programs (e.g., monitoring, regulation and facility operations).

In 2009, the Expert Panel on Climate Change Adaptation recommended that MNR, in collaboration with conservation authorities, review and update floodplain mapping. In addition, the ECO has previously expressed concern that inadequate funding for flood control and prevention measures has created a situation where, due to climate change, Ontario is now vulnerable to significant flooding events.

Conservation Authority as Agencies Delegated the Responsibility for Natural Hazards:
In 1995, to reduce duplication and overlap between local MNR district offices and the local conservation authorities, MNR delegated the sole commenting responsibility for development proposed in natural hazard areas to conservation authorities. In a 2001 memorandum of understanding, MNR, the Ministry of Municipal Affairs and Housing (MMAH) and conservation authorities formally defined their roles and relationships surrounding the natural hazard delegation under the provincial one window planning system. MNR retains the responsibility for development of flood, erosion and hazard land management policies, programs and standards. MMAH co-ordinates provincial input, review and approval of policy documents, and development proposals and appeals to the Ontario Municipal Board. Conservation authorities are delegated the responsibility to represent the provincial interests of PPS natural hazard policies (i.e., flood plain management, hazardous slopes, Great Lakes shorelines, unstable soils and erosion). Conservation authorities review and provide comments to municipalities on land use planning policy documents (e.g., official plans) and on applications made under the *Planning Act* (e.g., development applications).

Conservation Authorities as Service Providers:
Some conservation authorities may establish service agreements with municipalities to provide technical policy input and advice on technical matters such as water quality and quantity, environmental impacts, watershed science, hydrogeology and stormwater. For example, in 1996 the Region of Durham entered into an agreement with its five conservation authorities to provide information and analysis to the municipality on natural heritage features, adequacy of stormwater management plans, and natural hazards. Some conservation authorities enter into agreements with the province, federal government and municipalities to undertake regulatory review and approval responsibilities or provide technical advice. For example, conservation authorities may have individual agreements with Fisheries and Oceans Canada to review proposed works to identify potential harmful alteration, disruption or destruction of fish habitat under section 35 of the federal *Fisheries Act*.

Other Roles and Responsibilities:
In Ontario's land use planning system, conservation authorities are also involved as watershed management agencies under the *Conservation Authorities Act*, as public bodies under the *Planning Act*, as source protection authorities under the *Clean Water Act, 2006* and as landowners.

Conservation Authorities Liaison Committee:
In 2007, MNR established the Conservation Authorities Liaison Committee in response to concerns raised by the development industry with regard to conservation authorities and their roles in land use planning. The committee includes representatives from conservation authorities, Conservation Ontario, the development industry, municipalities, environmental organizations, MNR, MMAH and the Ministry of Energy. It was formed "to provide advice to the government, [conservation authorities] and municipalities to identify opportunities to clarify the roles and responsibilities of [conservation authorities] in the development process, to provide a forum to raise new ideas to streamline and harmonize municipal planning and [conservation authority] processes, and to discuss other matters relating to sustainable, community development". The committee reviewed and provided input into the conservation authority policy.

Policies and Procedures for Conservation Authority Plan Review and Permitting Activities:
The Conservation Authority Policy is a new chapter in MNR's Conservation Authorities Policy and Procedures Manual. The document states that conservation authorities shall develop individual policies,

procedures and guidelines for the issuance of section 28 permits and for municipal plan review that are consistent with direction provided by MNR in the Conservation Authority Policy.

The Conservation Authority Policy clarifies that the conservation authority or the applicant can request pre-consultation prior to the submission of a section 28 permit application to determine complete permit requirements. The document suggests timelines for the conservation authority to provide the applicant with application requirements, following pre-consultation (21 days). If the applicant makes significant changes to the proposed development after pre-consultation, the conservation authority can require additional information to complete the application. Once the conservation authority receives an application, it should send a confirmation letter within 21 days to the applicant stating whether or not the application is complete. If the applicant is not satisfied with the conservation authority's decision regarding what is required, they can request an administrative review by the conservation authority general manager, chief administrative officer or board of directors.

The Conservation Authority Policy requires that they make a decision on a permit within 30 days for minor applications or 90 days for major applications. If the conservation authority has not made a decision within that timeline, the applicant can submit a request for an administrative review. If a conservation authority requests more information to address errors or gaps in the technical information submitted by the applicants, the conservation authority and applicant can defer the permit decision.

The Conservation Authority Policy encourages conservation authorities to develop watershed and sub-watershed plans. The policy states that municipalities can use the information in these plans during the creation and update of official plans and by-laws and during their review of development applications. The policy further states that conservation authorities should request that municipalities identify natural hazard lands in their official plans and by-laws. This would enable municipalities to direct development away from natural hazard lands.

Where a conservation authority provides technical services to a municipality, the conservation authority policy suggests that they establish a formal technical service agreement. This agreement should establish the role a conservation authority will play in various situations, such as during pre-consultation and at Ontario Municipal Board hearings.

Implications of the Decision

Overall, the Conservation Authority Policy generally reflects and supports the current roles, functions and responsibilities of conservation authorities in land use permitting and plan review activities across the province. The majority of the direction provided in the document merely clarifies how conservation authorities are involved in these processes. However, the document also contains a few new administrative procedures that may initially increase the workload of conservation authority staff (e.g., pre-consultation, confirmation of complete application requirements for section 28 permits, timelines to complete an application review and appeal processes).

While not required, conservation authorities are also encouraged by MNR to develop and make publicly accessible conservation authority board approved policies, procedures and guidelines for their activities in land use planning (e.g., section 28 permits and municipal plan review). While some conservation authorities have previously developed these policies, procedures and guidelines, many have not. Furthermore, they may need to amend existing policies, procedures and guidelines to bring them in line with MNR's Conservation Authority Policy.

MNR advised the ECO that it organized training for conservation authorities to support the implementation of the Conservation Authority Policy. The training focused on developing service delivery policies and procedures and developing and renewing municipal service agreements. MNR also informed the ECO that it developed a one year monitoring project for section 28 permit decision timelines. In January 2011, MNR began to monitor how long it takes for conservation authorities to issue section 28 permits in order to assess whether or not the timelines are realistic and appropriate.

Public Participation & *EBR* Process

In November 2009, MNR posted the draft Conservation Authority Policy on the Environmental Registry for a 47-day comment period. MNR received 27 comments on the proposal. MNR stated that an inter-ministerial working group, consisting of the then Ministry of Energy and Infrastructure, MMAH and MNR, reviewed the comments.

The majority of commenters supported the Conservation Authority Policy because it clarifies the roles and responsibilities of conservation authorities with regard to plan review and permitting activities and should increase the efficiency and consistency in conservation authorities' comments and decision making. One municipality stated that it "relies heavily on the expertise provided by our [conservation authorities] to assist with the [municipality's] policy formulation and development review activities" and that conservation authorities "provide an invaluable local perspective on natural heritage issues." The following is a summary of key comments submitted to MNR.

Conservation Authorities' Mandate

The development industry expressed concern that a number of conservation authorities are extending their reach beyond their mandate to influence the development approval process. The commenters stated that by providing comments outside of their delegated responsibilities, conservation authorities' comments are often misinterpreted. They suggested that conservation authorities must identify the role and legislative authority under which they are providing comments to municipalities and planning authorities and identify when their comments are "advisory only."

Public Consultation on Conservation Authority Policies, Guidelines, Plans and Strategies

Municipal and development industry commenters suggested that MNR make public consultation on conservation authority policies, guidelines, plans and strategies mandatory rather than a best management practice.

Permit Expiration

The development industry expressed concern to MNR about permits expiring after a 24 month period. The commenters stated that many complex construction and engineering projects take longer than 24 months to complete and the permit expiration creates "tremendous risk and uncertainty with respect to an additional permit being granted, especially if regulations have been updated or altered."

Watershed Plans

A municipality requested that MNR provide better guidance on the relationship between watershed plans and official plans. They stated that given the nature and purpose of watershed plans, and the type of language, technical information and mapping they contain, it is generally not possible for watershed plan recommendations or information to be simply "inserted" into official plans.

Funding and Fees

A municipality noted that there is no appeal mechanism to contest the amount charged by conservation authorities for their permit fees. The municipality suggested that conservation authorities should consult on their fee schedules and provide a process for dispute resolution, similar to the *Planning Act* process. Conservation authorities noted that fees are not recovering the costs of program delivery, particularly with regard to the plan review function. Conservation authorities stated that additional and consistent provincial funding should be provided to conservation authorities to ensure sufficient and qualified staff are available to meet these application processing timelines and the increased administrative demand (e.g., policy development and review, public consultation) suggested in the document.

Guidelines

An environmental organization and conservation authorities commenters stated that the Conservation Authority Policy is only one half of the equation to address plan review and permitting inadequacies. They suggested that MNR develop and approve additional guidelines to support conservation authorities and their staff in the effective implementation of plan review and permitting (e.g., geotechnical studies, hydrological analysis for interference with wetlands, updates to flood access and egress standards) to facilitate timely decision making.

SEV

MNR reported that in developing the Conservation Authority Policy, it considered some principles of resource stewardship as outlined in the ministry's Statement of Environmental Values, such as:

- An understanding of natural and ecological systems;
- Participation in resource management by all those who share an interest;
- Scientific and technological knowledge to support sustainable development;
- Use of an ecosystem approach; and
- Use of an adaptive management approach.

Other Information

In October 2010, MNR posted a proposal on the Environmental Registry (#011-0884) to amend O. Reg. 97/04 made under the *Conservation Authorities Act*, as part of the government's Open for Business initiative. MNR's proposed amendments to the regulation would enable a conservation authority to delegate its permit approval powers from the conservation authority board to the conservation authority's executive committee or conservation authority employees. This would allow conservation authorities to make decisions on the issuance of permits faster. MNR also proposes to extend the maximum period of validity of a permit from 24 months to 5 years.

ECO Comment

Conservation authorities play a significant and valuable land use planning role in Ontario. They ensure that houses are not built on floodplains and that wetlands are not filled in for development. They also act as important local environmental advocates, as watershed management agencies, as source water protection authorities and, in some cases, as municipal technical advisors on local natural heritage features and systems. While the Conservation Authority Policy formally confirms what some conservation authorities have been doing for years, it also adds a few new requirements. The ECO is pleased with MNR's Conservation Authority Policy as it clearly defines the numerous roles and responsibilities of conservation authorities in land use planning and should increase efficiency and consistency among them.

These are challenging times for land use planning in Ontario. Municipalities must adapt to the impacts of climate change (e.g., more frequent and powerful storm events may increase flooding events) and balance environmental protection with growth and development pressures. Among other negative effects, development can significantly change the hydrology of a watershed, leading to flooding, erosion, and water quality and aquatic habitat concerns. During the last 10 to 15 years, stormwater management facilities, which may require a conservation authority permit, have become popular in Ontario to mitigate these impacts from development. Therefore, it will be increasingly important for conservation authorities to be active participants in land use plan review and permitting activities, particularly given their original role in floodplain management.

Generally speaking, flooding is the most significant natural hazard in Ontario. Flood plain maps are important in flood prevention, and conservation authorities and municipalities rely on these maps to direct development away from flood prone areas. Ontario's Expert Panel on Climate Change Adaptation and Conservation Ontario have both stated that floodplain maps in Ontario are out of date and should be

reviewed and updated. In addition, the ECO has previously expressed concern that inadequate funding for flood control and prevention measures has created a situation where, due to climate change, Ontario is now vulnerable to significant flooding events. The ECO encourages MNR to continue to support conservation authorities in their plan review and permitting activities and to ensure that conservation authorities are adequately funded so that future development is directed away from natural hazard areas.

Review of Posted Decision:

4.13 Government Response Statements for 13 Species At Risk

Decision Information

Registry Number: 010-9192
Proposal Posted: February 18, 2010 (stage 1); September 15, 2010 (stage 2)
Decision Posted: November 18, 2010
Comment Period: 62 days (32 at stage one, 30 at stage two)
Number of Comments: 30
Decision Implemented: November 18, 2010

Keywords: species at risk; *Endangered Species Act, 2007* (*ESA*); recovery strategy; government response statement

Description

The Ministry of Natural Resources is required to publish a document summarizing and prioritizing the recovery actions the Ontario government will take for each endangered or threatened species listed under the *Endangered Species Act, 2007* (*ESA*). These "government response statements" comprise the government's response to science-based advice provided by independent species experts. In November 2010, the government published response statements for 13 endangered and threatened species.

Overview

On February 18, 2010, the Ministry of Natural Resources (MNR) posted a notice on the Environmental Registry alerting the public that it had initiated the process for developing government response statements for 13 endangered and threatened species:

- American Badger (*Taxidea taxus*) – endangered
- Barn Owl (*Tyto alba*) – endangered
- Deerberry (*Vaccinium stamineum*) – threatened
- Eastern Flowering Dogwood (*Cornus florida*) – endangered
- Eastern Prairie Fringed-orchid (*Platanthera leucophaea*) – endangered
- Engelmann's Quillwort (*Isoetes engelmannii*) – endangered
- Few-flowered Club-rush (*Trichophorum planifolium*) – endangered
- Jefferson Salamander (*Ambystoma jeffersonianum*) – threatened
- Ogden's Pondweed (*Potamogeton ogdenii*) – endangered
- Peregrine Falcon (*Falco peregrinus*) – threatened
- Redside Dace (*Clinostomus elongatus*) – endangered
- Spotted Wintergreen (*Chimaphila maculate*) – endangered
- Wood Turtle (*Glyptemys insculpta*) – endangered

The initial proposal was posted on the Environmental Registry for a 32-day comment period, after which the ministry held public engagement sessions at six locations around the province. A second proposal

that provided draft government response statements was posted on the Registry on September 15, 2010, for a 30-day comment period. MNR published the final government response statements nine months later on November 18, 2010 as required under the *ESA*. These 13 response statements, required under section 11 of the *ESA*, were among the first to be prepared since the Act came into force in 2008.

Background

Planning for the protection and recovery of species under the *ESA* is a multi-stage process (see Figure 1). After a species is listed as being endangered or threatened by the independent Committee on the Status of Species at Risk in Ontario (COSSARO) and is included on the Species at Risk in Ontario List (O. Reg. 230/08), a recovery strategy must be prepared for that species. These recovery strategies, intended to be based on science, are developed by independent species experts, which often comprise the recovery team for that species. The recovery strategies provide recommendations for protecting and recovering the species, detail specific approaches to achieve those goals and describe the area that should be considered in developing a habitat regulation for that species.

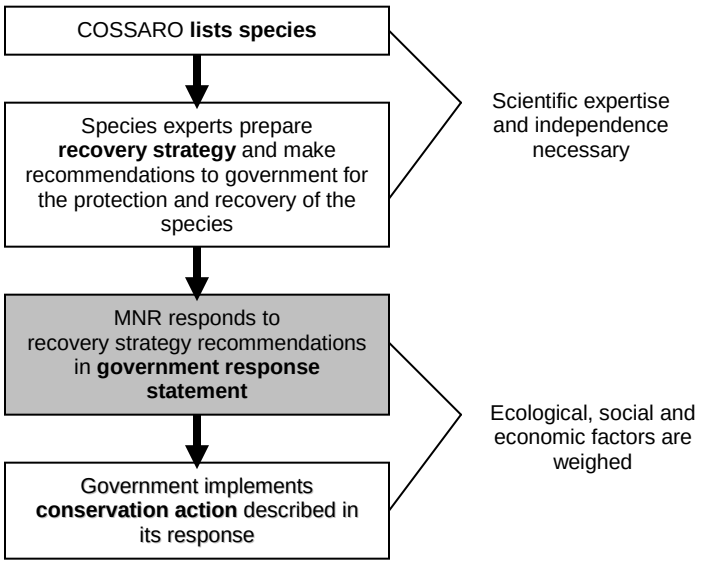

Figure 1: Government response statements in the framework for protection and recovery under the *Endangered Species Act, 2007*.

After a recovery strategy is prepared, the Minister of Natural Resources has nine months to publish a government response statement that "summarizes the actions that the Government of Ontario intends to take in response to the recovery strategy and the Government's priorities with respect to taking those actions." The Minister may prioritize recovery actions both amongst those suggested for each individual species, and amongst different species at risk. The prioritized actions and their implementation must be "feasible" in the opinion of the Minister, who may consider social and economic factors in determining feasibility.

Government response statements must be considered by the Minister prior to entering into stewardship agreements, or issuing permits or other instruments under the *ESA*. The Minister must also consider the statement prior to proposing habitat regulations. The *ESA* requires that the Minister ensure a review is conducted five years after the government response statement is published to examine the progress towards the protection and recovery of the species.

MNR used a standard format for the 13 government response statements released in November 2010, which included: an overview of government response statements in the context of the *ESA;* the government's recovery goal for that species; a list of government-led actions; a prioritized list of government-supported actions; and notes on implementation of actions for each species.

Recovery Goals

The government describes a goal for the recovery of each species. In some cases, this goal is closely aligned with the goal described in the recovery strategy by the independent species experts. For example, for Eastern flowering dogwood, the goal of both the recovery strategy and the government response statement is to "protect and conserve existing populations, reduce rate of decline, and where possible, restore populations of the species across its range in southern Ontario."

In other cases, the goal in the final government response statement is narrower in scope than what was described in the recovery strategy. For example, the goal in the recovery strategy for the peregrine falcon is to "ensure a viable and self-sustaining Peregrine Falcon population in Ontario, occupying the full extent of current and historical range," while the final government response aims to restore populations only within its current range.

Government-Led Commitments

In each of the 13 government response statements, the government makes 6 specific commitments:

- Collaborate with and educate agencies and planning authorities on the requirement to consider the species and its habitat in planning activities and environmental assessments;
- Encourage the submission of species data to the MNR's Natural Heritage Information Centre (NHIC);
- Undertake communications and outreach to increase public awareness of species at risk;
- Protect the species through the *ESA* and [develop and] enforce the regulation protecting the species' habitat;
- Support partners in activities to protect and recover the species; and
- Establish and communicate annual priority actions for government support.

In four of the 13 statements – for wood turtle, peregrine falcon, redside dace and Jefferson salamander – the government also commits to ensuring that "appropriate timing windows for undertaking activities in and around [species'] habitat are considered in the application of the *ESA*."

Further, the government has made other specific commitments related to peregrine falcon and redside dace. For peregrine falcon, the government committed to "continue to participate in province-wide population surveys every five years" as part of a national survey, and to review and improve current approaches to storage and management of species-related data to "reduce duplication and increase consistency in the associated collection and reporting requirements." For redside dace, the government's further commitments include finalizing and implementing the Framework for Managing Commercial Baitfish Harvest to Protect Redside Dace Populations, to maintain a database of redside dace distribution information for planning authorities and to "develop urban development guidelines to provide guidance where there is an interest in developing urban areas within Redside Dace habitat, as protected under the *ESA*."

Government-Supported Commitments

Each of the government response statements contain a list that echoes many of the conservation and recovery actions described in the independent recovery strategies. Although the government "endorses" these actions as "being necessary for the protection and recovery" of each species, the government will not undertake these recovery activities directly. To this end, the response statements stress that species recovery is a shared responsibility, and that "no single agency or organization has the knowledge, authority, or financial resources to protect and recover all of Ontario's species at risk."

Some listed actions are noted as being "high" priority. The government states these "will be given priority consideration for funding or for authorizations under the *ESA*" and that government support will be focused on these actions over the next five years.

Although independent recovery strategies may have considered particular conservation actions of "urgent" importance, these actions were not necessarily considered high priority in the government response statements. For example, for the American badger, the government response considered the action to "develop and implement, where feasible, options to reduce road mortality and incidental trapping" a high priority, similar to the recovery strategy. However, the action to "investigate the cause of death for all samples found" was considered "urgent" by the recovery team, but was not considered a high priority in the government response. These differences may reflect the Minister's prioritization of actions for species, and between species.

Implications of the Decision

For most of the 13 species, the government is making broad commitments for recovering species at risk that would be expected responsibilities under the *ESA*. For example, the commitment to "protect the species through the *ESA* and enforce the regulation protecting the species' habitat" appears to be a re-statement of legal obligations MNR already has under the *ESA*. Also, the commitment to "undertake communications and outreach to increase public awareness of species at risk in Ontario" is part of the Minister's responsibilities under the Act. It is not clear how ministries outside of MNR might be given defined responsibilities for species recovery under any of the government's commitments, or what their direct involvement might have been in developing the government response statements.

Dependence on Third Parties for Recovery Activities

The government has listed the more specific recovery activities recommended by species experts in recovery strategies that it will support or "endorse," but not lead or develop. It appears that these actions are expected to be undertaken by individuals or groups outside of government. Although the government response statements indicated that support will be provided through "funding, agreements, permits (including conditions) and advisory services," no relevant details are included. The statements note that "financial support for the implementation of actions may be available through the Species at Risk Stewardship Fund, Species at Risk Farm Incentive Program, or Community Fisheries and Wildlife Involvement Program." These programs are voluntary, and it is not clear from the response statements what the government will do if third parties are not available to undertake high priority (or any) activities. For example, if no third party was available to "conduct research to identify threats, evaluate their impacts and develop potential approaches to mitigate them" for spotted wintergreen, it is not clear whether the government would step in to fill this research gap.

Further, the majority of the listed recovery activities are not considered "high" priority and therefore it is unclear whether these activities will be eligible for government support over the next five years. Some of these lower priority activities comprise basic monitoring activities, and would be required to fulfill the government's recovery goals. For example, the action to "develop and implement a monitoring program to observe population trends, threats and habitat condition at existing sites in Ontario" for Ogden's pondweed is not considered high priority, but would likely be required to reach the government's goal to "ensure the persistence of populations where they exist in Ontario."

No Government Commitment for Restoration

Most commonly accepted definitions of the word "recovery" include restoration to a former state. However, in terms of the government's goals for the recovery of these 13 species, it does not appear that restoring habitat or populations beyond their current limits is a priority. In only 4 of 13 cases (Eastern flowering dogwood, Eastern prairie fringed-orchid, redside dace, and spotted wintergreen) is restoration of habitat beyond the currently occupied regions mentioned as a goal, and this will only be undertaken after it is determined to be "feasible." For the redside dace, while the recovery team aimed to "restore viable populations of Redside Dace in a significant portion of their historic range in Ontario," the government's goal for recovery of the species is "to protect existing populations and their habitats and where feasible, restore degraded habitats to allow for increased distribution adjacent to occupied reaches." This indicates that restoration activities for redside dace habitat, even when deemed to be feasible, will only occur in areas next to the species' current range.

Reliance on NHIC as Central Data Repository

Each of the statements indicates that submission of species data to the MNR's Natural Heritage Information Centre (NHIC) will be encouraged. However, the NHIC currently has an approximate two-year backlog for data entry, and information submitted may not be incorporated quickly enough to facilitate collaborative species at risk research. The NHIC will require additional capacity if it is to effectively take on this crucial role. Further, the push to require NHIC reporting may indicate a movement away from government-led monitoring, to dependence on third parties for gathering information on species' status.

For the wood turtle, the government has committed to both encouraging data submission to NHIC, and also "ensur[ing] data sensitivity guidelines are put in place to improve information sharing as appropriate." Since this statement was not made for other species, it appears that additional data sensitivity measures may be taken for this species. However, any non-government group must complete a data-sharing agreement and take data sensitivity training prior to gaining access to detailed NHIC data.

Annual Prioritization of Actions

The response statements indicate that the government will establish priority actions for support on an annual basis. However, it is not clear what methods the government will use to prioritize or communicate these actions. The lack of clarity raises some concern that the government may unilaterally change relative priorities for actions, support additional recovery actions, or remove particular recovery actions from access to government support. The government response statements do not describe whether or not the prioritized actions will be posted on the Environmental Registry for public input and participation.

This commitment could prove to be cumbersome for the government if it will require reviewing each response statement on an annual basis, especially as response statements for additional species are finalized.

Use of Government Response Statements

Reviews are required to be conducted five years after a government response statement is issued. These reviews will examine the progress towards the protection and recovery of the species, could act as an important accountability mechanism under the *ESA.* However, these reviews will not be able to function efficiently, as the ministry has not set measurable targets or timelines within the government response statements. Lack of progress towards recovery may not be apparent: as no targets or benchmarks have been provided, it is unclear how the minister's five-year reviews will measure success or failure of the recovery activities undertaken.

Under the *ESA*, government response statements must be considered prior to entering into agreements, issuing permits or instruments under the Act. As the 13 response statements are some of the first prepared, they set the stage and the template for those in the future. At least 118 additional government response statements for endangered and threatened species are required to be prepared by March 30, 2014.

Public Participation & *EBR* Process

MNR sought public consultation on this proposal in two stages, as it had committed to do in 2007. In the first stage, from February 18 to March 22, 2010, the ministry posted a proposal notice on the Environmental Registry requesting comments on the actions to which the government should consider committing in the development of the government response statements. MNR also held stakeholder consultation sessions in six communities across the province (Guelph, Thunder Bay, Sault Ste. Marie, Ottawa, London and Toronto). During these sessions, participants had the opportunity to rank priority recovery actions between species and between actions for each species. In the second stage, from September 15 to October 15, 2010, draft government response statements were posted for public comment. The ministry received 30 written comments on the proposal from concerned individuals,

municipalities, industry associations, environmental organizations and others. Some of these comments are summarized below.

Many individuals expressed concern for the apparent lack of government leadership in recovery action. One commenter noted that "without a greater leadership role by the provincial government, it is questionable whether success in the stabilization and restoration of healthy populations of species at risk can be achieved." Other commenters noted that "government-led actions identified in the draft [statements] consist of only generalized, high-level statements without timelines or resources. Leadership roles are not identified, and no further clarification as to the government's role is provided." Further, commenters noted that "critical activities such as restoring habitat and mitigating threats at priority sites are left completely at sea – all we know is that they are unlikely to take place within the next five years because they haven't been identified as a high priority."

An individual from the Ontario Badger Project commented that "nearly all of the actions listed in the statement are already components of the project we have undertaken since 2009 and many of the actions have already been completed. Each of the actions listed are not unique goals, but are all part of an entire approach. The success of each one depends on the success of others…. meeting any and all of them will be best accomplished with one single long-term project." The commenter went on to say that "it would be simply counterproductive to dole out specific duties to unique and often competing agencies." The commenter also noted that MNR funding for stewardship activities is restricted to particular projects, and that activities classified as "research" have not been supported in the past, noting that "in the case of badgers and what little we know of them, there can be no stewardship without first answering basic ecological questions."

Ducks Unlimited Canada supported the implementation of the government response statements "through a 'stewardship first' approach" in recognition of the extensive work that will be undertaken on private land. The organization made further comments including encouraging the province to "establish performance measures and targets for those measures for all recovery strategies" within an adaptive management approach.

The Nature Conservancy of Canada found that the government response statements were too generalized, noting that it was difficult to determine how the government intended to support species recovery: "…it is unclear how MNR is going to support these activities, if funds will be available for groups to conduct the specific actions identified as urgent or critical, and the type of support MNR will provide."

Hydro One noted its concern that some actions described in the response statements could conflict with its legal responsibilities for operation, maintenance and emergency response activities, including: vegetation removal in rights-of-ways, stations, corridors and access roads; herbicide use; pesticide use; creation of access roads and accessing sites; use of loud equipment; and alteration of soil characteristics. Hydro One stated that its goal is to "implement the required actions to the extent possible with the understanding that they may be overruled when [operation and maintenance] and emergency response tasks are required to ensure the safe operation of assets."

Ontario Nature and the David Suzuki Foundation commented jointly, noting that habitat protection should be the core component of government action and that the statements should explicitly note the requirement for planning authorities to comply with the *ESA*. The organizations also noted that the government should take further responsibility, stating "...in every [government response statement], the government-led actions rely heavily on actions involving 'collaboration' with or 'support' for other agencies. While we acknowledge that working with other individuals and organizations is essential to accomplish many of the recovery objectives, the leadership role for government must be firmly articulated…". The groups also commented that timelines for action need to be included, stating "the complete lack of detail regarding timelines in the 13 [government response statements] under review is unacceptable."

The Building Industry and Land Development Association, which is "active throughout most of the areas identified as Redside Dace range," voiced concern about using a regulatory approach for redside dace

habitat protection. The organization, together with landowner groups in Brampton, noted a preference for a stewardship and collaborative approach to species recovery. The organization identified the potential for conflict between development goals and objectives for redside dace, stating that although the provincial government is supporting development and urbanization in the Greater Toronto Area, the recovery goal for the redside dace will challenge the achievement of those development objectives.

The City of Brampton expressed concern that the government response statement for redside dace did not provide a level of detail required for making planning decisions, noting "the statement provides no further direction and/or information to solve the current dilemma of implementing the *ESA* to protect and conserve redside dace habitat in respect of municipal planning, operations and programs." The city recommended that the government dedicate annual funding for the program's first five years, to ensure that demonstrable progress in protecting redside dace was achieved. Another municipality, the Town of Markham, noted the importance of access to information on redside dace in order to "take a proactive role in advising staff, landowners and the development community on potential development constraints and required approvals." The town noted that it did not have adequate information and mapping products, and requested that MNR provide municipalities with this data.

In its response to the comments received, MNR stated that "in developing the [government response statements], the ministry considered what actions are feasible for the government to lead directly, and what actions are feasible for the government to support its conservation partners to undertake." The ministry further highlighted the shared responsibility for protecting and recovering species at risk. The ministry noted that as the statements are the government's "policy response" to the recovery strategies, they "are not intended to be detailed action or implementation plans, but rather, broader policy documents" that are "framed broadly to allow government and partners to scope activities (and determine impacts) 'on the ground,' in a way that is practical and effective."

SEV

MNR considered its Statement of Environmental Values (SEV) in reaching its decision. The ministry noted that "the precautionary principle was considered in the development of the government response statements in that the lack of full scientific certainty was not used as a reason for postponing measures to avoid or minimize threats where there is a threat of significant reduction of loss of biological diversity." The ministry stated that in making its decision, it "strived to balance the social, economic, and environmental concerns in the protection and recovery of these species" and is "aiming to ensure that human activities can continue where they are conducted in ways that allow for the protection and recovery of species at risk," to the extent possible. The SEV consideration document also explicitly recognized that protecting and recovering species is a shared responsibility.

Other Information

Government Response Statements for an Additional Nine Species

In September 2010, MNR began the initial stage of consultation for the development of government response statements for an additional nine species at risk under the *ESA* (Environmental Registry #011-1101, Development of government response statements in relation to 9 recovery strategies published on September 10, 2010 in accordance with the *Endangered Species Act, 2007*):

- Aurora Trout (*Salvelinus fontinalis timagamiensis*) – endangered
- Bent Spike-rush (*Eleocharis geniculata*) – endangered
- Common Five-lined Skink (*Plestiodon fasciatus*) – Carolinian population – endangered; Southern Shield population – special concern
- Cucumber Tree (*Magnolia acuminate*) – endangered
- Eastern Foxsnake (*Pantherophis gloydi*) – Carolinian population – endangered; Georgian Bay population - threatened
- Gray Ratsnake (*Pantherophis spiloides*) – Carolinian population – endangered; Frontenac Axis population - threatened

- Round Hickorynut (*Obovaria subrotunda*) and Kidneyshell (*Ptychobranchus fasciolaris*) – endangered
- Northern Riffleshell (*Epioblasma torulosa rangiana*), Snuffbox (*Epioblasma triquetra),* Round Pigtoe (*Pleurobema sintoxia*), Mudpuppy Mussel (*Simpsonaias ambigua*) and Rayed Bean (*Villosa fabalis*) – endangered
- Rapids Clubtail (*Gomphus quadricolor*) – endangered

The final government response statements for these species were published on June 16, 2011.

ECO Comment

The stated purpose of the *ESA* is to both protect and recover species at risk in Ontario. It would appear that the government is not taking direct responsibility for the second component – species recovery. One of the "keys to successful implementation" of the *ESA* that the ECO identified in our 2009 Special Report, The Last Line of Defence, was that MNR "ensure that its response statements to recovery strategies and management plans are robust, effective, and defensible and that its commitments are fully implemented in a timely fashion." Instead, the commitments the government has made for species recovery are weak, vague and arguably redundant, reiterating the responsibilities the government already has under the *ESA*.

As written, the statements do not create clarity for those who need it. The ECO believes that government response statements should clearly articulate the actions that will and will not be taken to recover species at risk, to alleviate the uncertainties that have existed for impacted groups such as landowners, municipal planners and those involved with recovery activities. The government responses require difficult, but legitimate, decisions to take, or not to take, particular actions recommended by the recovery teams. All of these choices should be clearly stated and include the government's rationale for the decision.

The responsibilities for protecting and recovering species at risk extend to the entire Ontario government, not just to MNR. The ECO is disappointed that the response statements have not included explicit roles for other government ministries in species recovery. In the past, lack of direction for other ministries has led to confusion on the part of non-MNR government staff as to their responsibilities under the *ESA* (for more information, please see page 45 and 46 of the ECO's 2009/2010 Annual Report). There is no evidence that ministries other than MNR assisted in the development of government response statements, or are aware of their possible responsibilities under the statements – contrary to what a "government" response statement should entail as directed by the *ESA.* This issue is of particular concern for species for which extensive inter-ministry co-ordination will be required (for example, in the case of redside dace, municipal planners require provincial guidance, likely in co-ordination with both MNR and the Ministry of Municipal Affairs and Housing).

MNR has created a scenario in which the on-the-ground recovery of species at risk in Ontario appears to be entirely in the hands of external, voluntary programs. Ontarians cannot be assured that the government will take the lead if no group is available to do the type of activity necessary for species recovery, as it only "endorses" these actions and does not lead them. The ECO understands the value of stewardship programs and the importance of community and stakeholder involvement in species at risk recovery activities. However, if the government does not take a leadership role, it may be unlikely that programs will have staying power over the long term.

The ECO has previously noted that government response statements are "one of the most critically important aspects of the new law. [Each statement] will detail what actions the Ontario government will take to actually protect and recover a given species at risk." The government responses should be action-oriented documents, but instead, it appears that MNR is interpreting its responsibilities as the minimum requirements under the *ESA* and has offloaded key recovery activities. Instead of securing positive results over the long term for species at risk, the government response statements have been reduced to an empty bureaucratic exercise with a low probability of producing measurable results in species recovery. The ECO urges the government to re-evaluate its responsibilities in these future government response statements, and to set measurable targets for species recovery. The ECO also

urges MNR to ensure that the annual prioritization of government actions is completed in an open and transparent manner that is in accordance with the *Environmental Bill of Rights, 1993*.

Review of Posted Decision:

4.14 Conservation Land Tax Incentive Program (CLTIP) Policy and Community Conservation Lands (CCL) Guide

Decision Information

Registry Number: 010-9840
Proposal Posted: April 30, 2010
Decision Posted: July 15, 2010
Comment Period: 31 days
Number of Comments: 25
Decision Implemented: July 5, 2010

Keywords: land; conservation; tax incentives; Conservation Land Tax Incentive Program; CLTIP; Community Conservation Lands Guide

Description

In July 2010, the Ministry of Natural Resources (MNR) finalized a policy for its Conservation Land Tax Incentive Program (CLTIP). This voluntary program encourages long-term stewardship of conservation land (e.g., significant wetlands and endangered species habitat) by offering property tax relief to landowners who protect the natural heritage and biodiversity values of their property. At the same time, MNR also approved a Community Conservation Lands Guide (CCL Guide) to assist conservation groups and conservation authorities to both determine whether a property is eligible under the Community Conservation Lands (CCL) category of the CLTIP and prepare a CLTIP application.

The History of Ontario's Conservation Land Tax Incentive Program (CLTIP)

Although Ontario has a rich and varied natural heritage, many of Ontario's significant natural areas are located on private property, restricting the government's ability to maintain and protect them. In 1987, to encourage landowners to be involved in the long-term stewardship of natural heritage values, the government established the Conservation Land Tax Reduction Program (CLTRP), also sometimes referred to as the Conservation Land Tax Rebate Program. Through this program, the government offered private landowners a 100 per cent tax rebate for conserving eligible portions of their properties. Conservation authority properties were also eligible to participate in the rebate program under a "non-revenue producing conservation authority lands" category. In the early 1990s, however, the provincial government removed this category and conservation authorities were considered ineligible organizations for the program. Because the CLTRP was established before the passing of Ontario's *Environmental Bill of Rights, 1993* (*EBR*), there was no requirement for the government to consult the public during its development.

MNR replaced the CLTRP with the CLTIP in 1998 as part of the government's overall property tax reform. While the CLTIP continues the CLTRP's practice of offering 100 per cent property tax relief for the protection of provincially significant natural heritage lands, it does so in the form of a property tax exemption rather than a rebate. (While prior to 1998, eligible property owners would pay taxes to their municipality and apply to the provincial government for a rebate, program participants are now exempt from paying taxes to the municipality for eligible conservation land.) Because MNR considered the changes to this program "predominantly of an administrative nature" and therefore not environmentally

significant, the ministry posted an exception notice on the Environmental Registry (#PB7E4007), avoiding the *EBR* requirement to consult the public.

The types of conservation lands eligible under the CLTIP are identified in O. Reg. 282/98, made under the *Assessment Act*, and include: provincially significant wetlands (PSWs); provincially significant areas of natural and scientific interest (ANSIs); endangered species habitat; and lands designated as escarpment natural areas in the Niagara Escarpment Plan. When O. Reg. 282/98 was first passed in 1998, during the establishment of the CLTIP, an "other conservation lands" category was also included on the list of eligible lands, which re-established conservation authorities (as well as charitable organizations) as eligible landowners. A moratorium, however, was put on the category of "other conservation lands" while the provincial government reviewed the potential impact of conservation authority lands placed under this category.

In July 2000 (and again in April 2002), MNR posted a policy proposal on the Environmental Registry (#PB00E6007) proposing to revise this category. On January 1, 2005, O. Reg. 282/98 was amended to replace CLTIP's "other conservation lands" category with the "CCL" category. The CCL category applies to lands owned by conservation authorities or eligible charitable conservation organizations that have a primary objective of natural heritage conservation. To be eligible for the CCL category, O. Reg. 282/98 stipulates that the land must meet one of 11 criteria. For details on this amendment, the CCL criteria, and the ECO's review of this decision, see pages 58-63 of the Supplement to the ECO's 2005/2006 Annual Report.

The Conservation Land Tax Incentive Program Policy (CLTIP Policy)

In July 2010, MNR finalized its policy for the CLTIP. The newly developed CLTIP policy: articulates the program's objectives and guiding principles; describes the framework to evaluate which lands and land uses are permitted under the program; identifies activities that are inconsistent with program objectives; and identifies how properties should be maintained to remain consistent with program objectives.

Goal and Objectives:
The policy states that the goal of the program is to "recognize, encourage and support the long-term stewardship of specific categories of conservation land by offering tax exemption to those landowners who agree to maintain their land in a manner that contributes to the natural heritage and biodiversity objectives for conserving land." According to the policy, the CLTIP's natural heritage and biodiversity objectives are to:

- Help private landowners protect the natural heritage and biodiversity values of their conservation lands;
- Protect provincially significant conservation lands and regionally significant CCL with representative ecosystems, while promoting natural ecosystem functions, processes and succession;
- Ensure that eligible owners of conservation lands are recognized under the CLTIP;
- Prevent incompatible uses that could negatively affect the natural heritage and biodiversity values on lands included in the program; and
- Work in concert with other provincial and stewardship programs to collectively enhance the conservation, protection and management of natural heritage features and areas.

