NEGLECTING OUR OBLIGATIONS

Environmental Commissioner of Ontario | Annual Report 2005–2006 | Supplement

TABLE OF CONTENTS

ABBREVIATIONS

Terms & Titles

ALMR Association of Lighting & Mercury Recyclers
ANSI Area of Natural and Scientific Interest
ARP Acid Regeneration Plant
C of A Certificate of Approval
CA Conservation Authority
CAT Conservation Action Team
CCME Canadian Council of Ministers of the Environment
CELA Canadian Environmental Law Association
CEM Continuous Emissions Monitor
CFIA Canadian Food Inspection Agency
Class EA Class Environmental Assessment
COA Canada Ontario Agreement Respecting the Great Lakes Basin Ecosystem
CPAWS Canadian Parks and Wilderness Society
CPU Certificate of Property Use
CWS Canada-wide Standard
DFO Department of Fisheries & Oceans (federal)
EA Environmental Assessment
EC Environment Canada
ECO Environmental Commissioner of Ontario
EDU Ministry of Education
EEON Environmental Education of Ontario
ENG Ministry of Energy
ENGO Environmental Non-Governmental Organization
EPs Environmental Penalties
EPR Environmental Protection Requirements
ERC Emission Reduction Credit
ERT Environmental Review Tribunal
ESDWGs Education for Sustainable Development Working Groups
FMP Forest Management Plan
FMPM Forest Management Planning Manual
GHG Greenhouse Gas
GRCA Grand River Conservation Authority
HALT Haldimand Against Landfill Transfers
IC&I Industrial, Commercial & Institutional (waste)
IESO Independent Electricity System Operator
IPAT Industrial Pollution Action Team
LDR Land Disposal Restrictions
LEED Leadership in Energy and Environmental Design
MAH Municipal Affairs and Housing
MBS Management Board Secretariat
MFTIP Managed Forest Tax Incentive Program
MGS Ministry of Government Services
MISA Municipal Industrial Strategy for Abatement
MNDM Ministry of Northern Development and Mines
MNR Ministry of Natural Resources
MOE Ministry of the Environment
MOF Ministry of Finance
MOU Memorandum of Understanding
MPAC Municipal Property Assessment Corporation
MPIR Ministry of Public Infrastructure Renewal
MTO Ministry of Transportation
MURF Multi-Use Recreational Facility
NEC Niagara Escarpment Commission
NO_x Nitrogen Oxides
NPRI National Pollutant Release Inventory
NSSA New Source Set Aside
OBA Ontario Bar Association
OCA Ontario Court of Appeal
OEB Ontario Energy Board
OFA Ontario Federation of Agriculture
OFA Ontario Forestry Association
OMAF Ontario Ministry of Agriculture and Food
OMB Ontario Municipal Board
OPA Official Plan Amendment
OPA Ontario Power Authority
ORC Ontario Realty Corporation
ORM Oak Ridges Moraine
ORMCP Oak Ridges Moraine Conservation Plan
POO Provincial Officer's Order
PPS Provincial Policy Statement
PSW Provincially Significant Wetland
PTTW Permit to take water
PWQO Provincial Water Quality Objectives
SCB Sector Compliance Branch (MOE)
SEV Statement of Environmental Values
SO_2 Sulphur Dioxide
STORM Save the Oak Ridges Moraine
SWIS Solid Waste Information System
TDSB Toronto District School Board
TSSA Technical Standards and Safety Authority
TTRPOA Trent Talbot River Property Owners Association
UCO United Cooperatives of Ontario
US EPA United States Environmental Protection Agency
UTRCA Upper Thames River Conservation Authority
VOCs Volatile Organic Compounds

ABBREVIATIONS (Continued)

Legislation

AMLA *Adams Mine Lake Act*
ARA *Aggregate Resources Act*
BSLAA *Brownfield Statute Law Amendment Act*
CAA *Conservation Authorities Act*
CEPA *Canadian Environmental Protection Act*
CFSA *Crown Forest Sustainability Act*
DADA *Dead Animal Disposal Act*
EAA *Environmental Assessment Act*
EBR *Environmental Bill of Rights*
EESLAA *Environmental Enforcement Statute Law Amendment Act*
EPA *Environmental Protection Act*
ERA *Electricity Restructuring Act*
ESA *Endangered Species Act*
FFPPA *Farming and Food Production Protection Act*
FIPPA *Freedom of Information and Protection of Privacy Act*
FSQA *Food Safety and Quality Act*
FWCA *Fish and Wildlife Conservation Act*
GBA *Greenbelt Act*
KHSSPA *Kawartha Highlands Signature Site Parks Act*
LRIA *Lakes and Rivers Improvement Act*
MBCA *Migratory Birds Convention Act (federal)*
NEPDA *Niagara Escarpment Planning and Development Act*
NMA *Nutrient Management Act*
OEBA *Ontario Energy Board Act*
ORMCA *Oak Ridges Moraine Conservation Act*
OWRA *Ontario Water Resources Act*
PA *Planning Act*
PGA *Places to Grow Act*
POA *Provincial Offences Act*
SCA *Strong Communities Act*
SDWA *Safe Drinking Water Act*
SWSSA *Sustainable Water and Sewage Systems Act*
WDA *Waste Diversion Act*

PREFACE: INTRODUCTION TO THE SUPPLEMENT

Welcome to the supplement to the Environmental Commissioner of Ontario's 2005/2006 annual report. This year's supplement consists of 11 sections. It addresses the reporting year of April 1, 2005 to March 31, 2006. The following summary contains highlights of each section and discusses the role of the Environmental Commissioner of Ontario (ECO) in reporting this information to the public.

Section 1 – Unposted Decisions

Under the *Environmental Bill of Rights* (*EBR*), prescribed ministries are required to post notices 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 decision without first posting a proposal on the Registry, we review that decision and make inquiries to the ministry to determine whether the public's participation rights have been respected. Section 1 of this supplement presents the ECO's findings. While the ECO monitors decision-making in all prescribed ministries, in 2005/2006 we made inquiries on specific decisions made by the Ministries of Natural Resources, Labour, Environment, Energy, Culture, and Municipal Affairs and Housing. Thirteen policy decisions, summarized in this section, were singled out by the ECO as unposted decisions.

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 s. 15, 16, or 22 of the *EBR* and information notices created under s. 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. This process is far superior to the posting of an information notice on the Registry, and provides greater public accountability and transparency. However, in cases where provincial ministries are not required to post a regular proposal notice, they can still provide a public service by posting an information notice. These notices keep Ontario's residents informed of important environmental developments.

As presented in this section, seven ministries posted information notices during the 2005/2006 reporting year. The ECO's review found that while some of these postings constituted acceptable and even commendable uses of information notices, sharing important information with the public, many 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 was or will be employed instead. In 2005/2006, both the Ministry of the Environment and the Ministry of Natural Resources made use of exception notices. Section 3 provides a summary of each exception notice, and the ECO's assessment of whether the use of the exception provisions was appropriate.

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 2005/2006 reporting year, more than 2,300 decision notices were posted on the Environmental Registry, most of them for site-specific permits or approvals. 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 15 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.

Each reporting year the ECO reviews and reports on the handling and disposition of applications by ministries. In this section we provide a detailed review of applications on which the ministry has made a decision during the reporting year. Applications which have been received but not responded to by ministries are briefly summarized. Section 5 provides a summary and review of applications for review, while s. 6 addresses applications for investigation.

Section 7 – *EBR* Leave to Appeal Applications

For certain instruments issued by ministries, e.g., Certificates of Approval, Permits to Take Water, Ontario residents have 15 days to seek leave to appeal a decision after it is posted on the Environmental Registry. The ECO posts notice on the Registry of these leave to appeal applications, and updates a notice once the appropriate appeal tribunal has made its decision. This section provides a summary of the seven leave to appeal applications under the *EBR* that were received within the 2005/2006 reporting year.

Section 8 – *EBR* Court Actions

Under s. 84 of the *EBR,* residents of Ontario have the right to bring a legal action against someone who is violating or is about to violate an environmental Act, regulation or instrument, and is harming, or about to harm, a public resource. In addition, anyone who suffers, or who may suffer, a direct economic loss or personal injury as a result of a public nuisance that caused harm to the environment may bring a legal action under s. 103 of the *EBR*. The ECO is responsible for posting notices of court actions on the Registry for information purposes only. This section provides a summary of the two court actions that took place during the 2005/2006 reporting year.

There were no whistle-blower complaints under the *EBR* during the reporting year.

Section 9 – Status of ECO Requests to Prescribe New Laws, Regulations and Instruments 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 9 discusses the process for prescribing new laws, regulations and instruments, and provides a summary table to illustrate the current status of various recent Acts and regulations.

Section 10 – Overview of Waste Diversion in Ontario

This year, the annual report presented a discussion of waste diversion in Ontario under the heading: "60% Waste Diversion - Pipe Dream or Reality?" This supplement section provides more detail and context for the main annual report article, along with statistics, and management information on diversion regulation in the Industrial, Commercial and Institutional, and Construction and Demolition sectors.

Section 11 - Undecided Proposals

As required under s. 58(c) of the *EBR*, the ECO reports annually on all proposals posted on the Environmental Registry within the reporting year that have not had a decision notice posted by March 31 of that year. This section provides a summary of the number of undecided policy, Act, regulation and instrument proposals by prescribed ministries.

SECTION 1

ECO REVIEWS OF UNPOSTED DECISIONS

SECTION 1: ECO REVIEWS OF UNPOSTED DECISIONS

Public participation in environmental decision-making is at the heart of the *Environmental Bill of Rights (EBR)*. Under s. 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. These notices are to be posted for public comment for a minimum of 30 days before a decision is made on the proposal. The ministry must also consider all relevant 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 decision without first posting a proposal on the Registry, we review that decision to determine whether the public's participation rights have been respected.

Such inquiries can lead to one of several outcomes. The ministry may provide the ECO with legitimate reasons for not posting the decision on the Registry. For example, the decision may not 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 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, because they do not regard the decision as environmentally significant, or perhaps for other reasons. In such cases, the ECO believes that the ministry has not adhered to the requirements of the *Environmental Bill of Rights* and has deprived the Ontario public of notification and comment rights.

While the ECO monitors decision-making in all prescribed ministries, in 2005/2006 we made inquiries on specific decisions by the Ministries of Natural Resources, Labour, Environment, Energy, Culture, and Municipal Affairs and Housing. Thirteen decisions, summarized below, were singled out by the ECO as unposted decisions. Each summary provides information on the decision, explains the ministry's response to the ECO's inquiry, and discusses whether this response was adequate under the *EBR*. In some of the cases discussed, a ministry has responded positively, for example, in the case of biomedical waste management policy; in this instance, MOE committed to informing the public through a Registry proposal notice if and when the policy changes. In most of the cases discussed, however, ECO continues to disagree with a ministry's failure to abide by *EBR* requirements to post a notice on the Registry.

Ministry of Culture – Policy

Natural Spaces: Land Acquisition by the Ontario Heritage Trust

Description

- In August 2005, the Premier along with the Minister of Natural Resources and the Minister of Culture announced a provincial "Natural Spaces Program." Part of this program is a new Natural Spaces Land Acquisition and Stewardship Program (NSLASP). Through NSLASP, the province may acquire and protect ecologically significant lands such as wildlife habitat, source water areas, woodlands and wetlands. Since January 2006, NSLASP has been administered by the Ontario Heritage Trust under the Ministry of Culture.

- NSLASP's predecessor program for ecological land acquisition was operated by the Ministry of Natural Resources (MNR). Under MNR, the program's eligibility criteria and guidelines were posted for public consultation on the Environmental Registry. When the ECO met with MNR in November 2005 to discuss the Natural Spaces Program, we pointed out that the program structure and participation criteria for the new land acquisition program (NSLASP) should be posted to the Environmental Registry for full public consultation.
- The NSLASP program launch proceeded without such consultation. The ECO therefore wrote to the Ministry of Culture in March 2006, pointing out that the land acquisition program is no less environmentally significant now that it is administered by the Ontario Heritage Trust rather than by MNR, and should be subject to full public consultation. The ECO further noted that this matter illustrates the importance of prescribing the Ontario Heritage Trust under the *Environmental Bill of Rights*, to ensure that the agency's environmentally significant decisions are made with the benefit of full and transparent public consultation.

Ministry Rationale

- MCL responded in a letter in April 2006 by suggesting that the OHT arrange a meeting between OHT, MNR and the ECO to discuss the land acquisition program. MCL indicated that MNR, as well as private and non-governmental organisations who make up the "Natural Spaces Leadership Alliance," were involved in the development and design of NSLASP. As of May 2006, the ECO had not heard from OHT and was following up on this proposed meeting.
- MCL's letter pointed to an information notice regarding the Natural Spaces Program, posted on the Registry in December 2005 by MNR, which included a reference to NSLASP (the program was not mentioned by name in this information notice, although the notice did note that the Ontario Heritage Trust and the Ministry of Culture received a grant for securement of significant natural heritage properties). The ministry also pointed to the success of the program in attracting numerous applications for support of land acquisition and stewardship projects.

ECO Comment

- The ECO does not accept MCL's stated rationale for failing to post a regular Registry proposal notice on the land acquisition program. Mention of the land securement program within a Registry information notice on natural space protection is not a credible substitute for a policy proposal, nor is the involvement of an expert advisory group such as the "Natural Spaces Leadership Alliance" an alternative to public consultation. Provincial land acquisition programs are of significant environmental interest to the Ontario public and their design and development should be subject to public notification and consultation. The ECO suspects that the underlying issue is that the Ontario Heritage Trust is not a prescribed agency under the *EBR*.
- The failure to post a proposal notice for NSLASP is particularly disappointing given that the Minister of Natural Resources had assured the ECO, in January 2005, that details of the province's new program for acquisition and conservation of ecologically significant lands would be posted on the Registry for public review and comment.
- Given the environmental significance of the Natural Spaces Land Acquisition and Stewardship Program administered by OHT, the ECO urges MCL to make the Ontario Heritage Trust subject to Ontario's *Environmental Bill of Rights* (see page 288-295 of this supplement for more on the status of ECO requests to prescribe ministries under the *EBR*.)

For more on the province's conservation land acquisition program, see pages 54 and 76 of the 2005/2006 annual report.

Ministry of Energy – Act

Energy Conservation Responsibility Act, 2006

Description

- When the government introduced an energy conservation bill on November 2, 2005 (Bill 21, the *Energy Conservation Responsibility Act, 2006*), it did so without posting a proposal notice on the Environmental Registry. The ECO wrote to ENG on November 9, 2005, reminding the ministry to post this proposal for public consultation.

Ministry Rationale

- ENG responded within days by informing the ECO that a proposal would be posted shortly, and followed through by loading its proposal on the Registry on November 16, 2005 (AO05E0501).
- However, ENG has been less responsive in posting a decision notice for this Registry proposal. The bill received Royal Assent on March 28, 2006, enacting the *Energy Conservation Responsibility Act, 2006*, as well as amending other Acts. As of May 2006, no decision notice has been posted to the Registry.

ECO Comment

- Ministries typically post *EBR* proposals for environmentally significant legislation on the same day that the legislation is announced. The ECO promotes this practice, as it reduces confusion, supports transparency and accountability, and ensures the provision of the minimum 30-day comment period prior to the enactment of the new law. We urge ENG to follow this approach in the future when introducing environmentally significant legislation.
- The ECO urges ENG to improve its track record on timely Registry postings regarding environmentally significant proposals and decisions.

Ministry of Labour – Act

Regulatory Modernization: Bill 69

Description

- In February 2006, the ECO met with representatives of MOL and MOE to discuss an initiative called "Modernizing Regulatory Compliance in Ontario." MOL has been leading this project since 2001. According to briefings provided to the ECO in 2002 and 2004, most of the efforts between 2001 and 2005 were focused on making it easier for ministries to work together on inspections, investigations and enforcement, and on developing protocols on information sharing and cooperation. At the February 2006 meeting, MOL representatives provided assurances that if new policies and related laws were developed, these would be posted for consultation on the Registry
- On February 27, 2006, the Minister of Labour tabled Bill 69, the proposed *Regulatory Modernization Act, 2006* (*RMA*). There was no accompanying Registry proposal.

- The *RMA*, if passed, will introduce changes to information sharing and the targeting of inspections by 13 enforcement ministries and related agencies (including MOE, MNR, OMAFRA, MTO, MOL, the TSSA and other *EBR*-prescribed ministries). It is designed to allow staff in these 13 ministries and related agencies to better cooperate, share information, and target enforcement efforts related to protection of the environment, wildlife, and workplace health and safety.

- MOL also claims that the proposed law will allow businesses to operate more effectively by reducing duplication in information collection and other compliance activities. As of May 23, 2006, Bill 69 was still at first reading stage in the Legislature.

Ministry Rationale

- When the bill was tabled in February 2006 without a corresponding Environmental Registry proposal, the ECO followed up with inquiries about when the bill would be posted on the Registry. We received assurances in March 2006 that it would be posted to the Registry. However, a proposal notice was not posted until June 16, 2006 (RH06E0001).

ECO Comment

- The proposed *Regulatory Modernization Act* is aimed in part at improving the enforcement of environmentally significant laws. The proposed law should be subject to public notice and consultation on the Environmental Registry.
- The ECO notes that, as of June 2006, Bill 69 was still at the first reading stage in the Ontario Legislature. In the future, the ECO urges MOL to post a proposal notice on the Registry and consider public comments as soon as a Bill is tabled.

Ministry of the Environment – Policy

Compliance and Enforcement Guidelines for Environmental Officers

Description

- In the spring of 2005, it came to the ECO's attention that MOE was developing a new compliance and enforcement policy, in the form of a document called "A Field Guide for Environmental Officers: Applying Compliance and Enforcement Tools." The guide describes the kinds of tools that should be used by an Environmental Officer (EO) when he or she encounters compliance problems with a particular facility or individual, depending on the environmental and health implications of the violation and the compliance history of the responsible party. Examples of such tools include tickets and orders, voluntary abatement measures and education, or referral to the Investigations and Enforcement Branch for investigation and possible prosecution.
- MOE failed to consult the public by posting a proposal notice on the Registry as it developed the guide.
- In August 2005, the ECO wrote to MOE, pointing out that the guide is an environmentally significant policy, and should be posted to the Registry as a proposal notice as required by the *Environmental Bill of Rights*.

Ministry Rationale

- Ministry representatives met with the ECO in August 2005 to discuss our concerns about lack of public consultation on the compliance and enforcement policies set out in the "field guide."
- MOE described the field guide as an internal document. The ministry emphasized that its new approach to compliance is to focus on risk-based, targeted inspections.

- The ministry indicated that training on use of the field guide was carried out in December 2004, and that the guide had already been in use since January 2005. However, MOE characterised this as a "field-testing stage." Ministry representatives informed the ECO that a public version of the guideline, to replace the October 2001 "Compliance Guideline" (F-2), was being prepared for posting on the Environmental Registry, together with the posting of proposed environmental penalty regulations. They indicated a target date of fall 2005 for the proposal notice.

ECO Comment

- As of May 2006, there has still been no Registry proposal on the compliance and enforcement field guide or on a revised Compliance Guideline. The compliance guideline accessible to the public from MOE's own website as of May 2006 is still Compliance Guideline F-2, which dates back to 2001.
- The field guide for Environmental Officers is an environmentally significant policy document, and should have been subject to public notification and consultation through the Environmental Registry, as required by the *EBR*.
- The ECO recognises the key role that Environmental Officers play in achieving compliance with Ontario's environmental laws, and the importance of providing guidance that empowers EOs to make consistent and effective decisions on the use of abatement tools. The ECO urges MOE to consult the public using the Registry, as the ministry proceeds with developing new policies on how much effort it will invest in various compliance activities, what tools its officers will employ, and what compliance roles it might shift from its own staff to external agencies. We urge the ministry to employ a fully transparent and consultative process as it revises and updates Ontario's environmental enforcement framework.

Ministry of the Environment (MOE) – Policy

Guidelines for Land Use Approval at Former Landfill Sites

Description

- In May 2005, MOE issued a document on requirements and restrictions for land use on former landfill sites. The document, entitled "Operational Guidance for Obtaining *Environmental Protection Act* Section 46 Approval for the use of Lands Previously Used for Disposal of Waste," was not posted to the Registry.
- The ECO wrote to MOE in December 2005, pointing out that this operational guidance document is an environmentally significant policy, and asking the ministry to explain the decision not to post a policy proposal. The ECO also asked how the ministry's Statement of Environmental Values (SEV) was considered and whether other public consultation was undertaken in the development of this policy.

Ministry Rationale

- MOE responded in January 2006, explaining that it sees the document as an administrative guide for applying for an *Environmental Protection Act* (*EPA*) s. 46 approval. MOE considers the actual s. 46 approval, but not the guidance document, as environmentally significant, and applications for s. 46 approvals are placed on the Registry as instrument proposals.

- Since MOE did not consider this operational guidance document to be an environmentally significant policy, but rather an administrative policy, the ministry did not consider itself obligated to consider its Statement of Environmental Values. However, MOE did add that "the ministry's SEV underpins every aspect of this guidance document in that it addresses as its bottom line, in approvals given, the health and well-being of people and the natural environment."
- MOE indicated that it circulated the document to MNR and MAH before finalising it, but did not undertake public consultation.

ECO Comment

- This guidance document is an environmentally significant document that satisfies the *EBR* definition of a policy. MOE should therefore have posted this document to the Environmental Registry for public comment.
- MOE's failure to post this document is very unfortunate, in light of the fact that more and more old landfill sites are becoming eligible for other uses, having sat dormant for the required 25-year period set out in s. 46 of the *Environmental Protection Act*. The public should have been offered the opportunity to comment on the MOE guidelines directing the potential re-use of lands previously used for waste disposal.

Ministry of the Environment (MOE) – Policy

Managing Ontario's Biomedical Waste

Description

- In March 2006, MOE sent letters to selected stakeholders inviting their review and comment on Guideline C-4, "The Management of Biomedical Waste in Ontario." This guideline defines biomedical waste and specifies requirements for its handling and disposal. The guideline was first published in April 1994.
- In response to the March 2006 limited stakeholder consultation on this guideline, the ECO contacted MOE to determine whether this environmentally significant policy document would be consulted on more broadly through the Environmental Registry.
- MOE had consulted on aspects of this guideline as part of a December 2001 Environmental Registry proposal (RA01E0023) on changes to many of the regulations and policies that make up Ontario's hazardous waste management framework. The decision notice in December 2002 did not address changes to Guideline C-4.
- In August 2005, an application was submitted under the *EBR* requesting that MOE review Guideline C-4. MOE responded in December 2005 by agreeing to conduct a review. The ministry indicated that it expected to complete its review by September 1, 2006, and to provide the applicants with a summary of results by October 1. For a brief summary of this application for review, see page 204 of this supplement.

Ministry Rationale

- MOE justified its decision to consult only with selected stakeholders by stating that MOE has only agreed to look at the question of whether or not the guideline needs updating. If they do decide to update the guideline, they will post a proposal to the Registry.