Land Use:
While O. Reg. 282/98 specifies the types of lands that are eligible for inclusion in the CLTIP, the CLTIP policy elaborates on these criteria to specify land use features and activities that are inconsistent with program objectives. Ineligible land features include: built areas (e.g., buildings, maintained roadways and parking facilities); landscaped and groomed areas (e.g., ski hills, camping areas); farmed areas; and unrepresentative conditions (e.g., plantations and other areas where non-native or invasive vegetative species are a significant component). Ineligible land uses and activities include: commercial timber harvesting; the harvest of non-timber forest products; site alteration (e.g., draining, dredging, aggregate extraction); and motorized vehicle use.

The CLTIP policy specifies that low impact recreational activities, such as hiking, cross-country skiing, snowshoeing, hunting and fishing, are permitted under the program. Moreover, other routine or regular land use activities (e.g., invasive species management, infill planting of representative native species, planned prescribed burns, planned trail maintenance) are also permitted. Other activities, however, require prior approval from MNR to ensure consistency with the natural heritage and biodiversity objectives for conserving the land. These activities include:

- Culling non-native tree species where culling would enhance residual natural heritage values;
- Removing/felling infested or infected trees for health or safety purposes, where the wood is intended to be sold;
- Removing fuel wood for sustainable personal use only;
- Developing or upgrading planned trails (with no demonstrated negative impacts on natural heritage or biodiversity values).

While the CLTIP does not normally allow the sale of forest or non-timber forest products that results in the removal of natural features and/or biodiversity, the CLTIP policy notes that under special circumstances (e.g., the sale of trees removed for safety or health purposes), the limited sale of forest products may be permitted with MNR approval. The policy notes, however, that forest lands that are actively managed to provide revenue and forest products are more appropriate for inclusion in the Managed Forest Tax Incentive Program (MFTIP) (see Other Information). To prevent landowners from inappropriately moving from one incentive program to the other, and to ensure natural heritage features have begun to recover, commercially harvested properties are ineligible to participate in the CLTIP for at least ten years after harvest or until MNR has re-evaluated the property to determine whether CLTIP features and values have been retained. MNR has informed the ECO, however, that new property owners are not subject to this 10-year restriction so long as any necessary restoration efforts have been completed.

Authorization and Approval:
MNR is responsible for identifying and approving the natural heritage features in Ontario that are eligible under the CLTIP. In order to qualify for the CLTIP, a property owner's land must have been identified by MNR as being, or having a component of, a provincially significant natural feature. (The exception to this is land identified as "escarpment natural area" by the Niagara Escarpment Commission and found in the Niagara Escarpment Plan.) After identifying lands possessing eligible natural heritage features, the ministry sends eligible property owners application packages that describe the program and invite landowner participation. To participate in the CLTIP, landowners must submit an application annually to MNR and, if requested, allow the ministry or its agent to inspect land(s) included in the CLTIP. MNR may also audit CLTIP lands to ensure compatibility with the program and policy, and may refine or revise natural feature boundaries that affect CLTIP eligibility.

The policy affirms that MNR is the primary decision maker regarding the eligibility of lands under the CLTIP and may make exceptions to the policy when, in MNR's judgment, an exception still satisfies the requirements of O. Reg. 282/98 and "is in the best interest of the province or CLTIP." If a landowner disagrees with MNR's decision, any person, including a municipality, may bring an appeal under subsection 40(1) of the *Assessment Act*. Municipalities or other governments, including agencies thereof however, are not eligible landowners under the CLTIP.

The Community Conservation Lands Guide (CCL Guide)

At the same time that MNR approved its CLTIP policy, it also approved the CCL Guide. The purpose of this document is to assist conservation groups and conservation authorities to both determine whether a property is eligible under the CCL category and to prepare a CLTIP application. While the CCL Guide provides additional detail to help interpret the requirements in O. Reg. 282/98 under the *Assessment Act*, the regulation continues to be the authoritative text on the eligibility of lands under the CCL category.

Administration:
In order to be approved under the CCL category, conservation authorities or conservation organizations must submit an application to MNR identifying their conservation lands, describing how they satisfy the

criteria set out in section 25(3) of O. Reg. 282/98, and providing supporting documentation. Unlike other lands under the CLTIP, lands in the CCL category that are not currently recognized under the program can be submitted to MNR for consideration by completing an application package available from the CLTIP office.

The CCL Guide outlines: the key dates for submitting applications and requesting reconsiderations; the responsibilities of MNR and other parties (e.g., the Municipal Property Assessment Corporation, landowners, municipalities); and the CLTIP process for notifying applicants of application receipt and approval.

Determining CCL Eligibility:
The CCL Guide outlines the criteria for determining CCL eligibility (as set out in O. Reg. 282/98) and includes a flow chart and detailed steps for assessing property eligibility, reiterating the activities and features that are compatible and incompatible with the CLTIP (see above). One compatible activity that the guide elaborates on is invasive species management; the guide specifies that habitat management to reduce, remove or limit threats from invasive species (e.g., biological or chemical control), that results in a net benefit to the remaining native flora and fauna is permitted. The CCL Guide also points out that land that is eligible for the program under one of the regular CLTIP categories (e.g., PSW, ANSI, endangered species habitat) should not be submitted for CCL consideration Those lands, if not currently identified as eligible, should be submitted to CLTIP for inclusion under those designations.

Completing the CCL Application:
To be approved under the CCL category, conservation authorities or conservation organizations must submit a one-time application to MNR. Once approved, CCL properties are handled in the same manner as non-CCL properties.

The CCL Guide describes the requirements for completing an application, and indicates that the onus is on the applicant to ensure that all necessary information (including a detailed description of the land, detailed property maps, and supporting documentation) is provided. For example, if the applicant is submitting land under the CCL category that "is designated as a natural core area, natural linkage area or countryside in the Oak Ridges Moraine Conservation Plan," the applicant must identify the Oak Ridges Moraine designation and provide a map showing the location and extent of the designated area on the property.

Implications of the Decision

The Conservation Land Tax Incentive Program Policy

Although O. Reg. 282/98 specifies the types of lands that are eligible under the CLTIP, it is silent on the activities that are permitted and prohibited on approved lands, stating only that landowners are "not to engage in activities during the taxation year that are inconsistent with the natural heritage and biodiversity objectives for conserving the land." The new CLTIP policy provides clarity by establishing the framework by which land use activities are evaluated for compatibility with the program, and by providing a (non-exhaustive) list of land uses that are permitted and prohibited under the CLTIP. So while the policy does not necessarily change the features and activities that are permitted under the CLTIP, it does inform the public which types of land uses are permitted on eligible properties.

Because the CLTIP was posted as an exception notice on the Environmental Registry when it was first posted in 1998, MNR's decision to develop and post the CLTIP policy on the Registry in 2010 provided the public with its first opportunity to comment on the program as a whole.

The Community Conservation Lands Guide

The CCL Guide will help conservation authorities and conservation groups determine the eligibility of properties for the CCL category and prepare an application package. Although the guide is largely a summary of O. Reg. 282/98 and the CLTIP policy, the guide should be useful to applicants in that it also

provides timelines and information on the application/notification process, a description of the documentation required for a complete application, guidance on invasive species control and information on the native tree species that are appropriate for land restoration.

Public Participation & *EBR* Process

MNR posted the draft policy and guide on the Environmental Registry in April 2010 for a 31-day comment period, during which the ministry received 25 comments. After reviewing the comments and revising the manual, MNR posted the approved policy and guide in July 2010.

The most common complaint about the draft CLTIP policy was its prohibition on commercial timber harvesting on approved properties. One commenter argued that "automatically deeming a commercial harvest as an unacceptable practice, without providing the landowner an opportunity to modify their harvest operations in a manner that would protect the conservation values is troubling, and is inconsistent with the Ministry's approach and endorsement of good forestry practices." The other common concern was that requirements to notify CLTIP staff for routine endeavours, such as invasive species management, trail maintenance, and tree removal for health and safety purposes, would be onerous and prohibitive for property owners.

Other concerns about the CLTIP policy related to:

- The compatibility of specific activities (e.g., licensed trapping, invasive species management, mowing of fallow fields, tree removal/felling for the direct benefit of species at risk, mountain biking) with the CLTIP;
- The potential financial impact of property tax loss on municipalities; and
- Clarity as to which tree species are considered "appropriate" for restoration purposes.

While most of the submitted comments related to the CLTIP policy, one organization commented specifically on the CCL Guide, expressing concerns over the process and timelines for informing applicants of incomplete, insufficient or incorrect applications. This organization argued that applicants must be notified of incomplete applications and be given the opportunity to revise a rejected application.

Ministry Consideration of Public Comments

MNR reviewed the comments submitted on the policy proposal and made several changes to the draft CLTIP policy and guide before approval. For example, the ministry:

- Added an explanation of the ministry's rationale for continuing to exclude commercial harvesting from CLTIP;
- Clarified that open spaces, such as meadows and grasslands of native species, are recognized under the program;
- Removed the requirement that landowners notify CLTIP staff for routine management activities;
- Added the caveat that MNR has the authority to consider properties that have been commercially harvested within ten years eligible for the CLTIP after a re-evaluation of the CLTIP features and values;
- Added guidance to the guide around timelines for application review/notification, invasive species control, and appropriate native tree species for restoration; and
- Included direction in the guide that CLTIP staff should provide landowners with rationale for application decisions and notification when the eligibility status of CLTIP lands changes.

In its comments to MNR, one organization noted that under the CLTIP, eligible landowners are not required to commit to any management, stewardship or protection plan or even necessarily be informed about what natural heritage or biodiversity values are of interest on their property; landowners need only fill out the CLTIP application form to receive the tax reduction. In contrast, under the MFTIP (see Other Information), eligible landowners must take stock of the values of their forest and commit to a

management/stewardship plan. Arguing that program participation does not necessarily translate into good land stewardship or the protection of the feature(s) of interest, the organization recommended that the province review how the CLTIP might be more effective and efficient if its delivery and requirements were modeled after the MFTIP. In response to this concern, MNR argued that a review of the CLTIP was beyond the scope of this policy development.

Other suggestions that MNR deemed beyond the scope of this policy decision included requests to include threatened species habitat and exclude earth science ANSIs from the CLTIP, since these changes would require amendments to O. Reg. 282/98.

SEV

MNR considered its Statement of Environmental Values (SEV) in making this decision, stating that "as the program provides incentives to private landowners to protect the natural heritage and biodiversity values on their lands to encourage sound stewardship, the program as a whole has a significant positive effect on the environment." MNR explained that the policy: will establish clear program objectives; identify land uses and activities that are consistent with program objectives; provide clarity regarding program eligibility and compatibility; and ensure that program participants are practicing sound stewardship.

Other Information

Managed Forest Tax Incentive Program (MFTIP)

The MFTIP is a voluntary program offered by MNR that provides lower property taxes to participating landowners that agree to conserve and actively manage their forests. While many of the objectives of the MFTIP are complementary to the CLTIP, they differ in that the MFTIP allows the commercial harvest of timber, so long as it is done under an approved plan to ensure ecological sustainability. Currently, the Ontario Forestry Association and the Ontario Woodlot Association provide assistance to MNR in the administration of the program, which offers a 75 per cent tax reduction for landowners who own four or more hectares of forested land and agree to prepare and follow a Managed Forest Plan for their property.

The ECO notes that the MFTIP Guide, which was updated in January 2000 and January 2006, was not posted on the Environmental Registry for public comment. The MFTIP Guide provides guidance on the MFTIP application and approval process, as well as information on the land types that are eligible under the MFTIP. Although the MFTIP itself was posted on the Registry in October 1998 (#PB7E4008), it was posted as an exception notice, averting the need to consult the public through the Registry.

Farm Property Class Tax Rate Program

Under the Farmland Taxation Policy administered by the Ministry of Agriculture, Food and Rural Affairs (OMAFRA), properties assessed as farmland by the Municipal Property Assessment Corporation (MPAC) are eligible for a 75 per cent reduction in the municipal residential tax rate.

ECO Comment

The ECO is pleased that MNR has finally created a policy for the CLTIP, a program that has been operating in the province for over a decade. The ECO is also glad that in posting the CLTIP policy on the Environmental Registry, MNR has finally given the public an opportunity to comment on the CLTIP as a whole, since previous Registry notices were either exception notices or limited to addressing a specific aspect of the program. As the ECO has mentioned before, the CLTIP is one of the most important environmental stewardship programs for private lands in Ontario, and is a cost-effective approach to conserving important land and ecosystems. The new policy and CCL Guide are useful not only in articulating the program's goals and objectives, but also in informing the public as to what land uses are permitted and prohibited under the program.

The ECO is disappointed, however, that the CLTIP and CCL Guide fail to clearly inform the public that new owners of lands (within an eligible feature or designation) that are currently ineligible because of previous disturbance, including commercial harvesting in the past 10 years, may be eligible for the CLTIP, as long as any necessary restoration efforts have been completed. It is important that conservation authorities and other land conservation organizations know that in acquiring recently disturbed lands, they will not be penalized for the land use activities of previous property owners and may be eligible to participate in the CLTIP once appropriate restoration activities have been completed.

While the ECO agrees that changes to the CLTIP that require amending O. Reg. 282/98 are beyond the scope of policy development, because the policy now guides the program's implementation, the ECO believes that the Environmental Registry consultation period on the CLTIP policy would have been the appropriate opportunity for MNR to review the effectiveness of the CLTIP and consider stakeholder suggestions – that do not require amending O. Reg. 282/98 – to improve it. For example, one commenter suggested that the CLTIP policy direct MNR to inform landowners about the natural heritage and ecosystem features on eligible properties and how best to sustain them. Although the CLTIP application MNR sends eligible landowners identifies the natural heritage feature type that makes the property eligible, MNR acknowledges that the program "does not provide information specific to the particular feature and location in respect of monitoring or enhanced stewardship activities." MNR does, however, refer landowners to their local MNR office for more information, and has, in the past, provided participating landowners with A Guide to Stewardship Planning for Natural Areas, which contains information on land stewardship and offers a framework to help rural landowners create a stewardship plan for their property. The ECO believes that adding guidelines to the CLTIP policy that direct MNR to encourage landowners to monitor and nurture features of provincial interest would advance the program goal of promoting long-term stewardship of conservation land.

In May 2007, the government reformed Ontario's species at risk legislation – the *Endangered Species Act, 2007* (*ESA*) – expanding the Act's habitat protection to include not only endangered but also threatened species. Despite this improvement to the Act, MNR's CLTIP program, as established under O. Reg. 282/98, still only allows private landowners to obtain property tax relief if endangered species inhabit their land; although the regulation allows the habitat of threatened and species of special concern to be included in the CCL category, no CLTIP incentives exist for the habitats of threatened species or other species at risk on non-CCL properties. This concern was raised previously by the ECO as well as MNR's *Endangered Species Act* Review Advisory Panel. In our February 2009 Special Report on the *ESA* (The Last Line of Defence: A Review of Ontario's New Protections for Species at Risk), the ECO recommended that MNR, to be consistent with the purposes of the revised *ESA*, "expand its CLTIP to provide financial incentives to private landowners to protect the habitat of a broader range of species at risk, including for recovery purposes."

In November 2010, the ECO requested an update from MNR on government progress in fulfilling this recommendation. In response, MNR stated that after exploring different options, the government decided not to expand the CLTIP's qualification criteria but to instead pursue an alternative approach: the Species at Risk Farm Incentive Program (SARFIP). Publicly announced in November 2008, the SARFIP reimburses farmers for up to 50 per cent of the eligible cost of establishing Best Management Practices that support the protection and recovery of species at risk and their habitat. MNR also noted, however, that while revising the CLTIP to include the habitats of threatened and other species at risk would be contingent on the Ministry of Finance (MOF) passing a regulation under the *Assessment Act*, MNR would support such a regulation.

The ECO believes the CLTIP is a positive initiative that supports conservation in Ontario. However, the ECO has mentioned before that the province may need to pay attention to and, on occasion, financially assist certain smaller municipalities with limited tax bases and extensive eligible conservation lands (see page 63 of the Supplement to the ECO's 2005/2006 Annual Report). In response to an information request on this issue, MOF noted that one of the objectives of the Ontario Municipal Partnership Fund (OMPF) – the province's main transfer payment to municipalities to assist with social program costs – is to support areas with limited property assessment. MOF explained that although the OMPF does not directly compensate municipalities for revenue losses resulting from conservation lands exempt from

property taxes, the calculation of the total weighted assessment, and hence the calculation of some OMPF grant components, does take into account that CLTIP properties do not directly generate municipal revenues.

Review of Posted Decision:

4.15 Standards and Guidelines for Conservation of Provincial Heritage Properties

Decision Information

Registry Number: 010-8883
Proposal Posted: February 4, 2010
Decision Posted: August 20, 2010
Comment Period: 45 days
Number of Comments: 12
Decision Implemented: July 1, 2010

Decision Information:

Registry Number: 010-8884
Proposal Posted: February 4, 2010
Decision Posted: August 20, 2010
Comment Period: 45 days
Number of Comments: 10
Decision Implemented: July 1, 2010

Keywords: provincial cultural heritage properties; Ministry of Tourism and Culture; heritage buildings conservation

Description

Overview

The Ontario government and its agencies own or control many properties with potential for cultural heritage, such as courthouses, bridges and provincial parks. The Ministry of Tourism and Culture (MTC) has the lead responsibility for protecting and conserving cultural heritage in Ontario and administers the *Ontario Heritage Act* (*OHA*), but other agencies have responsibility too.

In April 2010, MTC finalized its policy document "Standards and Guidelines for Conservation of Provincial Heritage Properties," ("Standards and Guidelines") which sets out the criteria and process for identifying provincially-owned or controlled cultural heritage properties and the principles for their protection, maintenance, use and disposal. At about the same time, MTC introduced O. Reg. 157/10 made under the *OHA,* naming the public bodies – in addition to all provincial ministries – to which the standards apply. Thirty provincial ministries, such as the Ministry of Natural Resources (MNR) and the Ministry of Transportation (MTO), and 14 of the government's approximately 600 agencies, such as the Ontario Heritage Trust and Ontario Power Generation (OPG) are bound by the new Standards and Guidelines.

Background

The way that cultural heritage properties – such as significant gardens, buildings and other human-made structures to name a few – are protected in Ontario has evolved over time. Before a round of legislative amendments to the *OHA* that took place in 2005, municipalities were solely responsible for designating properties of cultural heritage value. There was no explicit provision for provincially-owned or controlled heritage properties, although the *OHA* was not binding on the Crown. Municipalities, however, did not use their power to designate properties consistently, and some municipal councils refused to designate cultural heritage properties owned or controlled by the province.

The 2005 amendments to the *OHA* now allow both municipalities and the province to designate *privately*-owned cultural heritage properties. The province, however, can only designate privately-owned properties that are of "cultural heritage value or interest of provincial significance." MTC explained that these amendments were intended to better protect culturally significant properties.

Designating a cultural heritage property imposes restrictions on the alteration of the property or the alteration or demolition of buildings and human-made structures on the property. Before any alterations or demolition can take place, the owner of a designated property needs the written consent of either the municipal council that has designated the property or, in cases of provincial designation, the Minister of Tourism and Culture.

As a result of the 2005 *OHA* amendments, properties of cultural heritage value owned or controlled by the province or prescribed public bodies are now clearly exempt from municipal or Minister designation. Instead, ministries and prescribed public bodies must comply with the Standards and Guidelines for identifying, protecting and maintaining provincially-owned or controlled cultural heritage properties.

Standards and Guidelines

One of the 2005 *OHA* amendments required MTC to prepare standards and guidelines for the identification, management and disposal of provincially–owned or controlled cultural heritage properties. MTC explains that the Standards and Guidelines it developed should bring consistency and uniformity to the management of provincially-owned or controlled cultural heritage properties, establishing standards of identification, protection and care for provincial heritage properties comparable to the designation process that exists for private property. MTC also explains that the prescribed public bodies it named under O. Reg. 157/10 have real property holdings in more than one municipality or in areas without municipal organization and therefore will benefit from a uniform set of standards and guidelines. The scope of cultural heritage properties as defined by the Standards and Guidelines is very broad, encompassing not only buildings and human-made structures but also landscapes and archaeological sites.

The Standards and Guidelines require ministries and prescribed public bodies to develop an evaluation process to identify provincially-owned or controlled cultural heritage properties and subsequently prepare a Strategic Conservation Plan for the maintenance, use and disposal of identified heritage properties. If an identified property is of "cultural heritage value or interest of provincial significance" ministries and prescribed public bodies must submit the Strategic Conservation Plan to MTC for approval.

To determine whether a property is of "cultural heritage value or interest" or of "cultural heritage value or interest of provincial significance", ministries and prescribed public bodies must consider the criteria set out in two regulations under the *OHA*. Ontario Regulation 9/06 specifies the criteria for determining whether a property is of "cultural heritage value or interest" while O. Reg. 10/06 details the criteria for deciding whether a property is of "cultural heritage value or interest of provincial significance."

The Standards and Guidelines state that ministries and prescribed public bodies must only consider the removal or demolition of a provincially-owned or controlled built heritage resource as a last resort, subject to heritage impact assessment and public engagement. Further, ministries and prescribed public bodies must obtain MTC's consent before they remove or demolish provincially-owned or controlled buildings or human-made structures of "cultural heritage value or interest of provincial significance."

Implications of the Decision

The Standards and Guidelines bind the Crown and all ministries and public bodies prescribed by O. Reg. 157/10 that own or occupy provincial heritage properties. Under the standards, ministries and prescribed public bodies have a formal legal obligation to consider cultural heritage value found in real property they own or occupy; also, they must each develop their own cultural heritage conservation policy for a consistent, transparent approach to integrating provisions for conserving provincial heritage properties into decision-making processes. This obligation may strengthen the ability of agencies to request funding for the upkeep of their cultural heritage.

MTC does not expect any significant impact on natural heritage. The Standards and Guidelines are primarily about cultural heritage buildings and structures, although they also encompass landscape elements, such as parks, gardens and battlefields. (For the ECO's discussion of the natural heritage elements of the *OHA*, see pages 76-79 of our 2005/2006 Annual Report.)

MTC states that ministries and prescribed public bodies are encouraged to meet the standards by integrating the requirements into their existing approval processes. For instance, MNR is already required to protect cultural heritage under the *Provincial Parks and Conservation Reserves Act, 2006* and the *Far North Act, 2010*. MTC states that MNR has a team working on integrating the Standards and Guidelines with its existing cultural heritage protection framework.

Bringing provincially-owned or controlled properties under the Standards and Guidelines will likely take a number of years. By the end of June 2011, all ministries and prescribed public bodies must agree with MTC on a timeframe for the submission of their evaluation processes. Since there are no other timelines identified in the Standards and Guidelines, the process may be protracted.

Currently, the number of provincially-owned or controlled cultural heritage properties is unknown. Under the new rules, each ministry and prescribed public body will develop a public listing of its cultural heritage properties; so Ontario will eventually have an inventory of cultural heritage sites.

Conserving and restoring heritage buildings and structures appears to have some environmental benefits. A 2009 report for Parks Canada, for example, found that preserving heritage buildings as compared to constructing new ones can save non-renewable energy used to transform or transport raw materials into products and buildings and cause lower net greenhouse gas emissions. The report concludes that preserving a small fire station in Ottawa, for instance, can spare carbon dioxide emissions equivalent to the energy use of 85 homes for one year. Similarly, preserving a large multi-purpose commercial building in Calgary can avoid carbon dioxide emissions equivalent to the annual energy use of close to 1,600 homes.

Public Participation & *EBR* Process

MTC began its consultation process on its proposed policy and regulatory framework by releasing a discussion paper in November 2005. MTC held discussions with ministries and affected public bodies for five years before its consultation process culminated in two concurrent 45-day Environmental Registry proposal notices posted in February 2010.

The ministry received 12 comments on its policy proposal and 10 comments on its regulation proposal. A summary of the comments is provided below.

No Formal Consultation Process between Province and Municipalities:
Staff of the Planning Division of the City of Toronto characterized the Standards and Guidelines as "a very good framework for maintaining, using and conserving provincial[ly-owned or controlled cultural] heritage properties." A major concern, though, was that the Standards and Guidelines did not provide for a formal consultation process between the provincial bodies responsible for the identification, protection and disposal of provincially-owned or controlled cultural heritage properties and the municipalities in which they are located. MTC did not make any changes to the Standards and Guidelines to address these concerns.

Significant Costs for OPG:
OPG stated that being prescribed as a public body subject to the Standards and Guidelines would entail significant costs and resources for the agency. It noted that conducting heritage assessments of the 65 generating stations that are 40 years and older and hundreds of its other structures would require a lot of financial and human resources. The anticipated costs, OPG cautioned, "would ultimately impact on the Ontario ratepayers through increased electricity rates." MTC replied that the burden on OPG should not be as heavy as perceived because the public body already has processes in place under the *Environmental Assessment Act* to care for its cultural heritage resources.

Narrow the Definition of "Qualified Person":
The Canadian Association of Heritage Professionals and the Ontario Association of Heritage Professionals asked for an amendment to the definition of "qualified person" that appeared in the glossary of the Standards and Guidelines document to include more specific professional credentials and require that qualified persons be members of the Canadian Association of Heritage Professionals. MTC did not make the amendment.

Exclude Forestry Sector:
The Ontario Forest Industries Association asked MTC to explicitly recognize in the Standards and Guidelines document that the standards will not apply to the forest sector or forest management planning and operations on Crown land in Ontario. MTC's document does not contain such an explicit exception.

Procedurally, the ECO is pleased that MTC posted three versions of the Standards and Guidelines document on the Environmental Registry as part of its consultation process. The initial draft provided for the public's familiarization with the proposal; the black-lined draft made it easy for the public to understand what changes the ministry made as a result of considering the comments it received; the approved final document can easily be compared to the preliminary drafts and the public can trace the modifications it underwent.

SEV

In its SEV consideration document, MTC stressed the link between the preservation and protection of cultural heritage and the protection of the natural environment. MTC stated that "adaptive reuse of heritage buildings helps protect green field land, requires less energy for the creation of new products and services, uses less landfill space, and reduces the generation and release of pollutants that threaten the integrity of the environment."

ECO Comment

The ECO is supportive of MTC's initiative to develop the Standards and Guidelines. Under the pre-2005 *OHA* regime, some provincially-owned or controlled cultural heritage properties might not have been identified and protected. The Standards and Guidelines may eventually increase the overall number of built structures in Ontario that are required to be preserved and/or retrofitted for cultural reasons.

The Standards and Guidelines may also add consistency, transparency and accountability to the evaluation and management of provincially-owned or controlled cultural heritage properties. MTO, for example, has several existing processes to guide ministry staff and service providers on managing MTO properties, including heritage components, and will be updating them to reflect MTC's Standards and Guidelines. The result should be a more uniform, clearer and more traceable process for identifying and dealing with cultural heritage properties. The Standards and Guidelines should enhance the public's understanding of the process ministries and prescribed public bodies use to treat cultural heritage properties.

SECTION 5

ECO REVIEWS OF APPLICATIONS FOR REVIEW

SECTION 5: ECO REVIEWS OF APPLICATIONS FOR REVIEW

5.1 Ministry of Agriculture, Food and Rural Affairs

Review of Application R2010010:

5.1.1 The Need to Green Ontario's Definition of Infrastructure (Review Denied by OMAFRA, MOE, MMAH, MNR, MTO, MOI)

This application was reviewed in conjunction with R2010011 (MOE), R2010012 (MMAH), R2010013 (MNR), R2010014 (MTO) and R2010015 (MOI). Please see Section 5.5.3 of this Supplement for the full review.

5.2 Ministry of Energy

Review of Application R2010003:

5.2.1 Need for Policies to Support the Development of Ammonia as a Carbon-Free Alternative Fuel Source (Review Denied by ENG)

Keywords: ammonia; carbon; fuel; energy

Background/Summary of Issues

In September 2010, two Ontario residents requested that the Ministry of Energy (ENG) review the need for a policy to support the development of ammonia (NH_3) as both an alternative transportation fuel and a medium to store electricity. The applicants argue that ammonia is a carbon-free fuel which, if utilized more broadly, can contribute to the government's goal of moving toward a less carbon-intensive society. They also argue that other social benefits would accrue from using ammonia as a fuel source, including: less dependence on imported oil; a reduced need to extract oil in environmentally sensitive areas; cost savings for Ontarians and the creation of high paying jobs in the manufacturing industry.

What is Ammonia?

Ammonia (also referred to as NH_3 or anhydrous ammonia) is one of the most widely used chemicals in the world. Most commonly used for its nitrogen content in the production of fertilizer, ammonia is also used as a refrigerant gas, in the manufacturing of other chemicals and in many household and industrial cleaning products. Ammonia also occurs naturally in the environment as the result of the decomposition of organic matter.

A colourless, malodourous gas at room temperature, ammonia becomes a clear liquid under moderate pressure. Ammonia vapours are an irritant at low concentration, and can be life threatening at high concentration. Ammonia is also corrosive, and while it is officially classified as non-flammable, in gas form it does have flammability potential and an explosive range. In the environment, ammonia is particularly harmful to aquatic organisms such as fish and amphibians. Both gaseous ammonia and ammonia

dissolved in water are listed as toxic substances under Schedule 1 of the *Canadian Environmental Protection Act, 1999*.

Ammonia is created by the catalytic reaction of nitrogen and hydrogen. It can be produced synthetically by combining nitrogen and hydrogen at high temperature and pressure. The hydrogen required to produce ammonia can be derived from a variety of energy sources, including fossil fuel combustion or through renewable resources such as hydro, wind or nuclear power. On combustion, the by-products of ammonia are nitrogen and water.

Ammonia as an Alternative Fuel

Ammonia has been contemplated (and, in some cases, used) as an alternative fuel for decades. Because the combustion of ammonia fuel does not result in greenhouse gas emissions, its potential as an environmentally friendly transportation fuel has gained some momentum in recent years. It is considered by some as a solution to the need to reduce dependence on fossil fuels and reduce greenhouse gases.

Some of the key arguments used to support ammonia as an alternative fuel include:

- *Environmentally friendly/sustainable:* When produced using renewable resources, ammonia is a completely carbon-free fuel source.

- *Versatility*: Ammonia can be used directly in internal combustion engines (with minor modifications), ammonia fuel cells, gas turbines and spark ignition engines, and can be used to store hydrogen for hydrogen fuel cells.

- *Existing infrastructure*: Because ammonia is one of the most commonly produced chemicals in the world, ammonia storage and transportation systems already exist. Advocates also argue that existing pipelines and fuel distribution systems could be easily converted to accommodate ammonia fuel.

- *Low cost*: Ammonia is widely claimed to be cost effective to produce and cost competitive with other transportation fuels.

- *Safety*: While safety issues with ammonia fuel involving toxicity and flammability have been identified, advocates suggest that the safety issues associated with ammonia are, at worst, comparable to those associated with gasoline and other fuels.

Additionally, ammonia, which is sometimes called “the other hydrogen” because of its potential as a clean energy carrier and storage medium, is argued to be a safer, less expensive, more efficient and more commercially viable fuel than hydrogen.

In support of this application, the applicants state that their own vehicles and tractors run, at very low cost, on ammonia produced using non-carbon resources, and that those vehicles have no carbon emissions.

Ministry Response

In November 2010, ENG denied this application. The ministry concluded that the public interest did not warrant a review of the use of ammonia as fuel due to uncertainty regarding its environmental impact and its market and economic viability.

The ministry stated that while ammonia can be produced from renewable sources, it is more commonly produced by fossil fuels, resulting in significant greenhouse gas emissions. ENG remarked that it would be challenging for a policy promoting the use of ammonia to distinguish between “green” ammonia and carbon-intensive ammonia. The ministry also pointed to uncertainty regarding the safety of frequent consumer handling of ammonia, and whether emissions of nitrous oxide and other substances resulting

from the combustion of ammonia would be within acceptable levels. The applicants had not supplied any environmental impact analysis of the combustion of ammonia to address these issues.

In terms of ammonia as a transportation fuel, ENG identified a number of barriers related to cost, vehicle compatibility and consumer acceptance. For example, the ministry noted that ammonia has a lower energy content than gasoline, ethanol or biodiesel, which, from a cost-per-kilometre perspective, would limit adoption by consumers. Vehicle manufacturers do not appear to be designing ammonia-fuelled vehicles, unlike other petroleum alternatives such as ethanol blends, biodiesel and electricity, and the availability of after-market retrofits to use ammonia as fuel is unlikely to result in significant consumer uptake. The ministry also observed that the Canadian General Standards Board does not appear to be working on an ammonia-based transportation fuel standard, while standards for ethanol blends and biodiesel are either in place or in active development. Similarly, other jurisdictions are not using ammonia as fuel, suggesting that "ammonia is well behind other alternatives to gasoline and diesel in terms of market readiness and consumer acceptability." In short, ENG stated that while using ammonia as a transportation fuel is technically feasible, the technology "is more in the incubation stage of product development and not yet prepared for widespread deployment."

Finally, ENG noted that the applicants had not provided any information to demonstrate the economic viability of using ammonia as fuel. In particular, the ministry wondered whether ammonia produced from renewable sources would be cost competitive with gasoline or diesel, and surmised that the use of ammonia to store electricity would be costly.

Given all of the foregoing, the ministry concluded that "the level of market development of ammonia as a fuel does not appear to be sufficiently advanced at this time to warrant a new Government of Ontario policy to promote its development, commercialization, and adoption."

However, ENG suggested that the applicants consider other opportunities to pursue the idea of using ammonia as fuel, including the Ministry of Research and Innovation (MRI)'s Innovation Demonstration Fund, which "allows MRI to partner with innovative companies to develop emerging technologies, with a preference towards environmental, alternative energy, bio-products, hydrogen and other globally significant technologies." The ministry also suggested contacting the Ontario Network of Excellence, "a collaborative network of organizations across Ontario designed to support commercialization of ideas."

For the full text of the ministry decision, please see our website at www.eco.on.ca.

ECO Comment

The ministry appears to have undertaken a thorough and thoughtful preliminary evaluation of this application for review, and its reasons for denying the application seem reasonable. It would be premature for Ontario to develop policies promoting the development and use of ammonia as a transportation fuel without resolving uncertainties about its viability from both the market standpoint and the health and environmental perspective.

Nevertheless, the applicants have raised a valid and important issue. We must seek alternative fuel sources as oil shortages loom, and we must reduce our greenhouse gas emissions in the face of climate change. Ammonia bears consideration as a potential, if partial, solution to both of these dilemmas. Indeed, there appears to be no question that ammonia could technically be used as fuel for transportation and other purposes, or that it may, if produced from renewable sources, represent an environmental and sustainable solution. However, questions about the feasibility of such a prospect – alone and in comparison to other fossil fuel alternatives – must first be satisfied.

The province should support innovative research and development of alternative fuel sources. The ECO is therefore pleased that ENG directed the applicants to MRI's Innovation Demonstration Fund and to the Ontario Network of Excellence, and urges ENG to take every opportunity to encourage and assist proponents of innovative and emerging technologies that could help move Ontario towards a carbon-free economy.

5.3 Ministry of the Environment

Review of Application R0334:

5.3.1 Classification of Chromium containing Waste as Hazardous (Review Undertaken by MOE)

Background/Summary of Issues

Over 15 years ago, in November 1995, two applicants from the tanning industry requested that the Ministry of the Environment (MOE) regulate the different forms of chromium according to their toxicity.

Chromium is a metal that is used for a variety of purposes, including the production of stainless steel, chrome plating, and as a catalyst in the dyeing and tanning of leather. There are a number of different chromium compounds, but only some forms are toxic. Hexavalent chromium, for example, is known to cause health effects, such as skin rashes, allergic reactions, respiratory problems, kidney and liver damage and lung cancer, particularly in people who work in the steel and textile industries. Hexavalent chromium was declared toxic to the environment and a danger to human life or health under the *Canadian Environmental Protection Act, 1999* (*CEPA*).

In Ontario, a waste is considered "hazardous" under Regulation 347 - General – Waste Management, made under the *Environmental Protection Act* (*EPA*), if the total chromium level in a leachate test exceeds five milligrams per litre, regardless of whether the waste contains the toxic or non-toxic forms of chromium. The applicants noted that leather tanning uses only the trivalent form of chromium and less than 5 per cent of the chromium in tannery waste is typically available for leaching. However, under Regulation 347, tannery waste is usually designated as "hazardous", and must be transported and disposed of at a higher cost than non-hazardous waste. The applicants argued that continuing to classify the non-toxic form of chromium as hazardous "places an unnecessary economic burden on industry" for managing chromium-contaminated waste and diverts resources away from "more legitimate environmental concerns."

The applicants noted that other jurisdictions, including the United States, differentiate between toxic and non-toxic forms of chromium.

Ministry Response

In 1996, MOE agreed to undertake the review, advising the applicants that the ministry's review would be "coordinated and harmonized with the federal review of the national hazardous waste definition." In 2005, the federal government updated the national hazardous waste regulations, which did not include an exemption for tanning waste containing chromium. Despite this federal decision – which ostensibly was the cause of the delay of the ministry's review – MOE still has not made a decision on this application.

ECO Comment

In past reports, the ECO has repeatedly criticized MOE for its unprecedented delay – now over 15 years – in making a final decision on this *EBR* application. MOE's objective of co-ordinating and harmonizing its review with the federal government's review was understandable in 1996; however, when it became apparent that national efforts would be protracted, MOE's failure to take independent action could no longer be justified. The ECO once again urges MOE to make a decision and close this application.

Review of Application R2007018:

5.3.2 Fluorides in Drinking Water (Review Undertaken by MOE)

Keywords: Canadian Drinking Water Quality Guideline; drinking water; fluorides; Health Canada; hydrofluorosilicic acid; Ministry of the Environment (MOE); *Safe Drinking Water Act, 2002* (*SDWA*)

Background/Summary of Issues

In November 2007, two applicants requested that the Ministry of the Environment (MOE) review existing policies, regulations and standards (as well as the need for new regulations and policies) under the *Safe Drinking Water Act*, *2002* (*SDWA*) as they relate to the addition of inorganic fluorides (and any other accompanying contaminants) to drinking water.

Although Japan, China, almost all of Europe, and some Ontario cities (e.g., Welland, Thorold and Dryden) have banned or stopped adding fluoride to drinking water, several municipalities in Ontario continue this practice. Most fluoridated communities in Ontario add hydrofluorosilicic acid (an inorganic fluoride) to their drinking water. The applicants assert that the "additions of toxic inorganic [vs. organic] fluorides…with its accompanying contaminants such as inorganic arsenic and lead into our drinking water" have:

- resulted in increased contamination of groundwater, surface water and sewage effluent to water bodies and natural environments;
- caused significant harm to water bodies, ground water sources and the life therein; and
- caused harm to the health of certain subsets of the population, including babies, pregnant women, fetuses and the elderly.

Ministry Response

MOE agreed to undertake this review in February 2008. The ministry indicated that Health Canada, as secretariat to the Federal-Provincial-Territorial Committee on Drinking Water (CDW), was revising the technical support document for the Canadian Drinking Water Quality Guideline for fluoride and was expected to conduct a national consultation within two years. MOE stated that the Government of Ontario participates on the CDW and will consider the applicants' comments before undertaking a provincial consultation via the Environmental Registry. MOE noted that this provincial consultation "will be carried out at the same time as Health Canada conducts the national consultation." The ministry stated that comments received through the provincial public consultation, as well as materials provided in the application, will be considered by the province in setting new policies regarding fluoride in drinking water.