ECO Comment

- The ECO was pleased to hear MOE commit to public notification and consultation, as required under the *EBR*, if and when the ministry proceeds with a proposal to revise its biomedical waste management guideline. We will continue to track and report on developments in the policy framework for biomedical waste in Ontario.

Ministry of the Environment (MOE) – Policy

A "Modernization Agenda" for Regulatory Approvals

Description

- Since early 2005, MOE has been consulting with selected stakeholders on a proposed overhaul of the ministry's approvals program. The ministry calls this initiative its Modernization Agenda, and it would entail shifting a large percentage of approvals to third-party certification or permit-by-rule, under a risk classification system. At this point, it is not clear whether such approvals would remain subject to the *EBR's* public participation and other requirements.
- In January 2006, the ECO encouraged MOE to consult broadly on the overall framework of the Modernization Agenda, using the Registry. The ECO also raised concerns that the initiative might result in the erosion of important *EBR* rights for many types of approvals.

Ministry Rationale

- In February 2006, the ministry assured the ECO that the ministry would continue to post regulations, policies and environmentally significant Certificates of Approval on the Registry for public consultation. However, the ministry was not yet able to comment on what role public participation will play in alternative approval processes.

ECO Comment

- The ECO will continue to track the development of MOE's Modernization Agenda.

Ministry of the Environment (MOE) – Policy

Pesticide Use for West Nile Virus Control

Description

- In March 2004, MOE finalized a document to guide the design and implementation of pesticide spraying related to controlling the spread of West Nile virus. The document, "Best Practices for the Application of Malathion by Ultra Low Volume Equipment for Control of Adult Mosquitoes in West Nile Virus Control Programs," was posted on MOE's website, but was never consulted on through a Registry proposal notice. Malathion is recognised as highly toxic to bees, and is also toxic to fish, aquatic insects, and birds.
- The ECO wrote to MOE in August 2005, pointing out that the document should have been posted as a policy proposal on the Environmental Registry, and asking for further information about why it was not posted. The letter also asked whether MOE conducts monitoring and compliance activities to ensure that best practices are applied in adult mosquito control programs.

- Noting that the best practices document calls for the local Medical Officer of Health or the Health Unit to monitor the effectiveness of the program, the ECO also asked whether MOE has any information on such effectiveness monitoring.

Ministry Rationale

- MOE responded to the ECO's questions in September 2005, pointing to other controls and guidelines on malathion use such as the pesticide label, manufacturer's equipment directions, MOE licensing of pesticide applicators, and the provincial *Pesticides Act* and Regulation 914, RRO 1990 (the principal regulation under the *Pesticides Act*). MOE stated that it had considered its Statement of Environmental Values in the development of the best practices document.
- In response to the question of why MOE decided not to post the policy on the Registry for public consultation, the ministry indicated that it did not consider the document to be a policy. MOE also cited the urgent need to develop the document. The ministry did not conduct public consultation in developing the document, but stated that it did consult with scientific experts, government staff, several medical officers of health, and the multi-disciplinary Ontario Pesticides Advisory Committee.
- MOE responded to questions about compliance activities and effectiveness monitoring for mosquito control programs by stating that since the detection of West Nile virus in Ontario, there have not been any municipal programs for adult mosquito control. MOE has undertaken monitoring and compliance related to programs for controlling mosquito larvae.

ECO Comment

- The ECO had addressed the requirement for public consultation on pesticide use for West Nile virus control in our 2003/2004 annual report (pages 21-22), in connection with policies of the Ministry of Health and Long-Term care. MOE's malathion application guidance for West Nile virus control is likewise environmentally significant, and meets the *EBR* definition of a policy. The document should, therefore, have been subject to public consultation.
- The question of whether and how large areas are to be sprayed with pesticides for mosquito control is an issue of significant public interest. Questions have been raised not only about the potential environmental and health impacts, but also about the long-term effectiveness of spraying programs to reduce the spread of disease by mosquitoes. In fact, a long-term scientific study of mosquito spraying for disease control demonstrated that while the pesticide achieved short-term reductions in mosquito populations, the long-term impact was an *increase* in abundance of the mosquito species responsible for disease transmission, possibly by killing fish and other mosquito predators.
- The ECO is aware of at least one program of adult mosquito spraying by an Ontario municipality, in the Town of Georgina in York Region. We are therefore puzzled by MOE's assertion that "since the detection of West Nile virus in Ontario, there have not been any municipal programs for the control of adult mosquitoes in Ontario" and therefore no impacts monitoring of such spraying has been necessary.

In a related development, the Ministry of Health and Long-Term Care posted a proposal notice in May 2006 for its "West Nile Virus (WNV) Preparedness and Prevention Plan for Ontario – 2006" (PG06E1111). Although the ministry has been producing WNV preparedness and prevention plans since 2001, which include policies on use of adulticide and larvicide treatments for mosquito control, this is the first time the ministry has met the *EBR* requirements for a Registry proposal notice to allow public notification and comment. The ECO is pleased with this improved transparency, and will monitor and report on developments in pesticide policies under Ontario's West Nile virus mosquito control programs.

Ministry Municipal Affairs and Housing – Policy

Impacts of Growth in the Lake Simcoe and Nottawasaga River Watersheds

Description

- Since late 2004, Ontario has been working with the County of Simcoe and the cities of Barrie and Orillia on an "Intergovernmental Action Plan" (IGAP) to support population growth and related infrastructure development in this area of the province. A key focus for the plan is to determine the capacity of the Lake Simcoe and Nottawasaga River watersheds to assimilate pollution from increased development in the region. The Lake Simcoe Region and Nottawasaga Valley Conservation Authorities worked with MOE, MAH and MNR to study the watersheds' assimilative capacity. The $1.5 million study was funded entirely by the province. This assimilative capacity study was announced as phase I of a four-phase study. The other phases consisted of an urban infrastructure study, an assessment of future population growth capacity, and a planning and implementation phase. The action plan was expected to be complete by June 2006.
- In May 2005, the ECO wrote to MAH regarding the Intergovernmental Action Plan for Simcoe, Barrie and Orillia, and the assimilative capacity studies in particular. We noted that the ministry had not posted a proposal notice on the Registry for this initiative, and pointed out the value of making full use of the Registry during all phases of the action plan.

Ministry Rationale

- In September 2005, MAH posted an information notice on the Environmental Registry (XF05E0022). The notice stated: "The IGAP is not considered to be a policy but it may lead to information that would assist the province and Simcoe area municipalities in developing policy and/or making informed decisions regarding land use and infrastructure planning." The notice briefly summarized the four phases of the study, which it said were going on concurrently, and the budget for the project.
- The notice was updated on March 16, 2006, to inform the public of IGAP open houses to be held on March 22 and 23 in Orillia and Alliston.

ECO Comment

- The ECO recognises the importance of studying sensitive and stressed watersheds such as Lake Simcoe, and of taking watershed impacts into account when addressing regional growth challenges. Substantial efforts have been made, through the Lake Simcoe Environmental Management Strategy and other initiatives, to limit phosphorus loadings and to protect and restore Lake Simcoe's ecosystem. Given the existing environmental constraints to growth, the assimilative capacity study and the IGAP are environmentally very significant and are of considerable public interest.
- Under the *EBR*, a policy includes a "program, plan or objective" and the Intergovernmental Action Plan meets this definition. The ECO therefore urges MAH and other participating ministries to post a policy proposal for full public comment, rather than relying on information notices.

Ministry of Natural Resources – Policy

Forest Management Policy Development

Description

- In December 2005, the ECO wrote to MNR expressing concern with that ministry's approach to the development of forest management policy. The *Crown Forest Sustainability Act* and the *EBR* together lay out public transparency, consultation and accountability requirements for decision-making on forest management policy. However, MNR appears to have sidestepped consultation on revisions to forest management policy through, for example, the use of "interpretation notes" or "training material" to set policy.
- The ECO noted the following as examples of documents which were adopted without public consultation through a Registry proposal:

    - "Use of Indicators in Forest Management Planning: FMP Training Material" (April 2005)
    - "FMP Notes: Old Growth" Version 1A (December 2004)
    - "Marten Habitat Guide Interpretation Note" (September 2004)

- In the case of both the "FMP Notes: Old Growth" and the "Marten Habitat Guide Interpretation Note," the document was also not made available to the public on MNR's website. The "Use of Indicators" document was posted as an information notice on the Registry, as well as being available on MNR's website.

Ministry Rationale

- MNR responded in December and January 2006, asserting that training and interpretation notes are "within the bounds and direction" set out in policy documents. These materials are not used to alter policy but rather to explain it, taking into account the variability of the province and MNR's experience with implementing the policy. MNR indicated that it is the ministry's intent to remain within the bounds of approved policy while providing a better understanding of forest management policy and its interpretation to field practitioners.

ECO Comment

- The ECO's review of the documents reveals that they went beyond "interpretation" to actually setting policy for forest management. The ministry is required under the *EBR* to post such documents as policy proposals for full public consultation.
- We remain concerned with a creeping loss of transparency when MNR policy direction moves from publicly accessible regulated manuals and forest management guides to "notes" and "training materials" developed in isolation from public input.
- The ECO urges MNR to ensure that all documents setting and interpreting policy are posted on the Environmental Registry for full public consultation.

See page 175 of this year's annual report for more on MNR's approach to circumventing public consultation on forestry policy. Loss of transparency in MNR's forest management policies is discussed on pages 99-104 of the 2003/2004 annual report.

Ministry of Natural Resources – Policy

A Recovery Strategy for Carolinian Woodlands

Description

- The Carolinian ecological zone in southwestern Ontario occupies only one per cent of Canada's land mass, but boasts a greater number of plant and animal species than any other life zone in Canada. This small area of land is also home to 25 per cent of the country's human population, and Carolinian woodlands and wetlands have been reduced to a fraction of their former area.
- MNR is involved in the development of a Carolinian Woodland Recovery Strategy, mapping out a recovery plan for species and natural communities at risk in the Carolinian life zone. In November 2004, a Carolinian Woodland Recovery Team began meeting to develop goals and objectives for the recovery strategy. In the fall of 2005 the team solicited public comment through other means but not with an Environmental Registry notice, and began to review a first draft strategy.
- The ECO wrote to MNR in November 2005, urging MNR to post the draft strategy, and all other recovery plans, as proposals on the Environmental Registry.

Ministry Rationale

- MNR responded in January 2006. The ministry argued that recovery strategies are not government policy, but rather, are science-based advice documents used to guide policy development. The ministry stated that at the later policy development stage (e.g., during forest management planning, park management planning, or the preparation of specific Recovery Action Plans), consultation occurs and social and economic impacts are taken into account. Although MNR staff may be involved in developing recovery strategies, these documents are independent of government. Before signing off on a recovery strategy, MNR ensures that the document includes a disclaimer to the effect that MNR is not required to implement the strategy recommendations.
- The ministry also noted steps taken to inform the public on recovery strategies, including federal government consultation obligations under the *Species At Risk Act*. The ministry indicated that MNR posts information notices on the Environmental Registry for all recovery strategies involving Ontario species, and indicated that MNR will be assisting the federal government in public consultations that involve Ontario species.
- MNR stated that it is developing a "recovery planning information package" to guide staff and partner agencies in using recovery planning for the conservation and recovery of species at risk, and will post this document as an information notice on the Environmental Registry. The ECO notes that, as of May 2006, MNR has not yet posted either a recovery planning information package or any specific Recovery Action Plans on the Registry.
- The ministry's response included an indication that MNR staff would contact the ECO to arrange a meeting to further discuss the recovery planning process. As of May 2006, such a meeting had not been arranged.

ECO Comment

- The ECO recognises the value of multi-agency teams in developing recovery strategies. However, such partnerships do not relieve prescribed ministries of transparency and accountability provisions of the *Environmental Bill of Rights*.

- Under the *EBR*, a policy is "a program, plan or objective and includes guidelines or criteria to be used in making decisions about the issuance, amendment or revocation of instruments [...]." The Carolinian Woodland Recovery Strategy and other recovery strategies, which set out objectives for species and habitat recovery, meet the *EBR* definition of a policy. Such strategies are not only science-based, but also include elements of management planning and tradeoffs between scientific, economic and social considerations. The strategies are of clear environmental significance, and should be subject to full notification and consultation requirements.
- The ECO urges MNR to post its draft recovery strategies on the Environmental Registry. MNR's assertion that it posts recovery strategies as information notices is neither satisfactory (under the *EBR*, recovery strategies should be posted as proposals) nor accurate (as of May 2006, no such information notices have been posted; MNR has only ever posted three recovery strategies or plans, and these were regular policy proposals). In fact, in response to questions from the ECO in 2004 about other recovery planning guidance documents (see pages 23-24 of the 2003/2004 annual report), MNR indicated that draft recovery strategies and proposals would be posted on the Registry for public review and comment. MNR has not lived up to that commitment.
- The "recovery planning information package" that MNR indicated it is developing, to guide government and partner agencies in the use of recovery planning, should also be posted for public consultation before it is put into effect.

In a related development, MNR posted a proposal notice on the Registry in May 2006 for a review of Ontario's Species at Risk legislation (AB06E6001). The ECO will continue to follow and report on developments in Ontario's protection of endangered species and spaces.

Ministry of Natural Resources – Policy

Walleye Management in Southern Ontario

Description

- In April 2005, MNR released a report called "Walleye State of the Resource Report for Southern Region," providing information on the status of the region's walleye populations and opportunities for public involvement. This report indicated that the ministry is conducting a "Southern Region Walleye Management Review," including a public consultation component, to develop a walleye management policy for the region. The report stated: "MNR will work with stakeholders and the public to provide healthy, sustainable walleye populations in southern Ontario, and a healthier natural environment."
- The ECO wrote to MNR in October 2005, reminding MNR of its obligation to post a proposal for its walleye management policy on the Environmental Registry at the earliest reasonable time.

Ministry Rationale

- MNR responded in December 2005, indicating that an information notice (XB05E6801) had been posted on the Registry, informing the public that MNR is reviewing regulatory options for the walleye sport fishery for inland waters in MNR's Southern Region.

ECO Comment

- The information notice on walleye management was first posted in November 2005. It was re-posted in February 2006 to advise the public of proposed regulatory options for walleye and solicit feedback, and republished in March 2006 to extend the comment period to May 1, 2006.

- The walleye management review involved "working with stakeholders, other government agencies and the general public to select regulatory options that will protect and enhance" walleye populations. This policy-making process should have included full opportunity for public comment through a Registry proposal. Since regulatory and management options are still not finalized, an opportunity exists for MNR to post a policy proposal. The ECO urges MNR to use the Registry for broad public consultation on the final phase of developing its walleye management policy.

Ministry of Natural Resources – Regulation

Regulating Wetlands Development Under the Conservation Authorities Act

Description

- On May 1, 2004, after consultation on the Registry, a "generic regulation" on wetlands and shoreline development came into effect under the *Conservation Authorities Act* (*CAA*). The regulation, O. Reg. 97/04, is called: "Content of Conservation Authority Regulations under subs. 28(1) of the *Act*: Development, Interference with Wetlands and Alterations to Shorelines and Watercourses."
- O. Reg. 97/04 required that by May 1, 2006, individual regulations be passed under the *CAA* for each Conservation Authority (CA), modeled on the generic regulation. These would replace the CAs' previous "fill, construction and alteration of waterways" regulations under the *CAA*.
- The first of these CA-specific regulations to be passed was O. Reg. 42/06 in April 2006: "Central Lake Ontario Conservation Authority: Regulation of Development, Interference with Wetlands and Alterations to Shorelines and Watercourses." This regulation was not accompanied by a proposal notice on the Environmental Registry. Some members of the public contacted the ECO, expressing concern with some of the changes to CA powers around wetlands and watercourses, and asking why O. Reg. 42/06 was not posted on the Registry.
- The ECO contacted MNR in April 2006, pointing out the public concern about the lack of an Environmental Registry posting. Noting that the rest of the CAs' regulations would likely be passed shortly, we asked whether these would be consulted on through policy notices on the Registry.

Ministry Rationale

- MNR argued that enough notification and consultation had already been carried out, and that postings for the individual regulations for each Conservation Authority were not necessary. The ministry pointed to the decision notice (RB03E6007) for O.Reg. 97/04 (the generic regulation). MNR also pointed to proposals on the *Red Tape Reduction Act* (AB7E4001 and RB7E4001, posted as proposals in 1997, with decision notices posted in 2000), which advised that the government intended to amend the *CAA* to replace individual regulations with one generic regulation together with separate schedules for each CA. No comments from the public were received on these notices. MNR also pointed to an exception notice it had posted in 1998 (AB8E4001) updating the public on red tape legislation, including a reference to CA regulations that would be passed, consistent with a generic regulation.
- The ministry also argued that there was considerable public consultation on the generic regulation, O. Reg. 97/04, and that this regulation outlines the specific contents required in the subsequent local regulation for each CA, leaving little room for local variance. MNR also noted that there was local public consultation carried out for each of the individual regulations.
- MNR did state that it would post an exception notice on the Registry to advise the public of the status of local regulations being passed.

ECO Comment

- The ECO does not agree that Registry notices in the 1990s, on the omnibus Red Tape Reduction *Act*, constituted meaningful public notice and comment opportunity for the specific changes made to *CAA* regulations controlling development near waterways and wetlands.
- Although the generic regulation, O. Reg. 97/04, outlines the specific contents required in the subsequent local regulation for each CA, it does leave room for local variance on environmentally significant factors such as the type of flood event and floodwater level to plan for, and the size of setback distances from watercourses.
- Despite MNR's assurance that the notice regarding the generic regulation and local meetings held by the CAs were sufficient public consultation, the ECO has received questions from the public about the lack of Registry notices for the CA-specific regulations. Given the considerable public anxiety and interest around setback distances, definitions of wetlands, and potential implications for private property use, it is disappointing that MNR did not provide the public with the opportunity to see the proposed regulations and express their concerns through Registry proposal notices.
- Although the local regulations have been passed, as of May 2006 no notice has been posted on the Registry to inform the public of these regulations.

SECTION 2

ECO REVIEWS OF INFORMATION NOTICES

SECTION 2: ECO REVIEWS OF INFORMATION NOTICES

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 s. 6 of the *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 s. 15, 16 or 22 of the *EBR*). Significant differences exist between regular proposal notices posted on the 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 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. Third-party appeal rights are only available for instruments if they are posted as regular proposal notices. This approach is superior to posting an information notice and provides greater public accountability and transparency.

As described in more detail in the ECO 2000/2001 annual report, if a prescribed ministry decides that it is appropriate to seek public comment on a policy, Act or regulation proposal through the Registry, the correct procedure is to post a proposal notice, not an information notice. Soliciting comments through information notices causes confusion for the public, since, as noted above, there is no legal requirement for the ministries to consider public comments or to post a final decision notice explaining how comments were considered. Ministries that post information notices can certainly inform the public in the text of the notice about the availability of any other "non-*EBR*" consultation opportunities. 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 *Environmental Assessment Act* exceptions and regulations that are not prescribed under the *EBR*. The ECO encourages ministries in this situation to post a follow-up notice informing the public about the decision and how comments were considered.

Quality of Information Notices

Ministries should strive to ensure that notices use plain language and precise explanations, and provide an adequate level of detail. The ECO encourages ministries to update information notices if new developments occur in relation to an ongoing project, and to clearly indicate which information is new in the updated notices. Ministries should ensure that all notices include the name, address, phone number and fax number of a ministry contact person, and provide adequate information about any non-*EBR* consultations underway.

Use of Information Notices in 2005/2006

During the 2005/2006 reporting year, seven ministries posted 171 information notices in total, related to 92 different initiatives. For the purposes of tracking trends year-to-year, the count of 92 does not include multiple postings for the same initiative, or the notices MNR posted related to 28 Forest Management Plans:

- MOE – 9
- MGS – 1
- MAH – 26
- MNR – 42 (plus additional notices related to 28 Forest Management Plans)
- MPIR – 2
- MNDM – 10
- MTO – 2

In previous years, the ECO provided a description of each notice and commented on the appropriateness of each. This year, the ECO is still providing a list of information notices, but is providing comments only on certain trends and selected notices.

Good Use of Information Notices

Several ministries used information notices during this reporting period to inform the public about initiatives which are legally accepted from the requirement to post regular proposal and decision notices. For example, MOE posted an information notice describing its intention to revoke the existing conditions in the certificate of approval for the Kitchener Street Landfill in Orillia, and to impose new terms and conditions. For more information about this landfill, please see page 176 in the supplement. This instrument would not normally be posted on the Registry because the landfill is considered an "undertaking" under the *Environmental Assessment Act*. MOE posted an information notice, inviting comments, then posted an update to describe its decision and the effects of the 27 comments. The ministry also provided the public comments to the ECO. The ECO is pleased that the ministry took such efforts, even though posting this instrument is not currently required by the *EBR*.

MNR also introduced another innovative use of information notices this year, using them to draw attention to joint initiatives where another ministry was conducting public consultation through a regular proposal notice. MNR posted an information notice linking to MOE's proposal notice related to the Cornwall Sediment Strategy, and an information notice linking to MTO's proposal notice for the draft MTO-MNR-DFO Fisheries Protocol for Protecting Fish and Fish Habitat on Provincial Transportation Undertakings.

The ECO is also pleased that MOE posted an information notice to act as an index to the ministry's recent notices related to the development of Air Standards in Ontario. The notice explained that the ministry had recently finalized several proposals to improve the regulatory framework for local air quality, and described the status of new air standards for various substances. The notice also provided links to relevant materials on the ministry's website. For further information regarding the ministry's air activities, please refer to pages 89-96 of this year's annual report.

Inappropriate Use of Information Notices

Ministries also used information notices inappropriately during this reporting period, stating that the initiatives were not "policy decisions" for a variety of reasons. The ECO concludes that the following ministry decisions should have been posted for public comment as policy proposals before they were implemented. MNR should have used regular policy proposals with an opportunity to comment for the Ontario Chronic Wasting Disease Surveillance and Response Plan, Natural Spaces Program, and the Use of Indicators in Forest Management Planning. MAH should have posted the Intergovernmental Action Plan (IGAP) for Simcoe, Barrie and Orillia.

MNR posted an information notice to tell the public about the Ontario Chronic Wasting Disease (CWD) Surveillance and Response Plan, which identifies risks to wild and captive members of the deer family (e.g., white-tailed deer and elk) and sets out the roles and responsibilities of MNR, OMAFRA, MOHLTC and the Canadian Food Inspection Agency in five areas: prevention, surveillance, control and eradication, recovery and communication. The potential control actions set out in the plan include eradication of CWD infected animals and herds. The document describes the need for collaboration with stakeholders and consultation with the public in implementing and periodically reviewing the Plan. Stakeholders and the public should have been invited to submit comments on the development of the plan through a proposal notice.

MNR posted an information notice in December 2005 to describe its Natural Spaces Program, a two-year initiative launched by the Premier in August 2005 to help reduce loss of green space in Ontario. MNR said it used an information notice because, at that time, the ministry was not advancing specific policy proposals, and was just providing background information. MNR said that the program would be developed in more detail over the next eighteen months and it would post information notices or regular proposal notices outlining the main elements of the program as it evolves. The ECO has concluded however that at least two key elements described in the information notice are policy decisions that have already been implemented. Funding was provided for a private foundation to implement a new tree planting and native tree seed collection program, and a new land acquisition program was announced and implemented. For more information on the land acquisition program, see page 54-56 of the annual report.