In September 2009, MOE posted an information notice on the Environmental Registry (#010-7777) informing the public and stakeholders that Health Canada was consulting the public on its technical support document "Fluoride in Drinking Water." Health Canada's national consultation period was held for 71 days, ending November 27, 2009. In the information notice, MOE indicated that it would carry out its own consultation under an Environmental Registry policy proposal notice once the Health Canada document had been finalized. The ministry stated that it will use information provided by Health Canada's consultation to review and amend, if necessary, its position on fluoridation as outlined in the ministry's "Technical Support Document for Ontario Drinking Water Standards, Objectives and Guidelines."

In January 2010, MOE sent a letter to the applicants to update them on the status of their application for review. MOE explained that Health Canada was in the process of compiling and reviewing the many comments it had received. Moreover, the ministry noted that Health Canada was responding to a federal

petition regarding fluoride, which could delay the review and finalization of Health Canada's rationale document for at least a year. The ministry noted that this delay would in turn delay MOE's review of fluoride. MOE assured the applicants that it is still committed to reviewing any new information cited in the final version of Health Canada's rationale document that may have an impact on provincial policies regarding the fluoridation of Ontario's drinking water. Moreover, the ministry stated that if this review results in any changes to policies related to inorganic fluorides in drinking water, it will conduct stakeholder consultation on the Environmental Registry.

In January 2011, the ECO contacted MOE for an update on the status of Health Canada's guideline revision and therefore MOE's fluoride review. MOE responded that Health Canada's revised Canadian Drinking Water Quality Guideline for fluoride has undergone a number of delays. Although Health Canada expected to post the final guideline rationale document in the first quarter of 2011, the calling of a federal election in March 2011 delayed document postings by the federal government. MOE mentioned that it hopes Health Canada will post the final document in the near future, at which time the ministry will provide a final response to the application for review.

ECO Comment

The ECO will review the handling of this application once the ministry has completed its review.

Review of Application R2008014:

5.3.3 Need for Air Pollution Hot Spots Regulatory Reform (Decision Undertaken by MOE)

Keywords: Aamjiwnaang First Nation; Air Quality Management System; air pollution; cumulative impacts; hot spots; Ministy of the Environment (MOE); Statement of Environmental Values

Background/Summary of Issues

In January 2009, two applicants requested a review of the need for a new regulatory framework to fill gaps in Ontario's air pollution laws related to cumulative impacts of pollution, particularly air pollution "hot spots." Hot spots are described by the applicants as "multi-pollutant, multi-facility areas with significant background levels of pollutants or pollutant levels from local sources that exceed toxic air pollutant standards and areas impacted by persistent, bioaccumulative, toxic air pollutants from industrial sources."

The applicants are concerned that air pollution hot spots in Ontario threaten the physical and psychological health of people living in those areas, and compromise their right to live in a healthful environment. As evidence of significant deficiencies in Ontario's air pollution regulatory regime, the applicants cited the environmental health crisis in the community of Aamjiwnaang First Nation near Sarnia, an air pollution hot spot area known as "Chemical Valley." The applicants assert that the current regulatory framework is "unable to adequately protect the environment or human health from the dangers associated with air pollution."

The applicants asked the Ministry of the Environment (MOE) to:

- Identify Pollution Hot Spots areas in Ontario requiring pollution reduction plans;
- Regulate air pollution in hot spot areas using a cumulative effects approach;
- Require that any assessment, report or estimate of emissions and/or pollutant concentrations include background levels of pollution;
- Require MOE standards to be ratcheted down over regulated enforceable timelines;

- Make the reduction of emissions of persistent and bioaccumulative pollutants a priority;
- Require that "maximum achievable control technologies" and "lowest achievable emission rates" be used to achieve a reduction of overall emissions;
- Require ongoing monitoring of emission sources at industrial facilities;
- Engage community members and industry in the development of pollution reduction plans;
- Prohibit the issuance of new or amended Certificates of Approval (C of A) while pollution reduction plans are being developed, unless the approvals would result in a reduction of emissions; and
- Ensure that pollution reduction plans set out maximum limits on pollution that can be approved by MOE under the C of A process.

The ECO forwarded the application to MOE.

Ministry Response

By letter dated May 11, 2009, MOE notified the applicants that it would undertake the requested review. MOE stated that it is

> committed to developing the long-term tools, including science, policies and guidelines to support the application of an ecosystem approach, including consideration of cumulative effects. As such the ministry is currently reviewing how it applies the principles of its Statement of Environmental Values (SEV), including cumulative effects assessment and the ecosystem approach, in its environmentally significant decision making.

The ministry advised the applicants that, as part of its review of the environmental decision-making process, it would review the matters raised in the application. The ministry noted that if the review concludes that the current framework warrants revision, the ministry "will actively engage the regulated community, local residents, and other stakeholders."

In May 2010, the ECO requested an update from MOE on the status of its review. MOE informed the ECO that the ministry has been working on its SEV Guiding Principles Review, which is considering "how to best operationalize the SEV principles, including consideration of cumulative effects." MOE stated that as part of the SEV project, the ministry is looking at new approaches, examining experiences in other jurisdictions, and actively considering the proposal presented in the application for review.

A year later, MOE had not yet completed its review. In May 2011, the ECO requested another update on the status of the ministry's review. MOE responded that it continues to consider the issues raised in the application as the ministry determines how best to incorporate cumulative effects assessment in its decision-making processes. MOE also responded that "the ministry is working on a number of initiatives that are expected to incorporate a cumulative approach, including its work with [the Canadian Council of Ministers of the Environment (CCME)] regarding proceeding with an Air Quality Management System, participation in a research consortium on aquatic cumulative effects and requiring proponents to undertake formal cumulative effects assessments on a case-by-case basis."

Other Information

In October 2010, the CCME announced that federal, provincial and territorial Ministers of the Environment are "moving forward with a new collaborative air management approach to better protect human health and the environment." The CCME stated that the proposed new air quality management system would: include more ambitious Canadian air quality standards and consistent industrial emissions standards across the country; and establish regionally co-ordinated airsheds and air zones within individual provinces and territories. The system, which is based on a proposed model developed by a committee of experts, is to be developed in 2011 and begin implementation in 2013.

ECO Comment

The ECO is pleased that MOE has agreed to undertake this review. As MOE's review is ongoing, the ECO will report on the ministry's handling of this application and the outcome of the review in a future reporting year.

Review of Application R2009015:

5.3.4 Request for New Rules on Airborne Fine Particulates to Protect Health (Decision Underway by MOE)

Background/Summary of Issues

On December 18, 2009, the Town of Oakville used the *EBR* to request new rules to protect human health from airborne fine particulate matter (fine PM). The town issued a related news release arguing that existing regulatory frameworks do not protect communities from fine PM. The news release cited Oakville's mayor, Rob Burton, who explained "There is no limit on fine PM concentrations now, and no limit on how much more can be added into our already overtaxed airshed. We're requesting a regulation that would require extensive assessment of the total fine PM levels for an area, and then ensure the results of the assessment are public. Residents should have an opportunity to comment before the Province makes any decisions that could affect their health."

The application suggested that the Ministry of the Environment (MOE) might be most appropriate to implement this request, and noted that MOE is committed to considering cumulative effects on the environment, according to its Statement of Environmental Values. The ECO sent this application to MOE.

Ministry Response

MOE received additional information from the applicants on April 16, 2010 and consequently shifted the 60-day legislative time line for a response to June 15, 2010. After advising the applicants of two further delays totalling five months, MOE issued its decision on November 15, 2010. MOE's decision concluded that while the province does have a comprehensive strategy to address fine particulate emissions and precursors, a review is warranted of the effectiveness of the current policy framework in addressing fine PM. Specifically, MOE acknowledged that "there may be a policy gap with respect to domestic sources of primary $PM_{2.5}$." The ministry noted that its review would take a minimum of 15 months – inferring completion by February 2012 or later.

ECO Comment

The ECO will review the outcome of this application once MOE's review is released.

Review of Application R2009016:

5.3.5 New Regulation Providing for Stays Pending Decisions on Leave to Appeal Applications filed under the *EBR*

(Review Pending by MOE)

Keywords: leave to appeal; appeal; stay; procedure; Environmental Review Tribunal; *Environmental Bill of Rights, 1993*

Background/Summary of Issues

The applicants filed a request for a new regulation under the *Environmental Bill of Rights, 1993* (*EBR*) that would provide jurisdiction to stay a decision subject to a leave to appeal (LTA) application made under the *EBR*. A "stay" would suspend any activities permitted by an instrument while an LTA application challenging the decision to issue the instrument is being considered. If leave is granted, the *EBR* already provides for an automatic stay pending the outcome of the appeal.

LTA applications under the *EBR* are adjudicated by administrative tribunals such as the Environmental Review Tribunal (ERT). Although the ERT attempts to render decisions on LTA applications within 30 days of receiving an application, many factors can prolong deliberation on whether to grant leave.

Delays in the LTA process are problematic because there is currently no way for the ERT to stay the government's decision pending a determination on whether leave should be granted. The applicants contend that this lack of jurisdiction leads to uncertainty, and can give rise to "a situation where significant harm can be inflicted on the environment pending a decision on leave to appeal." The applicants cited an example in which a Permit to Take Water (PTTW) for an area near a provincially significant wetland was completely acted upon before residents had an opportunity to challenge the merits of the permit in a formal hearing before the ERT.

The applicants noted that Cabinet has the power, under subsection 121(1)(s) of the *EBR*, to make regulations "providing for stays pending decisions on applications for leave to appeal." However, to date no regulation has been made. The applicants argued that a new regulation providing for stays pending LTA decisions would be in the public interest and would support the purposes of the *EBR* to protect and restore the environment and to enhance public participation.

Ministry Response

Under the *EBR*, MOE was required to make a decision on whether to undertake the requested review by March 19, 2010 (i.e., 60 days after receipt of the application). On March 22, 2010, the responsible Assistant Deputy Minister (ADM) in the ministry's Integrated Environmental Policy Division wrote to the applicants and explained that MOE was unable to make a decision by March 19, 2010, and that a decision would be provided to the applicants and the ECO by May 14, 2010. On May 14, 2010, the ADM notified the applicants that MOE had still not made a decision but would be in a position to render a decision by July 30, 2010.

On August 23, 2010, MOE finally provided the applicants with its preliminary decision on the application. The ministry informed the applicants that it would undertake the requested review, but only as it relates to PTTWs. The ministry explained that it would be limiting the review to PTTWs, as they are instruments that may potentially be implemented or expire before a LTA request is heard by the ERT, and because PTTWs were not affected by the ministry-wide Modernization of Approvals program underway at the time. MOE indicated that it would need twelve months to complete the review.

ECO Comment

The ECO will review the handling of this application once the ministry has completed and provided a decision on its review.

The ECO is very concerned that MOE took over seven months to render its decision on whether to conduct the requested review. There is no discretion for a minister to extend the 60-day time period to make a preliminary determination under section 70 of the *EBR*.

Review of Application R2009017:

5.3.6 The "MISA" Regulations under the *Environmental Protection Act* (Decision Denied by MOE)

Keywords: wastewater; effluent; MISA regulations

Background

On January 15, 2010, two applicants requested a review of the province's MISA regulations. The "MISA" or "Municipal-Industrial Strategy for Abatement" regulations are a group of nine regulations under the *Environmental Protection Act* that regulate the discharges from prescribed industrial sectors into surface waters.

The MISA regulations were introduced between 1993 and 1995 to help meet the province's commitments under the "Canada/Ontario Agreement Respecting the Great Lakes Basin Ecosystem" (COA) to reduce the volume of harmful pollutants entering the Great Lakes environment. At the time of development, the Ministry of the Environment (MOE) stated that the goal of the MISA program was "the virtual elimination of persistent (long-lasting) toxic contaminants from discharges to Ontario's waterways."

To achieve that goal, the MISA regulations set out limits on the amount of toxic substances that can be directly discharged into surface waters from Ontario's nine industrial sectors with large wastewater discharges. These nine sectors are the: petroleum, pulp and paper, metal mining, industrial minerals, metal casting, organic chemical manufacturing, inorganic chemical manufacturing, iron and steel manufacturing, and electric power generation sectors. Despite MOE's original intent to also regulate wastewater discharges from the municipal sector, no such MISA regulation was ever developed. Furthermore, the MISA regulations only regulate direct discharges; they do not regulate industrial discharges that flow into municipal sewer systems.

Each MISA regulation includes a list of prescribed facilities, identified by name, that are subject to that sector's MISA requirements. Currently, there are approximately 140 facilities within the nine MISA sectors that are regulated in Ontario under the MISA framework.

Generally, each MISA regulation sets out limits on the permissible concentration (i.e., maximum milligrams of contaminant per litre of effluent) and/or the facility loading (i.e., maximum total kilograms of discharged contaminant) of specific chemicals of concern that can be discharged directly into surface waters from each regulated facility. The regulations set out two types of numerical limits – maximum daily limits and monthly average limits – as well as an "acute lethality" limit, which requires facilities to ensure that the effluent is not lethal to fish and water fleas.

In order for facilities to demonstrate that their effluent meets both the numerical limits and the acute lethality tests, each MISA regulation includes a number of sampling and monitoring requirements. In

addition, regulated facilities are required to submit quarterly reports to MOE and publish annual reports. Facilities must also report any incidents of non-compliance directly to MOE.

Summary of Issues

The applicants argue that a complete review of the MISA regulations by MOE is long overdue given that there has not been a comprehensive review of the MISA regulations since they were first introduced over 15 years ago.

The applicants provide two main grounds to support their argument that a review of the MISA regulations is needed: first, the original MISA goals and/or policies were never achieved; and second, even if the original MISA goals and policies were fully realized, they are insufficient to protect the environment.

More specifically, the applicants set out the following arguments:

No Mandatory Pollution Prevention

"Pollution prevention" was a stated principle of the MISA program. The applicants argue that this implies that the intent of the MISA program was to establish a preventative regulatory framework that focuses on avoiding the generation of contaminants at the point of use or creation. The applicants state that, instead, the MISA regulations focus on end-of-pipe pollution control at the point of discharge. As such, the applicants argue that the MISA program fails to mandate pollution prevention as was originally intended, with one exception – the MISA regulation for the pulp and paper industry required facilities to reduce the generation of adsorbable organic halides during the bleaching process, with the goal of completely eliminating these toxic compounds at pulp and paper mills by 2002.

The applicants note that the province's recent *Toxics Reduction Act, 2009* (*TRA*), which requires facilities to undertake an accounting of their toxics use and to develop toxics reduction plans, could arguably fill this void. However, as the *TRA* currently does not mandate any pollution reduction, the applicants assert that the *TRA*'s voluntary approach cannot be claimed to address this deficiency of the MISA regulations.

Accordingly, the applicants argue that the MISA regulations should be reviewed and revised to require MISA facilities to undertake pollution prevention actions to reduce contaminant discharges to surface waters (possibly in conjunction with the *TRA*).

No Periodic Review or Increase in Stringency of Discharge Limits

When developing the MISA regulations, MOE stated that the regulatory requirements "would be reviewed every five years with a view to establishing more stringent requirements." The applicants state that, contrary to this intent, the ministry has never undertaken a review of the regulations, has made very few revisions to the discharge limits, and any revisions that were made were made well over a decade ago.

The effluent limits were originally set in the early 1990s, based on data collected of the actual contaminant levels in the effluent in the late 1980s and early 1990s, and based on considerations of the best available technology economically achievable (BATEA) at that time. Since then, the applicants argue, treatment technologies and processes have improved, new technologies have been developed, and the costs of older technologies have decreased. Many technologies that would have been cutting edge, too expensive, or non-existent when the regulations were first brought into force are now common place and cost effective, and thus would now be considered "BATEA". In support of this argument, the applicants reference the Industrial Pollution Action Team (IPAT)'s Discussion Document submitted to MOE in 2004, which observed that the province was requiring industries to comply with regulations and BATEA that were, even then, significantly outdated.

The applicants assert that the failure to revise the MISA standards as technologies advance provides a disincentive for dischargers to improve their treatment processes. The applicants also state that, in several cases, the MISA discharge limits are so outdated as to have become almost meaningless.

Facilities in some industries are required – and are able – to meet discharge standards through their Certificates of Approvals (Cs of A) that are significantly more stringent than the MISA limits. Again, the applicants quote the IPAT report, which similarly stated that there has been very little incentive for industry to move beyond the outdated regulatory requirements and technologies. The IPAT report concludes that, rather than updating discharge limits in individual Cs of A, which is complex and resource-intensive, ministry resources "could perhaps better be directed to regular review and updating of [the MISA] regulatory limits."

The applicants also provide examples of discharge standards from other comparable jurisdictions to demonstrate just how much Ontario has failed to keep pace. In particular, the applicants provide a useful sampling of some European Union reference documents on best available technologies and achievable discharge limits for several industry sectors.

Accordingly, the applicants argue that the MISA regulations should be reviewed, as was originally intended, and updated to provide discharge standards that are more in line with present-day BATEA, and that keep pace with other comparable jurisdictions.

No Regulation of Municipal Sewage Effluent

In 1986, when MOE first announced the MISA program, it promised to address effluents from over 400 municipal sewage treatment plants (STPs). However, when an economic recession hit in the early 1990s, the Ontario government quietly shelved its plans to regulate municipal STPs (the last sector slated for regulation on the MISA timetable). Despite MOE's original intent, the municipal "M" part of "MISA" never came to be.

The applicants state that, without a regulation that sets out standards for municipal wastewater effluent, there is no consistency across the province with respect to the level of treatment or quality of municipal wastewater effluent. In Ontario, the operation of each municipal STP is governed by its C of A, which can include widely varying effluent limits, conditions of operation, and reporting requirements. Although the Cs of A are developed in reference to several ministry policy guidelines (such as MOE's F-series sewage treatment guidelines), MOE can, and does, set different conditions on a case-by-case basis.

The applicants also assert that "[t]he lack of regulation with respect to sewage discharges gives the impression that the province does not believe regulating this source of pollution (the largest source in Ontario of pollution to surface water) is a priority." As a result, the applicants state that municipalities similarly place low priority on upgrading sewage systems and addressing this source of pollution.

Given the extent of municipal sewage pollution in Ontario, the applicants assert that the MISA program must be reviewed and amended to incorporate a municipal sewage regulation as soon as possible. The applicants acknowledge that the federal government proposed (in March 2010) a national wastewater regulation under the *Fisheries Act*, but regardless, the applicants argue that the municipal sewage regulation should include more stringent limits and should apply to more pollutants than the proposed federal regulation.

No Regulation of Industrial Discharges into Sewers

By regulating discharge limits for municipal STP effluent, the MISA program was intended to indirectly regulate the contaminants in industrial wastewater that are released into municipal sewers. Accordingly, when MOE announced the MISA program in 1986, the ministry also proposed to develop a complementary program to control industrial discharges into municipal sewers. However, as noted above, this municipal part of the MISA program was never developed.

Instead, the applicants state that the province is simply relying on municipal sewer-use by-laws to control the industrial contaminants that enter municipal sewers. However, the applicants note that MOE does not require municipalities to have sewer-use by-laws, and those by-laws that do exist can vary greatly from

one municipality to the next. The applicants also remark that many municipalities lack the ability to enforce these by-laws.

The applicants note that STPs are designed to treat domestic sewage, not industrial wastewater. Therefore, to prevent the release of industrial pollutants to surface water (which can pass through the STPs untreated), the applicants assert that the MISA regulations should be amended to include industrial pre-treatment requirements for sewer discharges, particularly for constituents that are not treated by STPs.

MISA Does Not Consider Cumulative Effects (Contrary to MOE's SEV)

The applicants note that the MISA regulations do not take into account the existing conditions of a waterbody or the cumulative impacts of multiple facilities discharging into a watershed. In fact, as the applicants note, the developers of the MISA program explicitly stated: "Net loadings (the difference between the contaminants discharged, and the contaminants already present in the water) will not be used to develop effluent limits."

The applicants state that this approach is contrary to MOE's Statement of Environmental Values (SEV). MOE's SEV states that "the Ministry considers the cumulative effects on the environment" when it develops acts, regulations and policies. The applicants acknowledge that the MISA regulations were developed around the same time that the *Environmental Bill of Rights, 1993* (*EBR*), which established the requirement for ministries to develop and consider SEVs, was being passed. The applicants assert, however, that if the MISA regulations had been reviewed (as intended), they would have been brought into compliance with MOE's SEV.

The applicants cite Hamilton Harbour and the St. Clair River as two examples that demonstrate the need to take into account existing conditions of a waterbody and the cumulative impacts of multiple dischargers. The applicants note that both Hamilton Harbour and the St. Clair River have been designated as "Areas of Concern" under the Great Lakes Water Quality Agreement, and yet, under MISA, large numbers of industrial facilities are permitted to continue discharging toxic pollutants (both directly and via the sewage treatment plants) into these bodies of water.

The applicants argue that the MISA regulations must be reviewed and amended to comply with MOE's SEV. Specifically, the MISA regulations should consider the existing levels of pollutants in watersheds and the cumulative effects of multiple dischargers on the environment, particularly in polluted or degraded watersheds. The applicants note, for example, that under the United States' *Clean Water Act*, when a water body is considered impaired, the government can establish a total maximum daily loading of the pollutants of concern, and then allocate proportions to each of the pollution sources in that watershed.

MISA Omits Numerous Contaminants

The applicants state that there are a number of MISA-regulated facilities that report the release of toxic contaminants into water under the federal "National Pollutant Release Inventory", but that such releases are not regulated under MISA. The applicants list several examples of releases not covered under the MISA program (including releases of nitrate, benzene, toluene, ammonia, arsenic, cadmium and lead, among many others). Accordingly, the applicants assert that the MISA regulations should be reviewed and amended to ensure that all toxic pollutants released by MISA industries are being regulated.

Ministry Response

On July 30, 2010 – four months after the legislated *EBR* deadline for response – MOE advised the applicants that the ministry would not undertake the review. MOE stated that, while it "recognizes that some aspects of industrial effluent management have not been updated in recent years," the ministry is already engaged in a number of other initiatives that "will help address various aspects" of the concerns identified by the applicants.

Specifically, MOE listed the following ministry initiatives:

- The *Toxics Reduction Act, 2009*, which requires manufacturers and mineral processers to track and quantify their use, creation and release of prescribed toxic substances, and to prepare "toxic substance reduction plans";
- Implementation of policy to support the Canadian Council of Ministers of the Environment (CCME) Canada-wide Strategy for the Management of Municipal Wastewater Effluent, which requires all municipal wastewater treatment plants to report on effluent toxicity, and also requires all municipalities to characterize municipal plant effluents for chemical contaminants and establish new effluent objectives where necessary by 2016;
- MOE's "Modernization of Approvals" project, which will implement a new "multi-media focused approvals regime" as well as the development of a registry for specified low-risk activities and sectors;
- MOE's ongoing review of its policies and programs to ensure that they are consistent with the ministry's SEV, including the consideration of ecosystem-based approaches and cumulative effects.

MOE concluded that, as all of these programs are already underway, it is not necessary for the ministry to undertake a separate review of the MISA program. MOE noted, however, that based on the experience from these initiatives, the ministry may consider undertaking a review of the industrial and municipal effluent program when these initiatives are completed.

For the full text of the ministry decision, please see the ECO website at www.eco.on.ca.

ECO Comment

The ECO is very disappointed that the ministry decided, after months of deliberation and delay, not to undertake this review. The applicants submitted a thorough, well-articulated and well-supported request for review that raised a number of valid concerns with the current MISA regulations. In response, the ministry provided a short and unconvincing rationale for declining to undertake this review.

The MISA program was a bold initiative in its day, involving a decade of work and a huge investment of time and resources. MOE's failure to review and maintain this program represents a squandering of this enormous investment. The ECO believes that a review of this almost 20-year-old program is overdue.

Industrial effluents – whether discharged directly into surface waters or indirectly via sewage treatment plants – are a major source of toxic contaminants to Ontario's water bodies. As MOE itself acknowledges on its MISA webpage, industrial discharges of wastewater "represent a significant contributor to water quality impairment and a prominent source of toxics." MOE continuously states that reducing chemical discharges into the Great Lakes is a key priority for the ministry under COA. Yet, MOE's decision not to review the industrial discharge limits under MISA seems counter to this goal. A review of the MISA regulations could identify opportunities for strengthening discharge limits based on new economically achievable technologies and processes that have surely arisen over the the past twenty years, thus providing an effective means of prompting industry laggards to implement new cost-effective technologies and reduce chemical discharges into the Great Lakes and other water bodies.

The ECO has for many years expressed serious concerns about MOE's failure to adequately regulate municipal sewage discharges (see, most recently, Part 4.1 of our 2009/2010 Annual Report). The ECO has also repeatedly expressed concerns about the absence of underlying data on STP effluents needed to appropriately regulate sewage discharges. In our 2009/2010 Annual Report, the ECO formally recommended that MOE "monitor and publish annual reports on the quality of municipal wastewater discharges to Ontario waterways, providing both concentrations and loadings of key pollutants." Given the ECO's ongoing concerns regarding sewage effluent, it is a major disappointment that MOE did not address the applicants' request to review the MISA framework with a view to considering the regulation of municipal sewage discharges. A municipal regulation under MISA, with appropriate monitoring and

reporting requirements, could provide an efficient source of effluent data as well as an effective means of regulating municipal discharges.

Furthermore, the ECO has long advocated for the need to consider cumulative effects when regulating activities that can be harmful to the environment. To adequately protect the receiving waters, the regulatory framework for permitting discharges of contaminants into a water body should include consideration of background levels, total loadings from individual plants, and overall loadings from all dischargers. Indeed, a 2008 Ontario court decision (*Lafarge Canada Inc. v. Ontario*) affirmed that MOE must consider its SEV, including consideration of cumulative effects (where applicable), when issuing environmental approvals. Currently, neither the MISA regulations for industrial discharges, nor MOE's current approach for approving sewage discharges, takes into account the existing conditions of the receiving water or the cumulative impacts of multiple facilities dischargers.

The ECO strongly disagrees with MOE's assertion that the ministry's current initiatives – namely, the *Toxics Reduction Act, 2009*, the CCME municipal wastewater strategy, the modernization of approvals project, and the ministry's SEV review – either individually or collectively, will help to address these concerns.

First, while the new *TRA* should hopefully lead to some reductions in toxic discharges (by requiring facilities to analyze their use and creation of toxic substances, and to look for opportunities to reduce their use of toxics), the *TRA* does not include any mandatory discharge limits, nor does it include any requirements for facilities to reduce their use or release of toxics. Therefore, the *TRA* cannot justify MOE's decision to not review the MISA regulations. (See Part 4.2 of the ECO's 2009/2010 Annual Report for more on the *TRA*.)

Secondly, while the CCME Canada-wide Strategy for the Management of Municipal Wastewater Effluent along with the accompanying new federal effluent regulation will set out some minimum effluent standards and reporting requirements for all STPs across Canada, as discussed in the ECO's 2009/2010 Annual Report, the proposed new national standards are expected to have very little impact on Ontario's sewage discharges. Most municipal STPs in the province have already, for many years, been operating under effluent guidelines that are identical to the rather unambitious proposed new standards.

Thirdly, while MOE's "Modernization of Approvals" project may support the updating of approvals for municipal STPs, as noted in Part 5.2 of this Annual Report, such updating will likely not occur for many years to come.

Finally, while the ECO is pleased that MOE has made a broad commitment to review its policies and programs to ensure consistency with the ministry's SEV, the ECO is discouraged that MOE has used this broad commitment as a rationale for declining to undertake the requested review of the MISA program. Reviewing the MISA program through the *EBR* application process to ensure consistency with the ministry's SEV would have provided a focused, transparent and timely means for undertaking this important exercise.

Review of Application R2010001:

5.3.7 Certificate of Approval Exemption for Fire Training Exercises and the Need to Prescribe the *Fire Prevention and Protection Act, 1997*
(Decision Denied by MOE)

Geographic Area: Town of Bancroft

Keywords: firefighter training; O. Reg. 524/98

Background/Summary of Issues

On April 13, 2010 the ECO received an application requesting a review of O. Reg. 524/98 – Certificate of Approval Exemptions – Air, made under the *Environmental Protection Act* (*EPA*). The application also requested a review of the need to prescribe the Ministry of Community Safety and Correctional Services (MCSCS) and the *Fire Prevention and Protection Act,1997* (*FPPA*) under the *Environmental Bill of Rights, 1993* (*EBR*).

Background

In Ontario approximately 20,000 fire incidents involve various property types other than vehicles every year. Around 6,000 of these are residential fires. An unspecified percentage of such dwellings is acquired by fire departments and used for conducting live fire-training exercises. The Office of the Fire Marshal – a branch of the Community Safety Division of MCSCS – advises Ontario fire departments to adopt Standard 1403 of the National Fire Protection Association (NFPA), a standard that specifies which materials should not be used in a controlled burn. The NFPA is an international non-profit organization that develops, publishes, and disseminates consensus codes and standards to minimize the possibility and effects of fire. The Fire Marshal recommends this standard predominantly for safety concerns, not to mitigate environmental pollution.

Summary of Issues

The applicants asserted that the Bancroft fire department had not removed roof shingles, paint cans, siding or other potentially toxin emitting materials before conducting controlled burns of two houses for training purposes. The application included photographs to document the inclusion of these materials in the burns. The applicants said that they contacted the Ministry of the Environment's (MOE) Belleville office only to be told that O. Reg. 524/98 exempts fire departments from requiring a Certificate of Approval (C of A) – Air to perform a controlled burn of a dwelling for training purposes.

The applicants alleged that high dumping fees for demolition materials has led several owners of older and unwanted homes in the area to provide dwellings to the fire department for fire-training purposes rather than demolish them, implying that what they described in their application were not isolated incidents.

To ensure that the environment is adequately protected, the applicants requested a review of O. Reg. 524/98 and the need to prescribe MCSCS and the *FPPA* under the *EBR*.

The ECO forwarded the application to MOE on April 21, 2010.

Ministry Response

On June 22, 2010 MOE informed the applicants that, after reviewing their application, it would not be conducting a review.

MOE concluded that a review of O. Reg. 524/98 is not warranted because such fire-training exercises have emissions with negligible environmental impacts or localized impacts better addressed through municipal land use planning and by-law processes. To support this assertion, MOE also stated that the Hastings and Prince Edward Counties Health Unit did not have any concerns with this particular exercise or other similar ones as long as reasonable precautions are taken.

MOE informed the applicants that the Bancroft Fire Department reassured the ministry it had taken all the required steps prior to the burn. Surrounding residents had been notified in advance of the training exercise and the Town of Bancroft's Building Department had issued a demolition permit. MOE also stated that the Bancroft Fire Department is aware of the NFPA Standard 1403 and, when identifying structures for controlled burns, considers proximity to environmentally sensitive areas, adjacent property and hydro lines and the willingness of the owner to remove unnecessary materials.

As a result of this application, MOE requested that the Town of Bancroft continue to notify the ministry about future controlled burning in fire-fighting training activities. MOE also requested that the Bancroft Fire Department commit to using the NFPA Standard 1403 checklist when conducting such activities with acquired structures.

MOE also denied the applicants' request for the MCSCS and the *FPPA* to be prescribed under the *EBR*, noting that the ECO had made a similar request in 2009. MOE noted that during the preliminary review of the current application, MCSCS reaffirmed its 2009 position that the ministry's mandate and *FPPA* have no environmental impacts.

ECO Comment

The ECO is disappointed that MOE missed this opportunity to review O. Reg. 524/98.

A great deal of discretion is given to fire departments and owners of acquired structures regarding the removal of potentially environmentally harmful material prior to burns. This could be contributing to environmentally harmful emissions. Regardless as to whether the Bancroft Fire Department acted responsibly this time, this application raises the possibility that other fire departments are burning potentially toxic materials without appropriate standards. To ensure comprehensive protection from the impacts of this exemption, MOE could have looked at options, including perhaps new standard rules in O. Reg. 524/98, requiring that buildings be stripped of certain materials before burning occurs.

MOE did not provide any evidence to support its claim that fire-fighting training exercises have emissions with negligible environmental impacts. Given that some household items, once they reach the end of their lifecycle under normal circumstances, would not be disposed of even in state-of-the-art incinerating facilities equipped to capture harmful emissions, the concerns of the applicants are valid. Hot water heater insulation, for instance, often contains fibreglass interiors and vinyl lining, which, when burned, emit semi-volatile organic compounds and dioxins. Another example is the many household products, such as paint and plastics, containing chemical compounds that are not easily destroyed in open air fires.

The ECO has commented before on the negative impacts of open burning. In the Supplement to our 2008/2009 Annual Report, the ECO expressed disappointment that the ministry dismissed the applicants' assertions in a related application. The applicants used government approved dispersion modelling software to show that air pollution from open burning was exceeding regulated standards. The ministry pointed out that the modelling was done incorrectly. Following that, MOE simply stated that proper modelling would not have shown emissions in excess of specified standards. It must be noted that the ministry did not re-model the data to reach its conclusion. Likewise, in the current case, MOE concluded that the open burnings that occur from fire exercises would have little effect on the environment but failed to provide any modeling or other evidence to support that claim.

MOE needs to be consistent when regulating air pollutants from open fires. Open burning of materials emits air pollutants in several orders of magnitude higher than, for example, the controlled combustion of such materials in energy-from-waste facilities. In addition, the concentration of such emissions in local

neighbourhoods due to poor dispersion can lead to more direct inhalation exposure. MOE's approach to regulating emissions from open burning, as reflected in the handling of *EBR* applications for investigation or review over the past 15 years, has not been uniform. In some cases, the ECO has positively commented on MOE's willingness to address open burning air pollution issues under section 14(1) of the *EPA*, which states that the discharge of a contaminant that may cause an adverse effect into the natural environment is not allowed. In other cases, however, MOE has said that municipalities have been given the power under various acts to deal with such issues. The ECO believes that open burning of any kind should be primarily an issue of environmental concern and under environmental provincial authority.

Following a number of applications for review and investigation related to the fire at the Biedermann Pesticide Packaging Operation near Hamilton (see Section 5 of the Supplement to our 2008/2009 Annual Report), in 2009 the ECO urged the MCSCS to become prescribed under the *EBR* so that acts administered by the ministry, such as the *FPPA*, are subject to *EBR* provisions. As has been stated in the past (see Section 8 of the Supplement to our 2009/2010 Annual Report), the ECO disagrees with the MCSCS's position on the ministry's mandate and the *FPPA* and notes that prescribing the MCSCS would allow the public to participate in future consultations on environmentally significant aspects of its work.

Review of Application R2010002:

5.3.8 Review Certificate of Approval #2065-7UEPXC Issued to Bioversal Sarnia Ltd. (Decision Denied by MOE)

Keywords: biodiesel; Bioversel; methanol; sensitive receptor; Dain City

Background/Summary of Issues

On September 29, 2008, the Ministry of the Environment (MOE) issued a Certificate of Approval (C of A) to Bioversel Sarnia Ltd., a company that manufactures biodiesel, for a facility to be located on an industrial site in Dain City, a small suburb of Welland, Ontario. The site is zoned for heavy industrial use, but is in close proximity to a residential neighbourhood, a park, and several other non-industrial land uses. The original proposal for the C of A was posted on the Environmental Registry (#010-2790), with a public comment period from February 21 to March 22, 2008. At that time no comments were received. The decision notice was posted on the Registry on October 5, 2009, with a 15-day period allotted to apply for leave to appeal the decision. No applications for appeal were received.

The C of A was issued under section 9 of the *Environmental Protection Act* (*EPA*), which requires proponents to obtain such an approval for any operation that may discharge contaminants into the natural environment. Biodiesel is produced by combining plant-based oils or animal fats with alcohol (usually methanol or ethanol) in a process known as transesterification. The process has the potential to emit volatile organic compounds and oxides of nitrogen into the atmosphere. It can also generate a significant amount of noise.

In April 2010, a resident of the area became concerned when she noticed the Bioversel sign on a building on the lot, which had formerly been occupied by a trucking company. She informed other residents of the neighbourhood, who also became concerned about the potential impacts of the company on their immediate environment. Consulting with the municipality, MOE, and their local MPP, the concerned residents found that the process followed by Bioversel was legal in every respect and that the municipality was not required to entertain a presentation from their group, as the site was zoned appropriately and the company was following all of the appropriate local approval processes. Subsequently two of the residents filed an application for review of the C of A under the *Environmental Bill of Rights, 1993* (*EBR*).

The applicants' arguments in support of a review can be summarized as follows:

1) An acoustic assessment was conducted in support of the application for the C of A. However, the only other active heavy industry in the area, a John Deere manufacturing facility, has since closed. The applicants stated that because this closure changed the ambient sound levels in the neighbourhood, the acoustic assessment should be re-done.

2) Dain City should be considered rural, not urban, and thus subject to different (lower) noise standards.

3) Volatile chemicals (e.g., methanol) will be transported, stored, and pumped within 700-900 ft. of the nearest residences and it appears that plans do not call for a trench around the storage containers or the availability of nitrogen blankets. This raises concerns regarding the company's potential to control a serious fire hazard.

4) Increased truck and train traffic will negatively affect local wildlife, as the only two wildlife-supporting habitats are on either side of the proposed site.

5) Truck and train traffic will increase noise and vibrations and this eventuality is not covered by NPC-103, an MOE guideline document (part of the Ministry's model municipal noise control by-law) used as a reference in the acoustic assessment.

6) There are a number of "sensitive receptors" (e.g., small park, Niagara Rowing Club) within one mile of the facility; in addition, there are residences within 700 ft. of the facility and within 100 ft. of the train tracks.

7) The proposed facility has plans to expand in the near future, potentially exacerbating the concerns identified by the applicants.

8) The proposed Bioversel site has been "built up" to support a railway line; therefore any spill could run off into the adjacent wetlands, harming wildlife.

The ECO forwarded the application to MOE for consideration.

Ministry Response

On August 31, 2010, MOE advised the applicants that it had decided not to undertake the requested review of the Bioversel C of A.

The ministry noted that it had considered its Statement of Environmental Values (SEV) before issuing the C of A and in its assessment of the application for review. In addressing the applicants' environmental concerns, MOE stated generally that there would be a low potential for harm to the environment if the review of the C of A were not conducted because the ministry had conducted a technical review of the C of A application and, based on this review, imposed conditions in the C of A that are intended to address potential environmental impacts. Similarly, the ministry noted that any expansion of the facility would require amendments to the C of A, at which point any new potential environmental impacts would be addressed.

The ministry also responded directly to several of the applicants' concerns:

- the close proximity of the proposed facility to residential areas is a municipal zoning issue over which the ministry has no authority;
- the acoustic assessment would not be affected by a change to ambient noise levels as the standard of 45 dBA (which the facility is expected to meet) is the most stringent minimum limit for such cases;
- increased noise and air pollution from transportation sources were considered in the acoustic assessment report; and

- the "urban" versus "rural" classification is appropriate, as Class 3 or rural designations are reserved for areas in which there are large distances between houses and/or between industrial facilities and houses, which is clearly not the case in Dain City.

The Minister of the Environment also gave notice of this *EBR* application to Bioversel based on its direct interest as the instrument holder. In its decision, the ministry included a summary of Bioversel's comments on the issues raised by the applicants. Bioversel directly addressed all of the concerns but one (the proposed expansion). The company's key comments included:

- The closing of the John Deere plant is irrelevant to the acoustic assessment because the standard is not dependent on ambient noise levels;
- Dain City's designation as a Class 2 urban area is consistent with the criteria set out in the ministry's guidance documents;
- Bioversel has followed all of the guidelines and regulations and is well within the parameters for safe storage and handling of methanol (as per the Ontario Provincial Fire Code);
- Bioversel is following all municipal zoning requirements and its activities are not expected to adversely impact the surrounding wetlands or wildlife;
- Potential noise impacts from trains and trucks (worst-case scenarios) were included in the acoustic assessment;
- The emission dispersion modelling carried out implicitly accounted for impacts at all sensitive receptors and the projected impacts were found to be well within standards; and
- The company is following the Welland Fire Department rules and local building codes with respect to proper containment areas, fire roads, fire hydrants, grading and storm water management plans.

From a procedural standpoint, the ministry noted that the proposal for the C of A had been posted on the Environmental Registry, as had the decision to issue the approval, and that no one had taken advantage of the opportunity to comment on the instrument proposal or by seeking leave to appeal the decision to issue the C of A.

Finally, the ministry stated that, in accordance with section 68 of the *EBR*, the minister could not conclude that a review was warranted for the following reasons: first, the decision to issue the C of A was made within the five-year period prior to the applicants' request; second, the public consultation processes followed on the Registry were consistent with the *EBR;* and third, there did not appear to be any new evidence that should have been taken into account in making the decision.

Given all of the above, the ministry concluded that a review of the Bioversel Sarnia C of A for the Dain City site was not in the public interest.

For the full text of the ministry decision, please see our website at www.eco.on.ca.

ECO Comment

The ECO believes that MOE's decision not to conduct a review was appropriate. The ministry was reasonable in concluding that there was insufficient evidence to suggest that the conditions set out in the C of A will not provide adequate protection for the environment. The designation of the area as urban seems to be appropriate and the concerns of the applicants regarding noise appear to have been addressed in the acoustic assessment and subsequent provisions in the C of A.

The development and issuance of the C of A, including the Registry postings, were carried out in an appropriate manner and the proponent states that it has been complying with all of the rules and regulations set out by local authorities. The proximity of the residential area to the facility is a municipal zoning issue and therefore not grounds for a review of a provincial approval. Last, but certainly not least, the ECO found that the ministry's response to this application for review was prompt, fair and thorough.

The ECO notes, however, that this application illustrates a challenge with respect to the *EBR* consultation process. In this instance, the *EBR* provided a tool for the applicants to participate meaningfully before the C of A was issued (or after, in the form of a leave to appeal application); however, the applicants did not know about the C of A proposal until after the deadlines for these processes had been surpassed. The process, as currently constituted, counts on the public to know about and check the Registry regularly for proposals that might affect them.

In our 2005 Special Report on the *EBR*, the ECO recommended that ministries be encouraged to make more use of the enhanced public participation provisions of the *EBR* for proposals that are controversial or of broad public interest. In the text of that same Special Report, the ECO also suggested that ministries should consider bumping Class I instruments up to Class II, if the proposal is controversial or has a high level of public interest. Once a proposal becomes a Class II instrument, section 28 of the *EBR* applies, which means that the ministry needs to provide additional public notice, through news releases, signs, or one or more of several other options. The ECO believes that this application highlights the relevance and importance of this issue and of the suggested ministry alternatives for addressing it.

Review of Application R2010004:

5.3.9 Certificate of Approval for French River Sewage Works (Review Undertaken by MOE)

Background/Summary of Issues

On October 20, 2010, the applicants requested a review of the Certificate of Approval (C of A) issued to the Corporation of the Municipality of French River for the operation of two sewage treatment lagoons. The applicants contend that the formula used to calculate the capacity of the two lagoons is incorrect and that this has resulted in multiple discharges of insufficiently treated sewage into the French River. The basis for the error, the applicants state, lies in the assumption that the retention time of the lagoons is the same as the filling time, something that is true for continuous flow filtration systems, but not for batch systems such as those in French River. This resulted in the approval of a C of A that allows a daily flow rate that is much too high for the system to accommodate without greatly reducing residence time. The length of the residence time is important because the biological processes that treat the waste require time to work effectively. The applicants' main point is that this error in calculation results in inadequate residence times.

In addition, the applicants stated their concern that this same incorrect formula has been used to calculate the capacity required by many other Ontario municipalities. If this were to be the case, there may be other lagoon systems in the province that are chronically failing to adequately treat municipal sewage prior to discharge into waterways.

The ECO sent this application to the Ministry of the Environment (MOE).

Ministry Response

On December 20, 2010, the ministry decided that a review is warranted. It further stated that the review would be completed by June 18, 2011, at which time the results would be made available to the applicants.

ECO Comment

As the ministry's review was not complete at the end of our reporting year, the ECO will review MOE's handling of this application in our 2011/2012 Annual Report.

Review of Application R2010009:

5.3.10 Review of the *Environmental Bill of Rights, 1993* (Decision Undertaken by MOE)

Keywords: *EBR*; legislation; review; reform

Background

In December 2010, the ECO received an application from two staff members of the Canadian Environmental Law Association requesting a review of the *Environmental Bill of Rights, 1993* (*EBR*) and its regulations.

Since the *EBR* came into force in 1994, it has never undergone any formal review. Despite the identification of shortcomings in the legislation over the years and changes to societal values and environmental priorities, the statute has remained largely unchanged. The applicants urged the Ministry of the Environment (MOE) to undertake a formal, comprehensive and focused public review of the *EBR* to solicit input on key changes to the current *EBR* regime and better achieve the broad purposes of the legislation.

The applicants identified ten key issues, listed below, that should be formally reviewed by MOE in an open and public review of the *EBR*:

1. Updating the purposes of the *EBR;*
2. The lack of environmental rights in the *EBR;*
3. Complying with meaningful Statements of Environmental Values;
4. Use, misuse and avoidance of the Environmental Registry;
5. Fixing the "EA Exception" under section 32 of the *EBR;*
6. Revisiting the leave test and funding for third-party appeals;
7. Enhancing the powers of the ECO;
8. Prescribing additional ministries and statutes under the *EBR;*
9. Improving responses to applications for reviews and investigations; and
10. Facilitating access to environmental justice.

The applicants stressed that this list is not exhaustive, but merely the "Top 10" issues that are "illustrative of the types of systemic problems which require consideration within the requested review." For each issue, the applicants described their concerns and suggested potential reforms to address them.

The ECO forwarded the application to MOE.

Ministry Response

On March 1, 2011, MOE advised the applicants that it had concluded that the requested review was warranted.

MOE agreed with the applicants that "the EBR is generally sound and it would not be appropriate to conduct a wholesale reconsideration of the Act in its entirety," and stated that "the Ministry's review will examine certain components of the EBR, as determined necessary by the Ministry after further deliberation and references to some of the matters raised in your application."

ECO Comment

The ECO is pleased that MOE has agreed to undertake the requested review. The ECO will review the handling of this application in a future Annual Report, once the ministry has completed its review.

For a more detailed description of this application and the ECO's general commentary on the *EBR* process, see Part 7.1 of this year's Annual Report.

Review of Application R2010011:

5.3.11 The Need to Green Ontario's Definition of Infrastructure (Review Denied by OMAFRA, MOE, MMAH, MNR, MTO, MOI)

This application was reviewed in conjunction with R2010010 (OMAFRA), R2010012 (MMAH), R2010013 (MNR), R2010014 (MTO) and R2010015 (MOI). Please see Section 5.5.3 of this Supplement for the full review.

Review of Application R2010016:

5.3.12 Regulation and Guide for Landfill Standards (Decision Denied by MOE)

Background/Summary of Issues

On February 5, 2011, the applicants requested a review of O. Reg. 232/98 and the supporting document Landfill Standards: A Guide on the Regulatory and Approval Requirements for New and Expanding Landfill Sites (the "Guide"). The applicants maintain that the regulation and Guide are not sufficiently rigorous to provide Ontarians with the assurance of long-term environmental protection.

The applicants' specific concerns regarding the regulation and Guide include: the lack of a definite period of time for which the proponent must be responsible for the site; the lack of specific requirements for the geological and seismological assessment of potential sites; the overly generalized nature of many of the requirements; and the lack of consideration of the potential effects of earthquakes on the integrity of landfill containment systems. In summary, the applicants stated that the issues of geological stability and associated long-term environmental impacts (beyond a single generation) are not adequately addressed in the current regulatory regime.

In support of their position, the applicants drew on their experience in the disposal of nuclear waste to develop a detailed set of recommended geological requirements, which were included as an appendix to the application.

Ministry Response

The ministry denied the application for review on April 21, 2011 for the following reasons: first, the current Ontario approval processes for landfills, under both the *Environmental Assessment Act* and the *Environmental Protection Act*, allow for site-specific concerns, such as the ones identified by the applicants, to be considered; second, the existing standards are considered to be state-of-the-art when compared to other jurisdictions; third, the public had ample opportunity to participate in the development of the regulation and Guide; and finally, the risk of earthquakes in Ontario is considered to be low.

ECO Comment

As the ministry's decision fell outside our reporting year, the ECO will review the handling of this application in our 2011/2012 report.

Review of Application R2010017:

5.3.13 Review of the *EBR* to Clarify how the *Public Sector Salary Disclosure Act, 1996* and the *French Language Services Act* Apply to the ECO
(Review Denied by MOE)

Keywords: *Environmental Bill of Rights, 1993*; Environmental Commissioner of Ontario; *Public Sector Salary Disclosure Act, 1996*; *French Language Services Act*

Background/Summary of Issues

On March 14, 2011, two Ontario residents submitted an application requesting a review of the *Environmental Bill of Rights, 1993* (*EBR*) to clarify how the *Public Sector Salary Disclosure Act, 1996* (*PSSDA*) and the *French Language Services Act* (*FLSA*) apply to the ECO.

The applicants stated that information required under the *PSSDA* has not been included in the ECO's annual reports for a number of years, even though the *PSSDA* does not exempt the ECO. The applicants also stated that "dozens, perhaps hundreds" of ECO publications have not been translated from English to French since 2000, in contravention of the *FLSA*. The applicants requested that the *EBR* be amended to: a) expressly state that the *PSSDA* applies to the ECO; and b) indicate how the *FLSA* applies to the ECO.

Ministry Response

At the time of writing, the Ministry of the Environment had not yet responded to this application, as the deadline for providing a preliminary decision fell outside the ECO's reporting year.

ECO Comment

The ECO will review the ministry's handling of this application in a future report.

Review of Application R2010019:

5.3.14 Policies for Cage Aquaculture Licenses
(Decision Pending by MOE)

Background/Summary of Issues

In March 2011, two applicants requested that the Ministry of the Environment (MOE) review their policies for the issuance of cage aquaculture licenses. The applicants stated that cage aquaculture facilities in Ontario's side of the Great Lakes release 46 tonnes of untreated phosphorus into the water – equivalent to the discharge from three large wastewater treatment plants. The applicants requested that MOE ensure that its policies relating to phosphorus pollution from cage aquaculture are in line with the policies

governing other industries and municipalities in Ontario that release phosphorus into the Great Lakes. The applicants also requested that MOE ensure that its phosphorus policies relating to cage aquaculture do not conflict with international Great Lakes management initiatives.

The applicants also submitted an *Environmental Bill of Rights, 1993* application for the Ministry of Natural Resources to review its cage aquaculture policies.

Ministry Response

In May 2011, MOE advised the applicants that it requires more time to complete its preliminary review of the application, given the complexity of the issue. The ministry anticipated that it would complete the preliminary review by June 13, 2011.

ECO Comment

Since the ministry's decision on this application falls outside of the ECO's 2010/2011 reporting year, the ECO will review the handling of this application in our 2011/2012 Annual Report.

5.4 Ministry of Infrastructure

Review of Application R2010015:

5.4.1 The Need to Green Ontario's Definition of Infrastructure (Review Denied by OMAFRA, MOE, MMAH, MNR, MTO, MOI)

This application was reviewed in conjunction with R2010010 (OMAFRA), R2010011 (MOE), R2010012 (MMAH), R2010013 (MNR), and R2010014 (MTO). Please see Section 5.5.3 of this Supplement for the full review.

5.5 Ministry of Municipal Affairs and Housing

Review of Application R2009018:

5.5.1 Need for Amendments to the Oak Ridges Moraine Conservation Plan (2002) and O. Reg. 140/02 under the *Oak Ridges Moraine Conservation Act, 2001* (Review Denied by MMAH)

Keywords: Oak Ridges Moraine; groundwater; watershed plans

Background/Summary of Issues

In February 2010, two applicants requested that the Ministry of Municipal Affairs and Housing (MMAH) review the need for amendments to the Oak Ridges Moraine Conservation Plan (2002) (ORMCP or the

"Plan") under the *Oak Ridges Moraine Conservation Act, 2001* (*ORMCA*). The applicants contend that the ORMCP is unable to provide meaningful protection for groundwater aquifers within the Plan area. They state that under the current planning framework, developers can pipe water from moraine aquifers to service development just outside the Plan area without being subject to the ORMCP. The applicants assert that this manner of development can adversely impact the hydrological integrity of the Oak Ridges Moraine despite the intent of the ORMCP.

To address these concerns, the applicants request that the definition of "development" in the ORMCP be amended to include: "the creation of a new lot, a change in land use, or the construction of buildings and structures taking place outside of the ORMCP area, and that will be serviced with water taken from a well or surface water, sources within the ORMCP area, and that requires a Permit to Take Water (PTTW) under the *Ontario Water Resources Act*."

Oak Ridges Moraine

The Oak Ridges Moraine (the "Moraine") is an environmentally significant landform that includes over 160 kilometres of rolling hills and river valleys from the Niagara Escarpment to Rice Lake. It has a diversity of streams, woodlands, wetlands, kettle lakes, bogs, plant and animal species, including many species at risk.

The moraine is recognized as a regional groundwater recharge area, providing a source of groundwater to numerous aquifers, drinking water to over 250,000 people, and baseflow to the headwaters of 65 river systems. Urban development may have an impact on the quality and quantity of groundwater on the moraine. For example, impervious surfaces can reduce the amount of water available for recharge, the use of road salt may increase the salinity of groundwater, and large-scale withdrawal for consumption can deplete aquifers.

In response to growing development pressures and public concern to protect the moraine, MMAH created the *ORMCA* and its Plan. The Act and Plan provide land use direction within the moraine, and municipal decisions under the *Planning Act*, like development approvals, shall conform with the Plan. Two of the key stated objectives of the Plan are to protect "the ecological and hydrological integrity of the Oak Ridges Moraine Area" and to ensure that "only land and resource uses that maintain, improve or restore the ecological and hydrological functions of the Oak Ridges Moraine Area are permitted."

The Plan also requires that every upper-tier municipality and single-tier municipality shall begin preparing a watershed plan for every watershed whose streams originate within the municipality's area of jurisdiction by April 22, 2003. The objectives and requirements of watershed plans must be incorporated into municipal official plans by an unspecified date. As of April 2011, 21 of 49 watersheds in the Moraine had completed watershed plans, 14 had watershed plans well underway and 14 did not have watershed plans started.

Without a completed watershed plan, municipalities cannot approve major development projects (e.g., creation of four or more lots) commencing after April 23, 2007. The Plan also requires that a water budget and conservation plan has been completed for major development proposals. Watershed plans, water budgets and conservation plans are comprehensive tools that can be used by municipalities to demonstrate that the water supply required for the major development is sustainable and does not negatively affect the quantity or quality of moraine groundwater resources.

The Plan contains an implementation section that provides additional direction not included in the Act or the regulation that establishes the Plan. Within this section, it identifies that the provincial government, in consultation with municipalities, shall identify performance indicators for monitoring the effectiveness of the Plan. In 2009, MMAH prepared a discussion paper for Greenbelt Plan Performance Monitoring Framework, which includes the Oak Ridges Moraine (see Other Information section below for additional details). The Plan's implementation section also directs that the provincial government, in partnership with appropriate stakeholders, shall establish a monitoring network to collect, summarize and evaluate performance indicator data (i.e., to assess changes in the ecological integrity of the Moraine and

effectiveness of Plan policies and help identify improvements that would address problems encountered in implementing the Plan). As of April 2011, the provincial government has not made any progress on this commitment.

Fraserville Development

The applicants asserted that a proposed development in Fraserville, in the Township of Cavan Monaghan (the "Township"), is an illustration of how the ORMCP fails to protect groundwater aquifers. In 2005, the Township of Cavan Monaghan, located within Peterborough County, obtained approval for the establishment of a new community in Fraserville, just outside of the Moraine through the Fraserville Secondary Plan. There is no municipal water service in Fraserville. Currently, the racetrack at Kawartha Downs is the largest water user in the Fraserville area, trucking in approximately 30 cubic metres/day from wells in Millbrook (12 kilometres from Fraserville). The wells operate under a single permit to take water. Two of these wells are located within the ORMCP area. Wastewater from the Kawartha Downs facility is then hauled to the Millbrook wastewater treatment plant. While Fraserville is located outside of the ORMCP area, parts of Millbrook are within the Moraine.

In 2006, the Township completed the Fraserville – North Monaghan Servicing Study – Master Plan. As part of the Class Environmental Assessment process, the Township reviewed alternative options for providing water and wastewater servicing in the planned development area and their potential effects. Based on this study, the preferred alternative included a well and treatment plant near the Fraserville area. In 2007, the Ministry of the Environment (MOE) denied a "bump-up" request made by the public to conduct a full Environmental Assessment of the master plan; however, MOE did require the Township to perform additional well suitability analysis and well monitoring.

Upon further investigation, the Township found that the proposed municipal well facility in Fraserville was not suitable. As a result, the Township completed a second Fraserville Water Supply Master Plan Review in February 2010. This review identified the new preferred alternative as piping drinking water to Fraserville from municipal wells and an existing water treatment plant in Millbrook, within the Moraine. Since the proposed Fraserville development is not located within the Plan area, a watershed plan is not required under the ORMCP. While most municipalities on the Moraine have begun preparing or completed their watershed plans, Peterborough County has not started.

In September 2010 (eight months after this application was submitted), the Township decided not to proceed with the water diversion plan from Millbrook to Fraserville after all. Instead, the Township intends to proceed with water and wastewater services outlined in the approved 2006 master plan (water and wastewater in Fraserville) outside of the Moraine.

Other Information

Greenbelt Performance Monitoring

In April 2010, MMAH posted a Greenbelt Plan Draft Performance Monitoring Framework Discussion Paper proposal on the Environmental Registry (#010-9407). There are three regional land use plans under the framework of the Greenbelt, the Greenbelt Plan, the Niagara Escarpment Plan and the ORMCP. In 2015, MMAH is required under the *Greenbelt Act* and the *ORMCA* to review all three regional plans in conjunction. The Greenbelt Performance Monitoring Framework is intended to co-ordinate the performance monitoring review between the three plans. As of April 2011, MMAH has not posted a decision notice on this proposal.

Permit to Take Water

A PTTW, issued under the *Ontario Water Resources Act* by MOE, is required for large-scale water removals (i.e., more than 50,000 litres of water a day) from a lake, river, stream or groundwater source from MOE (with a few exceptions). The Oak Ridges Moraine Foundation found that while applicants are required to indicate whether or not the source of water is located in the Moraine, they are not required to

demonstrate how the requirements of the watershed plans are addressed. The Foundation recommended that "MOE should revisit its guidelines for the processing of [PTTW] Applications to ensure the very specific water policies of the ORMCP are fully addressed by the applicant in the preparation of the application."

Ministry Response

On April 9, 2010, MMAH denied this application for review. MMAH determined that a review was not warranted as:

- MMAH undertook extensive public consultation during the creation of the ORMCP in 2002 and the Greenbelt Plan in 2005;
- The *ORMCA* does not provide the legislative authority to regulate the use of land outside of the ORMCP area;
- The Provincial Policy Statement, 2005 (PPS), *Planning Act*, the Greenbelt Plan and the Growth Plan for the Greater Golden Horseshoe collectively provide growth direction and guide infrastructure decisions;
- The PPS already includes policies that protect water resources, manage growth and promote efficient land use and development patterns;
- The PPS is currently under review and the ORMCP and Greenbelt Plan will be reviewed in 2015; and
- The environmental impacts of taking water for development is already considered under the *Environmental Assessment Act* through Class Environmental Assessments or servicing master plans, the *Ontario Water Resources Act* through PTTWs; and the *Clean Water Act, 2006*.

For the full text of the ministry decision, please see our website at www.eco.on.ca.

ECO Comment

The ECO believes that MMAH's decision not to review the Oak Ridges Moraine Conservation Plan was unreasonable; the ministry failed to address the central concern of the applicants that Moraine groundwater is insufficiently protected from development outside of the Plan area. The applicants provided the example of the proposed Millbrooke/Fraserville water diversion plan to illustrate a gap in provincial policy that allows development outside of the Oak Ridges Moraine to use Moraine groundwater. The ECO believes that failure to address this serious gap and protect vulnerable moraine groundwater from development both within and outside of the Plan area will undermine the objectives of both the *ORMCA* and the Plan.

To protect the hydrological integrity of the Moraine, the Plan stipulates that municipalities shall prepare watershed plans, water budgets and conservation plans, and that major development proposals within the Moraine must conform to them. However, there are no such requirements for development proposals in areas adjacent to the Oak Ridges Moraine, even if Moraine water is used. The ECO believes that if an adjacent municipality seeks to take Moraine water, it should be required to adhere to a watershed plan, water budget and conservation plan.

The province regulates water takings through PTTWs, within and outside of the Oak Ridges Moraine. While MOE requires that applicants identify whether or not water will be taken from the Oak Ridges Moraine, it does not require applicants to show how the proposal meets Oak Ridges Moraine Conservation Plan policies, watershed plans, conservation plans or water budgets. The *ORMCA* requires that municipal land use decisions shall be consistent with the Plan; however, there is no specific requirement that instruments (such as PTTWs) issued by MOE must be consistent with the Plan, watershed plans, conservation plans or water budgets. Given that the intent of the Plan is to protect water resources in the moraine, this is a significant oversight. MMAH and MOE should make appropriate amendments to the Plan and PTTW policies to ensure that all PTTWs are consistent with the Plan and local watershed plans.

This application highlights the fact that MMAH does not actively oversee consistent implementation by municipalities, or monitor compliance with, or effectiveness of, the Plan's policies. For example, while the Plan requires that Peterborough County prepare watershed plans for every watershed whose streams originate within the municipality's area by 2003, the county has failed to do so. MMAH's self-defined role mainly involves: ensuring that municipal official plans and by-laws conform to the Plan; releasing technical guidance documents; and mapping features. Monitoring the performance of land use policies is vital to ensure that they are meeting their objectives, especially the on-the-ground ecological and hydrogeological consequences of decision making. Genuine monitoring of performance can identify when objectives are not being met and amendments are required. Nearly ten years after the Plan's approval, MMAH has failed to monitor the effectiveness or implementation of Plan policies, leaving the job to environmental organizations, such as the Oak Ridges Moraine Foundation and Monitoring the Moraine.

In addition, the ECO is deeply troubled that MMAH has systematically denied every single *Environmental Bill of Rights, 1993* application that it has received since 1994. The Ontario legislature has given Ontarians the right to request that the government consider changes to its policies when deficiencies come to light. When a ministry rejects every request over a 17-year period, it creates the valid perception that every application will be rejected no matter what issues are raised. Moreover, the ministry should not use scheduled reviews of its planning system, such as the review of the Oak Ridges Moraine Conservation Plan, set to begin in 2015, as an excuse not to remedy current issues that may be exacerbated by waiting. This application was clearly a missed opportunity for MMAH to examine and address gaps within the Plan that threaten Moraine groundwater.

Review of Application R2010005:

5.5.2 Review of Septic System Provisions under the Building Code (Review Denied by MMAH)

Keywords: Building code; *Clean Water Act, 2006*; septic systems; Lake Trout habitat; sewage systems

Background/Summary of Issues

In October 2010, the ECO received an application for review from two applicants requesting that the Ministry of Municipal Affairs and Housing (MMAH) review Ontario's Building Code. The applicants believe that the Building Code allows shoreline property owners to avoid complying with the rules governing septic systems, putting the quality of nearby water at risk. The applicants requested that the Building Code be amended to protect sensitive lakes supporting lake trout habitat.

The Building Code is a regulation (O. Reg. 350/06) under the *Building Code Act, 1992* (*BCA*). Section 11.5 of the Building Code offers "compliance alternatives" that may be used where complying with the requirements outlined in the Building Code is impracticable, such as when there are "structural or construction difficulties." This provision applies to Part 8 of the Building Code, which outlines construction and operation requirements for various classes of sewage systems, including septic systems frequently used in shoreline development.

The applicants believe that section 11.5 is being used as a loophole to avoid the construction and operating requirements set out under Part 8 of the Building Code. They argue that MMAH's application of section 11.5 is unreasonable given the widespread availability of economically achievable technologies to comply with the Part 8 requirements. As such, the applicants assert that all housing developments along shorelines should be required to treat their wastewater without exception.

The applicants cite Lake Matinenda located west of Sault Ste. Marie as an example of this issue. The lake, which was once an excellent habitat for lake trout, supports a small residential community, including

many properties that lack proper septic systems. MNR has determined that the lake is "at capacity" for development, based on lake trout habitat. The applicants allege that local officials have relied on section 11.5 to permit shoreline properties to install sewage systems that do not comply with the requirements under Part 8 of the Building Code. As a result, water quality in the area has been degraded and threatens lake trout habitat. The applicants noted that if the septic systems had been properly installed and maintained, this lake, which has approximately 80 miles of shoreline and only 200 developed lots, would not have experienced this degree of degradation at such a low level of development.

The applicants assert that section 11.5 should not apply to Part 8 and that strict compliance with performance levels and occupant loads by new and existing buildings should be required. This would reduce the environmental harm from development along sensitive lakes. The applicants also recommend that Building Code Appendix (A-8.2.1.4.), regarding greater clearance distances between the sewage system and water sources, structures and property lines, should be incorporated into Part 8 and become a requirement for all classes of sewage systems. They further recommend that section 11.3.1.1 (which requires that material alteration/repair of a building system must be at least equal to the performance level of the building prior to the alteration/repair) should be amended by creating a new subsection (11.3.1.1(2)) that requires all clearance distance requirements of Part 8 and Appendix A-8.2.1.4 be applied to this provision.

The Ontario Building Code

The *BCA* establishes the regulatory framework for the construction, renovation and change of use of buildings. It sets out technical standards; administrative procedures; enforcement powers; and the process for appeals and approvals.

The Building Code details technical and administrative provisions for matters including health and safety, fire protection, structural sufficiency, accessibility, sewage, energy, water and environmental measures related to buildings. Enforcement of the *BCA* and the Building Code falls on "local principal authorities" – municipalities, boards of health, or conservation authorities. In the late 1990s, MMAH delegated regulatory authority for permitting and inspecting small on-site septic systems to local principal authorities. Prior to this, the Ministry of the Environment (MOE) was responsible for septic systems under the *Environmental Protection Act*.

The Building Code is based on the National Building Code and National Plumbing Code, and was developed through a federal/provincial/territorial process directed by the Canadian Commission on Building and Fire Codes. Ontario's Building Code differs from its federal counterparts in areas Ontario considers to be priorities for the province, e.g., energy efficiency and barrier-free access. The Building Code undergoes a review every five years; however, interim changes are possible between editions.

In December 2009, the *BCA* was amended by the *Good Government Act, 2009*. The changes were primarily administrative or related to enforcement. The Building Code was also amended by O. Reg. 503/09 around the same time. Those amendments were technical and editorial in nature or implemented the changes made to the *BCA* by the *Good Government Act, 2009* (see Environmental Registry #010-8171 regarding reducing the minimum height of septic tanks). The government stated that the changes were meant to "help business … support the move to a green economy, promote public safety and enhance consumer protection."

These interim changes, and others described below, are a part of the larger five-year Building Code review. Information on proposed amendments to the Building Code can be found at the ministry's website: www.mah.gov.on.ca/Page8457.aspx. The government anticipates that a new edition of the Building Code will be ready in late 2011.

Other Information

Previous Application for Review:
In October 2008, the applicants submitted an application for investigation regarding alleged contraventions of the *Ontario Water Resources Act* on Lake Matinenda. The applicants alleged that many of the cottages on the lake had faulty, antiquated and non-permitted septic systems, resulting in illegal discharges into the waterbody. MOE denied the application, stating that the surface water quality and Lake Partners sampling data it had collected did not indicate significant risks or concerns for the lake. MOE also stated that many of the allegations did not fall within the ministry's authority and instead should be referred to MMAH. The ECO's review noted that "a comprehensive program of septic system inspection and re-inspection would be far preferable to the slow, but inexorable water quality impairment of thousands of cottage lakes across Ontario." (See the Supplement to the ECO's 2008/2009 Annual Report, page 236.)

Maintenance Inspection Programs for On-Site Septic Systems:
In March 2008, MMAH posted a proposal notice on the Environmental Registry (#010-3036) that proposed amendments to the Building Code related to on-site sewage systems. Approximately two years later, the ministry posted a supplementary notice (Registry #010-9557) for comment. In August 2010, O. Reg. 315/10 under the *BCA* was published and brought into force the regulatory amendments to the Building Code proposed in both Registry notices. A decision notice for both postings was posted to the Registry in March 2011.

Ontario Regulation 315/10 amends the Building Code to outline mandatory and discretionary maintenance inspection programs for on-site sewage systems. The local principal authority in a jurisdiction administers and conducts the maintenance inspections for that area. Mandatory programs are now required for on-site septic systems in "vulnerable areas" in a "source protection area" identified in assessment reports arising from the source protection planning process under the *Clean Water Act, 2006* (*CWA*). In addition, mandatory programs are required for on-site septic systems within 100 metres of the Lake Simcoe shoreline (except for areas excluded by the regulation).

In general, the mandatory maintenance inspections for pre-existing sewage systems along the Lake Simcoe shoreline will be required by January 1, 2016 or within five years for systems constructed after January 1, 2011. *CWA* inspections will occur within five years of the publishing of the assessment report or source protection plan under the *CWA*. Subsequent inspections will occur every five years after the first inspection.

Discretionary programs may be established by local principal authorities in jurisdictions not covered by mandatory inspection programs. The scope of the discretionary program extends to all sewage systems located in an area covered by a maintenance inspection program.

In addition to the scope of maintenance inspection programs, and the commencement of and frequency of inspections, the regulation also addresses details such as qualifications of inspectors, and the acceptance of "third-party" certificates, which are an alternative to maintenance inspections.

Proposed Tertiary Treatment in At-Risk Systems:
In February 2011, MMAH posted a proposal notice on the Environmental Registry (#011-2565) seeking consultation on a proposed regulation under the *BCA* that could become part of the next edition of the Building Code (O. Reg. 350/06). One proposed change was to amend the Building Code to require on-site sewage systems in certain at-risk areas to be equipped with a tertiary treatment unit that is certified to meet the same standards as the Bureau de normalisation du Quebec's standard to abate nutrients (i.e., phosphorous and nitrates). This amendment, if passed, would come into force December 31, 2016. At-risk areas would initially be those subject to mandatory on-site sewage re-inspection and other lakes considered to be at nutrient loading capacity. Other amendments proposed include changes to sampling requirements, referencing and establishing new standards.

Ministry Response

In January 2011, MMAH denied this application for review. The ministry stated that as part of the development of the next edition of the Building Code, the ministry conducted a round of public consultations in October and November 2010. One of the proposals included in that round of consultations was a change to clearance distance requirements for existing systems (proposed Code Change B-11-03-01) and the applicants submitted a comment on this issue. The ministry further stated that the Building Code Technical Advisory Committees would examine proposed changes to Part 11 of the Building Code, including proposed change B-11-03-01, in spring 2011. This review would also include comments, including that of the applicants, submitted during the consultation period.

MMAH also noted that the second round of consultations, which were held in March 2011, would include changes related to environmental protection and regulation of on-site sewage systems, including proposed requirements regulating phosphorus and nitrates in certain "at risk" areas, "to take effect five years after the release of the next edition of the Building Code." The Building Code currently only regulates the treatment of pathogens harmful to humans, but not nutrients. According to the ministry, these "at risk" areas may include "at capacity" lakes and previously defined vulnerable areas, and will be determined with MOE and the Ministry of Natural Resources.

With respect to existing on-site sewage systems, the ministry explained that O. Reg. 315/10 amended the Building Code to establish and govern mandatory on-site sewage system maintenance inspection programs in certain areas of the province, and provides for discretionary maintenance inspections programs established by local principal authorities elsewhere. Since Lake Matinenda is not located in a mandatory inspection program area, the ministry suggested that the applicants contact Algoma Public Health to discuss the possibility of establishing a discretionary maintenance inspection program in the area.

The ministry also noted that new editions of the Building Code are subject to regular reviews, which are transparent and allow for public participation. The ministry believed these consultation opportunities will address the applicants' concerns and it recommended that the applicants subscribe to CodeNews to receive regular updates.

For the full text of the ministry decision, please see our website at www.eco.on.ca.

ECO Comment

The ECO believes that MMAH's response to the application for review was only partially reasonable. MMAH was correct in noting that the Building Code, including matters relating to on-site sewage systems, has been addressed in recent regulatory amendments and was part of a public consultation process. The applicants provided comments during the first round of public consultation and were invited to participate in the second round of consultations. The ministry also encouraged the applicants to review the resources on the Building Code website.

The ECO is concerned, however, with MMAH's suggestion that the applicants contact their local public health department to discuss the possibility of implementing a discretionary maintenance inspection program for on-site sewage systems. Their previous *EBR* application shows that the applicants made numerous attempts over the years to engage the health unit, MMAH and other agencies in this matter. As the ECO noted earlier, in the absence of a regulatory requirement from a senior level of government, it is difficult for local authorities to justify the expense of such inspections, and it is politically unpopular to impose septic system upgrades, which can entail substantial costs on local ratepayers.

The ECO reiterates its comments regarding phosphorus loadings in provincial watersheds (see Parts 4.3 and 4.4 in this year's Annual Report for information about Lake Simcoe and the Precambrian shield). Development has intensified along many shorelines and the province must ensure that waters are protected from cumulative impacts of private septic systems. The ECO is concerned by MMAH's response to the applicants that proposed nutrient-loading amendments would not be implemented, if

accepted, until five years after the release of the new edition of the Building Code. A five-year delay in implementing nutrient-reducing measures is significant in light of growing development pressures in many watersheds. On-site sewage technologies and best management practices currently exist and should be mandatory in order to retrofit existing systems or construct septic systems for new developments. Furthermore, although the ECO agrees that vulnerable areas should be prioritized, protective measures should be phased in province-wide to prevent other water bodies from becoming further degraded.

The ECO strongly encourages the ministry to take the opportunity of the Building Code review to incorporate environmental protection measures, including water and energy conservation standards, into the Building Code. Significant achievements can be gained in these areas by ensuring best environmental practices are required when altering or constructing buildings (e.g., water/energy conservation measures, greywater recycling systems, tertiary treatment systems, septic leach prevention and capture, regular septic system maintenance and public education. These practices exist and are being used successfully in other jurisdictions. Moreover, these initiatives also support the province's energy and water conservation acts, regulations and policies. The ECO will follow developments on the new edition of the Building Code and initiatives to address nutrient loadings in Ontario water bodies.

Review of Application R2010012:

5.5.3 The Need to Green Ontario's Definition of Infrastructure (Review Denied by OMAFRA, MOE, MMAH, MNR, MTO, MOI)

Keywords: green infrastructure; stormwater; wetlands; woodlands

Summary of Issues

On December 23, 2010, the ECO received an *Environmental Bill of Rights, 1993* (*EBR*) application requesting that several Ontario ministries update their definitions of "infrastructure" to encompass "living green infrastructure." Water quality degradation in Ontario and unsustainable water use were key concerns driving this request. The application was submitted on behalf of the Green Infrastructure Ontario Coalition, which also published the full submission on the coalition's website.

The applicants asserted that Ontario ministries lack a clear, commonly understood definition of infrastructure, thus inhibiting provincial policies and funding to support sustainable communities. The applicants described living green infrastructure as "natural or engineered ecological processes or structures that process, capture and direct water, stormwater, and wastewater in a similar manner to grey infrastructure, yet have multiple social benefits." The applicants listed many examples of living green infrastructure, ranging in scale from urban forests, meadows and greenways, to the use of rain gardens, soils, porous paving, rain barrels and cisterns. Green infrastructure, defined broadly in this manner, does not merely address water quality and quantity, the applicants argued; it can also be a powerful approach to provide green space, improve air quality and biodiversity, and respond to climate change challenges, among other benefits.

Six ministries were cited by the applicants as needing updated definitions of infrastructure:

- Ministry of Infrastructure (MOI);
- Ministry of Municipal Affairs and Housing (MMAH);
- Ministry of Agriculture, Food and Rural Affairs (OMAFRA);
- Ministry of Transportation (MTO);
- Ministry of Natural Resources (MNR) and
- Ministry of the Environment (MOE).

The applicants argued that redefining "infrastructure" to incorporate sustainability principles would help MOE, MMAH and MTO to be consistent with their own Statement of Environmental Values (SEVs). They also noted that MOI is drafting a 10-year Long Term Infrastructure Plan for Ontario. A greener definition of infrastructure would be very timely for that ministry, the applicants suggested, and added that green infrastructure can often be less costly than traditional approaches.

To lend strength to their argument, the applicants appended seven recent reports illustrating the impacts of green infrastructure in various settings. For example, they included an MOE-commissioned economic analysis of costs and benefits expected if the Rouge River watershed were developed through a sustainable, green infrastructure approach, which estimated net benefits ranging from $416 to $960 million over a 30-year time period. By extrapolating to other similar tributaries of Lake Ontario, this study predicted further significant net benefits, suggesting that green infrastructure would be far more cost effective than a traditional approach. The applicants included two other studies showcasing the strong emphasis that U.S. cities like Portland, Oregon and Philadelphia, Pennsylvania are placing on green infrastructure.

The ECO made a decision to forward the application to the six ministries suggested by the applicants.

Background

"Infrastructure" in Ontario's policy context is clearly constrained to mean built structures, or "grey infrastructure" as formally defined by MMAH in the Provincial Policy Statement, 2005 (PPS):

> Infrastructure means physical structures (facilities and corridors) that form the foundation for development. Infrastructure includes: sewage and water systems, septage treatment systems, waste management systems, electric power generation and transmission, communications/telecommunications, transit and transportation corridors and facilities, oil and gas pipelines and associated facilities.

As a result, "green infrastructure" is not yet part of the infrastructure policy lexicon in Ontario. Since MMAH is currently leading a five-year review of the PPS, this question of how best to define "infrastructure" is very timely. Moreover, the applicants noted that a Long-term Infrastructure Plan for Ontario was being prepared by MOI, further underscoring the merit and urgency of examining new policy approaches. Ontario is also experiencing an unprecedented episode of capital investment, triggered by the federal Infrastructure Stimulus Fund. This funding is spread across many sectors, enabling the construction, repair or expansion of hospitals, schools, bridges and other infrastructure right across Ontario. Nearly 3,000 projects of all sizes are underway, and doubtless many would have had potential for integrating greener, cost-effective approaches to infrastructure.

Infrastructure is by its nature a cross-cutting issue, often involving multiple levels of government, multiple ministries and adjoining jurisdictions. Several Ontario ministries have day-to-day decision-making responsibilities pertaining to both traditional "grey" infrastructure and the "green" infrastructure under discussion here. For example, MTO oversees the maintenance of 16,500 kilometres of existing roads and their right-of-ways, as well as major highway expansion projects worth billions of dollars. As a result, MTO has great scope to shift towards greener stormwater management approaches throughout Ontario's highway system.