MNR used an information notice to announce its document Use of Indicators in Forest Management Planning, and described it as "training material" to be used during forest management planning. The ECO notes that the document includes important new policy and "reinterpretation" of existing policy, for example introducing desirable levels or targets for determining harvest levels, area of habitat for species at risk, and old growth. For more discussion of MNR's trend towards moving detailed forestry policy and guidance to training materials without public consultation, see page 175 of the annual report.

MAH posted an information notice to describe its Intergovernmental Action Plan (IGAP) for Simcoe, Barrie and Orillia. The ministry said that it was working with local governments to address development pressures in the area. The ministry said the IGAP is not considered to be a policy but it may lead to information that would assist the province and Simcoe area municipalities in developing policy and/or making informed decisions regarding land use and infrastructure planning. The ministry also committed to posting any future policies or regulatory proposals regarding IGAP on the *EBR* Registry for further public review and comment as required. However, since studies associated with the action plan began in December 2004 and the Action Plan was expected to be complete by June 2006, the ECO would have preferred to see a regular proposal notice posted on the Registry to allow for broad public participation in the development of the Action Plan.

Ministries are posting several types of environmentally significant decisions as information notices because they are new initiatives of decisions or approvals that have not yet been prescribed under the *EBR*. Examples include MAH approvals to bring municipal plans into conformity with the *Oak Ridges Moraine Conservation Act* and Plan and regulations to add lands to the Greenbelt Plan. Technically these decisions did not have to be posted on the Environmental Registry, but only because the ministries have been too slow to legally prescribe them under the *EBR*. In last year's annual report the ECO recommended that new government laws and initiatives that are environmentally significant be prescribed under the *EBR* within one year of implementation (see page 9 of the 2004/2005 ECO annual report and an update on page 185 of this year's annual report).

A related concern is MNR's continuing posting of information notices for Water Management Plans (WMPs), under the *Lakes and Rivers Improvement Act.* MNR staff indicated to the ECO in 2002 that WMPs would eventually be posted as instrument proposals, but a few would be posted as information notices in the interim. However, MNR informed the ECO in March 2006 that it will not prescribe these instruments under the *EBR*. The ECO is extremely concerned about MNR's decision, particularly as the ECO continues to receive complaints from members of the public about the fact that they are posted as information notices instead of proposals for public comment.

MNDM posted 10 information notices during this reporting period for amendments to mine closure plans. New mine closure plans are classified instruments under the *EBR* and must be posted as proposal notices on the Registry, but MNDM did not classify amendments to the closure plans (if proposed by the licensee) as instruments under the *EBR*. These amendments can be as environmentally significant as the original closure plans, and they must be approved by MNDM. For example, an amendment to the Victor Mine Closure Plan included expansion of a rock quarry to better optimize aggregate resource extraction, relocation of the intake/discharge location on the Attawapiskat River and responses to comments made by a First Nation that were not addressed in the closure plan certified in 2005. Some amendments are to plans first certified over ten years ago, and include major new facilities and rehabilitation plans. The ECO continues to encourage MNDM to consider regulatory or legislative amendments in order to provide opportunities for public participation on these closure plan amendments through regular proposal notices on the Registry in the future.

Summary of all Information Notices Posted by Ministries in the 2005/2006 Reporting Year

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Ministry of the Environment – Policy

Improvements to Ontario's Environmental Assessment Process
EBR Registry #: XA04E0015

Description

- MOE posted a notice in September 2004 to advise the public that the Ontario government had struck an advisory panel to advise on ways of revitalizing, rebalancing and refocusing Ontario's environmental assessment (EA) process.
- MOE updated the information notice in April 2005 to announce the completion of the advisory panel's report and to provide public access to it.

Advisory Council Report on Drinking Water Quality and Testing Standards

EBR Registry #: XA05E0007

Description

- MOE posted a notice in April 2005 to advise the public that the Advisory Council on Drinking Water Quality and Testing Standards has submitted a report to the Minister of the Environment. The Ministry of the Environment is not proposing any action based on this report.

Enhancements to the Provincial Water Quality Monitoring Network

EBR Registry #: XA05E0001

Description

- MOE posted a notice in May 2005 to update the public on its progress in relation to the Provincial Water Quality Monitoring Network.
- MOE said it posted this as an Information Notice as there is no decision related to this notice.

Air Standards Activities

EBR Registry #: XA05E0100

Description

- MOE posted a notice in August 2005 to act as an index to the Ministry of the Environment's recent notices related to the development of Air Standards in Ontario.

Release of: "Evaluation of Ontario Drive Clean Program – Final Report"

EBR Registry #: XA05E0018

Description

- MOE posted a notice in November 2005 to inform the public about the release of the report. MOE said there is no decision involved with this notice.
- In January 2005, the Ministry of the Environment initiated a review of the Drive Clean program. As part of the Drive Clean program review, the ministry commissioned an independent consultant to conduct an evaluation of the program. Upon completion of the ministry's review of the report, options will be brought forward for a government decision.

Establishment of the Nutrient Management Science-Based Standards Committee

EBR Registry #: XA05E0012

Description

- MOE posted a notice in February 2006 to advise the public that the Ministers of Environment and Agriculture, Food and Rural Affairs have established a Nutrient Management Science-Based Standards Committee to develop a short list of risk based scientific standards for all Ontario farms.

Ministry of Environment – Regulation

Regulation Exempting Hybrid Vehicles from Drive Clean Emissions Testing
EBR Registry #: XA05E0010

Description
- MOE posted a notice in April 2005 to inform the public that it had amended Regulation 628 under the *Highway Traffic Act* to exempt hybrid vehicles from emission testing under The Drive Clean program.

Exemption of Veterans' War Memorial (VWM) under the Environmental Assessment Act
EBR Registry #: XA05E0011

Description
- MOE posted a notice in October 2005 to inform the public that it had exempted the proposed VWM, to be constructed on the south lawn of Queen's Park, from the requirements of the *EAA*.

Ministry of Environment – Instruments

New Conditions for the Kitchener Street Landfill Site - City of Orillia
EBR Registry #: XA05E0008

Description
- In June 2005, MOE posted a notice informing the public that it was proposing to revoke the existing conditions in the C of A (A 250601) for the Kitchener Street Landfill, and impose new terms and conditions.
- MOE posted an information notice because this proposal is considered an undertaking carried out under the *Environmental Assessment Act.* As such, it is exempted under s. 32 of the *EBR* from the requirement to post a proposal notice on the Environmental Registry.
- In November 2005, MOE posted an update to the information notice to describe the ministry's decision and the effects of the 27 public comments received on the June 2005, information notice. The Ministry revoked the existing conditions and imposed new terms and conditions for the C of A.

Ministry of Municipal Affairs and Housing – Policy

Intergovernmental Action Plan for Simcoe, Barrie and Orillia
EBR Registry #: XF05E0022

Description
- In September 2005 MAH posted a notice to inform the public that the Ontario government is working with local governments in Simcoe County and the Cities of Barrie and Orillia to address local development pressures.

- In March 2006 MAH updated the notice to provide information about public open house sessions that will be held in Orillia and Alliston on March 22 and 23, 2006, respectively. To inform the public that the Ontario government is working with local governments in Simcoe County and the Cities of Barrie and Orillia to address local development pressures.
- MAH said it used an information notice because the IGAP is not considered to be a policy but it may lead to information that would assist the province and Simcoe area municipalities in developing policy and/or making informed decisions regarding land use and infrastructure planning. Any future policies or regulatory proposals regarding IGAP for Simcoe, Barrie and Orillia will be posted on the Environmental Registry for further public review and comment as required.

Ministry of Municipal Affairs and Housing – Regulation

Minister's Zoning Orders under the Planning Act

EBR Registry #s:

XF05E0013 O. Reg. 208/05
XF05E0014 O. Reg. 186/05
XF05E0015 O. Reg. 277/05
XF05E0016 O. Reg. 239/05
XF05E0017 O. Reg. 209/05
XF05E0023 O. Reg. 487/05
XF05E3001 O. Reg. 467/05
XF06E4001 O. Reg. 670/05
XF06E0002 revoke O. Reg. 431/03

Description

- Minister's zoning orders are regulations under the *Planning Act* that allow the minister to control land use in areas without municipal organization or in areas where the provincial government has an interest.
- Minister's zoning orders are not prescribed for regular proposal postings under the *EBR*.

Regulation to add lands to the Greenbelt under the Greenbelt Act, 2005

EBR Registry #: XF06E0001

Description

- MAH posted this notice in February 2006 to describe a regulation adding additional lands to the Greenbelt .
- O. Reg. 13/06, filed on February 3, 2006, extends the geographic coverage of the Greenbelt transition regulation (O. Reg. 61/05) to additional parts of the Rouge River watershed in Richmond Hill. These lands comprise areas of the major river tributaries in the Rouge River watershed, which are situated below the 245 m contour and within the Oak Ridges Moraine Area.
- MAH used an information notice because the *Greenbelt Act*, *2005* is not yet prescribed for the purposes of the *EBR*.

Ministry of Municipal Affairs and Housing – Instruments

Oak Ridges Moraine Conservation Plan Conformity Amendments

EBR Registry #s:

XF05E0004	Town of Markham Zoning By-law Amendment No. 2003-311
XF05E0005	Town of Aurora Zoning By-law Amendment No. 4469-03.D
XF05E0006	Township of Uxbridge Official Plan Amendment No. 33
XF05E0007	Town of Newmarket Zoning By-law Amendment No. 2003-121
XF05E0008	Township of Uxbridge Zoning By-law Amendment No. 2005-035
XF05E0009	Township of Scugog Zoning By-law Amendment No. 26-05
XF05E0010	Township of Scugog Official Plan Amendment No. 8
XF05E0011	Township of East Gwillimbury Zoning By-law Amendment No. 2003-64
XF05E0012	Township of Clarington Zoning By-law Amendment No. 2005-109
XF05E0018	Town of New Tecumseth Zoning By-law Amendment No. 2003-120
XF05E0019	Township of Adjala-Tosorontio Zoning By-law Amendment No. 03-56
XF05E0020	Town of New Richmond Hill, By-law No. 128-04
XF05E0021	Town of Whitby Zoning By-law Amendment No. 5581-05
XF06E0003	Town of Whitchurch-Stouffville Official Plan Amendment No. 113, Vandorf-Preston Lake Secondary Plan, By-law No. 2003-154-OP
XF06E0004	Town of Whitchurch-Stouffville Official Plan Amendment No. 112, By-law No. 2003-153-OP

Description

- MAH posted these notices to inform the public that it was considering official plan and zoning by-law amendments proposed by municipalities to bring their official plans into conformity with the Oak Ridges Moraine Conservation Plan.
- In each notice, MAH indicated that it was proposing to prescribe the *Oak Ridges Moraine Conservation Act*, *2001* (*ORMCA*) and classify instruments of the *Act* under the *EBR* at a later date.

Ministry of Natural Resources – Policies

2005 Bear Wise Program for Reducing Human-Bear Conflicts

EBR Registry #: XB04E6008

Description

- MNR posted a notice in April 2005 to inform the public about planned activities for 2005 in its ongoing Bear Wise Program

Draft Accord and Protocol - Cornwall Sediment Strategy

EBR Registry #: XB05E3005

Description

- MNR posted an information notice in May 2005 to inform the public that the Ministry of the Environment, as the lead ministry in this initiative, was conducting public consultation under *EBR* Registry Number PA05E0006. A hyper-link was provided at the end of the notice.

Process for Disentangling Pre-existing Mining Lands and Proposed Protected Areas
EBR Registry #: XB05E4002

Description
- MNR posted a notice in May 2005 to describe the land use planning processes that will be carried out to consider the disentanglement proposals.

Double-crested Cormorant Management at Presqu'ile Provincial Park
EBR Registry #: XB05E6001

Description
- MNR posted a notice in May 2005 to inform the public that the ministry will continue to implement cormorant management at Presqu'ile Provincial Park in 2005, and that supporting information is available for review.

Double-crested Cormorant Research and Monitoring Program on Manitoulin Island
EBR Registry #: XB05E6010

Description
- MNR posted a notice in May 2005 to advise the public that MNR will initiate a research and monitoring program on Manitoulin Island to examine the potential effects of double-crested cormorants on lake ecosystems.

Revised Niagara Escarpment Plan
EBR Registry #: XB05E6008

Description
- MNR posted a notice in June 2005 to notify the public about the content and how to access the revised Niagara Escarpment Plan approved and released in June 2005.

Use of Indicators in Forest Management Planning
EBR Registry #: XB05E7006

Description
- MNR posted a notice in July 2005 to make the public aware of the advice being provided to planning teams as to how indicators will be used in forest management planning in Ontario over the short-term (i.e., two or three years).

Lake Trout Strategy
EBR Registry #: XB05E6802

Description
- MNR posted a notice in September 2005 to advise the public that the MNR is developing a coordinated strategy to protect lake trout populations in Ontario. Comments are not being sought at this stage.

Restriction on Transfer and Sale of Frogs by Bait Operators

EBR Registry #: XB05E6804

Description

- MNR posted a notice in October 2005 to inform the public that the ministry is restricting the movement of frogs from the approved harvest areas in eastern to other parts of Ontario by a condition of licence on all commercial bait licences

The Ontario Chronic Wasting Disease Surveillance and Response Plan

EBR Registry #: XB05E6803

Description

- MNR posted a notice in November 2005 to advise the public about the Ontario Chronic Wasting Disease Surveillance and Response Plan. The Ministries of Natural Resources (MNR), Agriculture, Food and Rural Affairs (OMAFRA) and Health and Long Term Care (MOHLTC) (along with the Canadian Food Inspection Agency - CFIA) have collaboratively prepared the Ontario CWD Surveillance and Response Plan. The Plan identifies the risks to wild and captive members of the deer family (e.g., white-tailed deer, elk) associated with CWD and provides for multi-agency coordination in five key areas: prevention, surveillance, control and eradication, recovery and communications.
- The Plan identifies roles and responsibilities for government ministries/agencies, related to potential response actions and identifies the need to collaborate with affected stakeholders and the public to ensure preventative steps and potential response actions are effective.

Revised Draft Great Lakes Charter Annex Implementing Agreement

EBR Registry #: XB05E6807

Description

- MNR posted a notice in November 2005 to inform the public that the most recent (November 2005) drafts of the Great Lakes Charter Annex (GLCA) implementing agreements were available for viewing. MNR posted an information notice because there was no opportunity for public comment at this stage. MNR previously posted a Policy Proposal regarding the GLCA agreements on June 30, 2005, Registry # PB04E6018, and said that it would post a policy decision notice when it made a decision on the GLCA implementing agreements.

MacGregor Point Provincial Park – Visitor Centre Upgrade

EBR Registry #: XB05E2803

Description

- MNR posted a notice in November 2005 informing the public that MNR is proposing to expand and upgrade, or replace the Visitor Centre in MacGregor Point Provincial Park. MNR was providing formal Notice of Opportunity to Inspect the Draft Environmental Study Report.
- MNR used an information notice because the project is being carried out under MNR's Class Environmental Assessment for Provincial Parks and Conservation Reserves.

Natural Spaces Program

EBR Registry #: XB05E6808

Description

- In December 2005, MNR posted a notice to provide general notice to the public that in August 2005, the ministry launched the Natural Spaces Program, a two-year initiative that will help reduce loss of greenspace in southern Ontario.
- MNR said that it used an information notice because at that time, MNR was not advancing any specific policy proposals. MNR said it would post information notices or regular proposal notices outlining the main elements of the Natural Spaces program as it evolves.

Proposed Insect Pest Management Program - Jack Pine Budworm, Northwestern Ontario

EBR Registry #: XB05E2807

Description

- In December 2005, MNR posted a notice providing an opportunity to review and comment on the first stage of the proposed insect pest management program and draft project proposal for jack pine budworm aerial insecticide. The area of concern is located on Crown forests within Fort Frances, Kenora and Dryden Ministry of Natural Resources (MNR) districts. MNR used the notice to inform the public about scheduled information centres.
- MNR updated the notice in March 2006 to announce Stage two of the project – Insect Pest Management Program Inspection. The notice provided the public an opportunity to examine the approved project proposal. MNR approved several methods of combating the infestation, including redirected harvest and aerial spraying with Btk.

2006 Prescribed Burns

EBR Registry #: XB06E7004

Description

- MNR posted this notice in January 2006 to inform the public of the locations where prescribed burns would take place throughout the 2006 calendar year as well as the size of and purpose of the burns. The notice explained that all prescribed burns would occur according to guidelines set out in the Prescribed Burn Planning Manual, 1997.

MTO/DFO/MNR Fisheries Protocol for Protecting Fish and Fish Habitat on Provincial Transportation Undertakings

EBR Registry #: XB06E6006

Description

- In March 2006, MNR posted this notice to inform the public that the Ministry of Transportation has posted a policy proposal on the Registry. A web-link was provided to direct the public to MTO's proposal policy and information on submitting comments on the draft protocol.

Ministry of Natural Resources – Regulations

Changes to the Ontario Fishery Regulations under the federal Fisheries Act

EBR Registry #s:
XB04E6007 - Elimination of the Bay of Quinte Walleye Slot Size Limit Regulation
XB05E6006 - Closure of Recreational Eel Angling in Ontario

Description

- MNR posted these notices throughout the 2005/2006 reporting period to inform the public of changes to, or proposals to change, the Ontario Fishery Regulations (OFR), under the *Fisheries Act*. Some notices solicited public input on proposed changes. Others entailed updates informing the public of decisions made. Under s. 14(1) of the OFR, the Minister of Natural Resources may vary a close time, fishing quota or limit on the size or weight of fish where a close time, fishing quota or limit on the size or weight of fish is already fixed in respect of an area under these regulations.
- The federal *Fisheries Act* and its regulations are not prescribed under the *EBR* for the purpose of giving notice of proposals for amendments to the OFR on the Registry.

Southern Region Walleye Regulations Review

EBR Registry #: XB05E6801

Description

- MNR posted a notice in October 2005 to announce its review of the Southern Region walleye fishing regulations. MNR said the notice was intended to provide a broad context for the review of walleye regulations processes that will be carried out to consider new regulatory options for the walleye sport fishery for inland waters in Southern Region. Comments are not being sought at this stage.
- In February 2006, MNR republished the notice to invite comments on the proposed walleye regulations for southern Ontario. MNR provided a 45-day comment period through the information notice.
- In March 2006, MNR reposted the information notice to extend the comment period by another 43 days.

Proposed 2007 Recreational Fishing Regulations for the new Fisheries Management Zones for Ontario

EBR Registry #: XB06E6001

Description

- In February 2006, MNR posted a notice to inform the public that Ontario is developing a new ecological framework for recreational fisheries management focusing on new Fisheries Management Zones, managing and monitoring at the broad landscape level as opposed to individual lake management, and enhanced stewardship. This will also rationalize recreational fishing regulations to make them more standardized across the province and easier to understand.
- A complete review of recreational fishing regulations in the federal Ontario Fishery Regulations, 1989 has been completed. The proposed changes to the 2007 federal recreational fishing regulations require a revision of the Ontario Fishery Regulations (OFR), and are subject to approval by the federal government.

- MNR used an information notice because the federal *Fisheries Act* and its regulations, including the Ontario Fishery Regulations, are not prescribed under the *EBR* for the purposes of giving notice of proposals. MNR had posted a proposal and decision notice in 2005 on the Ecological Framework for Recreational Fisheries Management in Ontario to solicit comments on the overarching framework.
- MNR provided a 60-day comment period through the information notice.
- In March 2006, MNR reposted the information notice to extend the comment period by 20 days.

Ministry of Natural Resources – Instruments

Forest Management Plans

EBR Registry #s:

XB05E2007	FMP for the Big Pic River Forest 2007-2017 – Invitation to Participate
	FMP for the Big Pic River Forest 2007-2017 – Review of Proposed Long-term Management Direction
XB05E1002	FMP for the Lakehead Forest 2007-2017 – Invitation to Participate
	FMP for the Lakehead Forest 2007-2017 – Review of Proposed Long-term Management Direction
XB05E1003	FMP for the Caribou Forest 2007-2017 – Invitation to Participate
	FMP for the Caribou Forest 2008-2018 – Invitation to Participate
XB06E2002	Contingency Plan for the Caribou Forest 2007-2008 – Information Notice of Contingency Plan Preparation and Public Information Centres
XB04E1003	FMP for the Kenora Forest 2006-2026 – Draft Plan Review
	FMP for the Kenora Forest 2006-2026 – Public Inspection of Approved Plan
XB04E2003	FMP for the Timiskaming Forest 2006-2026 – Draft Plan Review
	FMP for the Timiskaming Forest 2006-2026 – Public Inspection of Approved Plan
XB04E1006	FMP for the Lac Seul Forest 2006-2026 – Draft Plan Review
	FMP for the Lac Seul Forest 2006-2026 – Public Inspection of Approved Plan
XB04E1008	FMP for the Spruce River Forest 2006-2026 – Draft Plan Review
	FMP for the Spruce River Forest 2006-2026 – Public Inspection of Approved Plan
XB04E1013	FMP for the Lake Nipigon Forest 2006-2026 – Draft Plan Review
	FMP for the Lake Nipigon Forest 2006-2026 – Public Inspection of Approved Plan
XB04E3001	FMP for the Ottawa Valley Forest 2006-2036 – Draft Plan Review
	FMP for the Ottawa Valley Forest 2006-2036 – Public Inspection of Approved Plan
XB04E1007	FMP for the Black Sturgeon Forest 2006-2026 – Draft Plan Review
	FMP for the Black Sturgeon Forest 2006-2026 – Public Inspection of Approved Plan
XB04E3003	FMP for the Bancroft-Minden Forest 2006-2026 – Draft Plan Review
	FMP for the Bancroft-Minden Forest 2006-2026 – Public Inspection of Approved Plan
XB04E2005	FMP for the Nagagami Forest 2006-2026 – Draft Plan Review
	FMP for the Nagagami Forest 2006-2026 – Public Inspection of Approved Plan
XB05E2804	Major Amendment to the Black Sturgeon 2001-2021 FMP
XB05E1001	FMP for the Crossroute Forest 2007-2017 – Review of Proposed Long-term Management Direction
XB04E3004	FMP for the Mazinaw-Lanark Forest 2006-2026 – Draft Plan Review
	FMP for the Mazinaw-Lanark Forest 2006-2026 – Public Inspection of Approved Plan
XB04E1009	FMP for the Pic River Ojibway Forest 2006-2026 – Draft Plan Review
	FMP for the Pic River Ojibway Forest 2006-2026 – Public Inspection of Approved Plan

XB04E2004	FMP for the Black River 2006-2026 – Draft Plan Review
	FMP for the Black River 2006-2026 – Public Inspection of Approved Plan
XB04E1015	FMP for the Dryden Forest 2006-2026 – Draft Plan Review
	FMP for the Dryden Forest 2006-2026 – Public Inspection of Approved Plan
XB04E2001	FMP for the Superior-Martel Forest 2006-2026 – Draft Plan Review
	FMP for the Superior-Martel Forest 2006-2026 – Public Inspection of Approved Plan
XB05E2805	Contingency FMP for the Romeo Malette Forest 2007-2009 – Invitation to Participate
	Contingency FMP for the Romeo Malette Forest 2007-2009 – Review of Proposed Operations
XB04E2002	FMP for the Pineland Forest 2006-2026 – Draft Plan Review
XB05E2809	FMP for the Red Lake Forest 2008-2028 – Invitation to Participate
XB05E1001	FMP for the Crossroute Forest 2007-2017 – Review of Proposed Operations
XB05E2810	FMP for the Hearst Forest 2007-2017 – Invitation to Participate
	FMP for the Hearst Forest 2007-2017 – Public Inspection of Approved Plan
XB05E2811	FMP for the Wabigoon Forest 2008-2018 – Invitation to Participate
XB06E2005	FMP for the Ogoki Forest 2008-2018 – Invitation to Participate
XB06E2009	FMP for the White River Forest 2008-2018 – Invitation to Participate

Description

- FMPs, major amendments to FMPs, and Contingency FMPs are instruments issued by MNR under the *Crown Forest Sustainability Act*. They are not classified as instruments under the *EBR* but MNR has incorporated into its Forest Management Planning Manual (FMPM) a requirement to post information notices on the Environmental Registry at each stage of public notice carried out under the *EAA* and the FMPM.

Water Management Plans

EBR Registry #s:

XB02E1008	WMP for the Aguasabon River – Public Inspection of Approved Plan
XB04E2008	WMP for the Kagawong River – Review of Options Report and Draft Plan
XB03E3005	WMP for the Mississippi River – Review of Options Report and Draft Plan
XB02E1009	WMP for the Kaministiquia River – Public Inspection of Approved Plan
XB03E0012	WMP for the Mississagi River – Scoping Report
XB03E2016	WMP for the Spanish-Vermilion River System – Review of Options Report
	WMP for the Spanish-Vermilion River System – Review of Draft Plan
XB05E3006	WMP for the Madawaska River – Notice of update of existing Madawaska River Water Management Review to the Water Management Planning Guidelines for Waterpower
XB05E2802	WMP for the Montreal River – Review of Draft Plan
XB05E2801	WMP for the Michipicoten River – Draft Plan Review Stage
XB03E3002	WMP for the Muskoka River – Review of Draft Plan
XB06E2003	WMP for the Current River – Review of Draft Plan
	WMP for the Current River – Public Inspection of Approved Plan
XB02E2009	WMP for the Wanapitei River – Review of Draft Plan
XB04E3006	WMP for Eugenia Falls – Draft Plan Review
XB06E2006	WMP for Charlton Generating Station – Review of Draft Plan
XB04E2008	WMP for the Kagawong River – Review of Draft Plan
XB06E2008	WMP for the Misema River – Review of Draft Plan
XB05E2002	WMP for the Black River – Draft Plan Review

Description

- WMPs are instruments issued by MNR. Under the *Lakes and Rivers Improvement Act* (*LRIA*), MNR has the authority to order dam owners to prepare management plans in accordance with the Water Management Planning Guidelines for Waterpower.
- WMPs issued under s. 23.1 of the *LRIA* are not classified as instruments under the *EBR*. For further information, refer to page 11 of the ECO 2002/2003 annual report and page 187 of the ECO 2005/2006 annual report.

Approvals of the Disposition of Land by Conservation Authorities

EBR Registry #s:

XB05E6805 Central Lake Ontario Conservation Authority (two proposals)
XB05E6806 Grand River Conservation Authority (proposal)

Description

- MNR posted these notices to inform the public about the disposition of conservation area lands under s. 21(2) of the *Conservation Authorities Act* (*CAA*). The ministry posted these notices for the purpose of soliciting public comment on proposals or to provide notice of decisions pertaining to land disposals.
- MNR maintains that proposals for the disposition of land under the *CAA* are excepted from the requirement for regular proposal notices on the Registry because they are exempted from the *EAA*. See page 10 of the ECO 2002/2003 annual report for further discussion.

Cage Culture Aquaculture Licences under the Fish and Wildlife Conservation Act

EBR Registry #s:

XB05E3004 Aqua-Cage Fisheries Ltd. – Licence issued for rainbow trout in Eastern Georgian Bay
XB04E2009 Cold Water Fisheries Inc. – Licence application for rainbow trout in Manitoulin District withdrawn
XB05E2010 Meeker's Aquaculture – Licence issued for rainbow trout in Manitoulin Island
XB05E2011 Cold Water Fisheries Inc. – Licence issued for rainbow trout in three locations in Espanola Area

Description

- MNR posted these notices throughout the reporting year to consult on proposals to issue licences for cage aquaculture operations under s. 47(1) of the *Fish and Wildlife Conservation Act* (*FWCA*) and to inform the public of decisions made about an aquaculture licence through an update to the original proposal. MNR solicited public comments on all of its proposals.
- Under MNR's new aquaculture policies and procedures, the ministry screens applications for cage aquaculture licences on Crown land as undertakings under the Environmental Assessment Act (EAA). The operations were screened according to the Class Environmental Assessment for MNR Resource Stewardship and Facility Development Projects and therefore not posted as regular instrument proposals on the Registry.

Ministry of Public Infrastructure Renewal – Act

Places to Grow Act, 2005

EBR Registry #s: XA04E0018

Description

- In October 2005 the Ministry of Public Infrastructure Renewal updated its information notice about the *Places To Grow Act*, to advise that the *Act* had been passed. Bill 136 – *Places To Grow Act, 2005* received Third Reading and Royal Assent on June 13, 2005, following second reading on April 6, 2005, and First Reading on October 28, 2004.
- MPIR used an information notice because the ministry is not yet prescribed under the *EBR*. For more information see page 185 of the 2005/2006 ECO annual report.

Ministry of Public Infrastructure Renewal – Policy

Proposed Growth Plan for the Greater Golden Horseshoe

EBR Registry #: XR05E0002

Description

- MPIR posted an information notice in November 2005 in accordance with s. 7(1)(c) of the *Places to Grow Act, 2005*. The Proposed Growth Plan builds on the results of the Ministry's consultation on the Draft Growth Plan for the Greater Golden Horseshoe released in February, 2005 (EBR Registry # XA050006) and the "Places to Grow: Better Choices, Brighter Future – A Growth Plan for the Greater Golden Horseshoe" discussion paper, released in July 2004, (EBR Registry # XA040011).

Ministry of Public Infrastructure Renewal – Information Notice

MBS/ORC Class Environmental Assessment – Richmond Hill / Seaton Land Swap

EBR Registry #: XN06E0001

Description

- In January 2006 the former Management Board Secretariat posted an information notice to provide general notice to the public about a Category C Class Environmental Assessment under the "Class Environment Assessment Process for Ontario Realty Corporation Realty Activities." ORC had commenced a study regarding the acquisition of lands on the Oak Ridges Moraine located in the Town of Richmond Hill, together with the severance and sale or disposition of provincially owned lands in the City of Pickering (known as Seaton). As part of the Class EA process, the Environmental Study Report was available for comment.
- ORC now reports to the Ministry of Public Infrastructure Renewal.

Ministry of Northern Development and Mines – Instruments

Amendments to Certified Closure Plans

EBR Registry #s:

XD05E1006	Falconbridge Limited, Montcalm Mine, Montcalm Townships
XD05E1009	Patricia Mining Corp., Lochlash Mine, Finan Township
XD05E1012	Roxmark Mines Ltd., Sand River – East Leitch Advanced Exploration Project, Eva Township
XD05E1016	INCO, Levack/Onaping Mine, Town of Levack
XD05E1017	Placer Dome and Kinross Gold Corp., Musselwhite Mine, Opapimiskan Lake, Northwestern Ontario
XD06E1001	Goldcorp Inc., Wilanour Mine, Dome Township
XD05E1015	Extender Minerals of Canada Ltd., North Williams Mine, North Williams Township
XD05E1018	Newmont Canada Ltd., Holloway Mine (Blacktop Project), Holloway Township
XD06E1004	St. Andrew Goldfields Ltd., Taylor Advanced Exploration Project, Taylor Township
XD06E1005	De Beers Canada Inc., Victor Project, Attawapiskat

Description

- Under the *Mining Act*, mining companies must submit a closure plan, which proposes rehabilitation measures to be implemented upon the eventual closure of the operation, for filing by MNDM. New closure plans are classified instruments and must be posted as proposal notices on the Registry. Amendments to closure plans are not classified instruments.

Ministry of Transportation – Policy

Environmental Assessment Terms of Reference

EBR Registry #s:

XE05E4514	Highway 427 Transportation Corridor
XE05E4515	Niagara to GTA Transportation Corridor

Description

- MTO posted these notices to alert the public to the availability of Environmental Assessment (EA) Terms of Reference and to inform the public that MOE would be accepting public input over the following approximately 30-day period.

SECTION 3

ECO REVIEWS OF EXCEPTION NOTICES

SECTION 3: ECO REVIEWS OF EXCEPTION NOTICES

Use of Exception Notices
In certain situations, the *EBR* relieves prescribed Ontario ministries of their obligation to post environmentally significant proposals on the Registry for public comment.

There are two main instances in which ministries can post an "exception" notice to inform the public of a decision and explain why it was not posted for public comment. First, ministries are able to post an exception notice under s. 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 s. 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).

Quality of Exception Notices
Ministries should strive to ensure that notices use plain language and precise explanations, and provide an adequate level of detail. Ministries should ensure that all notices include the name, address, phone number and fax number of a ministry contact person. Ministries should also strive to post exception notices promptly after decisions are made. The ECO has provided this advice in a guidance document to the ministries in 1996.

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

Ministry of the Environment – Instruments

Remedial Work at an Abandoned Waste and Wastewater Facility
EBR Registry #: IA06E0077 and IA06E0078

Description

- In January 2006, the ECO asked MOE to explain why there was no Environmental Registry posting for a Director's Order issued under s. 17, s. 18, and s. 43 *EPA* to General Chemical Canada Ltd., for remedial work, preventative measures and the removal of waste and restoration at their facility in Amherstburg. MOE posted two exception notices after the ECO's inquiry.
- MOE said that General Chemical Canada had abandoned the site on November 18, 2005. Director's Order #1(IA06E0077) was issued on November 18, 2005, and was amended on November 29, 2005, to change the Location Identifiers (IA06E0078).
- MOE said that it issued exception notices because EPA s. 43 orders are not required to be posted as proposals on the Environmental Registry. The ministry also stated that it decided there was not sufficient time for public participation in the issuance of this Order because a delay could 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 injuries or damage to any property.

ECO Comment

- Unacceptable use of an exception notice. MOE's stated rationale, that *EPA* s. 43 orders are not required to be posted as proposals on the Environmental Registry, is not a valid explanation, as both s. 17 and s. 18 orders do require proposal notices. While the ministry hinted at an emergency, it did not post the notice as an emergency exception under s. 29 of the *EBR*.

Approval for Soil Remediation

EBR Registry #: IA05E1919

Description

- In December 2005, MOE posted an emergency exception for a Certificate of Approval (air) to install a soil vapour extraction and treatment system at a residential property in the City of Cambridge. The purpose is to remove trichloroethylene (TCE) concentrations in soil vapour and treat the extracted soil vapour to reduce exposure to TCE to levels that are acceptable for human health.
- MOE said that any delay in giving notice to the public and allowing for public participation would result in further delays in the remediation of the TCE soil contamination and further human exposure to the TCE vapours. An emergency exception notice was used because a delay may result in danger to the health or safety of any person or harm or serious risk of harm to the environment.

ECO Comment

- *A*cceptable use of an emergency exception notice.

Short-term Approvals for Storage of Peel Region's Waste

EBR Registry #: IA05E0509, IA05E1251, IA05E1252, IA05E1253, IA05E1471, IA05E1472

Description – IA05E0509

- MOE posted notice on April 15, 2005, of an emergency approval to increase tonnage at a waste transfer station operated by Waste Management of Canada Corporation, to manage an estimated 200 tonnes per day. The notice stated that, due to the Algonquin Power Energy from Waste (EFW) Facility shutting down for maintenance and the potential for a labour disruption at the facility, the Region of Peel was required to find an alternative source for the waste that would normally be shipped to this facility.
- The temporary emergency Certificate of Approval was issued with a condition stipulating that the amendment would expire on April 22, 2005, unless the Region of Peel reconfirmed the emergency situation and further written approval of the Director had been obtained.
- The notice indicated that if the municipality did not find a legal alternative for waste disposal, there could have been a risk of illegal dumping, increase in vermin, disease and destruction of property.

Description – IA05E1251, IA05E1252, IA05E1253

- MOE posted notice on August 9, 2005, of another emergency approval to increase tonnage at three waste transfer stations operated by Waste Management of Canada Corporation, to manage up to 600 tonnes per day. The rationale was again maintenance and the potential for a labour disruption at the EFW Facility.
- A temporary emergency Certificate of Approval was issued with a condition stipulating that the amendment will expire on August 23, 2005, unless the Regional Municipality of Peel re-confirmed the emergency situation and further written approval of the Director has been obtained. MOE reposted the exception notice on August 24, 2005, to extend the emergency approval until September 12, 2005.

Description – IA05E1471, IA05E1472

- On September 19, 2005, MOE posted notice of two emergency approvals for waste transfer stations operated by Waste Management of Canada Corporation, to handle an estimated 500-600 tonnes of waste. The rationale for these approvals was that the municipality was implementing a three bag weekly limit for curbside waste collection and anticipated residents would be disposing more waste than usual prior to the limit coming into effect.
- The municipality and Waste Management of Canada Corporation requested temporary emergency approvals be issued to three waste transfer stations. The MOE Director issued two emergency approvals under Part V of the *Environmental Protection Act* but did not approve one emergency approval request due to odour concerns.

ECO Comment

- Acceptable use of exception notices, however, MOE granted seven emergency approvals and one further extension during this reporting year. Given the number of different rationales provided by the municipality and site operator, it would appear that the need for alternate waste storage and disposal is ongoing, and should be planned for with public consultation, rather than with continual emergency approvals. MOE's decision to turn down one of the requested approvals due to odour concerns underscores the need to provide notice to the public.

Sewage Works for Site Remediation

EBR Registry #: IA05E1291

Description

- On August 12, 2005, MOE posted notice of an *OWRA* s. 53(1) approval for sewage works for the collection, transmission, treatment and disposal of water accumulating in a site remediation excavation at the Sunderland Public School. This proposal is the final stage of an overall site remediation project to excavate hydrocarbon-contaminated soil on school property. Two previous proposals for excavations on other parts of the school site and groundwater remediation had been posted on the Registry and approvals issued (*EBR*# IA04E1253 and #IA04E1542).
- MOE posted an emergency exception notice because of the need to complete the remediation operations before the start of the school year, so that school children will not be exposed to potential health and safety hazards as a result of the operation of heavy earth moving equipment and the excavation of contaminated soil.

ECO Comment

- Acceptable use of an exception notice.

Ministry of Natural Resources – Regulations

Regulation to Prevent Chronic Wasting Disease in Deer and Elk

EBR Registry #: RB05E6806

Description

- On November 17, 2005, MNR posted an emergency exception notice for an amendment to O. Reg. 666/98 (Possession, Buying and Selling of Wildlife) under the *Fish and Wildlife Conservation Act* to prohibit possession in Ontario of certain parts of deer species and elk harvested in other jurisdictions, to help minimize the risk of entry of Chronic Wasting Disease into Ontario. MNR

also posted an information notice for The Ontario Chronic Wasting Disease Surveillance and Response Plan (*EBR*# XB05E6803).
- MNR said it used the emergency exception because the need for action to minimize the risk of CWD entering Ontario had become more immediate. The regulation was implemented in November so it would be in place for most deer seasons in other jurisdictions when the deer harvest is greatest and to allow the opportunity to inform Ontario hunters going to other jurisdictions about the regulation.

ECO Comment
- Acceptable use of an emergency exception notice.

Equivalent Public Participation Exceptions under Section 30(1) of the EBR

Ministry of Natural Resources – Regulations

Development Control in the Niagara Escarpment Plan Area
EBR Registry #: RB05E6009

Description
- On June 17, 2005, MNR posted an exception notice for an amendment to Regulation 826/90 under the *Niagara Escarpment Planning and Development Act.* The amendment revises the Area of Development Control for lands called the "Linklands" in the City of Hamilton and the City of Burlington. *Bill 135*, the *Greenbelt Act*, *2004*, added the Linklands to the Niagara Escarpment Plan Area. Regulation 826 was then amended to ensure that development control and the policies of the Niagara Escarpment Plan apply to those lands.
- MNR used an equivalent public participation notice because the environmentally significant aspects of the regulation were included in Bill 135 and the extensive public consultation on the *Greenbelt Act*.

ECO Comment
- Acceptable use of an equivalent public participation exception notice.

Establishing/Modifying Parks and Conservation Reserves Under Ontario's Living Legacy Land Use Strategy
EBR Registry #'s:

Description

RB9E6011	Establishing 51 conservation reserves
RB00E2001	Establishing 76 conservation reserves
RB00E2002	Establishing 16 provincial parks, additions to 13 existing provincial parks and the re-classification and re-configuration of an existing provincial park
RB01E2002	Establishing 20 new conservation reserves
RB02E2002	Establishing four new provincial parks and additions to five existing provincial parks

RB03E2003	Establishing five new provincial parks and additions to two existing provincial parks
RB03E2001	Establishing eight new conservation reserves
RB04E3001	Establishing one new provincial park
RB00E3002	Establishing five new provincial parks and additions to two existing provincial parks
RB01E2001	Establishing eight new provincial parks and additions to three existing provincial parks
RB03E2002	Establishing two new provincial parks and additions to two existing provincial parks

ECO Comment

- The regulations establish or modify parks and conservation reserves set out in Ontario's Living Legacy (OLL), and in one case, the Temagami Land Use Plan. Some of the notices are updates. In some cases, the notices' text provides information regarding permitted and prohibited land uses (such as hunting). Each of the notices set out specific reasons for using the s. 30 *EBR* exception. Readers should refer to the notices themselves should they wish further detail. For more information on the nature of these notices, see pages 41-42 of the ECO 2000/2001 annual report.
- In November 2004, the ECO urged MNR to begin using regular proposal notices for park boundaries in areas with unresolved pre-existing mining claims proposed to be regulated as provincial parks and conservation reserves as a result of OLL, because the boundaries may be substantially different than what was originally proposed in 1999. MNR announced in an information notice in May 2005 (XB05E4002) that, of the remaining 66 sites needing to be regulated, 41 would be subject to regular proposal notices on the Registry, and 25 sites would not, because no changes to the land use are proposed. MNR did begin to post regular notices on the Registry for these sites during this reporting year. For more information please refer to page 194 (Ministry progress) in this year's annual report.

SECTION 4

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

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Harmonizing Ontario and Federal Air Emissions Reporting Systems (MOE regulation O. Reg. 37/06 under the *Environmental Protection Act)*

Decision Information:

Registry Number: RA05E0019	Comment period: 37 days
Proposal posted: November 25, 2005	Number of comments: 9
Decision posted: February 16, 2006	Regulation filed: February 15, 2006

Description

Ontario described this initiative as "harmonizing Ontario and Federal Air Emissions Reporting Systems." MOE says that the objective was to avoid duplication, reduce the regulatory burden on industry and save resources for both industry and governments. MOE said that "harmonization should mean the reporting of a substance only once, on one date, with a single threshold, with the same reporting criteria, by a commonly defined facility, through a single window reporting system." MOE's decision is being implemented through two mechanisms:

- MOE amended its Airborne Contaminant Discharge Reporting and Monitoring Regulation (O. Reg. 127/01) and the "Step by Step Guideline for Emission Calculation, Record Keeping and Reporting for Airborne Contaminant Discharge" (the Guideline). These changes were described in the *EBR* decision notice and are the subject of this ECO review. Details of the changes are provided below.
- MOE is pursuing an administrative agreement with the federal government through the development of a Memorandum of Understanding (MOU). MOE says the MOU will effect various intergovernmental details of current and future harmonization efforts. MOE plans to post the MOU as an Information Notice on the Environmental Registry at a later date.

Description of MOE's Air Emissions Reporting System Before this Harmonization Initiative

When it was introduced in 2001, O. Reg. 127/01 required facilities in the electricity generation, industrial, institutional, commercial and municipal sectors to monitor and report their emissions of airborne contaminants. If they met certain criteria, they had to estimate their annual and smog season emissions of a number of contaminants and submit reports annually. Very large facilities with emissions of SO_2 and NO_x above a certain threshold were also required to submit quarterly reports. All reports had to be submitted to MOE and made available to the public.

MOE finalized O. Reg. 127/01 and its 600+ page Guideline in May 2001. MOE phased in the requirements over two years by dividing the sectors subject to the regulation into three classes: electricity generators, large industrial sources, and small sources.

The 2001 regulation set out three different sets of screening criteria for determining what monitoring and reporting each facility must undertake. Facilities subject to Ontario's regulation that were also required to report to Environment Canada under the National Pollutant Release Inventory (NPRI) had to provide the same air emissions data to MOE. MOE also introduced two lists of contaminants and thresholds separate from the list of NPRI substances. MOE said that the Ontario system would reach more facilities and cover more substances than the NPRI. Ontario's list of air toxics included some contaminants for one or both of the following reasons:

- the substance is more precisely defined in the Ontario case,
- the NPRI reporting threshold is less stringent than Ontario's.

The lists of contaminants, reporting thresholds and acceptable estimation methods were contained in the Guideline.

The contaminants were divided into three tables:

- Table 2A listed 11 "criteria air contaminants" that are smog and greenhouse gas (GHG) related and, at that time, not included in the NPRI. Facilities were also required to include estimates of their smog-season (May 1 – September 30) emissions of the criteria air contaminants.
- Table 2B listed 79 contaminants not included in the NPRI, which MOE referred to as toxics.
- Table 2C listed the 268 substances on the NPRI list for the reporting year 2000.

The ECO reviewed O. Reg. 127/01 (pages 91-94 of the 2001/2002 ECO annual report) and later provided an update on its implementation (pages 53-55 of the 2003/2004 ECO annual report).

Interim Changes
The NPRI was expanded to include some of Ontario's "criteria air contaminants" in 2002, although it still does not collect information on GHG emissions. MOE posted an information notice in May 2004 to inform the public that some administrative changes had been made to the Guideline. MOE posted another information notice in August 2004 to provide an update on harmonization activities including a consultant's report - Review of the NPRI and O. Reg. 127/01.

The O. Reg. 127/01 Stakeholders Work Group, the NPRI Substances Work Group, and a Joint O. Reg. 127/NPRI Stakeholders Work Group (JSWG) consisting of selected non-government members of both the preceding groups, provided advice to MOE about the harmonization initiative.

Just before the 2006 decision, there were approximately 280 substances common to the Ontario and federal reporting systems (albeit with some differences in applicability and thresholds), and over 70 Ontario-specific substances not covered by the NPRI.