Similarly, OMAFRA has responsibility for Ontario's agriculture industry and the province's roughly 57,000 farm operations, with extensive scope to encourage green infrastructure such as creek-side vegetated buffers, shelter belts and cover crops. Farm run-off remains a major Great Lakes water quality concern, especially for areas with high concentrations of livestock and high incidences of reported manure spills such as Ontario's Huron County shoreline. Studies in this area by MOE and Environment Canada have connected the dots between agricultural activities and fecal bacteria pollutants in surface waters, and have also called for more research on how best to strengthen agricultural management practices. Similarly, in Lake Simcoe's watershed, farm activities are responsible for about 25 per cent of total phosphorus loadings (which is more than three times the combined inputs from local municipal sewage

treatment plants). OMAFRA also administers the *Drainage Act,* a point of ECO concern and recommendations since 2004/2005. "Drainage works, by their very nature of dewatering land, pose a real and significant threat to wetlands in rural Ontario," the ECO observed in our 2009/2010 Annual Report, describing the Act as "archaic" and in need of amendment.

Ministry Responses

In March 2011, five of the six ministries denied the applicants' request for a greener definition of infrastructure. Each ministry provided its own rationale as summarized below, but a common underlying message could be distilled; "green infrastructure may be a good idea, but Ontario's current framework of laws and policies is already adequate to encourage this concept." The sixth ministry, MOI, denied the applicants' request in July 2011.

MMAH denied the request, noting its ongoing five-year review of the PPS, involving extensive consultation with a wide range of stakeholders. As part of this consultation, MMAH had already received input from the applicants, and the ministry promised to also consider the additional points raised in this *EBR* application. MMAH also noted that another formal review opportunity will arise in 2015, when the ministry will lead a co-ordinated review of the Oak Ridges Moraine Conservation Plan, the Greenbelt Plan and the Niagara Escarpment Plan.

OMAFRA denied the request, stating that "many aspects of what you refer to as living green infrastructure are addressed through a wide variety of programs, policies and activities within OMAFRA." OMAFRA made reference to the federal-provincial Growing Forward agreement, to Environmental Farm Planning, to Best Management Practice adoption and to OMAFRA's participation in the Canada-Ontario Agreement (COA) on the Great Lakes. OMAFRA also noted that the ministry administers a number of municipal infrastructure funding programs, such as the Canada-Ontario Municipal Rural Infrastructure Fund (COMRIF). However, the ministry's response lacked any examples or case studies of how these various programs promote green infrastructure, nor did the ministry provide any analysis or summary of the environmental impacts or effectiveness of these programs in improving water quality or water use trends.

MTO denied the request, explaining that the ministry is already guided by principles in its SEV, and by its recently published Sustainability Strategy. MTO also argued that the ministry's transportation projects already require approval under the Ontario *Environmental Assessment Act* (*EAA*) and also the *Canadian Environmental Assessment Act* (*CEAA*). "Applying the *EAA* process allows MTO to achieve the required standards of environmental protection in supporting a more sustainable transportation system," the ministry explained. MTO also noted the existence of over 60 separate provincial and federal statutes, policies and guidelines, collectively setting the environmental rules for transportation infrastructure in Ontario. The ministry also shared some examples of progressive approaches being applied as part of MTO projects; for example, the ministry has partnered with Trees Ontario to plant approximately 290,000 trees along Ontario's highways. Another example referred to a bioretention system to manage stormwater installed next to a carpool lot near the Queen Elizabeth Way (QEW) highway.

MNR denied the request, stating that "[g]reening is already a prominent consideration in the ministry's approach to asset and infrastructure management planning." MNR emphasized it has no direct role in policies and funding to promote sustainable communities, and referred to the leadership of MMAH for municipal land use planning under the *Planning Act* and the PPS. MNR advised it has only an advisory and supporting role under the "one-window" approach to planning in Ontario. (MOE and OMAFRA made very similar comments about MMAH's leadership on the *Planning Act* and the PPS in their responses.) MNR sees its influence on infrastructure to be restricted to its own operations, such as the construction and maintenance of ministry-owned hangars, forest fire bases, fish culture stations, bunkhouses and the like. Within this narrow sphere, MNR provided two examples of recent green approaches, where sustainable building standards were used for construction/design of MNR buildings. MNR staff noted that a review of the ministry's policies did not reveal any existing definition of "infrastructure".

MOE denied the request, but much of the ministry's response also validated the need for a major shift towards green infrastructure. In support of the status quo, MOE's response made reference to existing

legislation such as the *Clean Water Act, 2006,* the *Environmental Protection Act* and the *Ontario Water Resources Act*, but failed to explain how these statutes might encourage the adoption of green infrastructure. MOE's response also suggested that the new *Water Opportunities Act, 2010* would encourage green infrastructure "through development of guidance, demonstration projects and approval processes." The ministry also noted that its work protecting shorelines of the Great Lakes and Lake Simcoe contributes to green infrastructure.

Other language in MOE's response did acknowledge that policy change is needed. MOE drew attention to its own recently completed review of Ontario stormwater policy in light of climate change, available on the ministry's website. MOE's stormwater policy review concluded that: the ministry needs (among other things) a new policy framework to support resilient municipal stormwater management systems; the ministry's 2003 Stormwater Management Planning and Design Manual requires updating, and the ministry's approvals process for municipal stormwater management requires review "to encourage source control best practices for municipal stormwater management." MOE also acknowledged that redefining infrastructure as proposed by the applicants would have helped advance several concepts central to the ministry's SEV, including "ecosystem approach," "pollution prevention" and "continuous improvement".

MOI denied the request, assuring the applicants that sustainability principles have always been considered in the ministry's policies. The ministry referred to the *Places to Grow Act*, the Growth Plan for the Greater Golden Horseshoe, 2006 and also the Growth Plan for Northern Ontario, 2011. The ministry also advised the applicants that Building Together, the government's long-term infrastructure plan, was released in June 2011. The ministry explained that this infrastructure plan: promotes the use of green infrastructure; proposes a framework for planning water-related infrastructure on a watershed basis; and proposes that preconditions for infrastructure grants should include improved asset and financial management practices as well as conservation and efficiency initiatives.

For the full text of the ministry decisions, please see our website at www.eco.on.ca.

ECO Comment

The ECO is convinced that Ontario needs to introduce "green infrastructure" into its policy lexicon. Current provincial policies and funding approaches were written with grey infrastructure in mind, such as sewers, detention tanks, wastewater plants and other traditional engineering approaches to control water. The existing suite of policies do not effectively recognize or support the vital water management functions served by urban parklands, wetlands, woodlands and other forms of green infrastructure. Thus it is very unfortunate that the ministries collectively turned down this request under the *EBR* for a redefinition of "infrastructure." The issue is timely, of considerable importance, and of direct relevance to all six ministries.

Ontario needs to prepare for the twin challenges of a rapidly growing population and a less predictable future climate, marked by more extreme weather events and higher flooding risks. Facing the same challenges, other jurisdictions have recognized that green infrastructure tools are critical. For example, the U.S. Army Corps of Engineers has recognized that the loss of coastal wetlands around New Orleans significantly worsened the impacts of Hurricane Katrina. The measurable benefits of urban trees for air quality, local climate moderation and water management are also widely recognized. For example, energy savings attributed to shading by mature trees around U.S. residences are estimated at about $2 billion annually, and the direct carbon storage of urban trees in the U.S. is valued at $14.3 billion, according to the U.S. Department of Agriculture.

Ontario has its very own cautionary tale of how unwise land use practices can devastate whole landscapes – and how restoring such lands means working with nature. The Ganaraska region near Port Hope was reduced from dense forest to a barren waste and areas of blowing sand by the 1940s after generations of unsustainable farming and forestry practices. The area's restoration through the planting of millions of trees has been a testament to good stewardship, and a reminder that we depend on our existing green infrastructure, just as surely as New Orleans needed its coastal mangrove wetlands.

The ECO sees compelling stewardship arguments for MOI to seize the huge potential embodied in green infrastructure, and to translate the encouraging new green language of Building Together into pilot projects, measurable targets and goals. This ministry was charged with oversight of close to $16 billion worth of infrastructure projects in 2010/2011 alone. Going forward, the ECO urges MOI to open a dialogue with partners on green infrastructure, and to integrate the approach into its infrastructure plan.

In turning down this *EBR* request, ministries asserted that Ontario's existing policy regime adequately supports green infrastructure. The ECO does not agree. Ontario has very far to go to catch up with leading North American jurisdictions, such as Portland and Philadelphia. One hopeful sign is that MMAH, despite turning down the request, promised to consider the issue within the ongoing review of the PPS. The ECO encourages MMAH to make green infrastructure a major focus of PPS reform, and to work closely with MOE. Over the longer term, bringing green infrastructure into the mainstream of Ontario's planning and design approaches will also likely require reforms to the *Planning Act* and the *Building Code Act, 1992*.

OMAFRA, MTO and MNR did not provide convincing reasons for turning down this *EBR* request:

- OMAFRA pointed to its long-standing voluntary farmer education program: the Environmental Farm Plan (EFP). Since EFP's inception in 1992, about 57 per cent of farmers have had their EFP Action Plans peer reviewed and deemed eligible for funding support. While such data on farmer participation rates are available, OMAFRA has not been able to quantify or estimate the on-the-ground environmental outcomes and the cumulative effectiveness of the EFP or related programs. The concerns about farm run-off described above indicate that much more needs doing. A redefinition of "infrastructure" from an agricultural perspective would also have opened a discussion of *Drainage Act* reforms and the need to better recognize the services wetlands provide in water filtration and storage.

- MTO referenced its recently published Sustainability Strategy, implying that this strategy would address the applicants' issues. Unfortunately, this new MTO document does not advocate or even mention any green approaches for managing stormwater quality or quantity. MTO's response also implied that the existing environmental assessment process can be relied upon to provide green outcomes. The ECO does not agree. In response to concerns raised in ECO Annual Reports as far back as 2004/2005, MTO has acknowledged the need to update and strengthen sustainability approaches in the ministry's Class Environmental Assessment for Provincial Highway Facilities (MTO Class EA) – last revised in 2000, and now under amendment (see Environmental Registry #010-9138). The ECO encourages MTO to seize this opportunity to incorporate and emphasize green infrastructure approaches within the MTO Class EA.

- MNR depicted itself as having very limited authority over green infrastructure. But MNR's responsibility is far broader than merely its own forest fire bases, bunkhouses and park visitor centres. More than any other ministry, MNR is seen as the steward of the largest portion of Ontario's existing green infrastructure; wetlands and woodlands, including their under-appreciated services of storing and purifying water, moderating temperatures and sequestering carbon. The ECO has repeatedly warned that only vestiges remain of southern Ontario's wetlands and woodlands, that even those vestiges are imperilled, and that MNR has inadequate tools to protect them. A more enlightened definition of infrastructure would legitimize MNR's protection of wetlands, woodlands and other natural heritage, especially in urbanizing areas, on account of their enormous practical value as green infrastructure.

MOE also turned down the *EBR* request, but its response showed that ministry staff are keenly aware of the need for new water management paradigms and the potential for green infrastructure. MOE should request the go-ahead from Cabinet to engage the solutions represented by green infrastructure. This cannot be a one-ministry job; the new approaches will need to be integrated into the stewardship philosophies, engineering toolkits and daily decision-making of numerous ministries. For example, parent Class Environmental Assessment documents could be updated not only to permit but to actively recommend green infrastructure approaches; such an overhaul would influence the greening of

thousands of site-specific public sector projects. MOE should be given a senior role on these reforms along with MMAH, and should be assured the full engagement and support of sister ministries.

5.6 Ministry of Natural Resources

Review of Application R2006015:

5.6.1 Measures to Conserve Woodland Caribou (*Rangifer tarandus caribou*) and its Habitat (Review Undertaken by MNR)

Keywords: caribou; monitoring; recovery; species at risk

Background

The woodland caribou (*Rangifer tarandus caribou*) has long been considered a national symbol of Canada. Sensitive to human disturbances such as forestry operations and road-building, the forest-dwelling boreal population of woodland caribou is listed as a threatened species under Ontario's *Endangered Species Act, 2007* (*ESA*). It has become a sentinel species and indicator of the ecological impact of development in northern Ontario.

In October 2006, the ECO received an application for review that raised broad concerns about the extent and sufficiency of the Ontario government's guidance material and support mechanisms for the management of woodland caribou.

The ECO forwarded the application to the Ministry of Natural Resources (MNR), the Ministry of the Environment, the then Ministry of Northern Development and Mines, and the Ministry of Energy. The latter three ministries denied the application and the ECO reviewed these ministries' handling of the application in the Supplement to the ECO's 2006/2007 Annual Report.

In February 2007, MNR agreed to undertake a "scoped review," focusing only on provisions for monitoring woodland caribou and their habitat, instead of undertaking the broad review that the applicants requested. In September 2010, MNR provided the applicants with notice of the outcome of its review.

Summary of Issues

The applicants asserted that the requested review was warranted and in the public interest for the following reasons:

- "The activity of sustainable forest management, inclusive of managing for wildlife and wildlife habitat, occurs within public forests in Ontario;
- Widespread loss of caribou habitat in Ontario (including the majority of the area allocated to 'sustainable forest management') is well-documented, contributing to its status as a 'threatened' species nationally;
- An important component of the mandate of the Ministry of Natural Resources, as expressed in its Statement of Environmental Values, is the stewardship obligation to the conservation of this forest species and its habitat;
- The linkages between habitat loss and the expansion of industrial forest harvesting are well established – guidelines provided to Sustainable Forest Licence holders by the Ministry of Natural Resources are a critical tool for implementing MNR's obligations in the forest;

- Without documented improvements in managing the impacts of industrial forestry upon caribou, further loss of habitat is predictable;
- Without this review it is unlikely that MNR will [effect] a timely review of its own, given the history of the subject guidance;
- Without this review, it is predictable that a further period of years will elapse in the name of 'recovery planning', contributing to the current dire pressures on this species without any clearer direction being provided to harvesters operating around Caribou habitat; and
- In more than one audit performed on operations in Ontario under the requirements of the *Crown Forest Sustainability Act, 1994* (*CFSA*), independent auditors of forest management units containing caribou have raised concerns about the implementation and/or likelihood of success of caribou guidance provided by MNR to forest management planners."

The applicants were concerned that "while the government continues to delay actual (on the ground) implementation of a caribou recovery strategy, status quo industrial development continues . . . in critical caribou habitat." They stated that these other forms of development include mining and mineral exploration activities, road building and hydroelectric development.

The applicants expressed concern that the existing guidance is only applicable to forestry operations on Crown land and that there is "no sound premise for assuming that the well-documented range recession of caribou in the face of industrial forest harvesting will be held in check."

The applicants requested that the existing regulatory framework that guides the management of woodland caribou be reviewed. At the time of their request, the regulatory framework included MNR's Class Environmental Assessment Approval for Forest Management on Crown Lands in Ontario (Declaration Order MNR-71), the Provincial Wildlife Population Monitoring Program, the *CFSA*, the Forest Management Guidelines for the Conservation of Woodland Caribou, the Natural Disturbance Emulation Guideline, the Forest Fire Management Strategy for Ontario, and the draft Recovery Strategy for Forest-dwelling Woodland Caribou (*Rangifer tarandus caribou*) in Ontario.

The applicants stated that many components of the regulatory regime had been in place for a significant period of time, but that their effectiveness had never been comprehensively examined. For example, the Forest Management Guidelines for the Conservation of Woodland Caribou, which apply only to northwestern Ontario, have been in place since 1994 and no assessment has ever been made public as to its actual effect on woodland caribou. The applicants stated that "without adequate monitoring, the status quo is an unproven tool in preventing the decline of caribou in Ontario and should not be blindly relied upon."

Further, the applicants stated that a guideline for northeastern Ontario was "rumoured to exist," but that it had never been made public. The applicants expressed concern that this lack of a guideline for northeastern Ontario gives the appearance that this area is a "lower priority" despite the fact that it too has been identified as an area for the recovery of woodland caribou.

Ministry Response

Preliminary Consideration

In February 2007, MNR concluded that the requested review was warranted, but only insofar as it related to the adequacy of provisions for monitoring woodland caribou and their habitat. MNR stated that its "existing, scheduled, and planned activities" addressed the majority of concerns raised by the applicants, and there was no potential for harm to the environment (i.e., woodland caribou) in not undertaking the full review. On this basis, MNR stated that a "comprehensive" review was unwarranted. MNR originally stated that it would initiate its "scoped review" immediately, and that it would complete the review by February 2008.

For a more detailed discussion of MNR's preliminary decision, refer to Section 5.4.1 of the Supplement to the ECO's 2007/2008 Annual Report.

Outcome of MNR's Scoped Review

On September 16, 2010 – over two and a half years later than originally anticipated and almost four years after the applicants submitted their application – MNR provided the applicants with the results of its review. MNR explained its delay by stating that, "to ensure that the scoped review considered and reflected MNR's most current policies and directions regarding woodland caribou monitoring," it had waited to finalize the outcome of the scoped review until after Ontario's Woodland Caribou Conservation Plan was published a year earlier in October 2009.

MNR prefaced its decision by stating that the ministry "determined that monitoring provisions related to woodland caribou and their habitat must support specific recovery strategies and actions as identified in Ontario's Woodland Caribou Conservation Plan." The Caribou Conservation Plan, released in October 2009, represents the official government response to the Recovery Strategy for the Woodland Caribou, which was submitted to the ministry by the Ontario Woodland Caribou Recovery Team in August 2008. Both documents were required to be prepared under the *ESA*. MNR stated that the scoped review was informed by the assessment and analysis of both the Recovery Strategy and the Caribou Conservation Plan.

When describing the outcome of its review, MNR stated that it had "determined that new monitoring programs were needed to adequately assess the habitat and populations of woodland caribou."

MNR included a two-page table that sets out a high-level breakdown of strategies and actions identified in the Caribou Conservation Plan, monitoring requirements for each strategy or action, and how MNR would carry out the required monitoring. The table does not provide any information about who specifically will be responsible for the work, timelines, or how the work will be funded. The ECO noted similar problems with the 13 government response statements that MNR released this year under the *ESA*; those, too, lacked timelines and failed to provide direction on various ministries' responsibilities under those statements (for more information, see Part 3.2 of this year's Annual Report).

The ministry noted that, within the Area of the Undertaking (i.e., the portion of the province where commercial forestry is currently permitted), activities to implement the habitat component of the Caribou Conservation Plan would be "delivered through the anticipated Boreal Landscape Guide during forest management planning." However, MNR has pushed back the release date of the Boreal Landscape Guide until 2012.

MNR also described a number of other monitoring and assessment activities that were underway while the Caribou Conservation Plan was being developed, "in anticipation of the monitoring and reporting challenges associated with caribou conservation."

MNR reported that it will be developing a two-phase "implementation plan" to accompany the Caribou Conservation Plan, and that population and habitat monitoring would be a key component of that plan. The full monitoring strategy will emerge from the second phase of the plan. The Caribou Conservation Plan itself states that the implementation plan would be finalized within six months of the release of the plan (i.e., April 2010), and that the monitoring strategy would be complete within one year (i.e., October, 2010). As of May 2011, neither of those documents has been released.

Finally, MNR acknowledged the importance of having "long-term data from a monitoring program that is carefully designed at the outset." Noting that such a monitoring program should be designed to be able to continue under "difficult fiscal circumstances," MNR stated that it will "continue to look for partnership arrangements to share monitoring costs and increase capabilities."

For the full text of the ministry's decision, please see our website at www.eco.on.ca.

Other Information

In January 2011, MNR posted an information notice on the Environmental Registry (#011-2303) entitled "A proposed approach for habitat protection for Woodland Caribou (Forest-dwelling boreal population) under the Endangered Species Act, 2007." The ECO will review the ministry's approach to regulating caribou habitat once a habitat regulation has been made. In the meantime, see Section 2 of this Supplement for the ECO's comment on MNR's inappropriate use of an Information Notice for this proposal.

In July 2011, MNR informed the ECO that it has completed an estimate of Ontario's caribou population, as well as two integrated range assessments, and that it will be releasing both a report on caribou range delineation and an "18-month implementation report outlining accomplishments to date" by fall 2011.

ECO Comment

The *Environmental Bill of Rights, 1993* (*EBR*) states that when a ministry decides that a review is warranted, it will complete the review "within a reasonable time." MNR's delay in completing this review – nearly four years from application to outcome – is unreasonable and inexcusable. The ministry's handling of this application shows a lack of respect for the public exercising their rights and thwarts the ECO's duties to report to the Ontario Legislature.

The ECO has commented before on our disappointment with MNR's decision to scope this application to focus only on provisions for monitoring rather than undertake the applicants' broad request to review Ontario's existing caribou framework. The ECO is disappointed, therefore, that MNR's review was not just scoped to focus on monitoring needs, but narrowed even further to consider only those monitoring measures necessary to meet strategies and actions identified in the Caribou Conservation Plan.

The applicants were concerned that if a review were not undertaken, more years would elapse "in the name of 'recovery planning'" without adequate protection for caribou. This concern seems to have been well-founded; even though MNR undertook a review, there is no indication that it accelerated or prioritized its consideration of caribou monitoring needs or took any action as a direct result of the application. Although MNR states that "upon completion of the scoped review, [it] determined that new monitoring programs were needed," it did not identify any new monitoring programs beyond those already identified during development of the Caribou Conservation Plan. This, together with MNR's lengthy delay in completing the review, suggests that the ministry simply continued its planned work and then conducted the review retrospectively, summarizing the monitoring initiatives that existed or were identified during recovery planning. The more appropriate and transparent approach would have been for MNR to have reviewed its policies and directions on caribou monitoring when it agreed to undertake the scoped review in 2007, and to have provided the applicants with its conclusions about monitoring needs at that time. By waiting until the new framework was established three years later, the ministry effectively did an end run around the intent of the *EBR* applications process.

While the ECO is pleased to learn of MNR's recent work on caribou range delineation, we are extremely disappointed that MNR did not first release its implementation plan and caribou monitoring strategy, both of which are long overdue and ought to have undergone public consultation under the *EBR* prior to being implemented.

Ontarians have a high degree of interest and concern about plans for woodland caribou conservation in the province, and the consequences to forestry in particular. By failing to keep the public informed of its progress, MNR is allowing this public anxiety to fester. Monitoring information is critical to framing this sensitive dialogue; only with a current and clear understanding of caribou range and distribution can a rational discussion be had about conserving Ontario's caribou. If robust monitoring data was publicly available, the public might be surprised by the limited extent to which conservation measures would actually affect local communities. The ECO therefore exhorts MNR to make releasing all of these documents – as well as the draft Boreal Landscape Guide, which is long overdue – a high priority.

Review of Application R2010006:

5.6.2 Review to Remove Snapping Turtles from Game Species List under the *FWCA* (Review Denied by MNR)

Keywords: snapping turtles; *Fish and Wildlife Conservation Act*; MNR; *Endangered Species Act, 2007*

Background

Overview

Globally, turtles and tortoises are now among the most endangered group of vertebrate animals, according to the 2011 study Turtles in Trouble produced by the Turtle Conservation Coalition. The report finds that more than half of the 328 tortoise and freshwater turtle species in the world are threatened with extinction due to unsustainable hunting, the pet trade, pollution and destruction of their habitats.

In December 2010, the ECO received an application for review requesting the Ministry of Natural Resources (MNR) review the *Fish and Wildlife Conservation Act, 1997* (*FWCA*): Part X, Schedule 4. Schedule 4 of the Act lists the snapping turtle as a game species despite the fact that it is classified as a species of special concern in Ontario and Canada. The applicants want snapping turtles to be removed from the Schedule.

The applicants believe that the review is necessary because there is strong evidence indicating the hunting of snapping turtles is unsustainable, and argue that permitting the hunt is inconsistent with the *Endangered Species Act, 2007* (*ESA*) and MNR's Statement of Environmental Values (SEV).

Snapping Turtles:
As Canada's largest reptile, the snapping turtle (*Chelydra serpentina*) averages at 20-36 centimetres long and weighs 4.5-16 kilograms. These turtles have black, brown or olive shells, usually covered in algae, and long tails with triangular crests along its length. They are unable to retract their head, legs or tails into their shell for protection.

Snapping turtles are omnivorous and tend to prefer to reside in shallow waters. During nesting season (May-June), the females travel to sandy and gravelly areas along streams or man-made areas to build a nest and lay up to 50 eggs. They then cover the nests and leave. The nests are highly susceptible to predators. The eggs that do survive take 50 to 60 days to hatch. Temperature during incubation determines the gender of the hatchlings.

It takes 15 to 20 years for a snapping turtle to reach maturity. Their lifespan ranges from 30 to 100 years. Very low reproductive success rates and adult mortality affect the species' survival. Threats such as hunting, road kill, poaching, direct persecution, predation, pollution, fish by-catch, and boat strikes all contribute to the decline of the snapping turtle population.

Furthermore, the snapping turtle's range is shrinking due to habitat loss and degradation. Their range extends from Ecuador to Canada, and in Canada they are found between Saskatchewan and Nova Scotia. In Ontario, they are primarily limited to the southern part of the province.

Snapping turtles and their habitats receive a level of protection under several statutes. The snapping turtle is currently listed as a species of special concern under Ontario's *ESA* and under the federal *Species at Risk Act*. Snapping turtles are also designated as a "game species" under the *FWCA*.

A species of special concern is defined in the *ESA* as a species that lives in the wild and may become threatened or endangered as a result of a combination of biological characteristics and identified threats. In Ontario, a management plan must be developed for species of special concern within five years of a species being listed. The management plan for snapping turtles is expected to be completed in the fall of 2014. Once the plan is prepared, the Minister of Natural Resources will have nine months to issue a response statement describing the government's course of action in response to the management plan.

Summary of Issues

Hunting Snapping Turtles is Unsustainable:
Although snapping turtles are federally and provincially listed as species of special concern, they are also listed as a game species under the *FWCA*, meaning they can be legally hunted. Ontario Regulation 670/98 under the Act permits the holder of a sport or conservation fishing licence to take two snapping turtles per day during a two-month season in some parts of its range and year round in other parts of the species' range. Snapping turtles may only be taken by box or funnel traps or bare hands.

The applicants cited the 40-year research of Dr. Ronald Brooks in Algonquin Provincial Park in their application. An eminent expert in the field, his studies indicate the continued decline of snapping turtles. Extremely low reproductive success coupled with a reliance on adult longevity for species survival means an increase in mortality as small as one per cent over natural rates can affect a population's continued existence.

Furthermore, the applicants cite a report prepared by the Ontario Multi-Species Turtles at Risk Recovery Team that highlights how a significant number of turtles are lost by other threats such as road kills, poaching and pollution. For instance, one road kill study on the Long Point Causeway found 272 dead snapping turtles over four years.

The applicants argue that based on the snapping turtle's biological characteristics and other threats to their longevity, permitting the hunting of two snapping turtles per day will threaten the species' survival in Ontario. They urged the province to join Quebec and Nova Scotia and prohibit the harvesting of snapping turtles.

FWCA *Listing is Inconsistent with the* ESA *and MNR's SEV:*
The applicants recognize that the *ESA* does not prohibit the harvesting of species of special concern. However, given the evidence described above, the applicants believe that permitting the hunting of snapping turtles contradicts the purpose of the *ESA* to "protect species that are at risk and their habitats, and promote the recovery of species that are at risk."

In addition, the applicants state that Schedule 4 (in regards to snapping turtles) is inconsistent with the ministry's own SEV, particularly the principles of: achieving sustainability through a sound understanding of natural and ecological systems and how human actions affect them; exercising caution and special concern for natural values in the face of uncertainty; and preventing negative environmental impacts before undertaking new activities rather than correcting environmental problems after the fact.

The applicants state that both the evidence used to list snapping turtles as species of special concern and the reports cited in their application outline the reasons why hunting snapping turtles should be prohibited. They criticize the ministry for not monitoring how many snapping turtles are being hunted or killed before and after setting the harvest quotas. Moreover, they argue that MNR is responsible for preventing the population of snapping turtles from declining to the point where they become threatened, endangered or worse.

Other Information

In our 2009 Special Report, The Last Line of Defence, the ECO commented on examples of other species at risk in Ontario that the government permits to be harvested despite its protected status. For instance, eastern wolves, a species of special concern, can be hunted in conservation reserves (see Part

3.3 of the Annual Report for more information on Ontario wolves). Furthermore, exemptions under O. Reg. 242/08 of the *ESA* permit the hunting of the endangered northern bobwhite on game preserves, and the fishing of the endangered Aurora trout and the extirpated Great Lakes population of Atlantic salmon.

Ministry Response

In February 2011, MNR issued its decision to deny the application for review under section 67 of the *Environmental Bill of Rights, 1993*.

MNR stated that it denied the application because a management plan for the snapping turtle will be developed under the *ESA*, which is scheduled to be completed in September 2014, and would provide an opportunity for public consultation. The ministry stated it would consider the contents of the application for review and the possibility for future monitoring in the development of the management plan.

MNR also asserted that there was a low risk of harm to snapping turtles by not conducting the review. It cited evidence suggesting snapping turtles remain widely distributed and locally abundant in their core range south of the French River. Because of their expansive range, MNR is not undertaking an active monitoring program for snapping turtles. MNR referenced research that found snapping turtle populations to be sensitive to changes in adult survival rates, but limited harvesting by individuals may be sustainable if commercial harvesting is banned.

MNR outlined how its implementation of conservative harvest regulations has reduced the pressure on the species. Prior to 1990, Ontario did not regulate individual or commercial harvesting of snapping turtles. Then in 1990, snapping turtles were listed as a game species, which allowed Ontario to restrict its harvest. MNR stated that this included creating "conservative harvest regulations" that: allow a two turtle daily bag limit; limit harvesting in the turtle's core habitat to the months of July to September to avoid hunting during nesting season; prohibit harvesting in provincial parks; and end the commercial harvest and sale of snapping turtle meat.

Lastly, the ministry said its approach to snapping turtle management was consistent with its SEV. MNR stated that it takes an ecologically based approach to protecting snapping turtles by protecting their habitat through resource management planning processes on private and Crown lands. It also relies on the Provincial Policy Statement, 2005, Forest Management Planning and landscape-based regional land-use plans. The ministry believes it upholds the precautionary principle through the implementation of "conservative regulations" on legal harvesting and eliminating commercial harvesting and sale.

For the full text of the ministry decision, please see our website at www.eco.on.ca.

ECO Comment

The ECO disagrees with MNR's decision to deny this application for review. In weighing the evidence provided by the applicants and the ministry, the ECO concludes that the ministry should exercise a precautionary approach in accordance with its SEV and impose a moratorium or ban on the hunting of snapping turtles, at least until after this issue has been properly examined with full public consultation.

The biology of snapping turtles means that the viability of the population is affected by individual turtle deaths, and the population is unable to readily recover from the different threats it faces. Although the ministry is to be commended for ending the commercial harvest of snapping turtles, the ECO is troubled that current "conservative" harvesting rates were determined without proper population monitoring, and MNR is unaware of the number of turtles that are killed or hunted each year. With 764,374 angling licences issued in Ontario in 2005, these "conservative" harvesting practices could conceivably raise the at-risk status of this species of special concern to endangered or worse. As such, the ECO does not have confidence in MNR's assertion that its harvesting numbers are sustainable in the long term.

Although the ECO appreciates that the ministry has committed to developing a management plan for snapping turtles, the *ESA* does not specify what should be included in the plan or who is qualified to

prepare one. Furthermore, MNR is not expected to begin implementing the plan before late 2015. In the interim, an unknown number of snapping turtles will continue to be hunted, which may have long-term detrimental impacts for the population in its core range in the province.

The ECO is disappointed that, despite having the evidence, the responsibility and the ability to protect snapping turtles, the ministry decided instead to postpone effecting the necessary action – instituting a hunting moratorium or ban for the snapping turtle. This would give the ministry time to study the threats to the longevity of snapping turtles, monitor the species' population numbers to determine the sustainability of the harvest, and complete a management plan.

Review of Application R2010007:

5.6.3 Wolf Management
(Review Denied by MNR)

Keywords: Committee on the Status of Endangered Wildlife in Canada (COSEWIC); Committee on the Status of Species at Risk in Ontario (COSSARO); canids; conservation; coyotes; eastern wolf; *Endangered Species Act, 2007* (*ESA*); *Fish and Wildlife Conservation Act, 1997* (*FWCA*); gray wolf; hunting; Ministry of Natural Resources (MNR); species at risk; trapping

In December 2010, two applicants requested that the government review Ontario's regulatory and policy framework for managing wolves. Specifically, the applicants requested that the Ministry of Natural Resources (MNR):

- ask the Committee on the Status of Species at Risk in Ontario (COSSARO) to recognize that the eastern wolf (*Canis lycaon*) is a separate species from the gray wolf (*Canis lupus*) and elevate its at-risk status under the *Endangered Species Act, 2007* (*ESA*);
- amend the *Fish and Wildlife Conservation Act, 1997* (*FWCA*) to list eastern wolves as a specially protected mammal;
- review the Strategy for Wolf Conservation in Ontario (2005) on the basis that new scientific information demonstrates that eastern wolves are a unique species and therefore merit a different management approach; and
- review MNR's policy, Protection of Vulnerable, Threatened and Endangered Species in Parks (PM 11.03.02), review MNR's decision record under this policy, and amend O. Reg. 663/98 – Area Descriptions, made under the *FWCA*, to prohibit the harvesting of wolves in protected areas (provincial parks and conservation reserves).

Background

Several different "types" of wolf-like canids have been described in Ontario: the northern gray wolf, which inhabits the subarctic tundra; the eastern wolf (or "Algonquin type"), which inhabits the deciduous forests of the upper Great Lakes; the "Great Lakes type", an eastern wolf/gray wolf hybrid that inhabits the boreal forests; and the eastern coyote, an eastern wolf/coyote hybrid.

Both the provincial *ESA* and the federal *Species at Risk Act* (*SARA*) list the eastern wolf as a subspecies (*Canis lupus lycaon*) of the gray wolf (*Canis lupus*) and designate it as a "species of special concern." Recent research by MNR staff and other scientists, however, has suggested that the eastern wolf is not a gray wolf subspecies, but rather a separate species whose taxonomic distinctiveness has been reduced by interbreeding with both coyotes (*Canis latrans*) and gray wolves. If correct, this finding could have numerous management and conservation implications. For that reason, after reviewing the available scientific and taxonomic information, the U.S. Fish and Wildlife Service (USFWS) recognized the

presence of two wolf species in the Western Great Lakes area: the gray wolf and the eastern wolf. The USFWS notes that "recent wolf genetic studies indicate that what was formerly thought to be a subspecies of gray wolf is actually a distinct species." In light of this research finding and its potential ramifications, the two applicants requested that the Ontario government revise its legislative and policy framework for managing wolves.

Summary of Issues

The Eastern Wolf's At-Risk Status

In Ontario, the *ESA* legislates the listing, protection, and recovery of species at risk. Under the *ESA*, COSSARO – an independent body comprised of members with scientific or Aboriginal knowledge expertise – is tasked with determining the classification of species at risk: endangered, threatened, special concern, extirpated or extinct. However, if the Minister of Natural Resources is of the opinion that credible scientific information indicates that the classification of a species is not appropriate, the Minister may ask COSSARO to reconsider the classification.

The applicants requested that the Minister exercise her powers to ask COSSARO to assess the eastern wolf's taxonomic designation as a unique species and elevate its at-risk status. The applicants argued that "in light of all the vital research conducted, and all of the stern recommendations made over the last decade from different sources, this reclassification needs to happen in order to save the fragile eastern wolf species from extirpation." The applicants added that "the urgency of this request is highlighted by a solid foundation of research over the last 10 years, much of which is co-authored by MNR staff."

The Need to List the Eastern Wolf as a Specially Protected Mammal

Under the *FWCA*, hunting and trapping species listed as "furbearing mammals", such as coyotes, beavers and otters, is permitted in accordance with specific conditions. It is entirely illegal, however, to hunt or trap species listed as "specially protected mammals," such as shrews and chipmunks, except in defence of property. Because *Canis lupus* is listed as a "furbearing mammal" under the *FWCA* (and the eastern wolf is not listed as a unique species), the eastern wolf can be hunted or trapped in Ontario, subject to conditions. Given the "overwhelming scientific evidence" that the eastern wolf is a distinct species with an "extremely low (projected) population estimate," the applicants requested that MNR amend the *FWCA* to list eastern wolves as a specially protected mammal.

Ontario's Wolf Conservation Strategy

The applicants asserted that the new scientific evidence that eastern wolves are a unique species merits not only a higher at-risk status, but also a different approach to their management. The applicants, therefore, requested that MNR review the Strategy for Wolf Conservation in Ontario (the "Wolf Conservation Strategy") it completed in 2005.

The applicants also argued that the Wolf Conservation Strategy should be reviewed for a variety of other reasons:

- The strategy fails to prioritize the conservation of wolves simply for its own sake. Instead of aiming to balance social, ecological, cultural and economic concerns, the strategy should be focused on the survival of wolf species and limiting human threats to them.

- The strategy's intention to "determine sustainable harvest levels and evaluate the need for an allocation system that includes all user groups" would be ecologically indefensible.

- There is a lack of recent, comprehensive population assessments and monitoring for both eastern and gray wolves such that both species may be under threat. The applicants noted that without a thorough monitoring system, MNR cannot sufficiently determine the impact that hybridization has on gray wolves and whether its *ESA* status, like the eastern wolf, should also be updated.

- As required by MNR's Statement of Environmental Values, MNR policies should exercise caution and special concern for natural values in the face of uncertainty.

- Because there is no exact estimate of how many eastern wolves are hunted and trapped each year, MNR should follow the precautionary principle – a principle highlighted in both the *ESA* and the international Convention on Biological Diversity – and disallow hunting of this at-risk species.

The applicants also expressed discontent over MNR's implementation of the strategy. For example, they argued that MNR has neither evaluated nor explored future requirements for the role of protected areas on sustaining populations of wolves and their prey.

Hunting Species at Risk in Protected Areas

The applicants asserted that while "hunting an eastern wolf anywhere in the province is completely unacceptable . . . hunting a species at risk in a protected area is so egregious it defies all logic." They also stated that such practice runs contrary to the intent of the *Provincial Parks and Conservation Reserves Act, 2007* (*PPCRA*) to protect ecological integrity. As such, they argued that "the regulatory framework that permits this must be changed." Moreover, given their ecological importance as top predators and keystone species in Ontario, the applicants argued that both gray wolves and eastern wolves should be protected from hunting and trapping in protected areas. Specifically, the applicants requested a comprehensive review of: the MNR policy Protection of Vulnerable, Threatened and Endangered Species in Parks (PM 11.03.02), which was updated in 2004 and renamed Protection of Species at Risk in Provincial Parks; and MNR's September 28, 2004 decision record under this policy.

PM 11.03.02 directs that species listed as threatened or of special concern under the *ESA* are to be given the same level of protection in provincial parks as endangered species. This includes protection from hunting and trapping. The policy, however, also states that MNR can exempt species of special concern from this protection by documenting the ministry's rationale in a "decision record." In September 28, 2004, MNR finalized such a decision record for the eastern wolf, effectively exempting it from heightened protection in provincial parks. But because O. Reg. 665/98 – Hunting, made under the *FWCA* prohibits the hunting of wolves in provincial parks, this exemption only allows harvest by trappers – not by hunters – of eastern wolves in provincial parks. (While this point is unclear in the original decision record, MNR clarified this point when it updated the decision record in November 2004.)

Even though O. Reg. 665/98 already prohibits the hunting of wolves in parks, the applicants also asked MNR to amend O. Reg. 663/98. This regulation specifies the areas where activities regulated under the *FWCA*, including the hunting and trapping of furbearing mammals, may occur.

Ministry Response

In March 2011, MNR denied the application, stating that the public interest does not warrant a review. MNR's reasons for its decision are outlined below.