Description of 2006 Changes to MOE's Air Emissions Reporting System
MOE has revised O. Reg. 127/01 substantively, through the passage of O. Reg. 37/06 in February 2006. MOE has:

- De-listed over 335 substances from Ontario's airborne contaminant list, of which 280 are now tracked by NPRI and 55 are no longer tracked by any agency
- Removed requirements for smog-season reporting
- Removed requirements for quarterly reporting of SO_2 and NO_x by large quantity emitters
- Removed special rules applying to institutional and commercial buildings
- Removed reporting of the type of energy source and amount of electricity generated
- Discontinued MOE's OnAir website

The end result is that MOE now only requires emission reports on 15 substances over and above those that are on the NPRI list. Facilities must estimate their emissions of these 15 substances and report them to Environment Canada along with their NPRI data.

Under the proposed MOU:

- Environment Canada has agreed to accept emission reports from Ontario facilities on the 15 substances still regulated through O. Reg. 127/01
- In the long-term Environment Canada may incorporate substances from O. Reg. 127/01 after national consultation for 2006 data and onwards. Then MOE will consider rescinding O. Reg. 127/01.
- The federal government will provide for public access to reported data on a timely basis, including greenhouse gas data collected by Statistics Canada
- MOE will provide access to "historical data" and a link to Environment Canada's web-site for public data access.

Implications of the Decision

MOE did not adequately inform the public of the implications of the decision. MOE should have provided a Regulatory Impact Statement (RIS) for this initiative, to provide this information and an assessment of the environmental, social and economic consequences of implementing the proposal.

MOE's Registry notices, press release and backgrounder implied that the initiative merely eliminated duplication and that there would be no loss of information, public access to information or other consequences. MOE made a number of erroneous claims about the implications of the initiative, described below. MOE's press release was entitled "Ontario Improves Air Emission Reporting System: Industries to Save Time and Money While Protecting the Environment." A quote from the minister stated that "Clean safe air is essential in protecting the health of our people and our communities… Ontarians have a right to know what is being put in the air they breathe…Providing timely, accurate public information on environmental data is a vital step in improving air quality because it improves public knowledge and accountability for sources of air pollution, and motivates companies to reduce emissions." However, the effect of the ministry's decision is to reduce the amount and type of data collected on emissions from Ontario facilities, and to reduce the public's access to the information.

Fewer Ontario Facilities will Report

MOE implied that all facilities who used to report to MOE would still report to NPRI. However MOE's system was designed to apply to more facilities. While about 4,000 facilities reported annually to MOE under O. Reg. 127/01, only about 2,400 Ontario-based facilities reported to the NPRI. There are several reasons for this – in O. Reg. 127/01 MOE specifically targeted "small sources" which may not report to NPRI. MOE had also included a number of special criteria, including facilities that use: coal, refuse, wood or waste oil as fuel; a threshold quantity of solvents, coating materials, printing ink or welding rods and wires; and heating systems in institutional and commercial buildings.

Fewer Contaminants will be Tracked

MOE said in February 2006, that 55 of the contaminants which applied only through MOE's regulation were de-listed because they present minimal risk to the environment and human health. MOE did not adequately explain why these contaminants, which were described as "toxics" when the system was developed, are now considered low-risk. In 2001 MOE had argued that the list of air contaminants for this emission reporting regulation was developed based on linkages to MOE domestic, transboundary and international environmental programs, and that getting an accurate picture of air toxics and criteria air contaminants was essential for MOE air programs.

Smog Season and Quarterly Reports Discontinued
MOE said that "smog season and quarterly reports will continue to be available from EC's NPRI database." It does not appear to the ECO that MOE provided accurate information. There is no requirement under NPRI for any facilities to prepare smog season reports or quarterly reports, and these requirements have been removed completely from O. Reg. 127/01.

Reduced Tracking of Greenhouse Gas Emissions
The federal monitoring and reporting of GHG emissions, which is not part of NPRI, applies only to facilities that emit 100 kilotonnes or more of CO_2 equivalent emissions, currently estimated at only 250-300 facilities across Canada. The discontinued Ontario system required reporting of the criteria air contaminants including greenhouse gases from all subject facilities if any of the contaminants were discharged from the facility in any amount, and from any facility expected to use coal, refuse, wood or waste oil as fuel at any time during the year. MOE said that the federal government would provide public access to reported data on a timely basis, including greenhouse gas data collected by Statistics Canada. The federal information is collected and provided to the public by Statistics Canada. Under the *Statistics Act*, Statistics Canada is prohibited from publishing any information that would identify individual facilities, so it intends to publish only non-confidential aggregate data. No information is available on the federal website as of the end of May 2006, although the site says that 2004 data should be available in the spring of 2006.

Economic Implications
MOE said in a news release that the harmonization would save an estimated 4,000 facilities more than $2 million annually. MOE did not say how much money the ministry would save by discontinuing its OnAir website and administration of the reporting system.

Other Implications
In 2001, MOE said that the regulation would provide emission reductions, since public right-to-know will be an incentive for companies to reduce their emissions; an information base to assist future policy development; and a means of tracking progress in ministry air programs designed to address smog, acid rain, climate change and other issues. It is difficult to assess the implications of the harmonization initiative on these original objectives, partly because it was never clear what use MOE made of the information it collected.

MOE said that the information no longer collected under O. Reg. 127/01 is available through the NPRI, Independent Electricity System Operator (IESO) and the ministry's Emissions Trading Regulation, but the ECO has determined that if all the information is collected, it is not easily accessible to the public. The emissions trading regulation (O. Reg. 397/01) only covers two contaminants, SO_2 and NO_x, and the reporting requirements only apply to facilities who are participating in the trading system, or meet higher thresholds than O. Reg. 127/01. Further, the publicly accessible Emissions Trading Registry only contains information related to emission allowances and credits, and not reporting of total emissions. The IESO website includes a summary chart of information gathered from mandatory monthly generator disclosure reports. It includes statistics on the actual energy production for the month, and the type of fuel used, but it is not linked to emissions data. It would be very difficult for anyone to gather together the information that used to be reported from electricity generators under O. Reg. 127/01.

Public Participation & *EBR* Process
MOE posted a proposal notice with a 30-day comment period in November 2005, then extended the comment period by seven days, to January 1, 2006. MOE posted the decision notice in February 2006. Nine comments were received on the proposal, including 8 from industries and industry associations, and one environmental non-governmental organization (ENGO).

The industry commenters all supported the ministry's proposal. Several large companies and industry associations recommended that MOE rescind the regulation immediately, instead of maintaining the reduced list of 15 contaminants as an interim measure while Environment Canada considered whether to incorporate those contaminants. MOE responded that further harmonization is being discussed nationally and that if and when Environment Canada accepts an adequate number of the 15 substances, Ontario may consider rescinding O. Reg. 127/01.

Individual companies recommended further harmonization of the definition of NO_x, the removal of ethyl acetate from Ontario's regulation, and raised questions about the requirements for reporting particulate matter and road dust. MOE responded that the definitions for NO_x are consistent with NPRI and other Ontario regulations. Ethyl acetate is being maintained in O. Reg. 127/01 because Ontario's threshold is lower, and the three categories of particulate matter from road dust are being maintained. Ethyl acetate and road dust are being discussed further with Environment Canada and the Stakeholder Work Groups.

Several companies asked MOE to continue to consult stakeholders as the "one-window" reporting changes move forward, and specifically asked that MOE share the Ontario and Canada MOU with stakeholders. MOE responded that it would post the MOU as an information notice on the Environmental Registry.

The ENGO raised a number of substantive concerns with the MOE's proposal and made the case that the reporting system should be expanded. The group made a number of specific recommendations:

- that no changes be undertaken until the NPRI program is officially revised to include the substances of concern to Ontario;
- that MOE be required to prepare an annual report on pollution data submitted by facilities, to pull together the data from all facilities in Ontario reporting under NPRI and Ontario regulations, present the overall pollution loadings from facilities, and review trends over time;
- that MOE maintain the provisions requiring smog season reporting, quarterly reporting, commercial buildings and the special reporting from electricity generation facilities;
- that MOE undertake additional investigation and reporting to assess the impacts to the number of facilities reporting and the overall release data from these proposed revisions.

MOE responded that the objective of the initiative was to reduce the regulatory burden. MOE also said that the four types of reporting requirements were removed because the information is available through the NPRI, the IESO and/or Ontario's Emissions Trading Regulation. "Given the objective of this harmonization initiative and the availability of information, MOE considered these comments to be outside the purview of this proposed amendment to O. Reg. 127/01."

MOE did not make any changes to its proposal as a result of comments.

SEV

The ministry's SEV consideration was problematic, because the proposal is not consistent with the ministry's SEV. MOE stated that "keeping accurate and timely records of industry's and government's efforts in reducing air emissions" and "making industry and governments more accountable by assuring public accessibility" are key to achieving environmental protection and preserving ecosystems. But this proposal was focused on reducing the regulatory burden, not on improving the quality of information or accountability. It is unclear what MOE meant by its statement that reducing the regulatory burden would lead to resource conservation, unless MOE has reinterpreted "resource conservation" in its SEV to mean "financial resources." The ECO is also puzzled by MOE's claim that harmonization would improve government effectiveness and "reduce industrial reporting impact to a minimum."

Other Information
See page 97-102 in the annual report and page 88 in the supplement for ECO review of MOE's emission limits and trading regulation.

ECO Comment
The ECO commended MOE in 2001 for developing this monitoring and reporting program. We said that "though the regulated community considers monitoring and reporting an administrative burden, it is a necessary step for defining lasting air quality solutions." A mandatory monitoring system was needed for several reasons. The ministry has goals to reduce emissions under its Anti-Smog Action Plan and other programs, but until the reporting program was developed, the ministry had no inventory or measurement of actual emissions and no means to measure progress. The regulation was expected to provide an information base to track emission trends and develop new programs if needed to achieve emission reductions. It is unclear what impact this decision to discontinue MOE's program will have on these objectives.

The ECO recommended in the 2001/2002 annual report that the ministry provide analysis of the reported emissions of airborne contaminants and any tracking of emission reduction programs in an annual summary report to the public. If the ministry did analyse the data, the public was never provided access to that information. It is also unknown whether MOE will be analysing and reporting on the information it will receive from Environment Canada in the future.

The NPRI website provides better access to the data than MOE's OnAir registry, which was often out of service and very difficult to use. However, as discussed above, there are several types of information that were collected and provided to the public under MOE's system that will no longer be available. The ECO is concerned about MOE's characterization of the ENGO's comments as "outside the purview of this proposed amendment." MOE asserted that key information would be available through NPRI, the IESO MOE's emissions trading regulation, but this is not the case. Some of the information is simply not required to be reported now, and other data is not easily accessible.

The ECO agrees that, given the resource constraints faced by environmental protection agencies, there is merit in harmonizing the monitoring and reporting programs of federal and provincial governments. There is also merit in minimizing duplicative reporting burdens on industry. However, MOE's regulatory amendments in February of 2006 went much further – they also discontinued reporting requirements for 55 toxic substances, relieved a large number of facilities from reporting requirements altogether and eliminated a number of public reporting mechanisms. MOE's Registry notices, news release and backgrounder should have been more transparent about these monitoring and reporting cuts, and their environmental implications.

Commenters also asked that the ministry provide further opportunities for participation in the ongoing harmonization activities. They specifically asked that the administrative agreement be shared with stakeholders. MOE's response that it would post the MOU as an information notice on the Registry does not provide for public and stakeholder participation in the decision. Despite MOE's characterization of the MOU as an "administrative agreement," the ECO encourages MOE to carefully consider whether the MOU sets or revises policy and to provide a regular notice and an opportunity for the public to comment on any further environmentally significant changes to the emissions reporting system.

Ontario's Biodiversity Strategy

Decision Information:

Registry Number: PB05E6011	Comment Period: 30 days
Proposal Posted: April 25, 2005	Number of Comments: 35
Decision Posted: June 21, 2005	Decision Implemented: June 21, 2005

Description

In October 2004, the Minister of Natural Resources announced that his ministry would develop a biodiversity strategy for Ontario. The Minister stated, "We have a responsibility to conserve biodiversity and use our biological resources in a sustainable way. Conserving biodiversity is a key way of ensuring a healthy environment, strong communities and a thriving economy." The Ministry of Natural Resources (MNR) subsequently undertook public consultation and released a finalized strategy in June 2005.

Biological diversity, also called biodiversity, can be understood as the variety of native species, the genetic variability of each species, and the variety of different ecosystems they form. The loss of biodiversity is a global problem and it is acknowledged as one of the most critical environmental issues facing the planet. Ontario is not isolated from this crisis.

Biodiversity was propelled into the international spotlight in 1992 at the United Nations Conference on Environment and Development, more commonly known as the Rio "Earth Summit." Over the course of the next several years, 188 countries became signatories to the Convention on Biological Diversity. The Government of Canada introduced a national biodiversity strategy in 1995, and a year later all of Canada's provinces and territories committed to implementing it.

In our 2001/2002 annual report, the ECO expressed concerns about MNR's inaction and recommended that the ministry "develop a provincial biodiversity strategy in consultation with affected ministries, municipalities and stakeholders." The ECO also encouraged the ministry to undertake a comprehensive assessment of its Acts, regulations, and policies to ensure the conservation of Ontario's biodiversity. In our 2002/2003 annual report, the ECO suggested that MNR develop a series of sub-strategies to target specific biodiversity issues. At the time, MNR stated that these measures were unnecessary.

After a change in government, MNR began working on a biodiversity strategy in the fall of 2004, subsequently releasing a final strategy in June 2005. Part of the rationale for creating and implementing such a strategy, according to the Minister of Natural Resources, is the "2010 Biodiversity Target" – the year by which all signatories to the international convention should achieve a significant reduction in the current rate of loss of biodiversity loss.

Ontario's strategy identifies five main threats to biodiversity: pollution, habitat loss, invasive species, unsustainable use, and climate change. Each of these threats also cumulatively impact biodiversity, requiring a strategy that adopts an integrated approach. The strategy states that these impacts not only cause the loss of biodiversity, but also damages "society's ability to generate wealth."

Ontario's Biodiversity Strategy, 2005 is intended to be an "umbrella" strategy that aims to identify, at a strategic level, a series of actions. Its 37 recommended actions are grouped into six theme areas: engage Ontarians; promote stewardship; work together; integrate biodiversity conservation into land use planning; prevention; and, improve understanding. The strategy further prioritizes ten of the recommended actions for implementation in 2005, with the other actions presumably to follow in the years to come.

The Province of Ontario has once before attempted to develop and implement a strategy to conserve biodiversity. In 1987, the then Minister of Natural Resources created an expert committee that released a sweeping set of recommendations, "Looking Ahead: A Wild Life Strategy for Ontario." Unfortunately, the committee's recommendations – many of which still remain progressive and much needed to this day – went largely unimplemented.

Implications of the Decision

Recognizing the core issues and developing a coordinated plan to address them is an effective first for addressing the threats to biodiversity. It also allows for an efficient use of government resources. Environmental problems sometimes appear to be isolated issues, but often they are interrelated. The assessment of a strategy's strategic goals – its underlying motivation and agenda – is of enormous significance in gauging its relative success or failure.

The most significant historical cause of failure in addressing biodiversity issues, such as the management of wildlife and natural spaces, has been the dominance of human-centred and utilitarian approaches. The fallacy of these approaches lies in their assumption that a return, benefit or value to humans must typically result from conservation actions. While that may be possible in some instances, it dooms such programs to eventual failure as core threats to biodiversity remain unaddressed. Ontario's Biodiversity Strategy, 2005 states that two goals must be achieved for a "balanced and realistic approach":

- Protect the genetic, species, and ecosystem diversity of Ontario.
- Use and develop the biological assets of Ontario sustainably, and capture benefits from such use for Ontarians.

A successful biodiversity strategy should not attempt to be all things to all people. Its first and foremost focus should be the conservation of biodiversity. There are already a multitude of other government programs, policies, and strategies that seek to capitalize on the province's natural resources and promote economic growth. Unfortunately, Ontario's Biodiversity Strategy, 2005 sets its strategic direction in exploiting the "economic, social and cultural benefits of biodiversity, as well as its ecological and intrinsic values."

A central purpose of a biodiversity strategy should be to co-ordinate government action to re-direct policies and programs that are inadequate, misdirected, or even counterproductive. The strategy itself proclaims that many of its recommended actions "have been announced and/or initiated since 2003 by the current Ontario government," including:

- promoting Environmental Farm Plans (Action #4)
- updating the Conservation Land Tax Incentive Program (CLTIP) and the Managed Forest Tax Incentive Program (MFTIP) (Action #6)
- enacting the *Places to Grow Act* and implementing its growth plans (Action #10)
- implementing the *Greenbelt Protection Act* and its plan (Action #11)
- implementing the 2005 Provincial Policy Statement (2005 PPS) (Action #12)
- implementing the *Nutrient Management Act* (Action #15)
- enacting source water protection legislation (Action #16)
- updating the *Endangered Species Act* (Action #18)
- updating the *Provincial Parks Act* (Action #23)

While some of these recommended actions are logical choices for inclusion in the strategy, all were initiatives that were already underway or previously committed to by the current government.

Engage Ontarians
The strategy astutely recognizes that "there are challenges both in trying to create awareness in people about an issue and in trying to stimulate action." One of the central challenges is that conserving biodiversity is not a "top-of-mind issue" that Ontarians immediately identify. The ECO fully endorses the objectives of the strategy that broaden people's understanding about natural spaces and species, including their interconnected nature.

The ECO commends the strategy's recommendation centering on "multi-partner collaboration to promote community-based biodiversity education and awareness and environmental citizenship." However, the ECO believes that strategy does not sufficiently address educational concerns. The ECO urges the Ministry of Education to explicitly mandate the teaching of biodiversity conservation as part of elementary and secondary school curricula.

Promote Stewardship
The strategy recognizes that the support of private landowners is crucial to conserving biodiversity, particularly in southern Ontario where the majority of species at risk inhabit privately owned lands. The ECO believes that the strategy's focus on engaging private landowners and improving incentive programs is valuable, but, unfortunately, few details were provided aside from mentioning pre-existing programs. (For more discussion on this issue, please refer to the ECO write-up on the Conservation Land Tax Incentive Program on page 58 of this report).

Work Together
Ontario's Biodiversity Strategy, 2005 places a significant emphasis on partnerships in its development and implementation, involving a broad coalition including private landowners, academic institutions, non-government organizations, industrial sectors, urban and rural communities, First Nations, all levels of government and individual Ontarians working together. This inclusive approach to such a pervasive environmental issue is generally laudable, but it does not relieve MNR of primary responsibility.

The strategy states, "No one agency or organization retains the scientific expertise, the legal authority, or the financial resources to care for all of Ontario's biodiversity." However, the strategy fails to clearly state that MNR is ultimately responsible for the management of natural resources – conserving biodiversity – in Ontario. While this issue does involve a suite of other ministries and levels of government, it is MNR that has the mandate, authority, and expertise to be accountable to the public.

With few exceptions, the strategy does not delegate or describe which ministries are responsible for implementing each of the 37 recommended actions. As described above, MNR presumably is the lead ministry for many of these actions. However, the strategy should have specified the exact role of MNR and all of the other relevant ministries, such as the Ministries of Transportation, Municipal Affairs and Housing, Northern Development and Mines, Public Infrastructure Renewal, Agriculture and Food, and Education. As one commenter stated, "This needs to be corrected by ensuring that this is a *provincial* policy, and not just an MNR policy that can be largely ignored by other ministries."

The ECO does support the creation of a broad-based Ontario Biodiversity Council to guide implementation of the strategy. This council is composed of representatives from industry associations, environmental organizations, hunting organizations, conservation authorities, and First Nations, as well as having the Minister of Natural Resources as a member. This council will evaluate progress and report on implementation annually, with emphasis on each year's priorities. Further, it will also lead a five-year review of the strategy and its implementation, and preparation of an updated strategy for 2010-15.

Integrate Biodiversity Conservation into Land Use Planning

Ontario's Biodiversity Strategy, 2005 promises to "implement the 2005 Provincial Policy Statement under the *Planning Act* to ensure effective direction to promote managed growth, sustainable development, a strong economy and a healthy environment." Additionally, the strategy promises to "enact and implement a legislative framework that will guide the preparation of growth plans in Ontario to enable decisions about growth to be made in ways that sustain a robust economy, build strong communities and promote a healthy environment and a culture of conservation." However, the ECO has significant concerns that existing approaches to land use planning do not sufficiently address biodiversity concerns and, sometimes, are the root causes of threats to biodiversity.

In our 2004/2005 annual report, the ECO warned that "environmental planning and protection – natural areas, wild species and water quality – are not given the same importance as economic drivers. This fact is not new, but, rather, indicates that minimal progress has been made…. This 'development-first, environment-second' approach to planning has spawned a confusing mix of legislation and provincial plans…. The ECO believes that the natural environment must be treated as an integrated system and, at a minimum, given at least equal weight to other planning considerations."

The ECO does support the strategy's recommendation to "update provincial guidelines that encourage the enhanced integration of the conservation of biodiversity (including related water quality measures) into municipal land use planning decisions, including the guidelines for 'Significant Habitat' and 'Natural Heritage' for municipal planning to address gaps and/or inconsistencies." The ECO does note that changes to these government policies should also be accompanied by revisions to the planning statutes themselves to effectively enshrine biodiversity conservation as a provincial interest.

The strategy does seek to "improve public, private and NGO access to available biodiversity information…and technical guidelines to inform land use decisions." The ECO believes that MNR should have the capacity to serve as the government's lead experts on biodiversity issues and, in particular, serve as a clearinghouse of information for Ontario's municipal governments. As the ECO discussed in our 2004/2005 annual report, "many municipalities simply do not have the resources or capacity to cope with development pressures" that may threaten the province's biodiversity.

Prevention

Ontario's Biodiversity Strategy, 2005 organizes recommendations centering on preventative measures along six general themes: air and water pollution, invasive species, species at risk, genetic diversity, ecosystem representation and integrity, and compliance and enforcement. Several of the recommended actions are urgently needed to better conserve Ontario's biodiversity, including revisions to the statutes governing protected areas and species at risk. Indeed, the ECO and many other stakeholders have long called for such reforms.

Several of the other recommendations related to prevention are arguably worthy of inclusion, but the strategy does not provide sufficient details as to their exact roles. For example, enacting and implementing source water protection legislation is laudable, but it is unclear what the direct connection to conserving biodiversity may be. Further, other recommendations are seemingly valuable, such as strengthening institutions and partnerships related to the conservation of genetic diversity, but it unclear how this will actually be achieved.

Improve Understanding
The strategy commits to report on the "State of Ontario's Biodiversity" every five years and issue a first report by 2010. The purpose of such a report would be to describe biodiversity reporting standards, including criteria and indicators; establish benchmarks for biodiversity in Ontario to allow future reports to track progress in meeting conservation goals; and, to identify challenges, risks, threats and opportunities. The dissemination of baseline information is critical for the success of conserving the province's biodiversity as a whole, as well as for targeting key threats and areas of concern.

Reviews
Ontario's Biodiversity Strategy, 2005 commits to reviewing other relevant legislation, regulations, and policies to identify gaps and issues, including the need for potential changes in the legal framework for the conservation of biodiversity. The strategy does provide a list of possible items to review, such as land trust legislation and multi-ministry input into municipal planning. Indeed, in our 2001/2002, the ECO encouraged MNR to undertake a comprehensive assessment of its Acts, regulations, and policies to ensure the conservation of Ontario's biodiversity. Based on this strategy, the ECO believes that biodiversity concerns should be reflected in future amendments to a variety of legislation, such as the *Public Lands Act* and the *Mining Act*.

Public Participation & *EBR* Process
In December 2004, MNR posted an information notice on the Environmental Registry that advised the public about this initiative and directed them to a non-government internet site to provide comments on a discussion paper. The discussion paper contained information and extracts from other biodiversity strategies and prompted readers to respond on-line to various questions. Responses were moderated and posted for other readers to review. Despite minor technical difficulties, several commenters complimented MNR on this approach to consultation.

The ministry subsequently invited approximately 200 people to participate in the process of developing the strategy itself. According to MNR, these individuals represented conservation groups, resource industries, First Nations and other sectors. Two workshops were held and an independent facilitator oversaw the process.

MNR designed the process of developing the strategy to be highly dependent on the views and inputs of stakeholders with the end goal of a consensus-based strategy. However, some invited participants expressed concerns with this process. One hunting organization noted, "Four staff members volunteered to be on writing teams for the chapters within their specific expertise, often this included individuals participating on multiple writing teams. It would not be an exaggeration to estimate hundreds of hours of staff time devoted to writing, editing, teleconferencing, reviewing and participating in workshops related to the Ontario Biodiversity Strategy." Other organizations expressed their concerns that they did not have sufficient staff resources, time or funding to adequately contribute to the development of this strategy, despite its apparent significance.

In April 2005, MNR posted a proposal notice for the strategy on the Environmental Registry with a 30-day comment period. The ministry received 35 comments on its proposal from individual members of the public, First Nations, conservation and nature organizations, and industry associations. MNR stated that "many of the comments represent long-standing positions of groups that are sometimes at odds with one another, and cannot be specifically addressed in this high-level strategy." In general, the public comments were supportive of the concept of conserving Ontario's biodiversity, but they varied in the identification of the issues and the means to address them.

An independent body of scientists commented that the strategy, though well intentioned, was not effectively designed to address the core threats facing Ontario's biodiversity. According to the organization, the strategy "contains a fundamental contradiction that is based on the perceived 'growth imperative'…. To be capable of only minimizing the impacts while suggesting that economic and population growth is inevitable (if not desirable) will ensure a decline in biodiversity and ecosystem health, even if all of the actions in the strategy were implemented."

An organization representing cottagers' association echoed this same shortcoming. It stated, "Perhaps the most compelling opportunity for biodiversity protection is the potential to influence the growth paradigm for Ontario. It is imperative to highlight biodiversity as a central issue while the government of Ontario is currently targeting regions for additional growth and development. We currently have policy tools for [the] protection of natural areas. However, the tools are not consistently and uniformly applied."

Few of the strategy's 37 recommended actions have timelines for implementation. Public comments on the proposed strategy reflected this concern. One commenter suggested that each recommended action "have a timeline and appropriate milestones associated with it," in addition to specifically detailing which ministry was responsible and what government resources were necessary.

MNR received numerous comments from resource industry associations. One such association objected to the statement in the strategy that forestry was a contributor to the loss of biodiversity in Ontario. This industry association also strongly emphasized that the strategy "should not lead to the development of new policy or legislation (with the exception of initiatives currently underway)." Another organization representing the aggregate industry commented, "Rather than adopt new rules and more restrictive programs, we suggest that another notion would be to undertake the adjustment of societal values through public education and other means."

Other organizations noted that some of the stated threats to Ontario's biodiversity were not suitably addressed in the recommended actions, including the impacts of road building, agriculture, and mining. One commenter noted, "Aggregate extraction is rampant in this region, and highway development continues apace…. Unless the various development industries and the Ministry of Transportation commit to conserving Ontario's biodiversity, Carolinian species and ecosystems will continue to be at risk, and no amount of private stewardship can compensate for that."

One First Nations organization commented that "constitutional obligations are in no way being obliged within the framework of this document… in no way has meaningful consultation taken place with respect to the development of the proposal…. Moreover, the limitation imposed by the Electronic [sic] Bill of Rights process will impact the level of participation desired by First Nations who have not been properly engaged in this process."

SEV

MNR states that it reviewed its Statement of Environmental Values (SEV) in formulating its final decision. According to the ministry, the desired outcomes of Ontario's Biodiversity Strategy, 2005 are: healthy natural ecosystems; healthy and safe people; resource based jobs; community stability; competitive, natural resource based industries; revenue to the Province; and, outdoor recreation.

The ministry also states in its SEV consideration that "the priority, or weight, given to the achievement of these outcomes will vary over time and geographical area." The ECO does not understand how any of these "desired outcomes" – excluding healthy natural ecosystems – is of direct relevance to a strategy for conserving biodiversity. These desired outcomes may be priorities for the government as a whole, or MNR specifically, but they should not be the specific intent of a biodiversity strategy.

ECO Comment
One of the central purposes of the *Environmental Bill of Rights* is to hold the Ontario government accountable for the "protection and conservation of biological, ecological and genetic diversity." In our 2004/2005 annual report, the ECO wrote that "a successful biodiversity strategy should clearly detail the responsibilities of all relevant ministries, describe decisive actions, contain quantifiable targets, and specify timelines for delivery. It also should target program areas, policies, and legislation that need revision to achieve its goals. In essence, a successful strategy should focus on what new things need to be done, using an adaptive approach that makes biodiversity the priority."

The ECO commends the Ministry of Natural Resources for acknowledging that conserving Ontario's biodiversity is one of its prime responsibilities. It is in the public interest that the province's biodiversity be conserved and that MNR be the lead ministry. Ontario's Biodiversity Strategy, 2005 represents a good start at addressing one of the most pervasive and challenging environmental issues of our time. However, there are still many challenges that lie ahead.

The ECO urges the Ontario government to treat the issue of conserving biodiversity as a government-wide responsibility. Many ministries other than MNR have crucial roles to play in conserving biodiversity whether it involves regulating highway construction practices, establishing land use planning rules or even the design of school curricula. The ECO believes that each ministry that could aid in conserving biodiversity should be held accountable for its actions in this regard. Left to one ministry, failure will result at the cost of the province's wild spaces and species.

The Ontario government must ensure that this new agenda delivers concrete actions that tangibly conserve the province's biodiversity. Relegating this strategy to simple rhetoric would be a tragic loss, one that future generations of Ontario will likely lament. The ECO believes that the Ontario government should ensure that MNR and all other relevant ministries have the necessary financial and human resources to fulfill this commitment to Ontarians. The ECO commits to frequently reporting on the implementation of this strategy, and the actions taken by ministries to support, in our forthcoming annual reports.

Review of Posted Decision:
Provincial Strategy for Wolves in Ontario

Decision Information:

Registry Number: PB04E6020	Comment Period: 40 days
Proposal Posted: November 25, 2004	Number of Comments: 602
Decision Posted: July 8, 2005	Decision Implemented: July 8, 2005

Description
In March 2004, the Ministry of Natural Resources (MNR) announced a suite of commitments to conserve Ontario's two species of wolves – gray wolves and eastern wolves. These commitments included the development of a "proper wildlife management program for Ontario's wolves" to "ensure that Ontario gets the vital scientific information it needs to protect and manage wolves." In November 2004, MNR initiated the development of a strategy for wolves, finalizing it in July 2005.

In the ECO 2002/2003 annual report, partly as a result of an *EBR* application, the ECO urged MNR to create a province-wide strategy and to list the eastern wolf as a species at risk. The ECO also noted in that report that there are "significant gaps in the scientific study of wolves…. This is clearly evident in the lack of estimates of wolf population numbers and their current ranges, particularly as they apply to Ontario. The ECO believes that a central purpose of a provincial strategy should be to address this lack of information." However, at that time, MNR argued that these suggested measures were unnecessary as Ontario's wolf populations were healthy and that there was no evidence that hunting posed a threat to their sustainability. Since then, MNR has revised its position.

According to MNR, this new strategy will provide a framework for decision-making about wolf conservation in Ontario. It includes the goal for wolf conservation, a set of guiding principles, objectives, and key strategies. The ministry's goal is "to ensure ecologically sustainable wolf populations and the ecosystems on which they rely for the continuous ecological, social, cultural and economic benefit of the people of Ontario." The strategy recognizes the following objectives in order of priority:

- ensure ecologically sustainable wolf populations;
- provide for social, cultural and economic benefits based on ecologically sustainable wolf populations; and,
- increase public awareness and understanding about the role of wolves in natural functioning ecosystems and their conservation in Ontario.

These three objectives have associated actions for MNR to implement the strategy. The strategy's 13 recommended actions are based around the concepts of legislation and policy, population assessment, habitat management, information management, harvest mortality, and non-consumptive use. The following section will review the general implications of these sections of the strategy.

Implications of the Decision

Ontario's wolf strategy fails to establish a strategic direction that prioritizes the conservation of wolves for their own sake. The strategy's goal is "to ensure ecologically sustainable wolf populations and the ecosystems on which they rely for the continuous ecological, social, cultural and economic benefit of the people of Ontario." A successful conservation strategy for a species should not attempt to be all things to all people. Its first and foremost focus, in this case, should be the conservation of wolves. There are already a multitude of other government programs, policies, and strategies that seek to capitalize on the province's natural resources.

Legislation and Policy & Harvest Mortality

Concurrent with the development of this strategy, MNR implemented one of the strategy's recommended actions in establishing a closed hunting and trapping season for wolves in the northern half of Ontario. These regulation changes under the *Fish and Wildlife Conservation Act* also extended the same measures to coyotes within wolf range, because in large areas of the province the range of these species overlap and coyotes are very difficult to distinguish from wolves, especially eastern wolves. MNR's regulation changes included:

- requiring a wolf/coyote game seal, in addition to requiring a small game licence;
- establishing a limit for each hunter of two wolves or coyotes per hunter per year;
- establishing a wolf game seal fee for residents at $10.00 per seal and for non-residents at $250.00 per seal;
- establishing a closed wolf/coyote hunting and trapping season;
- requiring mandatory reporting of wolf/coyote hunting activity and harvest; and,
- requiring that these new regulations apply in wildlife management units in central and northern Ontario within wolf range.

In March 2005, MNR followed through with parts of this proposal, establishing a closed season that takes effect from April 1 to September 14 of each year in 67 wildlife management units. In July 2005, the ministry implemented the reporting requirements. In our 2004/2005 annual reported, the ECO described this closed season as a positive "initial step."

The strategy states that MNR will "determine sustainable harvest levels, and evaluate the need for an allocation system that includes all user groups (non-consumptive users, aboriginal persons, resident hunters, trappers and non-resident hunters)." The ECO cautions MNR that this objective reflects the ministry's failed historical approach to wildlife management that predominately viewed species simply as a resource to be divided up among "users."

A wolf conservation strategy should be focused on the survival of these species and limiting human threats to them. The ECO warns that an allocation system that would set aside X number of wolves for consumptive purposes (e.g., hunting, trapping) and Y number of wolves for non-consumptive purposes (e.g., nature appreciation, tourism, etc.) would not be ecologically defensible by the ministry, even though it might satisfy the goals of certain stakeholders. In our 2002/2003 annual report, the ECO wrote that "history and science have revealed that keystone species such as wolves should not be managed on the premise that they be harvested on a sustained yield basis. Wolves have evolved to fulfil an ecological niche different from that of prey species such as moose and deer, and require a different approach to their management."

Population Assessment
The strategy states that MNR will also "assess, monitor and report on the status and trends in wolf populations," as well as "enhance wolf population research." The ECO concurs with this objective and has repeatedly called for better monitoring programs for wolves. In our 2001/2002 annual report, the ECO urged the ministry to conduct a monitoring program and periodically inform the public as to its progress. In our 2002/2003 annual report, the ECO urged MNR to "make decisions based on scientific principles and data to conserve Ontario's wolf populations."

Habitat Management & Information Management
Ontario's forest management planning process does not currently require the consideration of wolf habitat. In a striking example, in 2003, Parks Canada specifically warned MNR that proposed forestry operations adjacent to Pukaskwa National Park were a direct threat to the park's wolf population and the ecological integrity of this protected area, but the ministry approved the forest management plan with only a minimal modification. The strategy does state that MNR will now "assess the effectiveness of species and landscape management guidelines that may support the management of wolves." Further, it also states that wolf habitat should be considered in the development of new or revised guides.

There are other examples of potential conflicts with the strategy's intent for wolves and the direction taken by other MNR policies. For example, the ministry's draft "Recovery Strategy for Forest-Dwelling Woodland Caribou (*Rangifer tarandus caribou*) in Ontario" recognizes that increased predation of caribou by gray wolves is likely caused by habitat alteration due to forestry operations, causing increased numbers of other prey species of ungulates. In lay terms, the logging of caribou habitat causes an increase of moose, which results in higher levels of predation by wolves on caribou. However, the caribou strategy then recommends that predator management be evaluated as a potential tool, minimizing its attention to the more contentious issue that the logging of caribou habitat is the root cause of the decline of that species.

Non-consumptive Use
The strategy states that MNR will "maintain and, where appropriate, increase opportunities for people to experience wolves in the wild" by promoting initiatives such as public wolf howls in provincial parks and promoting partnerships with the tourism sector. The strategy also states that the ministry will increase public awareness and understanding of wolves, their prey, and their habitat through a variety of means. The ECO fully supports these aspects of the strategy, including the enhancement of Ontario Parks' interpretive program. For example, Algonquin Provincial Park is world-renowned for its wolf population and it is reassuring that MNR is finally beginning to recognize the value of managing it on an ecological basis.

Public Participation & *EBR* Process
MNR posted a proposal notice on the Environmental Registry with a 40-day comment period. The ministry received 602 comments, including 528 form letters. Public comments overwhelmingly offered support for the proposed strategy as an initial step in improving wolf conservation, but most of these comments stressed that further action should be undertaken. A range of additional conservation measures were suggested by these commenters for inclusion in the strategy, including:

- the sustainability of wolf populations should supersede other objectives;
- wolves should receive full protection from hunting and trapping within provincial parks;
- large conservation areas should be established where wolves are fully protected.
- the closed season should be expanded to areas where wolves may re-occupy their former range, such as along the Frontenac Axis and in eastern Ontario; and,
- the harvest of eastern wolves should be discontinued as they are currently listed as a species at risk and, further, they should be reclassified as "specially protected mammals" under the *Fish and Wildlife Conservation Act*.

The Ottawa Valley Chapter of the Canadian Parks and Wilderness Society (CPAWS) was supportive of the ministry's proposal as a first step toward wolf conservation, but it raised numerous concerns about the effectiveness of the proposal. CPAWS was concerned that the closed season did not protect wolves during the mating season; the proposal failed to provide protection across the entire range of the eastern wolf; and, that the hunting and trapping of wolves is still permitted in protected areas. CPAWS was supportive of the monitoring and reporting requirements, as well as the precautionary inclusion of coyotes in the closed season.

CPAWS, Ontario Nature, the Wildlands League and Earthroots commented that there should be a year-round closed season for eastern wolves within their range. All four groups stated that eastern wolves, because of their federal and provincial status as a species at risk, warrant being listed as a "specially protected mammal" under the *Fish and Wildlife Conservation Act*. It is prohibited to hunt and trap specially protected species, except in defence of property.

Earthroots was supportive of MNR's proposal, although it did share many of the same concerns that CPAWS expressed. Earthroots did raise concern with regard to the ministry's regulation of the eastern wolf as a subspecies of gray wolf – *Canis lupus lycaon* – rather than as a distinct species – *Canis lycaon*. As the ECO noted in our 2001/2002 annual report, the taxonomic classification of the eastern wolf has significant implications for its conservation measures and its at-risk status. One of Canada's leading wolf experts observed that if eastern wolves were recognized as a distinct species, they would be "one of the most endangered canid species in the world." Numerous scientific reports and studies have concluded that the eastern wolf should be recognized as a distinct species.

The Ontario Federation of Agriculture (OFA) did not support MNR's proposal, asserting that there was "no scientific justification" for a closed season and there was "no demonstrated need" for the mandatory reporting of wolf and coyote harvests. Nor did the OFA support the requirement for licencing, the use of bag-limits, or the precautionary inclusion of coyotes. However, the OFA does support "initiatives to develop a better scientific basis for making wolf management decisions, and reminds the Ministry of Natural Resources that appropriate decisions cannot be made in an information vacuum." The Ontario Cattlemen's Association and the Ontario Sheep Marketing Association also voiced similar concerns.

The Ontario Fur Managers Federation (OFMF) did not support the ministry's proposal as it believes that Ontario's wolf populations are not sufficiently at-risk to warrant a closed season. However, the OFMF "acknowledges and supports the value of additional scientific research on wolves," including studies to determine the effects of trapping. The OFMF did not support the use of bag-limits as trappers "should continue to harvest wolves in accordance to their abundance, of which trappers are the best judges on a trapline by trapline basis." The OFMF supported the proposed mandatory reporting as trappers are already required to do so as a condition of their trapping licences.

SEV

MNR did not adequately consider its Statement of Environmental Values (SEV). The ministry's SEV consideration was identical to a previous SEV consideration, with only minor changes to the title and date. The other SEV consideration did address a related decision that dealt with the regulatory measures for wolf management. However, each SEV consideration is intended to be a unique document that addresses an individual decision of a ministry.

Other Information

Along with the proposal for the strategy, MNR released "A Backgrounder on Wolf Conservation in Ontario" that provides information on the ecology of eastern and gray wolves, as well as many of the policies, programs, and statutes that affect them. This is a much-needed update of a previous backgrounder done by the ministry. The ECO had called for a revision of in the supplement to our 2001/2002 annual report.

In February 2005, MNR released its new strategic directions framework entitled "Our Sustainable Future." According to the ministry, it details "specific strategies and proposed actions to help us plan activities and deliver results that are aligned with our strategic direction." In this document, MNR committed to "establish and implement a provincial wolf management strategy and policy, including consideration of Algonquin Park wolves and related science, management and protection needs."

ECO Comment

The ECO commends MNR for developing its Provincial Strategy for Wolves in Ontario. Indeed, the ECO has called for the development of such a strategy for several years. It is a dramatic shift in attitude by the ministry, but as acknowledged by the MNR itself, this represents only an "initial step" in establishing a proper wildlife management program for Ontario's wolves. There remain many unresolved and unaddressed aspects of wolf conservation. It is integral that MNR continue to monitor, assess, and study wolf populations to ensure their continued presence in Ontario.

In particular, MNR urgently needs to address the requirements of managing the eastern wolf as a species at risk. The eastern wolf is listed both provincially and federally as a species of special concern. Under the federal *Species at Risk Act*, a management plan for the eastern wolf and its habitat must be developed by 2008. As Ontario's eastern wolves live almost exclusively on lands regulated by the province, not federal lands, MNR likely will assume a lead role in the development of a management plan for this species. Ontario's strategy does not address this fact. Moreover, the ECO believes that Ontario's strategy does not constitute a management plan for the purposes of the federal *Species at Risk Act*.

Gray wolves and eastern wolves are keystone species in the dynamics of ecosystems and protected areas exist as among the few areas where they could live relatively undisturbed. However, both species – one of which is a species at risk – are allowed to be hunted and trapped in protected areas. The ECO believes that allowing the hunting and trapping of these species in provincial parks is directly counter to the purpose of these protected areas. It is also in direct conflict with Bill 11, the proposed new legislation governing Ontario's protected areas, that would make the "maintenance of ecological integrity" the first priority of provincial parks. Left unresolved, this issue may be contested before the courts in the years to come.

Bill 60 – An Act to amend the Ontario Heritage Act

Decision Information:

Registry Number: PI05E00010	Comment Period: 30 days
Proposal Posted: February 11, 2005	Number of Comments: 3
Decision Posted: April 6, 2005	Came into Force: April 28, 2005 (by Royal Assent)

Description

The *Ontario Heritage Act* (a.k.a. the "*OHA*" or the "*Act*") is the legislative framework for heritage conservation in Ontario. "Heritage" refers to special features of the human-built, cultural and natural environments. The *Act* had not been comprehensively amended since it was passed in 1975. The 2005 amendments expanded municipal and provincial powers to identify and protect Ontario's cultural heritage resources. The main additions and amendments to the *Act* include:

- Municipal powers to prohibit demolition of designated heritage buildings subject to a right of appeal;
- Provincial powers to designate cultural heritage properties and prohibit demolition of buildings, subject to a right of appeal;
- New provincial regulatory powers to establish standards and guidelines to identify and protect provincially-owned heritage property;
- Increased protection for significant marine heritage sites;
- New provincial powers to require standard designation criteria in ministry regulations and other improvements to the municipal designation process;
- Improved protection of archaeological sites, including increased fines for the illegal alteration of sites;
- Measures to streamline and strengthen protection of heritage conservation districts;
- The mandate of Ontario's principal heritage agency, the Ontario Heritage Trust, has been revised and updated; and,
- The role of the Conservation Review Board has been expanded.

Implications of the Decision

Given that this decision deals extensively with the conservation of built structures (usually historic) and the administration of cultural preservation, the ECO limited the scope of this review to the implications of this legislation for natural heritage protection in Ontario.

The main implication of this legislation, from the ECO's standpoint, is that the *Act* now formally recognizes the natural environment conservation function of the Ontario Heritage Trust (formerly the Ontario Heritage Foundation). The Ontario Heritage Trust (OHT) is an agency of the Ministry of Culture (MCL) and the province's lead heritage agency. It is dedicated to identifying, preserving, protecting and promoting Ontario's heritage for the benefit of present and future generations. One of its programs focuses on natural heritage. Specifically, the OHT holds in trust for the people of Ontario a portfolio of more than 130 natural heritage properties, including over 90 properties that are part of the Bruce Trail. Protected land includes the habitats of endangered species, rare Carolinian forests, wetlands, sensitive features of the Oak Ridges Moraine, nature reserves on the Canadian Shield and properties on the Niagara Escarpment. Before the Bill 60 amendments, the *Ontario Heritage Act* referred to the OHT's conservation role as limited to only "aesthetic and scenic environments" – Bill 60 amended these references so that the *Act* now reads "aesthetic, *natural* and scenic interest"" [emphasis added].

As a consequence of the *OHA*'s emphasis on conserving Ontario's built heritage, it is not surprising that a board created by the *OHA*, called the Conservation Review Board (CRB), has over the years dealt almost exclusively with conservation issues related to built structures. The CRB was created in 1975 to conduct hearings and make recommendations dealing with objections to a municipal council's decision for proposed designation of a heritage property and to deal with disputes over archaeological sites and licences. From a cursory review of the reports of the Conservation Review Board over the past 15 years, the ECO could not find reference to a hearing or review dealing exclusively with the designation of a natural heritage feature or property. Hearings and reviews available on the Board's website focused primarily on built structures, i.e., house, bridge, school etc. The CRB may in future be more involved with disputes relating to natural heritage preservation (for more on this, see Other Information).