The Eastern Wolf's At-Risk Status

Currently, the provincial at-risk status of the eastern wolf under the *ESA* is consistent with its federal status under the *SARA*. The Committee on the Status of Endangered Wildlife in Canada (COSEWIC), however, which classifies at-risk species under the *SARA*, has requested an updated status report on the eastern wolf subspecies and is scheduled to reassess its classification in April 2013. MNR informed the applicants that COSSARO will also receive the updated status report, which will include all available recent information on the taxonomic and population status of the eastern wolf, and COSSARO is expected to reassess the species' special concern status in spring 2013. MNR concluded, therefore, that there is no need to ask COSSARO to reassess the eastern wolf's at-risk status at this time. The ECO notes that nowhere does the *ESA* state or infer that COSSARO should postpone any of its responsibilities until after COSEWIC has deliberated the federal status of a species.

The Need to List the Eastern Wolf as a Specially Protected Mammal

MNR responded that "although there is presently not complete scientific agreement that the eastern wolf is a unique species, all wolves in Ontario are currently afforded protection as furbearing mammals under Ontario's *FWCA*." The ministry argued that the eastern wolf's current FWCA classification as a furbearing mammal "allows flexibility to implement appropriate regulatory measures to conserve wolf populations while providing a wider range of tools available to landowners experiencing conflicts with wild canids (e.g., coyote)." Furthermore, MNR noted that even under its current "furbearing mammal" classification, several conservation regulatory measures – including restrictions on hunting and trapping – protect eastern wolves, and that additional (or even complete) protection could be accomplished through further restrictions or closing of seasons. MNR concluded that reclassifying the eastern wolf as a specially protected mammal would "provide no further advantage for wolf protection and would prevent flexibility in species management."

Ontario's Wolf Conservation Strategy

MNR explained that the Strategy for Wolf Conservation in Ontario provides the policy framework for managing both gray and eastern wolves in Ontario, and that in implementing the strategy, MNR has collected much of the new information that will be used by COSEWIC and COSSARO to reassess eastern wolves. MNR noted that ministry research provides important information on the ecological and genetic relationships amongst Ontario's wild canid species and the effectiveness of the current management strategy. The ministry concluded, however, that final results of its research are important to make informed decisions on whether a review of Ontario's wolf strategy is required following COSEWIC and COSSARO's re-assessments.

Hunting Species at Risk in Protected Areas

In response to the applicants' request to prohibit the hunting of wolves in protected areas, MNR responded that because section 15(1) of the *PPCRA* prohibits hunting in provincial parks unless allowed by an *FWCA* regulation, and because no *FWCA* regulations specifically allow it, hunting of eastern wolves is prohibited in all provincial parks. MNR noted, however, that, unless prohibited by an *FWCA* regulation, the *PPCRA* does allow hunting in conservation reserves. Because no regulations prohibit it, the hunting of wolves – including eastern wolves – is permitted in conservation reserves. MNR's position is that allowing hunting in conservation reserves is consistent with their objective to provide opportunities for ecologically sustainable land uses, including traditional outdoor heritage activities.

For the full text of the ministry's decision, please see our website at www.eco.on.ca.

Other Information

Five months after the applicants submitted their application, a peer-reviewed study was published that used a new genomic tool to examine the genetic relationships of wolf-like species worldwide. Amongst other things, the study found that both the "Great Lakes wolf" and the eastern (or "Algonquin") wolf have highly blended genomes derived primarily from gray wolves. This study therefore reopens the debate as to whether the eastern wolf is a unique species closely related to the red wolf.

ECO Comment

The ECO is disappointed that the ministry denied this review; a request to review a ministry policy due to new scientific information – some of it generated by MNR itself – is an excellent use of the rights afforded the public under the *Environmental Bill of Rights, 1993*.

In its response to the applicants, MNR asserted that "there is presently not complete scientific agreement that the eastern wolf is a unique species." While the release of a new genetic analysis supports this statement (see Other Information), prior to this study's publication, the most recent scientific information soundly rejected the hypothesis that the eastern wolf is a gray wolf subspecies. Likewise, MNR's 2007

State of Resources report on wolves, produced by MNR's Inventory, Monitoring and Assessment Section, unequivocally states that "there are two species of wolf in Ontario: the gray wolf . . . and the eastern wolf." Moreover, MNR's Backgrounder on Wolf Conservation in Ontario (2005) explains that "Ontario is home to two wolf species" and that research at Trent University "concludes that the eastern wolf (*Canis lycaon*) is a distinct species of wolf very closely related to the red wolf (*Canis rufus*), rather than a subspecies of gray wolf as originally thought." To avoid the confusion caused by contradictory messages, it is imperative that MNR revise its position, policies and scientific publications to reflect the current state of the science.

Irrespective of any future *ESA* re-classification, MNR should revise its Wolf Conservation Strategy to reflect new information. Although the strategy itself states that MNR will "develop and maintain adequate policy and legislation/regulation support for wolf conservation by: reviewing legislation, regulations and policy direction periodically in light of new information" and "revising conservation approaches as new knowledge and information becomes available," the strategy was not updated to reflect scientific studies that suggest that the eastern wolf is a unique species. Other information that could be considered includes the finding that protecting wolves from harvesting can restore the natural social structure of their packs. The ECO urges MNR to actually employ the adaptive management approach referred to in its strategy and update its policy and regulatory framework accordingly.

Almost a decade ago, the ECO urged MNR to consider classifying the eastern wolf as a specially protected mammal until it is no longer considered a species of special concern. The ECO is entirely unconvinced by MNR's argument that classifying the eastern wolf as a specially protected mammal would provide no further protection, otherwise there would be no reason for this classification to exist. Rather, the ECO considers the protection from hunting and trapping afforded by the *FWCA*'s specially protected mammal category to be a considerably higher level of protection. The ECO is also unimpressed with MNR's argument that classifying the eastern wolf as a furbearing mammal provides greater flexibility in managing landowner-coyote conflicts. The ECO considers this a poor excuse for limiting the protection of a species at risk – especially since the *FWCA* allows landowners to capture or kill wildlife (including specially protected mammals) that is damaging or is about to damage their property. MNR's priority must be conserving at-risk species, not simplifying its management of nuisance animals.

The ECO acknowledges that hunting, in general, may be consistent with the objective of conservation reserves to provide outdoor recreational opportunities. Nevertheless, the ECO believes that – except for the traditional activities of First Nations and Aboriginal peoples – it is inappropriate to allow the hunting of species at risk in any protected area, whether it is a provincial park or conservation reserve. Indeed, the *PPCRA* states that the maintenance of ecological integrity, including healthy and viable populations of species at risk, shall be the first priority in planning and managing provincial parks and conservation reserves.

Finally, although wolf hunting is prohibited in provincial parks, the trapping of wolves – which has resulted in much higher wolf mortality rates than hunting in recent years – is not. If MNR's reluctance to prohibit trapping of eastern wolves in provincial parks is related to the inability for traps to discriminate amongst species, the ECO urges MNR to prioritize the conservation of species at risk and promptly ban trapping in provincial parks altogether. The ECO notes this issue would have been addressed if MNR had held to its long-standing policy to phase out trapping in provincial parks by 2010; unfortunately, MNR reversed its position at the eleventh hour and granted non-transferrable lifetime extensions, allowing trapping in provincial parks to continue.

Review of Application R2010008:

5.6.4 Review of Canoe Portage Routes and the Class Environmental Assessment for MNR Resource Stewardship and Facility Development Projects (Review Denied by MNR)

Keywords: canoe routes; Class Environmental Assessment; *Environmental Bill of Rights, 1993*; forest management planning; Ministry of Natural Resources

Background

In December 2010, two individuals submitted an application under the *Environmental Bill of Rights, 1993* (*EBR*) requesting a review of the Ministry of Natural Resources' (MNR's) policies for determining the legitimacy of canoe portage routes and a review of canoe route provisions in the Class Environmental Assessment for MNR Resource Stewardship and Facility Development Projects (Class EA RSFD).

Forest Management Planning on Crown Land

In Ontario, the *Crown Forest Sustainability Act, 1994* (*CFSA*) and the *Environmental Assessment Act* (*EAA*) guide forest management planning on Crown Land. The *CFSA* requires a forest management plan (FMP) for every forest management unit. The Act requires that FMPs have regard to plant and animal life, water, soil, air and social and economic values, including recreational and heritage values.

MNR's Forest Management Planning Manual outlines the FMP process. It provides direction based on the legislative requirements of the *CFSA* and Declaration Order MNR-71. If proponents follow the planning process described in the manual, along with direction from other regulated forestry planning manuals and other management guides, then forestry activities can proceed in that planning area without any further approval from the Minister of the Environment.

"Values" are defined in MNR's 2009 Forest Information Manual as features, benefits, or conditions of the forest that are linked to a geographic area, that are of interest from various points of view, and that must be considered in forest management planning. The manual states that any person or party (e.g., MNR or other government staff, non-government organizations and the public) can identify values information, at any time. MNR must confirm identified values.

The ECO identified in its review of another *EBR* application submitted during this reporting year that MNR's stringent verification methods could be excluding public input into the values identification process. Although this other application dealt with the identification of cougar habitat in FMPs, the concerns extend to other values such as canoe trails and portages. For additional information, refer to Section 6.2.2 of this Supplement.

The applicants allege that MNR is denying the existence of three historic canoe routes. MNR's basis for denying their existence is because these routes are not included in the Natural Resources and Values Information System (NRVIS), a geospatial database used by MNR staff to collect, maintain and analyze land and natural resource data. The three routes discussed – Marjorie Lake, Pinetorch Creek, and Backdoor – are in the Temagami Forest and Sudbury Forest Management Units (FMUs). The applicants state that by MNR denying their existence as values, the ministry is not required to protect these historic routes from logging through forest management planning. They further allege that MNR has not been diligent in identifying, maintaining and updating NRVIS databases in some FMUs.

The applicants also allege that MNR is using the Class EA RSFD to facilitate the removal of existing canoe routes from the landscape. For example, if MNR does not agree that it is an existing route (an identified value), then it is a new route and would be subject to the Class EA RSFD process. If MNR

considers a canoe route to be existing, maintenance work would not be subject to the Class EA RSFD process.

Class Environmental Assessment

Under the *EAA*, groups of projects can use a streamlined self-assessment environmental assessment process set out in a Class Environmental Assessment (Class EA) document. Once approved by the Minister of the Environment and Cabinet, proponents can follow the process for individual projects within that class to avoid completing a full environmental assessment. In 2003, the Minister of the Environment and Cabinet approved MNR's Class EA RSFD and MNR posted a policy decision notice on the Environmental Registry (#PB8E6012).

The establishment of trails, including canoe portage routes, on Crown Land requires a work permit from MNR under the *Public Lands Act*. A work permit for trails on Crown Land is a disposition of rights to Crown resources and, therefore, is subject to the Class EA RSFD and its screening process. The Class EA RSFD applies to canoe route development projects that include access points, portages, campsites, and garbage and sewage disposal on Crown land outside of provincial parks and conservation reserves. It states that new access points, trails and canoe routes could fall under the "C category" of projects, which is the category for projects with potential for medium to high negative environmental effects and/or public or agency concern.

The applicants also state that since MNR does not acknowledge the existence of the routes, and therefore considers the routes new, a work permit is required to formally establish the trails on Crown Land. Work permits are subject to the Class EA RSFD and its screening process. The applicants request that MNR review its Class EA provisions for canoe routes, including assessment requirements, classification of existing portage trails and the need for a work permit for maintenance. The applicants state that MNR no longer maintains canoe routes in most Crown Land areas, resulting in a permanent loss of canoe route values.

Temagami Application for Review

In 2009, an *EBR* application for review requested that forestry operations provide stronger protection of hiking trails, viewscapes and canoe routes in the Temagami area. All three ministries (MNR, the Ministry of the Environment and the Ministry of Northern Development, Mines and Forestry) turned down the application request. The ECO also sent the application to the Ministry of Tourism (now the Ministry of Tourism and Culture) as a courtesy. While the ECO accepted the technical validity of the ministries' responses, we concluded that the existing forest management framework insufficiently values resource based tourism. In addition, the ECO suggested that the *CFSA* fails to adequately protect wilderness trails and should be amended to make the Ministry of Tourism and Culture responsible for ensuring that resource-based tourism is appropriately valued and protected during forest management planning.

Ministry Response

MNR did not provide the applicants with an acknowledgement of receipt letter or a notice of decision. Ministries are required under the *EBR* to send a letter to the applicants acknowledging receipt of the application within 20 days and provide them with a decision on the application within 60 days. Instead, MNR issued a letter of determination under section 63(3) of the *EBR* on March 1, 2011, 67 days after it received the application for review. It stated that it would not consider this application because the Class EA RSFD is not a prescribed instrument for the purposes of applications for review under the *EBR*. MNR stated that only instruments specifically prescribed under O. Reg. 681/94, made under the *EBR*, can be subject to applications for review provisions of the *EBR*.

However, MNR stated that it considered the applicants' canoe routes and portages concerns. MNR confirmed that "all activities on Crown land, including canoe route establishment and maintenance, must be approved through the issuance of the appropriate permit." MNR stated that the permit would be evaluated under the Class EA RSFD prior to approval. The ministry also offered to work with the

applicants in the development and approval of the Pinetorch, Marjorie Lake and Backdoor canoe routes and associated new portages.

For the full text of the ministry decision, please see our website at www.eco.on.ca.

ECO Comment

The ECO disagrees with MNR's rationale for denying this application; Class EAs are subject to the *EBR*'s application for review process. All Class EA parent documents are policies for the purposes of the *EBR*. Class EAs apply province-wide and they set requirements for proponents to follow when planning projects that could have an impact on the environment. Class EAs are approved by MOE, a prescribed ministry under the *EBR*, and in some cases, they are written by prescribed ministries. Moreover, in 2003, MNR considered this particular Class EA as a policy by posting it on the Environmental Registry as a policy notice.

Canoe routes and portages in Ontario are important, not only as recreational values, but also as cultural and historical values. It is reasonable to believe that Aboriginal peoples used the same routes and portages that recreational canoe enthusiasts use today. From a geographic perspective, there may only be one logical route between two lakes, regardless of maintenance within the last 50 years. MNR tolerates many disturbances on Crown land, including forestry and mining, and these activities are often at conflict with canoeing activities. While the NRVIS database contains many landscape values and features, it is unreasonable for MNR to deny the existence of traditional canoe routes strictly because they are not in the ministry's database. In this reporting year, the ECO received two applications for review in which members of the public expressed concern and frustration with MNR's process for confirming identified values (i.e., canoe routes and cougar habitat) in forest management planning (for additional information, refer to Part 3.4 of this Annual Report). The ECO believes that MNR should ensure that traditional canoe routes and portages are protected because they are an important part of our cultural legacy.

Review of Application R2010013:

5.6.5 The Need to Green Ontario's Definition of Infrastructure (Review Denied by OMAFRA, MOE, MMAH, MNR, MTO, MOI)

This application was reviewed in conjunction with R2010010 (OMAFRA), R2010011 (MOE), R2010012 (MMAH), R2010014 (MTO) and R2010015 (MOI). Please see Section 5.5.3 of this Supplement for the full review.

Review of Application R2010018:

5.6.6 Policies for Cage Aquaculture Licences (Review Pending by MNR)

Background/Summary of Issues

In March 2011, two applicants requested that the Ministry of Natural Resources (MNR) review their policies for the issuance of cage aquaculture licences. The applicants allege that there is potential for detrimental impacts to the Great Lakes nearshore waters from cage aquaculture operations, such as from increased phosphorus loadings. The applicants also expressed concern with the level of public

participation during the issuance of cage aquaculture licences under the Class Environmental Assessment for MNR Resource Stewardship and Facility Development Projects process.

The applicants also submitted an *Environmental Bill of Rights, 1993* application (R2010019) for the Ministry of the Environment to review its cage aquaculture policies (see Section 5.3.14 of this Supplement).

Ministry Response

As of May 31, 2011, the ministry had not completed its preliminary review.

ECO Comment

Since the ministry's decision on this application falls outside of the ECO's 2010/2011 reporting year, the ECO will review the handling of this application in our 2011/2012 Annual Report.

5.7 Ministry of Transportation

Review of Application R2010014:

5.7.1 The Need to Green Ontario's Definition of Infrastructure (Review Denied by OMAFRA, MOE, MMAH, MNR, MTO, MOI)

This application was reviewed in conjunction with R2010010 (OMAFRA), R2010011 (MOE), R2010012 (MMAH), R2010013 (MNR) and R2010015 (MOI). Please see Section 5.5.3 of this Supplement for the full review.

SECTION 6

ECO REVIEWS OF APPLICATIONS FOR INVESTIGATION

SECTION 6: ECO REVIEWS OF APPLICATIONS FOR INVESTIGATION

6.1 Ministry of the Environment

Review of Application I2009012:

6.1.1 Contraventions of the *ARA*, *ESA*, *EPA* and *OWRA* at a Quarry Site (Investigation Denied by MOE and MNR)

This application was reviewed in conjunction with R2009013 (MNR). Please see Section 6.2.1 of this Supplement for the full review.

Review of Application I2009015:

6.1.2 Sewage Related Contraventions of Several Acts, Regulations and Certificates of Approval by Ontario Parks (Investigation Undertaken by MOE)

Keywords: Certificates of Approval (Cs of A); *Environmental Protection Act* (*EPA*); Ministry of Natural Resources (MNR); Ministry of the Environment (MOE); Ontario Parks; *Ontario Water Resources Act* (*OWRA*); provincial parks; sewage

In February 2010, two applicants requested that the Ministry of the Environment (MOE) investigate the Ministry of Natural Resources (MNR) for alleged contraventions of multiple acts, regulations, and Certificates of Approvals (Cs of A). The applicants alleged that Ontario Parks – the branch of MNR responsible for administering and operating the province's provincial parks – had contravened the *Environmental Protection Act* (*EPA*), the *Ontario Water Resources Act* (*OWRA*), O. Reg. 129/04 – Licensing of Sewage Works Operators and Regulation 903 – Wells Regulation, made under the *OWRA*, and four Cs of A in several provincial parks. These alleged contraventions include: the failure to comply with the basic maintenance of sewage works; the discharge of untreated sewage into the natural environment, and the alteration of sewage works without appropriate approvals.

Background

Ontario's more than 330 provincial parks receive approximately 10 million visits each year. Ontario Parks has the goal of ensuring that "Ontario's provincial parks protect significant natural, cultural, and recreational environments, while providing ample opportunities for visitors to participate in recreational activities." To support visitors, many parks provide campgrounds, showers, flush toilets and vault privies (outdoor toilet facilities that retain sewage in a watertight receptacle).

Several provincial acts, regulations and instruments serve to ensure the safe and effective operation of sewage facilities in Ontario. Ontario Regulation 129/04, for example, requires that operators of sewage works facilities ensure that facility operations are efficient, effective, and monitored. Moreover, this regulation allows an MOE Director to cancel or suspend a sewage facility operator's licence if failure to meet the above requirements results in: the discharge of a pollutant into the natural environment; an adverse effect on a process in the facility; or an adverse effect on a person's health or safety. In addition, the *OWRA* prohibits the establishment, alteration, extension, or replacement of sewage works without MOE approval, Regulation 903 outlines requirements for maintaining wells, and C of A #7950-6QPRJM

specifies conditions for the construction, maintenance and operation of sewage facilities in various provincial parks throughout the province.

More generally, several pieces of legislation protect the environment by prohibiting the unauthorized release of pollutants, including from sewage works facilities; the *OWRA* prohibits the discharge of any material that may impair water quality and the *EPA* prohibits the unauthorized discharge of a contaminant into the natural environment that causes or may cause an adverse effect (or that is in an amount, concentration or level in excess of that prescribed by regulations). The *EPA* also requires that MOE be notified if a discharge is out of the normal course of events, or causes – or is likely to cause – an adverse effect.

Within MNR, the Parks Environmental Sanitation Auditor is responsible for inspecting every operational provincial park at least once every three years for compliance with MNR's Minimum Operating Standards for Provincial Parks (MNR Policy PM 2.41). This includes inspecting a park's food storage practices, waste removal operations, accommodations, and water and sewage systems. Following an inspection, the Environmental Sanitation Auditor submits an audit report on each inspected park to Ontario Parks.

Summary of Issues

The applicants, one of whom was working for Ontario Parks during the alleged contraventions, alleged that MNR (various provincial parks, the Ontario Parks corporate office, the Director of Ontario Parks, and the Manager of Operations and Development for Ontario Parks) had contravened the *EPA*, the *OWRA*, O. Reg. 129/04, and Regulation 903 by:

- Discharging or causing/permitting the discharge of a contaminant (i.e., raw sewage) into the natural environment (e.g., soil) that causes or is likely to cause an adverse effect;
- Discharging or causing/permitting the discharge of a contaminant (i.e., raw sewage) into groundwater that may impair the quality of that groundwater and nearby wells, aquifers and lake water;
- Failing to comply with conditions in Cs of A; and
- Altering or causing/permitting the alteration of a sewage works facility without prior approval of the appropriate ministry or approval agency.

To support their allegations, the applicants provided a detailed list of specific complaints and alleged contraventions. For example, the applicants alleged that:

- In an effort to correct for a lack of routine maintenance of a sewage lagoon, staff at Sibbald Point Provincial Park removed raw sewage from the lagoon and dumped it at the park's property line, where it apparently migrated onto the adjoining private property;
- As a result of disrepair caused by years of neglect, an onsite sewage system at Lake Superior Provincial Park had released raw sewage into the natural environment, including groundwater;
- Lack of repairs and routine inspections of the vault tank of a sewage works in Fushimi Lake Provincial Park had allowed sink holes to form around the perimeter of a vault privy, allowing the release of raw sewage into the environment, including groundwater;
- A sewage system at Sioux Narrows Provincial Park was illegally altered to use an undersized, above-ground, plastic septic tank with unplugged holes on the side of the tank;
- Staff at Sibbald Point Provincial Park, Lake Superior Provincial Park, and Silent Lake Provincial Park failed to comply with Cs of A related to the basic maintenance of sewage works; and
- Staff at various provincial parks, including Restoule, Driftwood, Algonquin, Fushimi Lake, and Sioux Narrows, failed to comply with the C of A (#7950-6QPRJM) that specifies conditions for the construction, maintenance and operation of sewage facilities in Ontario's provincial parks.

In addition to the above alleged contraventions, the applicants stated that the number of cases where provincial parks have failed to comply with sewage works Cs of A are too numerous to mention. Rather than list them all, the applicants referred MOE to the 2008 Ontario Parks Comprehensive Environmental

Sanitation Report for a complete summary of the observed incidences of non-compliance across all provincial parks during the 2008 audit season.

The applicants argued that MNR, as the owner of sewage works in provincial parks, is responsible for maintaining, altering, and operating these systems according to applicable laws, Cs of A, operational policies and minimum operating standards in a manner that does not contaminate the environment with raw/untreated sewage. The applicants stated that although senior management at Ontario Parks had been informed of non-compliance issues through decades of environmental sanitation audits, these issues have remained unaddressed due to limited time, staff and money. The applicants alleged that management edited draft sanitation audit reports to steer away from embarrassing issues concerning environmental and public health and safety, leading the applicants to conclude that MNR is more interested in having favourable environmental sanitation audit reports generated (to claim a due diligence defence) than admitting/documenting that Ontario Parks cannot meet its required mandate. Moreover, the applicants asserted that despite being informed of certain illegal activities (i.e., dumping of sewage in Sibbald Point Provincial Park), management appeared to ignore these activities.

The seriousness of the contraventions, according to the applicants, is documented in scientific studies on the negative impacts of untreated sewage on the natural environment. The applicants pointed out that the historic failure of MNR to fulfil its legal obligation to contact MOE in the event of a sewage spill/release (as documented in Ontario Parks environment sanitation audits and parks management response reports) makes it difficult to determine to what extent these incidents – and the practices that caused them – have damaged the environment. Moreover, the applicants pointed out that Ontario's Class Environmental Assessment for Provincial Parks likely does not consider the cumulative impact that numerous sewage system malfunctions and spills – resulting from Ontario Parks' inability to maintain their sewage systems according to legally required standards – has had on the environment.

The applicants included several documents as evidence to support their application, including:

- Copies of the 2008 environmental sanitation audit reports for the eight provincial parks specified in the application;
- An abbreviated list of past concerns of the Parks Environmental Sanitation Auditor regarding specific provincial park sewage systems;
- An annotated list of the park sewage systems suspected of malfunctioning or failing during the 2007 and 2008 operating seasons;
- Photographs of the vault privy inspections for Restoule and Driftwood provincial parks;
- A 2005 MNR report, Operational and Maintenance Risk Management for Ontario Parks Water and Sewage Systems, that outlines drinking water and sewage treatment system operational issues, the risks involved by inaction, recommendations for courses of action, and the need for adequate funding for preventative maintenance;
- Copies of Ontario Parks management/operating policies; and
- Sections of the Minimum Operating Standards (revised in 1992) for provincial parks.

Ministry Response

By letter dated April 16, 2010, MOE notified the applicants that it would undertake the requested investigation. The ministry noted that based on the timelines in the *Environmental Bill of Rights, 1993* (*EBR*), this investigation was required to be completed by June 17, 2010 and the results sent to the applicants by July 17, 2010. In June 2010, however, the ministry informed the applicants that, due to the need to conduct inspections during the summer park operating season, MOE would not be able to complete the investigation and provide a report on its findings until September 30, 2010.

On September 29, 2010, MOE informed the applicants that it had completed its investigation, which involved: a review of the application, ministry records, and the operations at 12 of the provincial parks identified in the application (Restoule, Driftwood, Algonquin, Sibbald Point, Lake Superior, Fushimi, Sioux Narrows, Silent Lake, Balsam, Sandbanks, Obatanga, and Rushing River); inspections at 10 of these

sites; and a review of district inspections conducted at the two remaining parks (Driftwood and Fushimi) as part of MOE's ongoing compliance activities. Although MOE found that Ontario Parks has a comprehensive plan for reviewing the operations of its parks (including its sewage facilities), MOE's site inspections (summarized in the report entitled Ministry Findings in Relation to Alleged Contraventions at Twelve Ontario Parks) identified several issues of non-compliance, some of which were related to the applicants' allegations and others that were not. The ministry noted, however, that "at the time of inspections, while violations of ministry requirements were observed, there was no evidence of serious environmental impacts or immediate danger to public health and safety."

MOE found that the most egregious issues identified by the applicants were either unfounded or had already been addressed by Ontario Parks. For example, with regard to the allegation that staff at Sibbald Point Provincial Park had dumped raw sewage from a sewage lagoon, Ontario Parks advised MOE that a septic waste company, in attempting to remove duckweed from a sewage lagoon, may have also removed some top water, which was dispensed with the duckweed on the ground beside the lagoon. According to Ontario Parks, this practice was immediately halted by park management and has never happened since. With regard to allegations that dilapidated sewage systems in Lake Superior and Fushimi Lake Provincial Parks had resulted in the release of raw sewage into the environment, Ontario Parks advised MOE that the sewage system in Lake Superior Provincial Park was repaired in 2008 and that an April 2010 inspection found that the Fushimi Lake vault privies were functioning properly. MOE inspections also found no deficiencies or environmental impacts associated with these systems.

Issues of non-compliance that MOE did identify, however, included:

- Park staff being unaware of the location of a sewage tank;
- A sewage system being extended without a certification statement by a qualified person;
- The tile bed system for a comfort station operating without a C of A;
- A sewage system's C of A not including a cesspool that was operating as primary treatment for a sewage lagoon;
- A park's annual inventory list not including all sewage systems in the park (as required in the C of A); and
- Two park annual inventory lists not being submitted to MOE as required.

In response to the investigation's findings, MOE requested that specific parks undertake follow-up actions to address issues of non-compliance observed at the time of the inspections. MOE indicated that all items of non-compliance would be pursued by a Provincial Officer to ensure timely compliance. Moreover, based on the inspections, MOE encouraged – but did not require – the inspected parks to undertake recommended actions to enhance their current practices. MOE informed the applicants that it intended to update the applicants by March 2011 on progress made by Ontario Parks in fulfilling these required actions and recommendations.

For the full text of the ministry decision, please see our website at www.eco.on.ca.

ECO Comment

The ECO is pleased that MOE undertook this application for investigation; the applicants provided such convincing evidence of possible contraventions that it would have been alarming for the ministry not to have investigated the allegations further. Moreover, given this unusual situation in which the alleged contravenor is another provincial ministry (MNR), the ECO believes it was prudent of MOE to accept the application and conduct a transparent investigation.

While the ECO also commends MOE for conducting a thorough investigation, the ECO believes the conclusions drawn from MOE's inspections would have been even more convincing had they been conducted when park septic systems are most stressed (i.e., during peak park capacity or at the end of the summer season). For example, while the 2008 environmental sanitation audit of Sioux Narrows Provincial Park, which was conducted at the end of the summer in September 2008, found that some vault tanks may have developed leaks (leading to the recommendation that all park privies have their tank

interiors inspected for possible leaks), MOE's inspection, conducted on June 9, 2010, found that "at the time of inspection all of the systems appeared to be operating fine." By inspecting questionable vault privies under a variety of conditions, MOE would be better able to gauge whether these systems function properly throughout the summer.

The ECO applauds MOE for not only conducting this investigation, but also for ensuring that identified issues of non-compliance are rectified. Likewise, the ECO is pleased that MOE made recommendations to the inspected provincial parks to enhance their current practices. The ECO is disappointed, however, that MOE's requested actions and recommendations resolve only the problems MOE observed in the specific parks inspected for this investigation. For example, in response to violations observed during inspections of Algonquin and Sandbanks Provincial Parks, MOE requested that Ontario Parks "implement standardized procedures to ensure that the maintenance and operation of systems covered by [C of A #7905-6QPRJM] are completed appropriately" and recommended that "an additional component to the daily inspection [be] to check for the placement of the vault tank cover, and to observe the condition of the cover to identify any maintenance issues." To ensure that similar issues do not emerge in other parks, the ECO believes that MNR should implement standardized maintenance, operation, and inspection procedures across all provincial parks. The ECO agrees with MOE that standardized procedures "should include checklists, check frequencies, responsibilities, detection methods, how to identify potential issues and corrective actions" and that in order to identify structural anomalies, a visual inspection of the interior condition of vault tanks should be conducted when tanks are pumped out.

This application illustrates that applications for investigation can be an effective tool for protecting the environment; in submitting this application, the applicants compelled MOE to investigate the alleged contraventions, inspect suspect sewage systems, and require Ontario Parks to implement measures to rectify the situation. Unfortunately, this application also highlights the government's lack of capacity to maintain core infrastructure in protected areas. The applicants provided evidence indicating that the neglect and consequential deterioration of sewage systems in Ontario's provincial parks is a chronic problem, most likely due to a lack of funding and staffing. As noted by Ontario Parks in a 2005 report, sewage operation technology requires a minimum level of routine maintenance and inspection to protect park assets and public health from: system failures; inadequate treatment with possible risk to public health; closure of systems; and disruption of park operations. The report also noted that "each park will experience financial pressures during or after the peak season to operate [water and sewage systems] given the current level of annual funding" and that "inadequate funding can add to the potential for other more serious health and legal risks." For more information on how lack of capacity affects MNR's ability to fulfil its mandate, please see Part 5.1 of this Annual Report.

Review of Applications I2010001:

6.1.3 Contraventions of *Ontario Water Resources Act* Section 34 by a Waterpower Facility (Investigation Denied by MOE)

Keywords: Kagawong; Manitoulin Island; water management plan; permit to take water; waterpower

In July 2010, two individuals submitted an application for an investigation of a small hydroelectric waterpower facility on the Kagawong River, on Manitoulin Island. The applicants allege that the hydroelectric power company (the "Proponent") contravened conditions in its Permit to Take Water (PTTW), including water level monitoring and public reporting requirements. The applicants allege the Proponent contravened section 34(8)c of the *Ontario Water Resources Act* (*OWRA)* by failing to comply with these conditions. The Ministry of the Environment (MOE) denied this application for investigation in September 2010.

Background

The Kagawong River is located on the central north shore of Manitoulin Island. The river drains an area of approximately 250 square kilometres, including Lake Kagawong, into the North Channel of Lake Huron. The tributaries feeding Lake Kagawong are seasonal, with high levels of inflow during the spring thaw but low inflow from July to October. Some tributaries dry out completely in summer months, impacting the water levels and flow rates in the river. A waterfall, Bridal Veil Falls, divides the river into upper and lower sections.

The Township of Billings, located at the mouth of the river, had a population of 537 in 2006 and approximately 40 per cent private dwellings in the township have permanent residents. Recreation and tourism are important industries in the area. Thousands of tourists and cottagers visit annually for boating, fishing and camping opportunities, and Bridal Veil Falls is an important sightseeing destination on Manitoulin Island.

The waterpower generating station is located in the lower part of the Kagawong River. There is also a control dam upstream of Bridal Veil Falls. The Township of Billings owns the waterpower generating station and surrounding riverbed, but the waterpower rights are leased to the hydroelectric power company. The lease agreement was first signed in 1987 and was extended in April 2010 to December 31, 2029. The Township currently receives 15 per cent of the company's reported revenues. The station generates 0.75 megawatts (MW) of power, contracted to the Ontario Power Authority.

Two instruments regulate the operation of the generating station: the PTTW issued by MOE, last issued for a 10-year period in March 2010; and the Water Management Plan (WMP) developed by the Ministry of Natural Resources (MNR) in collaboration with the proponent, approved in October 2008. Model simulations were developed to predict annual flows from Lake Kagawong to the Kagawong River for the purposes of both the PTTW and the WMP, as measured data was insufficient to produce an accurate water budget for the watershed.

Water takings, monitoring and reporting by the waterpower generating station have been the centre of an acrimonious debate spanning the last several years. Residents in the Kagawong area rely on surface water from the lake and river for both residential and commercial purposes. Local residents have expressed concern over low water levels in Lake Kagawong and the Kagawong River through a variety of avenues, including reports to the local MOE office, comments in the WMP process, and participation at Environmental Review Tribunal (ERT) hearings. Over the years, a variety of concerns have been raised, including issues such as: future impacts of climate change on spring freshet levels; impacts of drawdown on the riparian zone; spawning failure in local fish populations; boat navigation issues; and freezing of water lines as a result of low water levels.

Summary of Issues

The applicants allege that the proponent contravened 13 conditions under its PTTW and therefore committed offenses per clause 34(8)c of the *OWRA*. This section provides an overview of the applicants' main concerns.

Measurement and Monitoring Conditions:
A 2007 ERT decision required that a publicly accessible gauge be installed in Lake Kagawong. The intent of the public gauge, within a stilling well, was to provide the public an opportunity to verify Proponent-reported water levels in the lake. However, the applicants allege the gauge was not properly installed, is in a dangerous location for the public to access, and it freezes in the winter (contraventions of conditions 4.6 and 4.7).

Condition 4.3 of the PTTW requires water levels to be measured and recorded by the Proponent at the primary water level measuring device and stilling well, to allow for public validation of the data. The applicants allege that observations are not being taken at the specified times required by the PTTW, and further, that the Proponent has not taken measurements from the stilling well since April 2010. They

further allege that the gauge was disabled by the Proponent and is unusable, therefore contravening any condition in the PTTW that requires data from the stilling well (conditions 3.3 and 4.16).

Reporting and Technical Requirements:
Measurements taken from the primary water level measuring device are required to be posted on the Proponent's website (condition 4.19) in data tables and in graph form (condition 4.20), however, the applicants allege data was posted late or was not available, and data was not presented in graph form. The applicants indicate that since relevant conversion instructions (from millimetres to metres above sea level) are not posted on the company website (condition 4.9), it is difficult for the public to interpret the Proponent-reported data. The applicants also note that because the measurements were not taken at the specified gauge or times, the information on the website was not "possible or credible."

The applicants allege that the Proponent did not submit information to the MOE Director as required by the PTTW including: the verification survey report (condition 4.10); data to complete the operational rule graph (condition 4.12); and the net available head calculations (condition 4.18.3). Further, some of this information is required to be posted on the company's website and the applicants allege this was not done.

Seriousness of the Alleged Contraventions:
The applicants state a number of reasons for the seriousness of the alleged contraventions, including the lack of transparency and accountability to the public and the need for accurate long-term data for research purposes. The applicants also state that excessive water taking impacts navigation and household water lines. The applicants note the freezing of water lines in the winter is of particular concern for local residents.

Ministry Response

MOE denied the application for investigation on September 10, 2010, on several grounds under section 77 the *Environmental Bill of Rights, 1993* (*EBR*). The ministry's initial response specifically addressed six of the alleged contraventions. MOE sent a second response addressing the outstanding conditions on December 3, 2010.

In its response, the ministry stated that it completed an investigation at the site on July 5, 2010, due to a prior incident of non-compliance by the same proponent. MOE staff issued a Provincial Officer's Order on July 9, 2010 to bring the Proponent into compliance with its PTTW.

Stilling Well Gauge and Public Reporting:
MOE stated that ministry inspections confirmed the stilling well does not freeze in the winter as it is insulated with styrofoam (condition 4.6), and is accessible to the public (condition 4.7). The ministry committed to ongoing inspections and site visits to ensure these conditions continue to be met. MOE denied the request for investigation of these alleged contraventions as it would duplicate an ongoing investigation (*EBR* subsection 77(3)).

Although the ministry acknowledged the Proponent was not taking measurements at the specific gauge or at times indicated in its PTTW (regarding conditions 3.3., 4.3, 4.16 and 4.19), MOE stated that equivalent measurements were taken at an alternate site. MOE also noted that these data, as well as unit conversion information (condition 4.9) were eventually posted, although not in a timely manner. MOE stated that these alleged contraventions did not likely cause harm to the environment, and therefore the minister was not required to conduct an investigation under the *EBR* (*EBR* clause 77(2)c).

MOE did agree with the applicants that no graphical representation of data was available on the proponent's website (condition 4.20) and represented a violation of the PTTW that would be pursued by ministry staff. However, the ministry stated that an investigation under the *EBR* was unnecessary, as this contravention was unlikely to cause harm to the environment and would duplicate an ongoing investigation.

Submissions to MOE and Technical Requirements:
MOE stated that the information required under condition 4.12 of the PTTW was submitted when it was due in March 2010, so an investigation was not necessary (*EBR* subsection 77(1)).

MOE noted that the Proponent submitted its verification survey (condition 4.10) and its net available head calculations (condition 4.18.3) to the ministry after the Provincial Officer's Order was issued in July, and that both documents are currently under review. Therefore, the ministry denied the request for investigation of these alleged contraventions under *EBR* clause 77(3).

The ministry stated that the data to validate the Orifice Flow equation (condition 4.17) was due for submission to the ministry on September 9, 2010, but was not submitted by the Proponent. A Provincial Officer's Order was issued in October to address the non-compliance, but the Proponent requested a review of the Order. A final Director's Order was issued before compliance was achieved. MOE denied the request for investigation of these alleged contraventions under *EBR* clause 77(3).

For the full text of the ministry decision, please see our website at www.eco.on.ca.

ECO Comment

MOE's decision to deny this application for investigation was reasonable. The ECO considers this case to be an appropriate use of *EBR* subsection 77(3), the provision that grants ministries the discretion to deny an application to avoid duplicating an ongoing investigation. The application was first submitted July 8, 2010, three days after an MOE inspection on July 5, 2010. Most of the specific issues raised in the application mirrored those addressed in the inspection or in the subsequent Provincial Officer's Orders.

Although monitoring activities were not carried out exactly as required in the permit, it appears that in terms of environmental protection, the intent of the sampling was met. Further, MOE has indicated it has followed up with all issues of non-compliance. However, the ECO advises MOE to exercise caution in its use of *EBR* clause 77(2)c as grounds to deny applications (i.e., when the minister considers alleged contraventions unlikely to harm the environment). Conditions on PTTWs are in place to ensure the environment is not harmed, and using a narrow definition of "harm" may not always be prudent or precautionary on the part of the ministry.

Since the PTTW is a legal instrument setting limits on the activity of the Proponent, the applicants focused their concerns on the enforcement of the PTTW and its conditions. However, the PTTW is not the only instrument in place to protect ecosystem health where waterpower facilities exist. WMPs aim to ensure waterpower resources are managed in an ecologically sustainable way, and to protect and enhance riverine ecosystems managed through waterpower facilities. However, unlike PTTWs, WMPs are not prescribed under the *EBR.* Therefore, WMPs are not subject to the same public participation rights as other instruments prescribed under O. Reg. 681/94, such as requesting *EBR* applications for investigations or reviews (for further information, see page 122 in the ECO's 2008/2009 Annual Report). If WMPs had been subject to the *EBR* review process, the applicants might have had a stronger case for expressing their environmental concerns by filing an application for review of the Kagawong WMP. For example, issues identified in the applicants' previous submissions to the ERT, such as long-term changes in spring freshet levels and water quantity due to climate change, might have been appropriate concerns to address under the WMP.

The ECO has pointed out in each Annual Report since 2002 that MNR should prescribe WMPs as instruments under the *EBR* to ensure enhanced public input into local water management planning. Prescribing WMPs may be of particular importance as the province moves to approve more renewable energy sources, like small-scale hydroelectric power. Further, under the pressures of climate change, hydraulic regimen changes over the long term will need to be taken into account. The ECO encourages MOE and MNR to work together to ensure careful risk-based assessment for hydro power facilities and to continue to require rigorous data collection for model validation and management effectiveness monitoring.

Review of Application I2010003:

6.1.4 Contraventions of the *EPA* and *OWRA* at an Automotive Collision Centre (Investigation Denied by MOE)

Geographic Area: St. Catharines, Niagara Regional Municipality, Ontario

Keywords: car fluids; asphalt; *EPA*; *OWRA*

Background/Summary of Issues

In December 2010, two individuals submitted an application for investigation under the *Environmental Bill of Rights* (*EBR*) related to the operation of an automotive repair business in St. Catharines. The applicants alleged that the company contravened the *Environmental Protection Act* (*EPA*) and Regulation 347 (Reg. 347) under the *EPA,* as well as the *Ontario water Resources Act* (*OWRA*). Both Acts are administered by the Ministry of the Environment (MOE).

Section 14(1) of the *EPA* prohibits anyone from discharging, or causing or permitting the discharge of a contaminant into the natural environment, where it may cause an adverse effect.

Alleging a contravention of the *EPA*, the applicants stated that dozens of damaged parked vehicles on the company's property were potentially leaking brake fluid, antifreeze, or oil directly into the ground, potentially causing an adverse effect. The applicants noted that there were no cement pads on the company's property to prevent fluids from migrating underground. The applicants claimed that most similar businesses in the area parked damaged vehicles on asphalt pads.

Regulation 347 specifies the criteria for the definition, designation and exemptions of "waste". The applicants further alleged that tonnes of crushed asphalt and concrete – which the applicants alleged are "wastes" under Reg. 347 – were illegally disposed of on almost half of the property.

Section 30(1) of the *OWRA* makes it an offence for anyone to discharge, or cause or permit the discharge of any material of any kind into or in any waters or any place that may impair the quality of the water. Alleging a contravention of the *OWRA*, the applicants suggested that leachate from the materials on the property may adversely impact the local water sources.

In support of their allegations, the applicants submitted photos dated between November 21, 2010 and December 12, 2010 showing damaged vehicles as well as crushed asphalt and concrete on the property.

Ministry Response

In February 2011, MOE informed the applicants that an investigation would not be undertaken.

The ministry stated that during a site inspection, shortly after MOE received the *EBR* application for investigation, it observed no evidence of leaking fluids from the damaged vehicles on the property. As a preventative measure, MOE advised the site operator to move damaged vehicles away from the property line to lessen the potential for fluids to move offsite and to clean up any detected spills as soon as reasonably possible. MOE also stated that there is no legal requirement for vehicle parking lots to have spill prevention or containment.

Ministry staff was informed by the site operator that the waste asphalt on the site was to be used to surface a parking area. MOE stated that it supports the recycling of waste asphalt for use as construction aggregate and that such use of waste asphalt is both common and legal. MOE explained that waste

asphalt pavement transferred by a generator for direct transportation to a site where it is to be used as construction aggregate is not considered a waste under Reg. 347 and a Certificate of Approval is not required for its deposition on a property. The ministry added that concrete without metal rebar is not considered a waste under Reg. 347 and is allowed to be used as inert or engineered fill. MOE, however, advised the site operator that such material cannot be permanently stored in piles on site. The ministry was informed by the site owner that large pieces of asphalt and concrete unsuitable for construction aggregate had been piled up for removal by the supplier. The site operator also agreed that the piles, along with some large pieces of asphalt outside the property line, would be removed by the supplier after the snowmelt in the spring of 2011.

The ministry concluded that there was no evidence of any *EPA* or *OWRA* contraventions associated with parking damaged vehicles on granular material on the site, and that waste asphalt material and concrete were being used on the site in keeping with legislative provisions. As such, MOE denied the investigation under the *EBR*.

For the full text of the ministry decision, please see our website at www.eco.on.ca.

Other Information

The same property was the focus of another *EBR* application for investigation in 2009 also alleging contraventions of the *EPA*. That application asserted that the automotive repair business illegally deposited fill material containing asphalt and concrete with rebar in a ravine adjacent to the property. As a result, that application maintained, contaminated runoff from the fill was a serious concern for neighbouring houses and a park. MOE undertook that investigation, and after conducting soil and water tests, it determined that such concerns were not warranted. One of MOE's findings was that some waste materials, such as asphalt and tires, were indeed illegally used as fill on the site. The ECO encouraged MOE to ensure all waste was removed from the entire site and to address any future compliance issues in a prompt manner. MOE required the property owner to hire a qualified consultant to undertake a further assessment and remedial actions, if required. (For a full discussion of the 2009 investigation, see pages 326-328 of the Supplement to our 2009/2010 Annual Report.)

In August 2010, MOE advised the applicants that a professional engineer and ministry staff oversaw the removal of the waste from the site.

ECO Comment

MOE's decision to deny this investigation appears reasonable. The ministry's preliminary inspection of the site did not uncover any evidence that contaminants were leaching into the natural environment or that waste material was improperly disposed of on the site. The ECO is pleased that MOE promptly responded to the request for the investigation by inspecting the site and that the ministry met the legislated *EBR* timelines.

With respect to the 2009 investigation, the ECO is pleased that MOE both ensured the waste was removed from the site and notified the applicants.

The applicants did raise a legitimate concern that can receive too little attention: vehicles, damaged or not, leak fluids on roadways and parking lots. Precipitation runoff carries and deposits contaminants into rivers, streams, and lakes. Brake fluid, antifreeze, and motor oil, for instance, may pollute water sources with ethylene glycol, heavy metals, and petroleum distillates. Preventative source control measures are increasingly considered stormwater best management practices in U.S. jurisdictions. For example, to prevent stormwater exposure to polluting materials, such as machinery and automobiles, many facilities are encouraged to put their equipment under shelters and overhangs. This could lessen the stress on end-of-pipe stormwater management structures, such as retaining ponds that are used to capture contaminants in precipitation runoff. (For a discussion of stormwater management in Ontario, see Part 4.5 of this Annual Report.)

Review of Application I2010004:

6.1.5 Burial of Asphalt (Investigation Undertaken by MOE)

Background/Summary of Issues

On December 21, 2010, an application for investigation was submitted to the Ministry of the Environment (MOE). The applicants maintained that asphalt and other waste materials were being buried in very large quantities on a private property in their region and that these materials pose a significant threat to the local environment. They stated that the dumping has raised the grade of the property, resulting in the flooding of adjacent areas. They expressed the concern that the run-off from the property could also reach Lake Erie, which would result in even greater environmental impacts. They also expressed the concern that the property currently has an application for severance for residential development, increasing the potential for adverse impacts from any ground and surface water contamination. The applicants stated that they believe the dumping to be in contravention of Regulation 347.

They included a number of photographs taken over the previous year by local residents, a copy of the application to the local municipality for severance, and a map of the property showing the areas where the dumping has been concentrated.

Ministry Response

On March 11, 2011, the ministry informed the applicants that an investigation was being conducted.

ECO Comment

As the ministry's investigation was not complete at the end of our reporting year, the ECO will review MOE's handling of this application in our 2011/2012 report.

6.2 Ministry of Natural Resources

Review of Applications I2009013:

6.2.1 Contraventions of the *ARA*, *ESA*, *EPA* and *OWRA* at a Quarry Site (Investigation Denied by MOE and MNR)

Geographic Area: Township of Pringle, District of Parry Sound, Ontario

Keywords: *Aggregate Resources Act*; Parry Sound quarry; "substantial amount" of aggregates; *Endangered Species Act, 2007*; *Environmental Protection Act*; *Ontario Resources Water Act*

On January 18, 2010, two individuals submitted an application for investigation into the operation of an aggregate quarry in Pringle Township. The applicants alleged that the owner and operator of the aggregate quarry contravened the *Aggregate Resources Act* (*ARA*), the *Endangered Species Act, 2007* (*ESA*), the *Environmental Protection Act* (*EPA*), and the *Ontario Water Resources Act* (*OWRA*). The *ARA*

and *ESA* are administered by the Ministry of Natural Resources (MNR), while the *EPA* and *OWRA* are administered by the Ministry of the Environment (MOE).

Background

On January 1, 2007, the Parry Sound area, where the aggregate quarry in question is located, was designated under the *ARA*. Under the *ARA*'s grandfathering provisions for newly designated areas, an established quarry can be licensed without having to meet the extensive licensing and public consultation requirements for new quarries. The site owner must apply within six months of the date the act comes into effect and show that a "substantial" amount of aggregate had been removed from the site in the two-year period before the act was applied to the area.

The site owner applied for an aggregate licence on June 29, 2007 and MNR issued it on February 13, 2008. The applicants claimed that the first blast from the quarry operation occurred on February 4, 2009. On March 24, 2009, both MNR and MOE inspected the aggregate quarry in response to complaints from the applicants. After identifying contraventions of the *ARA*, MNR issued an inspector's order of compliance. MOE also found that site equipment was operated without a Certificate of Approval – Air and Noise (C of A). On March 27, 2009 MNR suspended the aggregate licence until the operator obtained a C of A from MOE. Following an Environmental Registry posting with a 30-day consultation period MOE granted the aggregate site operator a C of A on May 22, 2009.

The applicants expressed their disappointment that neither MOE nor MNR staff informed them, at the time of the Registry posting, of their rights to comment on and appeal such instrument decisions under the *Environmental Bill of Rights, 1993* (*EBR*).

During follow-up inspections, MNR found the site to be in compliance with the aggregate licence and lifted the suspension on June 3, 2009 and MOE confirmed that equipment was being operated in compliance with the C of A on June 17, 2009.

At the beginning of 2010, the applicants exercised their rights under the *EBR* and filed their application for investigation.

ARA *Alleged Contraventions*

The applicants alleged the following contraventions of the *ARA*:

1) Section 71 specifying the licensing requirements for an established pit or quarry. The applicants alleged that the site should not have been issued a licence under the grandfathering provisions of the *ARA* because there was not sufficient evidence to prove that the site owner had removed a "substantial" amount of aggregate before 2007 and, as such, the site had never been an active quarry.
2) Section 57, which states that anyone contravening a condition of an aggregate removal licence is guilty of an offence. The applicants alleged that, once the licence had been issued, the licensee failed to comply with the operational standards that apply to such licences. For example, they claimed that fencing and gate requirements, provisions relating to entry and exit points of the site, and erosion control measures were not adhered to or followed.
3) Section 71(6), which states that the licensee will provide the Minister with copies of a site plan no later than six months after the Minister requests it.

ESA *Alleged Contraventions*

The applicants alleged a contravention of section 10 of the *ESA*, which prohibits the damage to habitat of a species at risk in Ontario without a permit. The applicants stated that the aggregate operation is damaging Blanding's Turtle habitat by failing to control fugitive dust and contaminants.

EPA *Alleged Contraventions*

The applicants alleged that the quarry operator was in contravention of subsection 14 (1) of the *EPA* which prohibits the discharge of contaminants into the natural environment without a C of A. The applicants claimed that the aggregate quarry was operating crushing, screening and ancillary equipment without a C of A. They claimed that even after the quarry obtained a C of A in May 2009 it did not operate according to the conditions set out in it. For instance, they maintained that the company did not comply with noise and operating time restrictions, separation distances from residences, dust control measures and signage for a portable crushing plant.

OWRA *Alleged Contraventions*

The applicants alleged that the quarry was contravening section 30 of the *OWRA*, which prohibits the discharge of polluting material into waters. Specifically, they claimed that the aggregate operation was impairing groundwater and local private wells. The applicants also expressed their concern about the impact of the operation on the local creek, a fish spawning and nursery site.

The ECO forwarded the application to both MNR and MOE on January 25, 2010.

Ministry Response

MNR denied the application for investigation on April 16, 2010. The ECO is disappointed that MNR's response to the applicants came 20 days after the *EBR* legislated deadline.

MNR Response to ARA *Alleged Contraventions*

The ministry:

1) Determined that the quarry constitutes an established quarry for the purposes of the *ARA* and therefore the transitional licensing provisions apply;
2) Had already inspected the site (on March 24, 2009) and taken appropriate enforcement measures to correct non-compliance activities; and
3) Determined that the application requirements (i.e., licensee to submit a site plan within six months) and issuance of a licence for the quarry was consistent with the *ARA* provisions for new licences within a newly designated area.

MNR Response to ESA *Alleged Contraventions*

The Ministry determined that subsection 10(1) of the *ESA* does not currently apply to habitat of the Blanding's Turtle and consequently no contravention of Section 10 occurred. In addition, the ministry said that it is not aware of any evidence indicating that the species or its habitat is being or would be adversely affected by the aggregate operations.

MOE also denied the application for investigation on March 29, 2010. The ECO is pleased with MOE's adherence to the technical requirements of the *EBR* in handling this application. The ministry met all legislated deadlines and committed to further action if provided with new substantial evidence.

MOE Response to EPA *Alleged Contraventions*

The ministry stated that it had already completed an investigation, the site operator had been charged with the alleged offence of operating equipment without a C of A, and the matter was then (March 2009) before the courts. MOE also said that it confirmed the operator complied with the terms and conditions of the C of A once it was issued.

MOE Response to OWRA *Alleged Contraventions*

In response to the applicants' claim about groundwater and well impairment, MOE said that the applicants did not present any evidence of adverse impacts as a result of the operation of the quarry. In addition, MOE stated that it had not received any reports of groundwater impacts or well damage as a result of the aggregate quarry operations.

With regards to the local creek, the ministry said that a site visit of the Department of Fisheries and Oceans (DFO) concluded there were no sediment impacts on the creek. Coupled with the lack of reports to the ministry of surface water quality impacts, MOE also concluded that it is unlikely that the quarry is causing an impact on the local creek.

MOE committed to respond to any future reported incidents of potential impacts on groundwater or wells or the local creek in the vicinity.

After receiving the decision of the ministries, the applicants wrote letters reiterating their concerns with the quarry, arguing that it should not have been grandfathered and that the land had not been a quarry prior to 2007.

ECO Comment

The ministries' rationale to deny this investigation appears valid and reasonable because they had undertaken enforcement action before the application was submitted.

The ECO suggests that MNR adopt a systematic and consistent method of interpreting "substantial" amount in the *ARA* and clearly communicate the criteria used to do so to the public. This is not the first time concerns have been raised regarding grandfathering of aggregate sites. In a 2007 application for investigation for a nearby site (see pages 319-321 of the Supplement to our 2007/2008 Annual Report), the applicants also disputed the site owner's claim that a substantial amount of aggregate had been removed from the site prior to the area's designation under the *ARA*. Consequently, they maintained that the site should not have been grandfathered and that MNR's issuance of the quarry licence was not consistent with the *ARA* provisions for new licences within a newly designated area of the province. The ECO reiterates our concern that the ministry again allowed the site owner to capitalize on the grandfathering provision of the *ARA* due to the lack of definition of what constitutes a "substantial" amount.

The ECO sympathises with the applicants' disappointment that neither MOE nor MNR staff informed them of their *EBR* legal rights and formal procedures for participating in environmental matters. Had the applicants been aware of the Environmental Registry posting for a C of A by the site operator, they might have submitted comments during the posting period or have sought leave to appeal the issuance of the C of A. The ECO encourages both ministries to inform concerned residents of Environmental Registry postings and their *EBR* rights.

Review of Application I2009014:

6.2.2 Contravention of the *Endangered Species Act, 2007*: Damage to the Habitat of the Endangered Eastern Cougar (Investigation Denied by MNR)

Keywords: cougar; *Endangered Species Act, 2007*; *Puma concolour*; habitat; forestry; species at risk

In January 2010, two applicants submitted an application to the ECO alleging that commercial forestry operations in the Nighthawk Forest, near Timmins, contravened the *Endangered Species Act, 2007* (*ESA*) by destroying cougar habitat. Cougars are currently listed as "endangered" on the Species at Risk in Ontario List and receive general habitat protection under the *ESA*. Therefore, the applicants claim that the damage or destruction of this species' habitat is prohibited under the *ESA*. MNR denied this application for investigation on April 19, 2010.

Background

The cougar (*Puma concolour*), also known in Ontario as the Eastern cougar or puma, is the largest cat species in North America. A highly adaptable species, the cougar has one of the largest ranges of any non-migratory terrestrial species.

Cougars are generally solitary animals. Cougar males are territorial and have very large home ranges (up to 1,800 square kilometres (km^2) reported in the United States), while females' home ranges are often smaller. Their lone lifestyle, large home ranges, and secretive nature – along with the rarity of cougar sightings – have led the species to acquire nicknames such as "mystery cat" or "ghost cat."

As an apex predator (i.e., an animal at the top of the food web), the presence of cougars can indicate a healthy ecosystem. Cougars are also important ecosystem regulators and play a key role in the population dynamics of their prey species. (For a full discussion of mammalian predators in Ontario, please see Part 8.2 of the ECO's 2007/2008 Annual Report.) In Ontario, white-tailed deer are cougars' preferred prey species.

Cougars currently have healthy populations in western North America, but have declined or disappeared from most of their ranges in the eastern portions of the continent. There have been both historic and recent debates on whether or not "eastern cougars" are a distinct subspecies from those in the west, and more controversially, simply on the existence of cougars in eastern Canada.

Cougars in Ontario

Cougars were once one of the most widely distributed land mammals in the western hemisphere. However, early settlers across eastern North America viewed cougars as a threat to livestock and public safety, and hunted and trapped them extensively. By the late 1800s, cougars were believed to be extirpated in much of their former eastern range, including in Ontario. The last reported cougar shooting in Ontario occurred in 1884 near Creemore.

Since that time, the presence of cougar populations in Ontario has been disputed. Between 1935 and 1983, 318 cougar sightings were reported to staff of the Ministry of Natural Resources (MNR), mostly in wilderness areas. Since 2002, over 2,000 cougar sightings have been reported in the province. Yet, the provincial government has been hesitant to confirm the existence of wild cougars in Ontario. Indeed, people making these reports often found they were treated with ambivalence or even ridiculed. Many of these reports have been dismissed by MNR as sightings of: lynx, bobcats, fishers, coyotes or even house cats; captive cougars that have escaped into the wild; or cougars from western populations moving eastward into Ontario.

Conversely, the Ontario Puma Foundation believes that the province currently has a cougar population of approximately 550 individuals, with populations dispersed across the province (see Figure 1). The Ontario Puma Foundation has identified cougar dens in the Niagara Escarpment and on Manitoulin Island.

The dismissal of cougar sightings has been common not only in Ontario but across North America, as the credibility of many reported cougar sightings is questionable. Experts suggest that less than 10 per cent of reported sightings in fact represent true cougar sightings. A challenge is that relatively few pieces of "material evidence" of cougar presence – such as photos, scat or DNA – have been collected in Ontario compared to the number of sightings recorded. In 2000, an MNR employee in Kenora found fresh cougar scat. The sample was analysed by thin layer chromatography and proven to be cougar; however, the method did not distinguish whether the cougar was of captive or native origins. In 2004, scat was found by another MNR employee in the Niagara region; using mitochondrial DNA analysis, this scat was shown to be from a native North American cougar.

MNR Research Study

In 2007, MNR began a research study on Ontario's cougars, centred in the Peterborough area. This study aims to collect quantitative data on the presence and distribution of the species in the province, and will "test the hypothesis that there are no free-ranging cougar genotypes in Ontario." Possible origins of cougars in Ontario, as considered by MNR, are summarized in Table 1, below.

Table 1: MNR's Proposed Explanations for the Presence of Cougars (*Puma concolour*) in Ontario

Hypotheses
1. Misidentification (e.g., coyote, fisher, lynx, house cat)
2. Wild-born, free-ranging cougars, native to Ontario
3. Wild-born, free-ranging cougars, dispersed from western North American populations or their progeny
4. Captive-born, escaped cougars or their progeny
5. Captive-born, intentionally released cougars or their progeny
6. A combination of two or more of the above (i.e., genetically mixed)

Through the ongoing MNR study, "credible" cougar sightings are followed up by local MNR district biologists with the installation of cameras and tracking efforts. Despite the higher level of research effort, MNR has not confirmed DNA from any hair or scat samples collected through this research program. Any data collected from this study are shared with external experts for review, including the Ontario Puma Foundation.

Prior to 2007, reported cougar sightings were directed to MNR's Natural Heritage Information Centre. However, since the dedicated cougar research program began, this centralized collection was discontinued. If researchers want to obtain cougar sighting reports from across the province, they now have to contact each MNR district office individually. Although sightings reports do not equate to population data, the loss of this centralized collection could be a loss of valuable information for detecting and reporting trends and frequencies, and mapping these trends across regions.

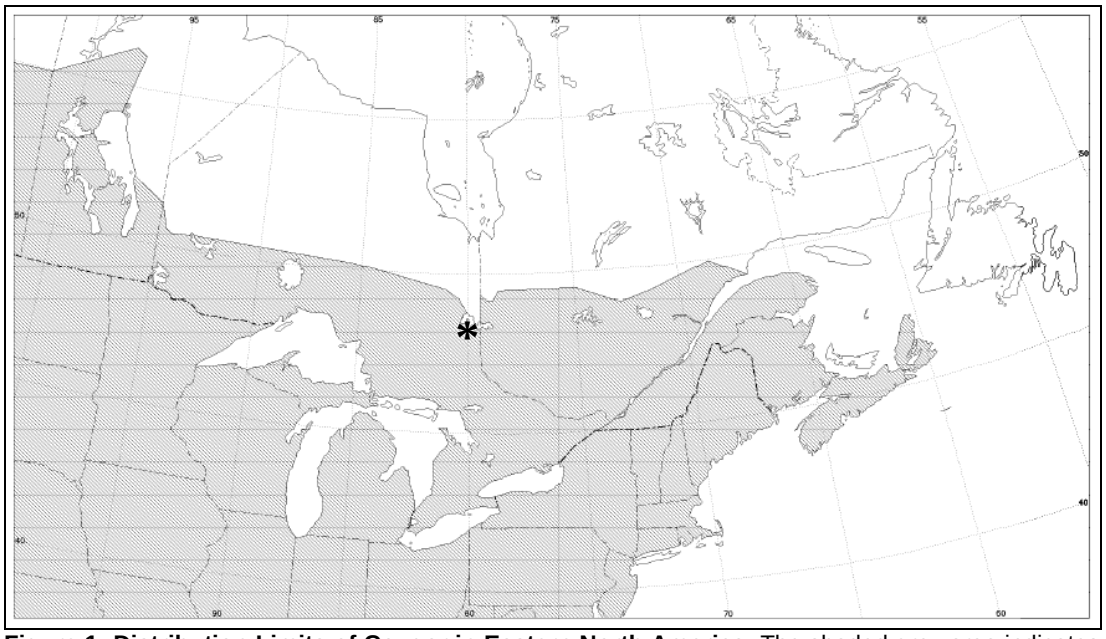

Figure 1: Distribution Limits of Cougar in Eastern North America. The shaded grey area indicates the estimated current distribution of cougars in eastern North America. The asterisk indicates the approximate location of Nighthawk Forest. *Source: Scott 1998.*

Status Listing of Cougars Under the ESA

In the original 1971 *Endangered Species Act,* Ontario listed the Eastern cougar (*Felis concolor couguar)* – a subspecies of cougars believed to have ranges in Ontario, Quebec, New Brunswick, Nova Scotia and the eastern United States – as endangered.

New genetic evidence published in 2000 indicates that a single cougar subspecies – the North American cougar (*Puma concolor couguar)* – exists across North America, rather than the 15 subspecies previously believed to exist (including the Eastern cougar). Accordingly, during the overhaul of Ontario's species at risk legislation in 2007, the Ontario government listed the entire cougar species (*Puma concolor*) as "endangered" on the regulated Species at Risk in Ontario List (in O. Reg. 230/08 made under the *ESA*).

The eastern cougar subspecies has been listed under the American *Endangered Species Act* since 1973. From 2007 to 2010, the United States Fish and Wildlife Service undertook a formal status review of the species. In March 2011 the service published its findings, concluding that the traditionally recognized eastern subspecies (*Felis=Puma concolor couguar)* has been extinct for nearly 75 years. The eastern cougar may be formally removed from the American list of endangered species in the near future.

Are Eastern Cougars Extinct?

The question of the extinction of eastern cougars in North America is largely a question of genetics. Some scientists believe that eastern cougars were a *subspecies* – that is, a genetically distinct grouping of cougars – and the United States have recently announced it believes this subspecies is extinct (see below for detail). However, other scientists believe that all cougars in North America are members of a single genetic group – and there should not be any distinction between "eastern" and western cougars. In this case, cougars as a whole would not be considered extinct, despite dramatic population reductions or extirpations in the eastern portions of their range.

In March 2011, the United States Fish and Wildlife Service (USFWS) published a status review of the Eastern cougar subspecies. The review concluded that "there is no evidence to suggest that a population of eastern pumas survived intense human exploitation and persecution, habitat changes, and near eradication of their primary prey, white-tailed deer, in eastern North America" around the turn

of the 20th century, and that the eastern cougar subspecies is extinct. The review noted that evidence of a breeding population of eastern cougars would be apparent by tracks, encounters with hunters, and road kills, even if the population was very small. The USFWS therefore suggested that there have not been any wild-breeding cougar populations in the eastern part of the continent since the extinction of the subspecies in the 1930s.

The study did not deny that cougars *exist* in the eastern United States or Canada, despite its finding that the eastern subspecies was extinct. The outcome of the USFWS review does not preclude the existence of cougars in Ontario, or suggest that evidence supporting the presence of cougars in Ontario is false. However, the review does suggest that any cougars in eastern North America (excluding Florida) are either migrants from healthy western populations, or have been released from captivity.

The Ministry of Natural Resources (MNR) has been conducting research since 2007 on the origins of the cougars currently in Ontario (see "MNR Research Study," above). MNR has acknowledged that evidence of cougars has been found in Ontario, but has not yet determined whether these cougars are native, western migrants, or captive-born.

Habitat Protection and Forestry

As an endangered species, it is prohibited to harm or harass cougars in Ontario, or to damage or destroy their general habitat. Cougars received automatic general habitat protection when the *ESA* came into force on June 30, 2008. "General habitat" is defined under the *ESA* as "an area on which the species depends, directly or indirectly, to carry on its life processes, including life processes such as reproduction, rearing, hibernation, migration or feeding."

As "habitat generalists," cougars can survive in a variety of habitats, and are not particularly dependent on any landscape type. Cougars in North America have been successful in a wide range of habitat types from deserts, to sub-alpine regions, to prairies. Some experts believe that cougar survival is more dependent on the availability of prey species than on any particular habitat component. Reports indicate that cougars may tolerate human presence, as long as extensive forest tracts and adequate prey populations are present.

Species at risk and their habitats are specifically protected by mechanisms within forest management planning. Provisions in MNR's Forest Management Guide for Conserving Biodiversity at the Stand and Site (the "Stand and Site Guide") provide fine-scale direction for planning protection for cougar den sites while continuing forest operations (for more information on the Stand and Site Guide, see Part 3.7 of the ECO's 2009/2010 Annual Report). The Stand and Site Guide directs that forestry operations are prohibited within a 200 metre radius around a den known or suspected to be occupied by cougars, during the denning period. However, as cougars use dens for birth and rearing at any point during the year, the Stand and Site Guide states that this protection is provided "for 8 weeks from the date an occupied den is located, or until a den is known to be no longer occupied."

The Stand and Site Guide is used in the preparation of area-specific Forest Management Plans (FMPs). FMPs are required under the *Crown Forest Sustainability Act* (*CFSA*) before a commercial harvest, and are prepared by a multi-stakeholder forest management planning team. FMPs include detailed information on planned operations, management direction and monitoring activities that will be undertaken. An FMP also details how particular species of concern and their habitats will be avoided or protected during forestry operations (for example, by leaving buffer zones around nest sites for bald eagle nest sites).

However, before being considered within an FMP, a species and/or its habitat must be identified and verified by MNR. Although forest workers or members of the public can identify values, MNR must verify them in accordance with the ministry's Forest Information Manual before being subject to direction under the Stand and Site Guide, and subsequently an FMP.

Studies in the U.S. have shown that cougars may avoid active logging sites and refrain from using the areas until at least six years after logging has ceased.

Summary of Issues

The applicants submitted an application to the ECO on January 25, 2010 alleging that in damaging cougar habitat, commercial forestry operations in the Nighthawk Forest, near Gibson Lake, contravened clause 10(1)(a) of the *ESA*, which states that no person shall damage or destroy the habitat of an endangered species.

The applicants contend that the Nighthawk Forest is cougar habitat, as several independent sightings of cougars have been reported in the area. The applicants further note that MNR identifies the boreal forest as cougar habitat, and that the site is within the boreal zone. The application included an affidavit of one witness who spotted a cougar in the Gibson Lake area of the Nighthawk Forest in summer 2008. The application also lists several other individuals who can vouch for sightings of cougars in the recently-logged region.

The applicants assert that clause 10(1)(a) of the *ESA* is contravened by the forest's FMP failing to identify or protect cougar habitat. The applicants contend that MNR failed to follow its Statement of Environmental Values when approving the FMP, as it did not take a precautionary or ecosystem approach. Further, the applicants state that the "recent 'ad hoc' attempts by the MNR to detect [c]ougars in the Nighthawk Forest… do not involve the public, affected stakeholders, [or] First Nations and do not meet the MNR's obligation under the *ESA* and *CFSA*."

The applicants believe that the alleged contravention warrants an investigation due to the risk of irreversible destruction of endangered species habitat. The applicants also note the ongoing federal and provincial government efforts to protect and recover the cougar and its habitat and argue that possible damage to habitat should be avoided while research and policies are completed. Finally, the applicants state that undertaking the investigation would provide important precedent-setting value in requiring FMPs to incorporate endangered species habitat protection measures.

Ministry Response

MNR denied the application on April 19, 2010, concluding that it "has not confirmed that [c]ougar is present in the Nighthawk Forest, and as such, the Nighthawk Forest does not meet the definition of habitat for [c]ougar. Even if [c]ougar were present in the Nighthawk Forest, the forest operations in [the Nighthawk forest] would not constitute damage or destruction of [c]ougar habitat under the ESA."

MNR's reasons for denying the application are detailed below.

Cougar Not Confirmed by MNR in Nighthawk Forest

MNR contends that cougar sightings in the Gibson Lake area, as described by the applicants, were: unverified; over a large area; and not substantive enough to confirm the presence of cougars. The ministry noted that confirmation of cougar observations is important because cougars are often mistaken for other species, such as domestic cats, lynx, and bobcats. As MNR's Natural Heritage Information Centre does not consider tracks to be a reliable method of confirming the presence of cougar, the track described in the application was not considered. The ministry states "definitive photos or DNA evidence is required to validate the presence of cougar" and notes that no occurrences of cougar in the Timmins area have been confirmed by MNR to date.

The ministry further described its attempt to verify reported sightings through a field investigation in September 2009; in an area planned for harvest in Nighthawk Forest, MNR biologists installed motion detecting wildlife cameras and conducted surveys for cougar tracks, scat or fresh kills. This investigation did not provide any evidence to indicate the presence of cougars.

The FMP is Not Required to Include Cougar Protection Provisions

As MNR has not verified occurrences of cougars in Nighthawk Forest, nor found definitive evidence that the forest provides cougar habitat, MNR argued that the Nighthawk Forest FMP is not required to include direction for the protection of cougar habitat. In other words, MNR has not identified cougar habitat as a "value" for the purposes of Nighthawk Forest management planning. The ministry notes that if cougar habitat is verified (e.g., a cougar den is discovered) during the implementation of the FMP and MNR determines that this habitat may be damaged or destroyed by planned operations, the FMP could be amended to include prescription for an area of concern around the den site.

Nighthawk Forest Does Not Meet MNR's Interpretation of Cougar Habitat

The *ESA* defines "habitat" as "an area on which the species depends, directly or indirectly, to carry on its life processes, including life processes such as reproduction, rearing, hibernation, migration or feeding." In providing rationale to deny the application, MNR stated "it must be shown that cougar depends on the Nighthawk Forest to carry on its life processes." The ministry noted that sightings of cougar, even if confirmed by the ministry, do not indicate the dependence of the species on the area. MNR further noted, "unless a physical feature such as a den is discovered, it is not reasonable to conclude the Nighthawk Forest is cougar habitat."

Forestry Activity Does Not Change the Functionality of Cougar Habitat

MNR noted that, even if the Nighthawk Forest were considered cougar habitat, if the cougar habitat has not been damaged or destroyed by the forestry activity, the *ESA* has not been contravened. The ministry stated that "to test whether an activity damages or destroys cougar habitat, one must assess whether an activity would impair or eliminate one or more of the functions of the habitat." MNR further stated that current forest management practices create a mosaic of vegetation stages and patterns that would maintain habitat functionality for cougar, and would not be considered "damage or destruction" under the *ESA*.

ECO Comment

The ECO believes that MNR's denial of this application is reasonable given the ministry's existing policy framework. Despite sightings by local residents, cougars have never been confirmed by MNR in the Timmins region. Under current ministry policies, no further cougar-related requirements apply until the species, and its habitat, have been confirmed. In other words, unless MNR confirms there are cougars in the area, there aren't any.

While MNR was technically justified in denying this application for investigation, this application brings to light several ECO concerns.

The stringent level of material data and expert verification needed in cougar identification has been perceived to limit public participation since it implies that "individuals with little experience can assist only if they provide a dead cougar specimen as proof of its existence." MNR's requirement for material evidence is of particular concern in the consideration of forestry values. Although members of the public can provide input into the forest management planning process, the final identification of values required to be considered in an FMP is up to the ministry. It would appear that the ministry's stringent verification methods could be excluding, or perceived to be excluding, public input into the values identification process. This concern extends to other species and their habitats.

As noted in our 2009/2010 Annual Report, the ECO is concerned about MNR's narrow interpretation of "habitat" as defined in the *ESA*. Since cougars are habitat generalists – that is, they adapt and survive in a great variety of habitat types – by MNR's interpretation, cougar habitat is not destroyed unless a den is destroyed. The ECO believes that this approach is contrary to the intent of the *ESA*, which explicitly indicates that habitat includes areas that species depend on indirectly for life process such as feeding and

migration, functions that would not be protected under the ministry's apparent interpretation of cougar habitat.

The wider implications of the ministry's limited approach to habitat protection apply to other species as well. The ECO is concerned that MNR is moving towards an interpretation of "damage or destruction" that would include only the functionality of habitat, rather than its component parts. The ECO noted in our 2009/2010 Annual Report that "it may be difficult for managers or scientists to demonstrate or quantify habitat functionality, or lack thereof. This could lead to potential problems and possible legal conflicts in determining what activities may be allowable in protected habitat – a perilously slippery slope with potentially irreparable consequences." This application has shown that the ECO's concern is already becoming a reality. MNR states that even if cougars did live in Nighthawk Forest, forestry activities would not have an impact on the functionality of their habitat. The ministry's rationale begs the question: for habitat generalists, can functionality of habitat ever be damaged or destroyed?

MNR's approach seems to ignore the gradual degradation of habitat quality. Habitat loss is not necessarily binary – lost or not lost, functioning or not functioning – and the *degradation* of habitat is also a major factor in species' health and long-term viability. To truly prevent species loss and recover those species already at risk, the ECO urges MNR to ensure that habitat quality is taken into account in their definition of habitat functionality.

The ministry currently has a legal responsibility to protect and recover cougars in Ontario (see box, "Do Cougar Origins Matter?"). MNR is required by the *ESA* to ensure that a recovery strategy is drafted by an independent team of cougar experts. A final recovery strategy for the cougar is required to be prepared and available to the public by June 2013, with a government response to the strategy required by March 2014. The ECO therefore looks forward to government action to protect and recover cougars, as is intended under the *ESA*.

Do Cougar Origins Matter?

When it comes to cougar conservation in Ontario, should their origins matter? Under the *Endangered Species Act, 2007* (*ESA*), a species is defined as "a species, subspecies, variety or genetically or geographically distinct population of animal, plant or other organism, other than a bacterium or virus, *that is native to Ontario*" (emphasis added). However, the word "native" is not defined in the law.

The Committee on the Status of Species at Risk in Ontario (COSSARO) determines eligibility for inclusion on Ontario's list of species at risk. COSSARO defines *native to Ontario* as "a species that now occurs in Ontario in the wild, and that was present in the geographic area now described as Ontario (or in adjacent geographic areas and has arrived in Ontario without human assistance), prior to colonization by Europeans."

Whether free-ranging cougars in Ontario originated from a "native" remnant population or are dispersers from western populations should have no bearing on how they are treated under the *ESA.* As long as they arrived without human intervention, cougars fit under COSSARO's definition of eligibility, since they are wild individuals of the same, listed native species. The ECO believes that as cougars are listed as an endangered species under the Species at Risk in Ontario List (O. Reg. 230/08), any free-ranging western dispersing individuals should be protected as a "native" species at risk under the *ESA*.

It seems incredible to assume that captive-raised South American pets could survive in the wilderness of northern Ontario. If the cougars sighted indeed are from captive origins, perhaps the ministry should be doing more to prevent the possession, escape and release of large, predatory animals to the wild. If MNR believes that there are large numbers of cougars in captivity, it is the ministry's responsibility to investigate. Until taking further action on escaped or released cougars, MNR is able to plead ignorance and suggest that any cougars in Ontario are from captive origins, allowing the ministry to shirk its responsibility to manage these individuals as members of an endangered species.