Public Participation & *EBR* Process
There were three commenters on this proposal. The commenters agreed with the direction of the legislation and some encouraged MCL to hasten the process of passing the legislation.

SEV
MCL carried out a clear and concise analysis of Bill 60 vis-a-vis the ministry's Statement of Environmental Values. For example, MCL highlighted the environmental benefits of building and structure preservation:

> *"The protection of cultural heritage is directly linked to the protection of the natural environment. Conservation of cultural heritage resources contributes to reducing urban sprawl, intensifying development, rehabilitation of brownfields, and reducing construction waste that may otherwise go to landfill. The adaptive re-use of heritage buildings keeps greenfield land available for wildlife, requires less energy for the manufacture of new materials, uses less landfill space, and their predominately inner city locations reduce commuting and consequent greenhouse gas emissions."*

The ECO agrees with this analysis. The re-use of existing buildings or building materials can result in substantial energy and material savings in development projects, as the ECO pointed out in our 2004/2005 annual report (see "Building Conservation in Ontario"). Re-use, in turn, reduces demand on resource extraction industries (lumber, aggregate) thereby reducing pressure to further exploit natural spaces.

Other Information

The Ministry of Culture posted the amendments to Bill 60 as a proposal notice for a "policy", not as an "act" as it should have. However, this appears not to have been problematic, as commenters succeeded in finding the proposal notice on the Registry and making comments.

Natural Spaces Program and MCL

In August of 2005, as part of an announcement about a Natural Spaces Program for Ontario, the Premier announced that the Ontario government would be providing a $6-million grant to the Ontario Heritage Trust, in partnership with the Ministry of Culture, to acquire and secure significant natural heritage properties.

The Ontario government allowed a program called the Ecological Land Acquisition Program (ELAP) to expire at the end of fiscal year 2004/2005. That program had a budget of $10 million over two years for the purpose of acquiring important natural lands, in the province, particularly in southern Ontario. The ECO has commented on the importance of continuing the type of work that ELAP was doing and to adequately fund the program (see 2000/2001 and 2002/2003 annual reports).

The OHA and Tree Protection

While the *Ontario Heritage Act* was being amended, tree advocates (i.e., supporters of trees, especially older large trees in urban centres) attempted to have introduced into Bill 60, tree preservation provisions which would permit a heritage designation for certain outstanding individual trees (e.g., because of size, age, genetics, location – see Box). While this specific approach, i.e., designating individual trees, does not appear to be the specific intent of the 2005 *OHA* amendments, some of the new provisions of the *OHA* might provide enhanced protection for individual trees or groupings of trees in the future. For example, in response to the request for tree designation provisions, a representative of the Ministry of Culture indicated that municipalities may choose to designate property which includes a certain tree or trees, to protect the trees, if they feel this is appropriate. Municipalities would need to pass a by-law to do so, but first MCL needs to produce regulations which outline the criteria that allows a municipality to determine whether a property is of "cultural heritage value or interest" (as of November 2005 these regulations were posted as a proposal on the Registry, but not finalized). The ECO believes that unless the ministry provides leadership by developing a model municipal by-law for tree protection and providing regulatory direction, this issue may not be clearly and completely resolved.

Heritage Tree: A Definition

A heritage tree is an outstanding specimen because of its size, form, shape, age, colour, rarity, genetic constitution or other distinctive community landmark; a specimen associated with an historic person, place, event or period; representative of a crop grown by ancestors and their successors that is at risk of disappearing from cultivation; a specimen recognized by members of a community as deserving heritage recognition.

Source: the Ontario Heritage Tree Alliance uses this definition created by Paul Aird, Professor Emeritus, Faculty of Forestry, University of Toronto.

Interestingly, the Ministry of Culture has helped fund the development of a heritage trees protection toolkit, through an organization called the Ontario Heritage Tree Alliance (an alliance with members from the Ontario Urban Forest Council and Community Heritage Ontario) – this suggests that MCL has some interest in involving municipalities in tree designation.

The success of tree designation may be further worked out through the development process, e.g., property developers challenging the validity of the protection designation and community members or groups needing to assert that trees are deserving of heritage protection value of tree protection because they have cultural heritage value or interest.

However, there should be no question that trees are legally regarded as property. Based on research by the ECO, it is apparent that the courts treat trees as real property. For example, in Ontario court decisions, vendors of real property have been held liable for damages when trees have been cut down or destroyed prior to purchasers taking possession. Such case law suggests that trees should be every bit as worthy of protections afforded any other piece of property.

Finally, there has been at least one instance in which a Conservation Review Board ruling has lent support to a municipal council that felt a specific site's trees ought to be protected as part of the site's heritage. The municipal council went on to designate the site and specifically protect the trees. This ruling took place before the 2005 *OHA* amendments which affirmed the Ontario Heritage Trust's role in preserving property of natural interest. In future, the OHT may be able to speak up (e.g., at hearings before the CRB) in the defence of a municipality's decision to designate natural features.

Designation Criteria and Other Proposal Postings
MCL posted a proposal (PI05E0504) in October 2005 on the Environmental Registry containing three sets of regulations under the *OHA*:

- Municipal Criteria to Determine Property of Cultural Heritage Value or Interest
- Criteria to Determine Property of Cultural Heritage Value or Interest of Provincial Significance
- Regulation for Prescribing Marine Archaeological Sites

The first set of regulations prescribe criteria under the section of the *OHA* which empowers municipalities to designate property. These are the regulations, described above, as being needed for a municipality to determine whether a property qualifies as something of "cultural heritage value or interest." A municipality would still need formulate and pass a by-law designating and protecting the property.

ECO Comment
The ECO hopes that the Ministry of Culture and the Ontario Heritage Trust will play a strong leadership role when it comes to designating, as part of Ontario's heritage, natural heritage features and ensuring that they receive adequate protection. The ECO believes it is appropriate that the OHT's natural heritage activities are being reflected in the legislation governing it. This reflection is long overdue. The OHT's predecessor, the Ontario Heritage Foundation was a forerunner, in Ontario, of establishing conservation easements (i.e., an easement used to protect natural spaces through a designation on a property title. This avoids using the costlier route of outright purchase of the land). Some of the pioneering work of the Foundation was in the Niagara Escarpment Plan Area, where conservation easements helped create continuous greenspace corridors for wildlife, trails and habitat protection.

In Autumn 2005, representatives of the Ministry of Natural Resources told the ECO that the province's key land acquisition program, the Ecological Land Acquisition Program, was being reinvented within the Ontario Heritage Trust under a program called the Natural Spaces Land Acquisition and Stewardship Program. In the past, the ECO has focussed attention on MNR's land acquisition programs, and has recommended the program be adequately funded given the task at hand (i.e., protecting large amounts of privately-owned habitat, mainly in southern Ontario, where land values are high). The ECO will continue to monitor conservation land acquisition developments now that the Ontario Heritage Trust will be the province's primary agent in this capacity. Of particular note, the ECO was disappointed to learn that the Ontario Heritage Trust proceeded to post elements of the new program on its website in February 2006 without first posting the program as a proposal on the Environmental Registry. Effectively, the OHT has begun to roll out the program without first consulting the public about it. Because of this, the ECO feels that the OHT ought to be an *EBR*-prescribed agency.

Also, the ECO expresses some concern that a program with primarily an ecological focus is being transferred to an agency whose predominate focus is protecting properties for their cultural values. This could lead to a shift in the program over time in which properties which have some cultural value, e.g., a recreational trail or some historic importance, in addition to some ecological value are favoured over properties which have purely ecological integrity e.g., property with rare vegetation.

Review of Posted Decision:
Conservation Land Tax Incentive Program

Decision Information:

Registry Number: PB00E6007
Proposal Posted: July 18, 2000 / April 3, 2002
Decision Posted: June 8, 2005
Comment Period: 30 days (twice)
Number of Comments: 65 (13+52)
Decision Implemented: December 10, 2004

Description

The purpose of the Conservation Land Tax Incentive Program (CLTIP) is to recognize, encourage and support the long-term stewardship of specific categories of conservation land by offering tax relief to those landowners who agree to protect the natural heritage features of their property. Many environmental organizations, conservation authorities and private citizens are involved in this program. How CLTIP defines eligibility for relief is very important.

In the period 1998-2000, the Ministry of Natural Resources decided that one of the program's categories of eligible land – the "Community Conservation Lands" (CCL) category – needed tighter definition (greater detail below). After two proposal notices were posted, one in 2000 and one in 2002, and after a lengthy policy development process, eleven eligibility criteria for the "Community Conservation Lands" category were finalized and presented in the 2005 decision notice (the outcome was announced by MNR in late 2004). The category Community Conservation Lands is restricted to non-profit charitable conservation organizations and conservation authorities. The CCL category stipulates that, to be eligible, the land must meet one of the following criteria:

- be designated as an Escarpment Protection Area in the Niagara Escarpment Plan under the *Niagara Escarpment Planning and Development Act;*
- is located within a Featured Area and contributes to the natural heritage protection objectives established for the Featured Area as set out in the "Ontario Living Legacy Land Use Strategy, July 1999";
- is a natural heritage feature or area that meets the criteria of the natural heritage provisions of the Provincial Policy Statement as issued and re-issued under s. 3 of the *Planning Act*;
- was identified by the Minister of Natural Resources as a regionally significant area of natural and scientific interest using the criteria set out in the Ministry of Natural Resources document entitled "A Framework for the Conservation of Ontario's Biological Heritage", dated May, 1980, or in the Ministry of Natural Resources document entitled "A Framework for the Conservation of Ontario's Earth Science Features", dated October, 1981;
- is a habitat for species of special concern, as designated by the Ministry of Natural Resources, based on the criteria in the "Categories and Criteria for Status Assessment" of the Committee on the Status of Species at Risk in Ontario;
- was identified as having species occurrences or ecological communities with an S-Rank designation of S1-S3, as determined by the Natural Heritage Information Centre of the Ministry of Natural Resources;

- is designated as a Natural Core Area, Natural Linkage Area or Countryside in the Oak Ridges Moraine Conservation Plan under the *Oak Ridges Moraine Conservation Act, 2001;*
- is a natural heritage area identified within a regional or watershed plan or strategy developed by a conservation authority under the *Conservation Authorities Act* or by another public agency under another provincial or federal statute;
- is designated as an environmentally sensitive area, environmentally significant area, environmental protection area, natural heritage system or another area with an equivalent designation within a municipal official plan or zoning by-law under the *Planning Act*;
- is within, abuts or abuts a road allowance that abuts a provincial park, national park, conservation reserve or provincial wildlife area and contributes significantly to the natural heritage objectives of the park, reserve or wildlife area;
- was an area identified under the Great Lakes Wetlands Conservation Action Plan described in the "Great Lakes Wetlands Conservation Action Plan Highlights Report (2000/2003)", published by Environment Canada.

Detailed Process Background
The process of finalizing the CCL category criteria took nearly seven years. The following describes the complicated process that led to the final outcome described above.

In 1988, the forerunner of CLTIP, the Conservation Land Tax Rebate Program (CLTRP) was introduced. On January 1, 1998, the Ontario government restructured the program from a rebate, to a property tax exemption scheme, as part of the government's reform of Ontario's property tax system (see PB7E4007). An important difference between the two forms of the program was that, originally, landowners received a rebate *from the province* for property taxes paid to a municipality on eligible lands; under CLTIP, landowners are simply exempt from paying property tax on eligible lands *to the local municipality.*

In explaining the origin of the 2000 CLTIP proposal, MNR stated that concerns about one category of the program were identified during the transition from the rebate to incentive-based program in 1998. The category formerly known as "Other Conservation Lands" category, and which became known as "Community Conservation Lands" required a review of how it was structured. The first concern according to MNR was the absence of clear and specific evaluation criteria for this category (unlike the other four categories of eligible land in the CLTIP program: provincially significant wetlands; provincially significant areas of natural and scientific interest; lands designated as escarpment natural areas in the Niagara Escarpment Plan; and, the habitat of endangered species, which MNR described as being based on scientific or planning criteria). The second concern was the potential of a significant increase in the amount of land under the category as a result of the reinstatement of conservation authority lands as being eligible under CLTIP.

In 2000, MNR posted a proposal notice to establish the new category called "Community Conservation Lands" and the criteria which would have to be met to make land eligible for tax exemption under this category. The 2000 proposal was very inclusive of land types and natural features and was compatible with a similar federal-based program (Environment Canada's EcoGifts program). It was well-received by environmental stakeholders. But, apparently because of pressure from stakeholders with financial or tax revenue concerns (such as municipalities and the Ministry of Finance), MNR drastically revised the eligibility criteria list, paring it back to just seven from 21. In April 2002, MNR posted a proposal with the new set of seven eligibility criteria:

- lands that contribute to the natural heritage protection objectives established for the Features Areas set out in the Ontario Living Legacy Use Strategy (e.g., the Great Lakes Heritage Coast);
- areas designated as a World Heritage Site for biodiversity conservation purposes;

- areas designated as a core area of a UNESCO Biosphere Reserve;
- areas designated as a Wetland of International Importance under the Ramsar Convention;
- areas designated in the Niagara Escarpment Plan as Escarpment Protection Area;
- areas designated as natural core, natural corridor, sensitive hydrological feature, regional recharge, regional discharge or significant landform within an Oak Ridges Moraine strategy or guideline;
- areas within or adjacent to a protected area such as a Provincial Park, National Park, Conservation Reserve or National or Provincial Wildlife Area that has natural heritage attributes that contribute to the natural heritage objectives of the protected area.

In addition, lands would need to be owned by a non-profit organization, *other than a Conservation Authority as defined under the Conservation Authorities Act*, which is a charitable organization for the purposes of the *Income Tax Act* (Canada), and has as one of its principle objectives, or has as its principle objective, natural heritage protection. This proposal would have effectively excluded CAs from participating in CLTIP.

The reaction of natural heritage protection groups ranged from disappointment to outrage (see public participation below). Over the period 2002 - 2005, MNR was able to negotiate with opponents of the program to achieve a set of the eligibility criteria broader than the second proposal. This effort resulted in the final 11 criteria (listed on the first page of this review) in its 2005 decision notice.

Implications of the Decision

The final outcome of this process (the eleven criteria that define eligibility for the CCL category) should be of great significance for the continuance of natural heritage protection in Ontario by private and not-for-profit organizations. For a period of nearly seven years there was a great deal of uncertainty for local conservation groups about the continued financial viability of many of their land conservation initiatives. Some commenters from conservation groups spoke of avoiding any further land acquisition and even jettisoning some properties because of the attendant tax responsibilities.

One key implication of the decision is that Conservation Authorities will again be able to participate in the program. Collectively, Conservation Authorities are probably the largest and most significant stewards of conservation lands in southern Ontario.

With the reasonably broad eligibility criteria and the return of tax-exempt status of qualifying properties, conservation organizations should be empowered to improve their land conservation programs.

Public Participation & *EBR* Process

As noted, the CLTIP program was the subject of two proposal processes and comment periods – the first in 2000 and the second in 2002. MNR summarized the first comment period in the following manner:

> *"Thirteen responses were received from individuals or stakeholder representatives, providing a combined total of 26 comments or suggestions. In general, the proposal was well received and comments were positive. The comments can be categorized into three groups: approval and support of the clarification of eligibility criteria; further refinement of criteria or the addition of other criteria not presently included, and; a request to clarify/ specify the inclusion of Conservation Authorities under the category."*

In 2002, MNR created a revised list of eligibility criteria which was much more exclusive, e.g., excluding conservation authorities from participating. MNR reposted the revised list for comment on the Registry in 2002, and summarized, in 2005, the response received as follows:

> *"Fifty-two responses were received from individual Commenters or stakeholder representatives, with over 40 different comments or suggestions being put forward. Most respondents used one of several form letters in circulation. The majority of responses did not support the current proposal and requested a return to the original or, failing that, inclusion of specific additional criteria. Other responses raised concerns over impacts of the new proposal in supporting the efforts of land trusts, including conservation authorities, and in meeting government environmental protection objectives. Comments were also provided regarding the impact to municipalities, and numerous economic and social benefits were provided."*

MNR also listed and responded in greater detail to various specific points raised by commenters in its decision notice (see PB00E6007). MNR's comment summary was generally appropriate.

From the ECO's review of the public participation process, a few points should be emphasized (the points listed below focus on the comments from the second comment period, as this was the set of comments that ultimately shaped the final outcome).

The vast majority of comments in the second comment period were from persons affiliated with land trusts (an organization established to protect a specific natural environment). The land trust commenters were unanimous in calling for a broadening of the criteria that could make lands and environments eligible for CLTIP's tax exempt status.

One commenter, a municipality in southwestern Ontario, cited its concern about the CLTIP proposal. The municipality said that there were several conservation properties within its boundaries that may be financially affected by this proposal. Citing one specific example, the municipality said there was a Provincial Wildlife Area within its boundaries with an assessed value of about nine million dollars; in 2001 this property generated about fifty thousand dollars in revenue for the municipality. Losing this revenue would result in a two per cent local tax rate increase for residents. The municipality insisted that it is not prepared to further subsidize land conservation at the expense of local residents and urged "the Ministry of Natural Resources to defeat the MNR Land Tax Exemption Proposal No. PB00E6007" This municipal council even passed a resolution seeking the "defeat" of MNR's CLTIP proposal. Other municipalities or financial administrators must have shared these views about foregone revenue, as this appears to be the only significant impediment to moving forward with the reconfigured CLTIP program. These negative comments appear to have delayed implementation of the revised program for several years. MNR responded to the issue of tax revenue impact in its decision notice, in the following manner:

> *"Economic impact analyses, conducted by the Ministries of Natural Resources and Finance, indicated that the province-wide financial impact to municipalities would be minimal. This cost is further reduced by enhanced revenues derived from eco-tourism, nature appreciation and outdoor education. Prior to this decision, the revised proposed criteria were shared with the Association of Municipalities of Ontario."*

Also of note, a central Ontario city filed comments completely opposite to the viewpoint of the municipality which found the CLTIP program to be a municipal burden. The city council passed a resolution in support of the Community Conservation Lands category of the CLTIP program and sent this in a letter to MNR. The city wrote that it:

> *"...supports a broadened definition of eligibility for Community Conservation Lands to include natural heritage areas identified under the Provincial Policy Statement, by municipal official plans, zoning by-laws, regional conservation plans, lands with rare species or communities and lands subject to conservation easements."*

Also of relevance to the issue of municipal support, MNR's comment summary indicated that municipal support for the program was strong. Of those municipalities that commented virtually all were in favour of the program.

MNR generally did a good job of being responsive to the comments raised. MNR staff responded to members of the public when they forwarded their comments to the minister (as opposed to the contact name on the proposal posting) and notified the person that their comments had been relayed to the appropriate MNR staff person for inclusion in the *EBR* proposal process. MNR also included comments which arrived after the end of one of the comment periods. MNR was also was able to introduce into the criteria, specific suggestions of some of the commenters – this is precisely the sort of adaptive and inclusive decision-making that the *EBR* was intended to bring about.

SEV

MNR found that no aspects of the proposal conflicted with any provisions or commitments in MNR's SEV. One revealing statement in MNR's SEV consideration document was:

> *"The purpose of this proposal is to create an environment that will strengthen the ability of conservation organizations to protect significant natural heritage features. Eligible organizations play a role in society through education, providing recreational opportunities or protecting lands for future generations. The cost of the program through the tax base is offset by additional business revenues realized through tourism and recreation. Proximity to significant green space has a positive effect on market value of residential areas, which increase the tax base for municipalities."*

Other Information

The Ontario government undertook an extensive review of the relationship between the provincial government and municipalities in 1996 called "Who Does What." This process subsequently led to changes in many areas, between 1995 and 2003, including the municipal property tax system. Programs like CLTIP and MFTIP (described below) were caught in this flux.

In 1998, MNR posted an Exception Notice (PB7E4007) to inform the public that the CLTIP program was moving from a rebate scheme to a tax exemption system. MNR considered the changes to be "predominantly of an administrative nature and are therefore not considered to be environmentally significant." As a result, there was no *EBR* comment period for this Registy notice.

A similarly structured program for the protection of private forests, called the Managed Forest Tax Incentive Program, was also re-cast after an extensive *EBR* process in the period just before the CLTIP announcement of December 2004 (see annual report 2004/2005).

Another natural heritage protection role of MNR – acquiring land for conservation purposes – was in a state of flux in the year 2005. MNR reported to the ECO that this function will be transferred to the Ontario Heritage Trust, an agency of the Ministry of Culture (see Bill 60: Amendments to the *Ontario Heritage Act,* in the ECO 2005/2006 annual report that this supplement accompanies, see page 76, and the ECO's review of MNR's Ecological Land Acquisition Program in 2002/2003).

ECO Comment
The ECO believes that natural spaces deserve protection, first and foremost for the protection of natural heritage and ecological function. Parcels of land should not be viewed exclusively from the perspective of what good or service they might provide to society. Nor should land which is being conserved be unduly characterized as a tax burden, given the numerous real benefits they provide and which can be quantified in economic terms. The mechanism of tax relief for conservation lands is one which the ECO regards as sensible. As such, CLTIP and MFTIP are two of the most important environment stewardship programs for private, municipal and non-Crown lands in Ontario. They are critically important to southern Ontario where there is a great deal of biodiversity at risk, lots of private land and little Crown land. Further, the ECO feels that the property tax incentive program is an affordable approach to conserving important land and ecosystems in southern Ontario.

Both CLTIP and MFTIP programs have been in a state of flux for a number of years; the resolution of the divisive issues regarding CLTIP is a positive development. We note that MNR did respond to stakeholder concerns expressed about the 2002 proposal. We are pleased that MNR adopted specific recommendations for criteria from commenters, including that Conservation Authorities be eligible to participate in CLTIP.

The ECO now encourages the parties involved – MNR, MOF, MPAC, municipalities – to honour the commitments implicit in the program's objectives and meet the expectations of participating land conservation organizations. As of autumn 2005, many conservation organizations seemed content with the outcome of this policy development process i.e., the eleven criteria are reasonably broad, are less exclusive than the earlier seven proposed criteria and the program should provide enough certainty for organizations to continue land acquisition operations. These are positive changes but it will require a number of years of fair and equitable assessment practices to reassure these organizations and the ECO that the program is operating properly again.

The ECO feels the revised CLTIP program is a good basis for moving forward for conservation protection in Ontario. Attention may need to be paid, on occasion, to certain municipalities with small populations (and therefore smaller tax bases) but with extensive eligible conservation lands – the Province may need to be willing to assist in these circumstances. Otherwise, CLTIP's tax exemption mechanism for conservation lands is a sensible and principled means of carrying out natural heritage protection in Ontario.