Review of Application I2010002:

6.2.3 Contraventions of the *Provincial Parks and Conservation Reserves Act, 2006* by Leaseholders in Rondeau Provincial Park (Investigation Denied by MNR)

Keywords: provincial parks; ecological integrity; Rondeau Provincial Park; Algonquin Provincial Park

Summary of Issues

In September 2010, two applicants submitted an *Environmental Bill of Rights, 1993* (*EBR*) application for investigation alleging contraventions of the *Provincial Parks and Conservation Reserves Act, 2006* (*PPCRA*) and its regulation, O. Reg. 347/07 (Provincial Parks: General Provisions), by leaseholders in Rondeau Provincial Park. The applicants claim that some leaseholders within the park are not complying with their lease agreements because they constructed off-lease structures, equipment and personal property (e.g., pathways, beach houses, volleyball nets, tennis courts, and docks) without a permit. The applicants allege that these activities are degrading the habitat of native species (i.e., the prothonotary warbler and the eastern spiny softshell turtle) in the park. The Environmental Commissioner of Ontario (ECO) forwarded the application to the Ministry of Natural Resources (MNR).

Provincial Parks and Conservation Reserves Act

The *PPCRA* governs provincial parks and conservation reserves administered by MNR (i.e., provincial parks and conservation reserves) in Ontario. The Act's purpose is "to permanently protect a system of provincial parks and conservation reserves that includes ecosystems that are representative of all of Ontario's natural regions, protects provincially significant elements of Ontario's natural and cultural heritage, maintains biodiversity and provides opportunities for compatible, ecologically sustainable recreation." Under the Act, MNR's first priority when planning and managing provincial parks and conservation reserves shall be the maintenance of ecological integrity. Ecological integrity is a condition in which components of ecosystems and the composition and abundance of native species and biological communities are characteristic of their natural regions and rates of change and ecosystem processes are unimpeded. This includes healthy and viable populations of native species, species at risk and the habitat on which they depend and levels of air and water quality consistent with protection of biodiversity and recreational enjoyment. For additional information on the *PPRCA*, see the ECO's 2006/2007 Annual Report

A work permit is required to undertake certain activities in provincial parks and conservation reserves, such as constructing, expanding or placing buildings or structures. Permits are also required for constructing trails or roads and clearing land.

Cottages in Rondeau Provincial Park

Rondeau is a relatively small provincial park (just over 3,200 hectares) near Chatham, Ontario that is located on a crescent shaped sandspit that juts into Lake Erie. The park's beach dunes, pine-oak and beech-maple forests, and marshes support an array of mammals, plants and birds, including the endangered prothonotary warbler.

Approximately 280 privately owned cottages are also located within the park. The cottages were built between the 1890s and 1950s, and currently have 25-year leases that are to expire in 2017. Rondeau and Algonquin are the only provincial parks in Ontario that have leased cottages. The General Provisions regulation (O. Reg. 347/07) under the *PPCRA* states that no person shall occupy land for non-commercial residential purposes in Algonquin or Rondeau Provincial Park except under a lease granted before July 2, 1954 or an extended or renewed lease that does not extend beyond December 31, 2017. Subject to

availability of funds, MNR will acquire and remove some cottages on a priority basis as they become available.

In October 2010, MNR posted a notice on the Environmental Registry (#011-1300) proposing to offer a one-time lease extension to cottagers in Rondeau Provincial Park but not to leaseholders in Algonquin Provincial Park. To date, MNR has not posted a decision notice on this change in policy direction.

The applicants allege that the *PPCRA* and O. Reg. 347/07 were contravened because some cottage leaseholders constructed off-lease structures, equipment and personal property (e.g., pathways, beach houses, volleyball nets, tennis courts and docks) without obtaining a permit from MNR. The applicants further allege that these activities are leading to the degradation of park habitat. The applicants provided photographs of alleged contraventions and numerous correspondences from park staff. This includes letters sent by MNR between 2007 and 2010 advising cottage leaseholders what activities require work permits and stating that there had been violations of lease conditions. The letters also state that in 2007 park staff began an initiative to determine the ownership of a variety of personal property and structures within the park that were not on leasehold property.

Ministry Response

In November 2010, MNR determined that an investigation under section 77 of the *EBR* was not necessary in relation to the contravention alleged in the application as MNR is currently addressing them through ongoing investigations, compliance and enforcement actions. MNR advised the applicants that it routinely monitors activities in the park and uses a range of compliance and enforcement tools, e.g., general education, lot-specific compliance education and investigations and enforcement action, where appropriate. MNR stated that it deals with each instance of non-compliance on a case-by-case basis.

MNR stated that it has not issued a work permit under the *PPCRA* to any cottage leaseholder to construct a trail or road in the park since 2007. MNR regularly educates leaseholders about the *PPCRA* requirements and, when it encounters a contravention, MNR asks the leaseholders to comply with the requirements. MNR further stated that when contraventions occur, the ministry takes one or more of the following actions:

- Verbal request to immediately comply;
- Request by letter to comply with specific deadlines;
- Where appropriate, if the cottager is unable to relocate the off-lot structure, the ministry may offer support to relocate items to the lease lot; and/or
- A range of enforcement actions as identified under the *PPCRA*.

MNR stated that since 2007, it has taken a "stepwise approach to achieve leaseholder compliance with the legislation." This approach includes:

- Letters to leaseholders informing them about the *PPCRA* and how to comply with the new provisions;
- Letters to leaseholders advising them that non-compliance will be addressed and what they can expect;
- Meeting with all leaseholders and specific leaseholders to address lease compliance issues; and
- Written warnings to individual leaseholders addressing specific issues relating to their lot and that MNR may lay charges if the leaseholder(s) fail(s) to comply within specified timelines.

For the full text of the ministry decision, please see our website at www.eco.on.ca.

ECO Comment

MNR's decision to deny this EBR application is technically reasonable given the ministry's ongoing investigation into this matter.

However, the ECO also believes that it was reasonable for the applicants to submit an application for investigation on this matter. The applicants documented that for over three years, MNR acknowledged problems in the park with off-lease structures and that there were violations of lease conditions. It is unclear at what point MNR will stop writing contravention warning letters and start laying additional charges. Without clear action, MNR is sending the wrong signal to leaseholders and the public; the ministry must show through its actions that it does take its enforcement responsibilities seriously.

The ECO stresses that provincial parks are dedicated to the public with the clear purpose of maintaining the ecological integrity of these protected areas. Both MNR and the cottage leaseholders have a legal obligation to ensure that biodiversity is safeguarded and left unimpaired for future generations. It is long-standing MNR policy that the leases in Rondeau and Algonquin provincial parks will expire in December 2017 based on the recognition that such land uses are inappropriate in protected areas. Until that time, MNR and cottage leaseholders must be diligent to safeguard these ecologically significant sites on behalf of all Ontarians.

Review of Application I2010005:

6.2.4 Hunting and Trapping Coyotes and Wolves for Gain (Investigation Pending by MNR)

Geographic Area: Towns of Cornwall and Osgoode

Keywords: bounties; contests; coyotes; *Fish and Wildlife Conservation Act* (*FWCA*); hunting; Ministry of Natural Resources (MNR); trapping; wolves

Background/Summary of Issues

In an attempt to control local coyote numbers, organizers have started holding contests – mostly in eastern Ontario – that encourage participants to kill coyotes for the chance to win guns and other prizes. In early 2010, however, concerned citizens began pointing out that these contests – in addition to being ineffective at reducing coyote numbers – may be illegal under Ontario's *Fish and Wildlife Conservation Act* (*FWCA*). Except with the authorization of the Minister of Natural Resources, section 11(1) of the *FWCA* prohibits:

1. Hunting or trapping for hire, gain or the expectation of gain;
2. Hiring, employing or inducing another person to hunt or trap for gain; and
3. Paying or accepting a bounty.

Sections 11(3) and 11(4) of the *FWCA*, however, contain exceptions that allow licenced trappers to: hunt or trap furbearing mammals (e.g., coyotes) for hire, gain, or the expectation of gain; and hire, employ or induce another licensed trapper to hunt or trap furbearing mammals for gain.

The Minister is quoted as saying she "absolutely" disapproved of two annual coyote contests held in the towns of Osgoode and Arnprior.

In winter 2010/2011, the Ontario Wildlife Coalition (OWC) repeatedly requested that the Minister of Natural Resources comment on the legality of coyote hunting contests. The spokesperson of the OWC remarked to media, "it is unbelievable that we simply cannot get an answer from the Minister about the legality of the contests." Despite MNR's awareness of the contests and citizens' concerns, and despite the Minister's apparent disapproval, the ministry has not charged contest organizers or participants to date.

In March 2011, two applicants requested that the ministry investigate alleged contraventions of section 11(1) of the *FWCA* by the organizers, hosts and participants of two such contests, one of which was advertised as a coyote/wolf hunt contest. The applicants argued that by sponsoring, advertising, organizing, and providing logistics and other benefits, contest organizers induced individuals to kill coyotes and wolves for gain (in the form of over $2,500 worth of prizes), thereby contravening the *FWCA*. Moreover, the applicants contended that by collecting and aggregating contest registration fees, and disbursing prizes to participants, contest organizers paid a bounty for each animal killed and presented. Likewise, the applicants argued that contest participants violated the *FWCA* by hunting/trapping for the expectation of gain and paying entry fees that contributed to the bounty.

Ministry Response

On April 5, 2011, MNR notified the applicants that the ministry had received the application and would be considering it under the provisions of Part V of the *Environmental Bill of Rights, 1993*.

ECO Comment

The ECO will review the handling of this application in a future Annual Report.

SECTION 7

APPEALS AND LEAVE TO APPEAL APPLICATIONS

SECTION 7: APPEALS AND LEAVE TO APPEAL APPLICATIONS
April 1, 2010 to March 31, 2011

Appeals

Many Ontario statutes provide individuals and companies with a right to appeal government decisions that directly affect them (such as a decision to deny, amend or revoke a permit, licence or approval). Where such an appeal relates to an instrument that is prescribed in O. Reg. 681/94 under the *Environmental Bill of Rights, 1993* (*EBR*) as a "Class I" or "Class II" instrument, the ECO is required to post a notice on the Environmental Registry to alert the public to the appeal. The ECO also posts notice on the Registry of the final disposition of these appeals (i.e., whether the appeal was allowed, denied or withdrawn) for the public's information.

During the 2010/2011 reporting year, the ECO posted nine new "instrument holder" notices of appeal on the Registry. Three of these appeals related to instruments issued by the Ministry of the Environment (MOE) – including a permit to take water, a renewable energy approval, and two Director's Orders. The remaining six appeals related to instruments, such as Official Plan Amendments, that were approved by the Ministry of Municipal Affairs and Housing.

Third-Party Leave to Appeal

The *EBR* expands the basic appeal rights granted to instrument holders by enabling members of the public to also apply for "leave" (i.e., permission) to appeal government decisions to issue "Class I" and "Class II" instruments to companies or individuals. Ontario residents who wish to seek leave to appeal, a decision must apply to the appropriate appeal body – generally the Environmental Review Tribunal or the Ontario Municipal Board – within 15 days of the ministry posting its decision on the Environmental Registry.

Such third-party applicants are not automatically granted permission to appeal. To be granted leave, third-party applicants must overcome several hurdles. First, the applicants must show that they have an interest in the decision. Next, they must satisfy the two-part leave to appeal test set out in section 41 of the *EBR*, by successfully demonstrating that:

1. There is good reason to believe that no reasonable person, having regard to the relevant law and policies, could have made the decision; and
2. The decision could result in significant harm to the environment.

If leave to appeal is granted, the dispute can proceed to a full tribunal hearing.

The ECO posts notices on the Registry of all applications for leave to appeal, as well as posts notice of the decisions made by the appeal body on the applications and appeals. During the 2010/2011 reporting year, concerned members of the public sought leave to appeal five instrument decisions. All of the applications this year involved Certificates of Approval (air) ("C of A") issued by MOE.

Table 1 below provides a brief summary of each leave to appeal application filed during the 2010/2011 reporting year. Additional details on the instruments and appeals can be found in the notices posted on the Environmental Registry. In addition, the full text of the decision for each appeal can be found on the Environmental Review Tribunal's website at www.ert.gov.on.ca.

Table 1: Applications for Leave to Appeal (LTA) initiated in the 2010/2011 reporting year:

Instrument Holder	Instrument	Registry #	LTA Applicant(s)	Date of LTA Application	Leave Decision
1036328 Ontario Inc. (operating as Baresa Kitchens)	C of A (air)	010-5407	Donna Dalton, Brenda Johnson (representing Environment Hamilton), et al.	June 21, 2010	All applicants withdrew their LTA application (September 2010)
Independent Cremation Group Ltd.	C of A (air)	010-9177	David Welch	August 11, 2010	LTA denied (November 2010)
844136 Ontario Ltd.	C of A (air)	010-6730	David Welch	August 11, 2010	LTA denied (November 2010)
ArcelorMittal Dofasco	C of A (air)	010-7987	Lorna Moreau	August 26, 2010	LTA denied (November 2010)
J. &. P. Leveque Bros. Haulage Limited	C of A (air)	011-0480	Peter and Marie-Claire Warden (representing the Boshkung Area Citizens Group), and Susan Yallop (representing the Boshkung Lake Property Owners' Association)	March 21, 2011	Wardens withdrew their LTA application; LTA denied for Susan Yallop (May 2011)

Table 2 provides a brief summary of two third-party appeals that were concluded in the 2010/2011 reporting year, but were commenced in an earlier reporting year. As above, additional details can be found on the Environmental Registry and the Environmental Review Tribunal's website.

Table 2: Leave to Appeals concluded in the 2010/2011 reporting year (commenced in earlier years):

Instrument Holder	Instrument	Registry #	LTA Applicant(s)	Date of LTA Application	Leave Decision
New Sabby Concrete and Supplies Inc.	C of A (air)	010-6576	City of Toronto	August 19, 2009	The applicant was granted leave to appeal (on one ground only) on November 2, 2009. Prior to the hearing, the parties reached a settlement and the applicant withdrew its appeal (January 14, 2011)

Findlay Creek Properties and 1374537 Ontario Ltd	Permit to Take Water	010-4670	Greenspace Alliance of Canada's Capital and Sierra Club Canada	May 20, 2009	The applicants were granted leave to appeal (on limited grounds) on July 29, 2009. Prior to the hearing, the parties reached a settlement, including revisions to the PTTW. The Tribunal confirmed the terms of the settlement and dismissed the appeal (April 22, 2010)

SECTION 8

REQUESTS TO PRESCRIBE MINISTRIES, ACTS AND INSTRUMENTS UNDER THE *EBR*

SECTION 8: REQUESTS TO PRESCRIBE MINISTRIES, ACTS AND INSTRUMENTS UNDER THE *EBR*

One of the challenges facing the Environmental Commissioner of Ontario (ECO) and the Ontario government is keeping the *Environmental Bill of Rights, 1993* (*EBR*) in sync with new laws and government changes, such as the creation of new ministries.

Ontario Regulation 73/94 – General, prescribes which ministries and acts are subject to the various provisions of the *EBR.* Ontario Regulation 681/94 (Classification of Proposals for Instruments) sets out which instruments (e.g., approvals, permits, etc.) are subject to the *EBR*. The ECO strives to ensure that these two regulations remain up-to-date and relevant to Ontario residents who want to participate in environmental decision-making under the *EBR*. There are a number of factors that frequently trigger a need to update these regulations, including:

- **New Environmentally Significant Acts**: The Ontario government periodically enacts new legislation of environmental significance. It is important that new environmentally significant acts are prescribed quickly under O. Reg. 73/94 so that Ontario residents are guaranteed the right to participate in the decision-making on any proposed new regulations and instruments under that Act. In addition, the public may only request an *EBR* review of the act or seek to have a ministry investigate an alleged contravention of the act if the act is prescribed.

- **Environmentally Significant Instruments**: New or amending acts or regulations may create new categories of environmentally significant instruments. It is important that such instruments are classified under O. Reg. 681/94 to ensure the public's right to: participate in the ministry decisions to issue the individual instruments; file leave to appeal applications; and request *EBR* investigations and reviews of the instruments.

- **Re-Organization of Ministry Portfolios***:* The Ontario government periodically creates new ministries, re-organizes existing ministries, or redistributes portfolios between ministries. Additionally, the government may transfer oversight of a program to an outside agency or organization. The *EBR* regulations must be updated to reflect these changes in ministry names, portfolios and oversight; otherwise existing rights under the *EBR* may be lost.

- **Applications for Review from the Public***:* Members of the public may file an application for review requesting that a specific ministry or act become prescribed under the *EBR*, or that a ministry that is already prescribed become prescribed for additional processes (such as for applications for review or investigation). The ECO has received nine applications of this nature since February 1995. In some cases, the government decides to accept such requests.

- **ECO Internal Review:** The ECO may from time-to-time recommend that a ministry, agency, law or instrument be prescribed under the *EBR* based on the outcome of an internal review. In some cases, the government decides to accept such a recommendation.

If a ministry agrees to be prescribed or to prescribe one of its laws, the ministry must work with the Ministry of the Environment (MOE), which is responsible for administering the *EBR*, to ensure that the appropriate amendments to the regulations under the *EBR* are made and that the proposed changes are posted on the Environmental Registry for public comment.

Progress in Prescribing Ministries, Acts and Instruments in 2010/2011

In the 2010/2011 reporting period, the ECO observed some progress in expanding *EBR* coverage. In May 2010, MOE filed important changes to O. Reg. 73/94, prescribing the *Lake Simcoe Protection Act, 2008*, the *Toxics Reduction Act, 2009*, and the *Food Safety and Quality Act, 2001*. MOE also amended O. Reg.

681/94 to prescribe certain instruments issued under the *Endangered Species Act, 2007* and the *Safe Drinking Water Act, 2002*.

In March 2011, MOE posted a proposal on the Environmental Registry (#011-2697) to amend O. Reg. 73/94 to prescribe the Ministry of Education for the purposes of the Statement of Environmental Values (SEV) and public consultation provisions under Part II of the *EBR*. The proposed amendments to O. Reg. 73/94, if made, would also prescribe most of the *Water Opportunities Act, 2010*, for the purposes of posting regulations, as well as make several administrative amendments, including updating the ministry names of the Ministry of Energy and the Ministry of Tourism and Culture, and updating references to the Building Code regulation. (As of July 2011, this proposal had not been decided.)

The ECO commends the ministries on these developments over the past reporting year. However, many outstanding requests to prescribe ministries, acts and instruments – by both the ECO and the public – remain unaddressed. In some cases, there have been serious delays in making certain laws and ministries subject to the *EBR*. The ECO is concerned that these lengthy delays deprive the public of important rights to participate in environmentally significant initiatives, file leave to appeal applications, and request *EBR* investigations and reviews.

Following is a summary of the status, as of July 2011, of the ministries' responses to various requests by the ECO and the public to prescribe specific acts, instruments and ministries under the *EBR*.

Requests to Prescribe New Acts under the *EBR*

Animal Health Act, 2009 (OMAFRA)

In September 2010, the ECO wrote to the Ministry of Agriculture, Food and Rural Affairs (OMAFRA) asking the ministry to review the need to prescribe the *Animal Health Act, 2009* for making regulations and for applications for review and investigation. In November 2010, OMAFRA advised the ECO that, while it was not contemplating developing any environmentally significant regulations for the foreseeable future, the ministry would give the option of prescribing the Act under the *EBR* "due consideration". The ECO encourages OMAFRA to undertake a review of the need to prescribe this Act.

Building Code Act, 1992 (MMAH)

The *Building Code Act, 1992* (*BCA*) is prescribed under the *EBR* for limited purposes relating to septic systems. In the ECO's 2005/2006 Annual Report, the ECO recommended that the Ministry of Municipal Affairs and Housing (MMAH) fully prescribe the *BCA* under the *EBR* for posting notice of proposed regulations and instruments and for applications for reviews. In March 2007, MMAH and MOE advised the ECO that MMAH had no plan to further prescribe the *BCA.*

In May 2009, the *Green Energy and Green Economy Act*, *2009* passed amendments to the *BCA* that make energy efficiency a central tenet of the Building Code. In November 2010, the *Water Opportunities and Water Conservation Act, 2010* passed amendments to the *BCA* to include water efficiency provisions in the Building Code. Given the new provisions in the *BCA* relating to energy and water efficiency, the ECO again urges MMAH to reconsider prescribing the entire *BCA*. Prescribing the entire *BCA* would ensure transparency and accountability for MMAH policies and laws relating to green building materials and energy and water technologies.

Far North Act, 2010 (MNR)

The *Far North Act, 2010* was passed on October 25, 2010. On November 4, 2010, the ECO wrote to the Ministry of Natural Resources (MNR) encouraging the ministry to swiftly prescribe the Act under the *EBR* for the purposes of posting environmentally significant regulations and making the Act and its regulations subject to applications for review. In December 2010, MNR advised the ECO that the ministry would work towards prescribing the *Far North Act, 2010* under the *EBR* once the Act was proclaimed into force. The

Far North Act, 2010 came into force on January 31, 2011. However, as of June 1, 2011, MNR and MOE still had not posted a proposal to prescribe the Act.

The ECO again urges MNR to quickly prescribe this Act. The ECO reminds MNR of the importance of prescribing new acts swiftly. For example, in March and April 2011, because the Act was not yet prescribed, MNR posted two information notices (rather than proposal notices) on the Environmental Registry for proposed regulations under the Act (#011-2854 and #011-2427). The ECO notes that there is no legal reason to wait for legislation to be proclaimed into force before beginning the process of prescribing an act under the *EBR*.

Food Safety and Quality Act, 2001 (OMAFRA)

In 2001, the ECO requested that OMAFRA prescribe the *Food Safety and Quality Act, 2001* (*FSQA*) for the full range of rights under the *EBR*, including regulation proposal notices and applications for review and investigation. In June 2002, OMAFRA informed the ECO that it did not consider the *FSQA* to be environmentally significant as the primary purpose of the Act is to provide for the safety and quality of food. However, in 2004, OMAFRA began developing a new regulatory framework for deadstock, including deadstock disposal regulations under the *FSQA* and *Nutrient Management Act, 2002*.

In November 2008, the ECO again wrote to OMAFRA saying that the *FSQA* must be prescribed to provide greater certainty and clarity and ensure that future environmentally significant amendments to the *FSQA*, its regulations, and instruments are posted.

In May 2010, MOE amended O. Reg. 73/94 under the *EBR* to prescribe the *FSQA* for the purposes of posting environmentally significant regulations that relate to the disposal of deadstock and that amend or replace O. Reg. 105/09 – Disposal of Deadstock, made under the *FSQA*. The ECO is pleased that MOE and OMAFRA prescribed the *FSQA* for new regulations. However, the ECO is disappointed that the ministries did not prescribe any *FSQA* instruments under the *EBR*.

Lake Simcoe Protection Act, 2008 (MOE)

In April 2009, the ECO requested that MOE prescribe the *Lake Simcoe Protection Act, 2008* (*LSPA*) under the *EBR* for regulations and instrument proposal notices and applications for review and investigation. In May 2010, MOE amended O. Reg. 73/94 to prescribe the *LSPA*.

The ECO is pleased that MOE prescribed the *LSPA*. However, the ECO urges the ministry, in the future, to prescribe acts more quickly so that regulations under the act will be posted as proper proposal notices on the Environmental Registry subject to public comment. In this case, MOE had passed a new regulation under the *LSPA* (O. Reg. 219/09) in June 2009 – before the *LSPA* had become prescribed – and as such, was not posted as a proposal notice on the Registry.

Toxics Reduction Act, 2009 (MOE)

The ECO wrote to MOE in October 2009 requesting that the ministry prescribe the *Toxics Reduction Act, 2009* (*TRA*) under the *EBR*. In May 2010, MOE amended O. Reg. 73/94 to prescribe the *TRA* for the purposes of posting environmentally significant regulations and for *EBR* applications for review and investigation.

The ECO commends MOE for prescribing the *TRA*. However, the ECO reminds MOE of the importance of prescribing new acts quickly. For example, in September 2009 and again in April 2010, MOE posted information notices (rather than proposal notices) on the Environmental Registry for proposed regulations under the *TRA* (#010-7792 and #010-9349). The ECO is also disappointed that MOE did not prescribe any *TRA* instruments, which means that no instruments under the *TRA* will be subject to applications for review, SEV consideration or other *EBR* rights.

Water Opportunities Act, 2010 (MOE)

The *Water Opportunities and Water Conservation Act, 2010*, which was passed on November 23, 2010, created a new stand-alone Act – the *Water Opportunities Act, 2010* (*WOA*). In March 2011, MOE posted a proposal on the Environmental Registry (#011-2697) to amend O. Reg. 73/94 to prescribe most of the *Water Opportunities Act, 2010* (except for the provisions relating to the new Water TAP corporation) for the purposes of posting regulations.

The ECO commends MOE on its proposal to prescribe the *WOA* under the *EBR*, and encourages the ministry to move quickly on this matter to ensure the public's right to notice and comment on new regulations developed under the *WOA*. The ECO also encourages MOE to consider prescribing the *WOA* for other important *EBR* rights, including applications for review.

Requests to Prescribe Instruments under the *EBR*

Instruments under the *Endangered Species Act, 2007* (MNR)

In June 2008, the *Endangered Species Act, 2007* (*ESA*) was prescribed under O. Reg. 73/94 for most purposes of the *EBR*, with an exception for non-discretionary regulations made under section 7 of the *ESA*. At that time, the ECO urged MNR to move swiftly to prescribe certain instruments under O. Reg. 681/94 in light of the imminent coming into force of the Act.

In May 2010, MOE prescribed specific approvals issued under the *ESA* as "Class I" instruments under O. Reg. 681/94. The ECO is pleased that MNR and MOE prescribed some instruments under the *ESA*. However, the ECO notes that instruments that are subject to the *Environmental Assessment Act* exception contained in section 32 of the *EBR* will not be subject to the *EBR* notice requirements. MNR states that it will continue to voluntarily post information notices for comment where notice is required under an *EAA* process.

Water Management Plans under the *Lakes and Rivers Improvement Act* (MNR)

In June 2002, new section 23.1 of the *Lakes and Rivers Improvement Act* (*LRIA*) was created. This provision enables the Minister of Natural Resources to order owners of dams to develop water management plans (WMPs).

In our 2002/2003 Annual Report, the ECO encouraged MNR to amend O. Reg. 681/94 to include WMPs issued under section 23.1 as prescribed instruments. In March 2006, MNR advised the ECO that it would not be prescribing WMPs under the *EBR* because MNR's Water Management Planning Guidelines for Waterpower already "establishes a comprehensive approach to public engagement." MNR also noted that the majority of WMPs were completed or close to completion.

The ECO continues to disagree with MNR's decision. During the 2010/2011 reporting period, MNR posted yet another three information notices for WMPs. These notices exemplify why WMPs should be prescribed, ensuring the public's right to notice and comment under the *EBR*. (See Section 6.1.3 of this Supplement for a further discussion of the importance of prescribing WMPs under the *EBR*.)

Nutrient Management Plans/Strategies under the *Nutrient Management Act, 2002* (OMAFRA)

In January 2006, after years of requests from the ECO, the *Nutrient Management Act, 2002 (NMA)* was prescribed under the *EBR* for the purposes of posting regulations for notice and comment and for applications for review. However, the *NMA* and its regulations were not prescribed for applications for investigation. Furthermore, Nutrient Management Strategies (NMSs) and Nutrient Management Plans (NMPs) were not prescribed as instruments, meaning that these instruments are not subject to *EBR* notice and comment processes, reviews, investigations, SEV consideration, etc.

In 2008, OMAFRA advised the ECO that the purposes of *EBR* investigations and prescribing instruments is to achieve transparency, and that this is already achieved by clearly articulating the requirements for NMSs and NMPs in O. Reg. 267/03, the general regulation made under the *NMA*. OMAFRA also noted that there is sensitivity in the farm community to posting NMSs and NMPs on the Environmental Registry because they contain proprietary information and public access to this information could cause business problems for these farmers.

The ECO strenuously disagrees with OMAFRA's approach. Unless NMSs and NMPs are designated as instruments, the public and municipalities will not be notified on the Registry of local nutrient management activities (such as land application of sewage sludges), and residents will be unable to request an investigation under the *EBR* into possible non-compliance, or to request reviews of specific NMSs and NMPs.

Instruments under the *Public Lands Act* (MNR)

The *Public Lands Act* establishes a number of instruments – including instruments that provide for the sale or lease of public lands, orders releasing land from letters patent, and licences of occupation – that are not prescribed under the *EBR*. Instead, MNR relies on its class environmental assessment for these approvals. The ECO has commented in the past that these instruments should be prescribed under the *EBR* to ensure full notice and consultation opportunities are provided for the public.

In 2009, the *Green Energy Act, 2009* created a new regime for renewable energy approvals that enables public lands to be made available for renewable energy projects without being subject to *EAA* requirements. Accordingly, these instruments are not legally required to undergo any public participation process under either the *EAA* or *EBR*. While MNR has committed to posting information notices for unclassified instruments for renewable energy projects, the ECO has strongly urged MNR to classify these instruments under the *EBR* for full public consultation.

Lease Agreements under the *Provincial Parks and Conservation Reserves Act, 2006* (MNR)

In March 2009, MNR posted on the Environmental Registry an information notice (#010-6162) stating that all proposed instruments under the *Provincial Parks and Conservation Reserves Act, 2006* (*PPCRA*) are covered by the section 32 exception under the *EBR*, as a result of the Class Environmental Assessment for Provincial Parks and Conservation Reserves. However, MNR stated that it would voluntarily post information notices that invite public comment for all proposals to enter into commercial agreements for new resort/hotel development within a provincial park or conservation reserve (per section 14 of the *PPCRA*).

In spring 2009, the ECO sent several letters to MNR and MOE expressing concerns about MNR's proposed reliance on the section 32 *EBR* exception for *PPCRA* instruments. The ECO finds MNR and MOE's approach on this issue very disappointing, and not supportive of transparency. A number of *PPCRA* instruments (such as those issued under sections 14(1) and (2) of the Act) may be environmentally significant and of public interest, yet they will not be subject to applications for review, SEV consideration or other *EBR* rights.

Instruments under the *Safe Drinking Water Act, 2002* (MOE)

In April 2008, the ECO wrote to MOE requesting that licences issued under the *Safe Drinking Water Act, 2002 (SDWA)* be prescribed as instruments under the *EBR*. In May 2010, MOE filed amendments to O. Reg. 681/94 to prescribe licenses and other instruments issued under the *SDWA* as "Class I" proposals for instruments. The ECO is pleased that these instruments have been prescribed under the *EBR*.

Gasoline Handling Permits under the *Technical Standards and Safety Act, 2000* (*MCS*)

When the *EBR* was proclaimed in 1994, gasoline handling permits (including underground storage tank approvals) were prescribed instruments issued by the Ministry of Consumer and Commercial Relations

under the *Gasoline Handling Act*. In 1997, the power to issue gasoline handling permits was transferred to the Technical Standards and Safety Authority (TSSA). In 2000/2001, the *Gasoline Handling Act* was repealed and the gasoline handling permits were moved to O. Reg. 217/01 – Liquid Fuels and the Liquid Fuels Handling Code, made under the *Technical Standards and Safety Act, 2000* (*TSS Act*).

While O. Reg. 73/94 was updated in 2003 to clarify that the *TSS Act* was prescribed for posting new regulations, the ECO asked MOE and the ministry overseeing the TSSA to update O. Reg. 681/94 to reflect the changes. In May 2010, MOE finally amended O. Reg. 681/94 to reflect the changes. The ECO is pleased that the Ministry of Consumer Services and MOE made these needed regulatory updates.

Requests to Prescribe New Ministries and Agencies

Ministry of Aboriginal Affairs (MAA)

The Ministry of Aboriginal Affairs (MAA) was established by the Ontario government in November 2007 with a mandate to protect the rights of Aboriginal peoples and promote the health and economic well-being of Aboriginal Ontarians. In November 2007, the ECO wrote to MAA requesting that the ministry be prescribed for SEV consideration, posting proposal notices on the Environmental Registry for notice and comment, and for applications for review under the *EBR.*

In early 2009, MOE advised the ECO that MOE and MAA had discussed some potential MAA activities that might be subject to the *EBR*. MOE also offered its ongoing assistance to MAA as MAA considered the parameters for becoming prescribed. In November 2010, MOE indicated that discussions with MAA were still ongoing, but as of June 2011, no further action was evident. The ECO continues to urge MOE and MAA to move forward on this matter.

Ministry of Community Safety and Correctional Services (MCSCS)

In July 2009, the ECO wrote to MCSCS requesting that the ministry be prescribed for SEV consideration, posting proposal notices on the Environmental Registry for notice and comment and for applications for review and investigation under the *EBR*. The ECO also recommended that, if MCSCS is prescribed, the *Fire Prevention and Protection Act, 1997*, (*FPPA*) administered by MCSCS, should also be prescribed for posting regulations.

In October 2009, MCSCS advised the ECO that the ministry had decided not to be prescribed. MCSCS also determined that the *FPPA* should not be prescribed at this time because the statute does not have any environmental impacts. Moreover, MCSCS stated that MOE is responsible for providing advice on cleaning up the environmental impacts associated with fires. In the ECO's 2009/2010 Annual Report, the ECO disagreed with MCSCS's decision. The ECO encourages MCSCS to reconsider their position.

Ministry of Education (EDU)

In May 2004, two applicants requested that MOE review O. Reg. 73/94 to determine whether the Ministry of Education (EDU) should be prescribed under the *EBR*. (A similar request was also made in 1999 and was reviewed in the ECO's 2000/2001 Annual Report.) In September 2005, MOE completed its review and recommended prescribing EDU for the purposes of developing and considering a SEV for environmentally significant proposals. (For the ECO comment on this review, see pages 123-128 of the ECO's 2005/2006 Annual Report.)

In November 2005, MOE posted a proposal notice on the Environmental Registry (#RA05E0016) to amend O. Reg. 73/94 to prescribe EDU for the purposes of SEV consideration. The proposal stated, however, that EDU would not be required to post proposals for changes to policy and curriculum on the Environmental Registry. This proposal was never finalized.

In March 2011, MOE posted a new proposal on the Registry (#011-2697) proposing to amend O. Reg. 73/94 to prescribe EDU for the purposes of Part II of the *EBR*. If implemented, this amendment would

require EDU to prepare and consider a SEV, and would also require EDU to post proposals for environmentally significant acts and policies on the Environmental Registry for public consultation.

The ECO is very pleased that EDU and MOE have finally posted a proposal to prescribe EDU. Although the ECO is disappointed that EDU is not proposing to be prescribed for posting regulations, the ECO is pleased that EDU has recognized the importance of posting proposals for environmentally significant acts and policies on the Environmental Registry for public consultation.

The ECO urges EDU and MOE to move forward quickly on this matter, as there has already been extensive delay in prescribing this ministry. The ECO also reminds MOE and EDU to post a decision notice on the original Registry proposal notice.

Ministry of Health Promotion and Sport (MHPS)

The Ministry of Health Promotion and Sport (MHPS) was established by the Ontario government in July 2005 with a mandate to promote the health and well-being of Ontarians. In 2006/2007, the ECO urged MHPS to be prescribed for SEV consideration, posting proposal notices on the Environmental Registry for notice and comment, and for applications for review under the *EBR.*

In 2009, MOE indicated that MOE and MHPS were discussing potential MHPS activities that might be subject to the *EBR*. In November 2010, MOE indicated that discussions with MHPS were still ongoing. The ECO continues to urge MOE and MHP to move forward on this matter.

Ministry of Infrastructure (MOI)

In August 2010, the Ministry of Energy and Infrastructure (MEI) – a prescribed ministry – was split into two separate ministries: the Ministry of Energy (ENG) and the Ministry of Infrastructure (MOI). In November 2010, the ECO met with the Deputy Minister of the new MOI and urged the ministry to become prescribed under the *EBR* for SEV consideration, posting proposal notices on the Environmental Registry for notice and comment, and for *EBR* applications for review.

MOI administers or oversees a number of acts (such as the *Places to Grow Act*), regulations, policies and agencies (e.g., Ontario Infrastructure and Lands Corporation) that have clear environmental significance. It is important that the public be given the opportunity to participate in MOI's environmentally significant decision-making relating to public infrastructure, growth and urban and rural development. For example, in 2010/2011, MOI developed a "ten-year plan for public infrastructure", which sets priorities for public infrastructure spending (including water, wastewater and transportation infrastructure). Although this major environmentally significant plan was subject to extensive consultation, it should have been subject to the full rights provided by the *EBR.*

In November 2010, the Deputy Minister indicated to the ECO that MOI was working on becoming prescribed and was considering how to adapt MEI's joint SEV for the new ministry. However, as of June 2011, no further progress in prescribing MOI was evident. The ECO strongly urges MOE and MOI to move forward, without delay, in prescribing MOI.

Ministry of Research and Innovation (MRI)

The Ministry of Research and Innovation (MRI) was established by the Ontario government in June 2005. According to MRI's website, its mandate includes: developing an integrated innovation strategy and guiding its delivery; and investing in green technology that balances Ontario's commitment to both the environment and the economy.

In July 2009, the ECO wrote to MRI requesting that the ministry be prescribed for SEV consideration, posting proposal notices on the Environmental Registry for notice and comment, and for applications for review under the *EBR*. The ECO noted the potential for MRI to make nanotechnology-related decisions, which may affect the environment and is of growing public interest.

In February 2010, MRI advised the ECO that it had reviewed the ECO's comments in our 2008/2009 Annual Report on nanotechnology-related decisions but disagreed with the ECO's conclusion that MRI should be prescribed. In addition, MRI explained that the posting of proposals for funding of research on the Environmental Registry would be strongly resisted by MRI's stakeholders and funding recipients and its peer review process for funding proposals is internationally-recognized.

The ECO finds MRI's approach disappointing. The ECO had suggested that MRI consult on its program and policy development with interested stakeholders, not on specific funding decisions for projects. The ECO encourages MRI to reconsider this position.

Ontario Heritage Trust (OHT)

The Ontario Heritage Trust (OHT), an agency of the Ministry of Tourism and Culture (MTC), is dedicated to identifying, preserving, and promoting Ontario's heritage for the benefit of present and future generations. In 2005, the amended *Ontario Heritage Act, 2005* (*OHA*) formally recognized the role of OHT in conserving the "natural" environment. OHT holds in trust a portfolio of more than 130 natural heritage properties, which include rare Carolinian forests, wetlands, the habitats of endangered species, sensitive features of the Oak Ridges Moraine, nature reserves on the Canadian Shield, and numerous properties on the Bruce Trail and Niagara Escarpment.

In 2006, the ECO urged MTC to prescribe OHT under the *EBR* for SEV consideration and for posting notices on the Environmental Registry (see pages 76-79 of the ECO's 2005/2006 Annual Report). In August 2007, MTC advised the ECO that it would not be prescribing OHT under the *EBR* because it is not a policy-making agency; it stated that all policies and programs related to the work of OHT are developed by MTC and MNR, and that OHT merely implements those programs. In September 2009, MTC and MOE did however prescribe the *OHA* under the *EBR*.

The ECO is disappointed by MTC's approach. The current funding, policy-making and reporting functions related to natural heritage protection are confused and fragmented between MNR, MTC and OHT. Responsibility for posting environmentally significant proposals related to natural heritage protection is not always clear and can slip through the cracks. The ECO continues to urge MTC to prescribe OHT. Until this occurs, MTC must take responsibility for ensuring that all environmentally significant proposals relating to OHT's work are posted on the Environmental Registry for public comment.

SECTION 9

UNDECIDED PROPOSALS

SECTION 9: UNDECIDED PROPOSALS

Section 58 of the *EBR* requires the ECO produce a list of all undecided proposal notices posted each reporting year on the Environmental Registry. A detailed list of undecided proposals posted between April 1, 2010 and March 31, 2011 is available from the ECO by special request.

Total Number of Undecided Proposals for the 2010/2011 Reporting Year	**1292**
Acts	5
Policies	38
Regulations	20
Instruments	1229