MTO Oak Ridges Moraine Rules
Review of Posted Decision: Environmental Protection Requirements for Provincial Highways - Oak Ridges Moraine

Decision Information:
Registry Number: PE04E4552
Proposal Posted: August 23, 2004
Decision Posted: July 15, 2005
Comment Period: 60 days
Number of Comments: 1
Decision Implemented: Will be implemented when Environmental Standards Project is completed

Description
In July 2005, the Ministry of Transportation (MTO) finalized a policy document entitled "Environmental Protection Requirements for Transportation Planning and Highway Design, Construction, Operation and Maintenance – Oak Ridges Moraine Component"(EPR-ORM). It provides MTO's interpretation of how legislation protecting the Oak Ridges Moraine applies to provincial highway projects.

Background to MTO's Environmental Standards Project
This policy is part of a larger MTO Environmental Standards Project launched in 2002. The project has evolved over the years, with various components renamed and delayed several times. None of the components, even those finalized in 2004 and 2005, will be implemented until the entire project is completed. An update on this project can be found in the Ministry Progress section of the ECO 2005/2006 annual report, page 202. MTO says it plans to finalize all the related documents by the end of summer 2006.

In August 2004, MTO finalized a summary of the numerous federal and provincial environmental laws, policies and guidelines that currently apply to highway projects in Ontario. MTO entitled this summary "Environmental Protection Requirements for Transportation Planning and Highway Design, Construction, Operation and Maintenance" (EPR). The EPR is MTO's interpretation of how these environmental laws, policies and guidelines apply to highway projects. The EPR summary was reviewed by the ECO in the 2004/2005 annual report and supplement.

The EPRs apply to provincial highway projects, which include new and modified highways and related structures such as interchanges, bridges, access roads, and drainage works. Highways are roadways under the jurisdiction of MTO and include King's highways, secondary highways and tertiary roads. These projects are carried out under MTO's Class Environmental Assessment for Provincial Transportation Facilities (MTO's Class EA) and are occasionally subject to federal environmental assessment (EA) legislation as well. New freeways (400 series highways) require an individual EA and are also subject to the EPR.

A draft of the ORM component of the EPR was posted on the Environmental Registry for comment in August 2004, and a decision notice was posted in July 2005. It is the EPR-ORM that is the subject of this review.

Background to the Oak Ridges Moraine Conservation Act and Plan
The *Oak Ridges Moraine Conservation Act* (*ORMCA*) was passed in 2001 and the Oak Ridges Moraine Conservation Plan (ORMCP or the Plan) was given legal effect by O. Reg. 140/02 passed under the *ORMCA* in 2002. The Plan provides land use and resource management planning direction for the 190,000 hectares of land and water within the Oak Ridges Moraine, to protect the Moraine's ecological and hydrological features and functions. Decisions of provincial ministers and ministries as well as municipalities are required to conform with the Plan. The ECO reviewed the *ORMCA* and ORMCP in the 2001/2002 ECO annual report.

The Plan sets out many approval requirements and restrictions on development and site alteration, but explicitly states, like the Provincial Policy Statement under the *Planning Act*, that the construction of transportation, infrastructure and utilities by a public body such as a ministry or a municipality, is <u>not</u> considered development or site alteration. The Plan also contains policies applying to the various permitted uses, including transportation, infrastructure and utilities.

The Plan divides the Moraine into four land use designations: Natural Core Areas (38 per cent of the Moraine), Natural Linkage Areas (24 per cent of the Moraine), Countryside Areas (30 per cent of the Moraine) and Settlement Areas (8 per cent of the Moraine). The designations are mapped in Map 208 included in the Plan Regulation. The Plan sets out permitted uses in each designation, generally restricting land uses and development in Natural Core and Natural Linkage Areas, and concentrating development in existing Settlement Areas.

Transportation uses, which include public highways, bridges and other structures, are one of the few types of land use permitted throughout the entire Plan Area, but with the following restriction: transportation projects are allowed in the most protective designations, Natural Core Areas and Natural Linkage Areas, only if they are shown to be necessary and there is no reasonable alternative. Sections 41(2)(a) and 41(3)(a) state that an application for a transportation project within a Natural Core Area or a Natural Linkage Area "shall not be approved unless the need for the project has been demonstrated and there is no reasonable alternative," and the applicant demonstrates that a number of ecological protection requirements will be satisfied, for example, that the project is located as close to the edge of the Natural Core Area as possible.

The Plan also describes protections for *key natural heritage features* (e.g., wetlands, endangered species habitat, fish habitat, areas of natural and scientific interest, significant woodlands and tallgrass prairies) and *hydrologically sensitive features* (e.g., streams, kettle lakes). Over 85 per cent of the *key natural heritage features* are estimated to be located within Natural Core Areas or Natural Linkage Areas but they and *hydrologically sensitive features* also occur in Countryside Areas. These features are not included on the ORM maps, but must be identified during project planning, using criteria in draft technical guidance documents prepared by the Ministries of Natural Resources and Environment (for more detail on this issue see "other information" below and on page 85 of the ECO 2005/2006 annual report).

The Plan exempts transportation from the strict prohibitions on development in and near these special features, and the requirement for natural heritage evaluations for any development within buffer areas around these features. But the Plan does require that applications for transportation projects in *key natural heritage features* or *hydrologically sensitive features* meet certain tests. Transportation projects "may be permitted to cross a *key natural heritage feature* or a *hydrologically sensitive feature* if the applicant demonstrates that the need for the project has been demonstrated and there is no reasonable alternative," and demonstrates that a number of ecological protection requirements will be satisfied, for example, that the "long-term management approaches adopted will maintain, and, where possible, improve or restore the health, diversity, size and connectivity of the *key natural feature* or *hydrologically sensitive feature*."

Content of the EPR – ORM
MTO has translated the ORMCP restrictions into 28 "Environmental Protection Requirements for Transportation Planning and Highway Design, Construction, Operation and Maintenance – Oak Ridges Moraine Component" (EPR-ORM).

MTO has determined that the ORMCP tests for need and lack of an alternative set out for highways in Natural Core and Linkage Areas will be met through EA processes:

"ORM-8 During the planning of highways in Natural Linkage Areas and Natural Core Areas, the need for the project shall be demonstrated. Where the need for the project has been demonstrated it shall also be demonstrated that there is no reasonable alternative (O. Reg. 140/02, s. 41(2)(b)2). <u>The federal and provincial Environmental Assessment processes are the ways by which the above are demonstrated</u>" [emphasis added].

"ORM-13 Highway planning, design, and construction practices that are adopted shall minimize adverse effects on the ecological integrity of the Plan Area. Where avoidance is not possible, and has been permitted through the Environmental Assessment process, the highway will be designed, constructed and operated/maintained to minimize effects on Natural Core Areas and Natural Linkage Areas (O. Reg. 140/02, s. 41(2)(b)5)" [emphasis added].

However, one of the most important ORMCP requirements regarding highways has been left out of MTO's ORM-EPR completely: the requirement to demonstrate need and a number of other conditions before permitting a transportation project to cross a *key natural heritage feature* or a *hydrologically sensitive feature*.

MTO has incorporated the ORMCP's requirements for special design and construction into the EPR without elaboration or further guidance. These ORM-EPR include matters such as:

- keep right-of-way widths and associated construction disturbance to a minimum;
- keep the number of corridors to a minimum;
- minimize light intrusion in to Natural Core Areas;
- facilitate wildlife movement;
- minimize adverse effects on the ecological integrity of the Plan Area;
- locate projects as close to the edge of the Natural Core Area as possible;
- improve or restore key ecological and recreational linkages;
- use native plant species as much as possible, especially along rights-of-way; and
- maintain and improve health, diversity, size and connectivity of the *key natural heritage feature* or *hydrologically sensitive feature*.

MTO's document has clearly translated a number of strict prohibitions, for example the prohibition of:

- future highway interchanges in Natural Core Areas;
- the disposal of stormwater into kettle lakes;
- the use of rapid infiltration basins;
- stormwater management ponds in *key natural heritage features* and *hydrologically sensitive features*; and
- storage of toxic contaminants including fuels, road salt and hazardous waste in wellhead protection areas and areas of high aquifer vulnerability.

Other ORMCP restrictions have been incorporated into the EPR with qualifiers added by MTO because rules that apply to "development" or "site alteration" applications are optional for highway projects. For example the minimum standard for water quality from stormwater run-off and water protection measures such as minimizing pesticide use are prefaced with: "To the extent that is technically, physically, and economically practical…"

Implications of the Decision

While the consolidation of ORM requirements into one document alongside other federal and provincial regulations is helpful for MTO and its consultants and contractors, it does not introduce any new environmental protections that are not already law in the *ORMCA* and ORMCP. Because key requirements of the ORMCP are not presented in MTO's document as conditions that have to be met before approval can be granted, there is a risk that they will not be implemented.

The wording of the ORMCP implies that transportation projects will require approval, and that the applicants will demonstrate that they have met the tests in the Plan. The introduction to the Plan states that only very restricted new transportation uses are permitted within the most protected areas and that "they shall also have to meet stringent review and approval standards." But in practice, provincial highway projects and indeed most municipal road, infrastructure and utilities projects do not have to be approved by anyone. They are not considered development and they are planned and constructed under EA processes, most often under Class EA processes that are self-directed and assessed, with no "applications" or "approval" by any agency that could consider whether the project meets the tests set out in the ORMCP. New 400-series highways require an individual EA and approval by the Minister of the Environment, but it is not a requirement under the *EAA* that the Minister will require compliance through the EA to the ORMCP. This important assumption of the ORMCP, that highways and related structures are only permitted if an application meets certain tests, is not clearly translated into the EPR-ORM.

For an illustration of how these requirements are implemented on the ground, the Highway 407 East EA Project Team has published a fact sheet on the Oak Ridges Moraine. It says that MTO is required to comply with the ORMCA and ORMCP in the extension of the 407 East which is just being planned now, and mentions the EPR-ORM. It sets out a brief description of how the ORM requirements are being addressed in the 407 East Individual EA Project. Neither the fact sheet nor the Terms of Reference for the EA mention *key natural heritage features* or *hydrologically sensitive features*, and the ORMCP rules are described as one type of environmental criteria that will be used to evaluate the project.

The fact sheet states that "for the purposes of the 407 East Individual EA project, the ORM is identified as a 'Special Space'. Impacts will be measured by assessing the compatibility of each alternative with the ORM Conservation Plan, and the degree of potential impacts to identified special spaces…. On Natural Cores [sic] Areas and Natural Linkage Areas, MTO will, wherever possible, seek to avoid and where avoidance is not possible, an attempt will be made to minimize any adverse impacts." The Terms of Reference for the EA approved by the Minister of the Environment in 2005 say that the proposed individual EA Study will utilize a study process that seeks to avoid, minimize or prevent detrimental environmental effects. It does not state that the ORMCP requirements must be met in order for the EA to be approved.

Public Participation & *EBR* Process

Save the Oak Ridges Moraine (STORM) and Ontario Nature (formerly known as the Federation of Ontario Naturalists), submitted one comment jointly. They stated that their comments pertained to the planning and construction only of secondary and lesser highways and roads within the ORM Area, because they take the position that there must be a moratorium on the planning and construction of 400-series highways and municipal roads of equivalent size throughout southern Ontario, until the Province has completed a comprehensive, transit-first transportation master plan for all of southern Ontario.

They pointed out that the ORM is a linear topographical feature with 62 per cent of the Plan Area in a connected system of Natural Core Areas and Natural Linkage Areas. A north-south highway system that crosses the ORM will inevitably affect either a Natural Core or Natural Linkage Area.

STORM and Ontario Nature said they supported the Ministry's Environmental Standards Project in general, and were pleased that the ORM component had been completed. However, their primary concern was the shift in focus from the *explicit* nature of "shall not be approved" as stated in the ORMCP to the *implicit* "approval" included in the MTO policy. They recommended that the Plan's language of "shall not be approved unless" be included in the EPR. They also recommended that the ministry undertake broad consultation in the timely completion of the next stages of the Environmental Standards Project.

MTO did not make any substantive changes, but clarified two of the EPR as a result of the comment. MTO added the statement that "need" and "no reasonable alternative" would be demonstrated through the EA process.

SEV
MTO staff considered MTO's Statement of Environmental Values in making this decision, including several specific considerations in the SEV. For example, MTO said that the natural environment of the Oak Ridges Moraine would be better preserved through the use of this policy and the forthcoming Environmental Best Practices. MTO also said that the Environmental Protection Requirements would clearly and concisely show decision makers their environmental obligations.

Other Information
Two related initiatives by MTO are most relevant to the Environmental Protection Requirements for the ORM were posted for public comment in July 2005. The first is a proposed Wildlife and Transportation Reference for the Oak Ridges Moraine (PE05E4554) which provides over 80 pages of technical guidance on mitigating the effects of highways on wildlife.

The second is an update of MTO's 2002 Environmental Reference for Highway Design (PE05E4553). This EA guidance document is being updated in part to add references to new legislative requirements such as the Oak Ridges Moraine Conservation Plan. It includes a section that describes the higher standard set in the Niagara Escarpment, Oak Ridges Moraine and the Greenbelt Plan areas:

> *"While highway projects are permitted through the Plan areas, the environmental assessment must demonstrate that the highway project is needed and that there is no reasonable alternative to that being proposed. Project design and construction activities will be expected to be put through a higher environmental test to demonstrate that the potential impacts are fully understood, that mitigation can minimize or avoid the impacts, and the net effects are acceptable."*

The draft Environmental Reference for Highway Design states that, when undertaking environmental impact studies and protection / mitigation design for provincial highways, the consultant shall address the requirements of the ORM plan *as detailed in the Environmental Protection Requirements*. An Appendix (which unfortunately was not available in the draft posted to the Registry for comment) will provide a list of considerations and requirements for an environmental impact study and environmental protection / mitigation in the Oak Ridges Moraine.

MAH has posted proposals for ORM technical guidance papers on the Registry for comment. Eight draft documents prepared by MNR (PF04E0001) were posted in March 2004 and nine documents prepared by MOE (PF05E0001) were posted in June 2005. For more detail on these technical guidance documents, see pages 85 of the ECO 2005/2006 annual report.

ECO Comment
In its review of the *ORMCA* and ORMCP in the ECO 2001/2002 annual report, the ECO pointed out that allowing transportation and utilities in the entire Plan area seemed contrary to the objectives of the Plan. Although the introduction to the Plan said that roads in the protected areas would have to meet stringent review and approval standards, none were set out in the Plan. The ECO reported that, since there are no mitigation measures or criteria for interpreting the transportation policies in the Plan, we anticipated that new policies would be developed as technical guidance.

The ECO has continued to raise concern about the exemption for transportation and utilities in the Provincial Policy Statement and land use plans such as the Oak Ridges Moraine Conservation Plan. For example, the ECO raised such concerns in its reviews of the revised Provincial Policy Statement and of the Environmental Protection Standards in the ECO 2004/2005 annual report. Yet given that the exemption does exist in the ORMCP, MTO has done a reasonable job of incorporating the requirements of the ORMCP into its Environmental Protection Requirements. One major oversight is MTO's failure to incorporate the requirement to demonstrate need and meet other conditions before crossing *key natural heritage features* and *hydrologically sensitive features*.

If this is all the guidance that will be provided, it seems probable that the province is not going to deliver the protections the public is expecting of the ORMCP. MTO says that technical guidance in the form of best practices and environmental tools will be forthcoming in the still-to-be developed appendix to the Environmental Reference For Highway Design. MTO is also preparing other guidance documents to elaborate on the ORM policies related to minimizing light intrusion and protecting wildlife. The ECO will monitor the development of the technical guidance and the implementation of the Environmental Standards Project.

The ECO remains concerned with the absence of a "stringent review and approval" mechanism that was promised in the ORMCP and the reliance on EA processes to demonstrate compliance with the many planning, design and construction restrictions set out in the ORMCP to protect ecological and hydrological integrity. The EA processes in place currently do not provide the type of approval mechanism intended by the framers of the ORMCP, and there are indications that MOE is considering recent recommendations to further streamline the EA approvals process for transportation projects.

There is still a need for guidance for regional and local roads as well as provincial highways. MMAH and MTO advised the ECO in 2004 that MTO was preparing standards for provincial highways first, then for regional and local roads at a later date. MTO did not commit to a timeframe but said they would be developed after the current Environmental Standards Project was finished. As of March 2006, MTO is no longer planning to prepare guidance for regional or local roads, due to time and budget constraints. This is a major policy gap, since the majority of road projects in the ORM Plan Area are either undertaken by or approved by municipalities, who have expressed concern about how to interpret the provisions of the ORMCP regarding the need for roads.

The ECO is aware of concerns expressed by environmental groups and staff of the Ministry of Natural Resources that many roads have been built through Natural Core Areas and Natural Linkage Areas since the Plan was established in 2002. The draft Greater Golden Horseshoe Growth Plan identifies new "economic corridors" (i.e., highways) that may impact the ORMCP. Municipalities and the province have jointly identified new roads and highways required to accommodate existing approved growth in the area. These include extensions of 400-series highways; new or modified interchanges and the widening of 400-series highways and many new local and regional roads and road improvements. Given the significant growth pressures faced by municipalities, the ECO encourages the provincial ministries to provide technical guidance regarding municipal roads in the ORM Plan Area.

Pretreatment of Hazardous Waste
Pretreatment of Hazardous Waste (Land Disposal Restrictions)

Decision Information:

Registry Number: RA04E0016	Comment Period: 94 days
Proposal Posted: September 28, 2004	Number of Comments: 50
Decision Posted: August 19, 2005	Came into Force: Regulation filed August 10, 2005 (see phase-in schedule in chart below)

Description

In 2005 MOE introduced new restrictions on the disposal of hazardous waste by amending Regulation 347, the General Waste Management Regulation under the *Environmental Protection Act* (*EPA*). The changes bring Ontario's program into line with that of the U.S. by adopting key elements of the U.S. Environmental Protection Agency's Land Disposal Restrictions (LDR) program. In the future, before hazardous waste can be disposed of on or in land, it must be treated to reduce its toxicity or minimize the ability of the hazardous components to enter soil or groundwater. Treatment technologies include: metal recovery from metal bearing wastes using high temperature processes, neutralization of acids, solidification of inorganic sludges and liquids, and incineration of organic sludges and solvents. The requirements will be phased in over four and a half years.

The pre-treatment requirements apply to all hazardous waste landfills, both commercial sites and those owned and operated by companies exclusively for their own wastes. In addition to landfills, other forms of land disposal are also captured by the regulation, including deep well disposal and landfarms, which are primarily used by the petrochemical industry to dispose of sludges produced during the refining process. MOE says that the new requirements will affect approximately 95,000 tonnes of waste generated in Ontario and 85,000 tonnes of waste imported annually. Approximately 450 tonnes of waste generated annually by small producers (those who generate less than 100 kilogram per month) will be exempt from the requirements.

Most of the treatment standards are "contaminant-based" standards, consisting of numeric concentration limits. The rest are "technology-based" standards prescribing the use of particular technologies. Both were developed from "best demonstrated available technologies" and the U.S. regulation. Alternate treatment standards are included for hazardous waste debris and contaminated soils. The alternate treatment standards include physical treatment, chemical treatment, thermal destruction and immobilization technologies. MOE included the less stringent standards for contaminated soils to avoid discouraging site remediation. In addition, MOE introduced new generator registration, notification and reporting requirements for tracking on-site processing of hazardous wastes destined for land disposal.

The General Waste Management Regulation covers all types of waste, not just hazardous waste. Although most of the amendments to the regulation are specific to hazardous waste, MOE also made some changes, which affect non-hazardous (also called municipal) waste. The regulation includes new requirements for on-site storage and processing for both hazardous and non-hazardous wastes. The changes outline when approvals are required for on-site processing. On-site storage is limited to two years, after which time a certificate of approval is necessary for continued storage.

MOE also said that a number of "housekeeping" amendments have been included that are unrelated to the LDR program. MOE says they correct section numbering, update references to other legislation or regulations and make corrections or clarification to minor items identified since the regulation was last revised.

The changes will be phased in according to the following schedule:

Phase-in Schedule	
Housekeeping amendments	August 10, 2005
Storage, mixing and on-site processing approval requirements	March 31, 2006
New generator registration requirements	January 1, 2007
Land disposal restrictions for inorganic wastes	August 31, 2007
Land disposal restrictions for organic and mixed wastes	December 31, 2009
Wastes treated to specified standard and removal of all underlying hazardous constituents	December 31, 2009

Implications of the Decision

The LDR program is the most significant reform of Ontario's waste management regulation in decades. In 2000 MOE adopted the U.S. *definition* of hazardous waste, resulting in an increase in the volume of wastes classified as hazardous. In the 2000/2001 annual report the ECO concluded that there was still an urgent need for Ontario to harmonize the *management* of hazardous waste in the two jurisdictions, by adopting the U.S. land disposal restrictions and universal treatment standards. This has now been accomplished.

MOE says that the regulation addresses the concern (raised by the ECO and stakeholders) that hazardous wastes were being imported to Ontario to avoid tougher U.S. requirements. The ministry also says that the regulation helps insure that Ontario is not viewed as a dumping ground and that hazardous waste movements between jurisdictions are based on sound business and environmental decisions.

The regulation lessens the risk of groundwater and other contamination. It provides more assurance that wastes will not harm the environment, by requiring treatment to physically or chemically change the waste to limit the potential for future impacts to soil, groundwater and air. The program should also provide incentive for industry to reduce the generation of hazardous waste.

According to the ministry, the program should reduce both the concentration and quantity of organic hazardous waste going to landfills, because pre-treatment by incineration reduces the volume of the waste. The volume of inorganic wastes sent to landfills is expected to increase however, since pre-treatment methods such as stabilization and immobilization require the addition of substances, increasing waste volumes. One negative impact anticipated from the additional incineration is an increase in the emissions of toxic contaminants and greenhouse gases to the atmosphere.

The regulation includes "cradle to grave" notification and reporting requirements for hazardous wastes requiring pre-treatment. This affects generators, treaters and processors, and receivers of the wastes. For the first time, hazardous waste disposed of at the same site where it was generated will require notification and reporting, but only if it requires pre-treatment. Because the regulation does not address hazardous waste disposed of in sewers, these wastes will still not be tracked.

MOE estimates that the regulation will affect approximately 3,200 generators of hazardous wastes. MOE estimated the new treatment costs would add anywhere from $150/tonne to over $1,000/tonne, depending on the waste type, quantity and type of treatment required. The ministry estimated this would cost generators approximately $30 – $50 million dollars per year, and that most of the impact would be felt by the six per cent of generators that produce 85 per cent of the waste. MOE included a "small quantity exemption" to reduce the impact on small generators. Industry commenters disputed MOE's estimates, stating that the impact would most likely be much greater.

Public Participation & *EBR* Process

MOE consulted the public on this program on and off for nearly four and a half years. A discussion document was posted on the Registry in 2001. The new government closed off the first proposal and announced its intent to move forward with the program in 2004. The ministry then posted an Information Notice on the Environmental Registry in July 2004 to sketch out the proposed program. These early stages of MOE's consultation were reviewed in the ECO annual report for 2004/2005.

In September 2004 MOE posted a proposal notice on the Environmental Registry to solicit comment on the proposed regulation. The 60-day comment period was subsequently extended to 94 days. Since earlier stages of public consultation were described in our last annual report, this review deals only with the ministry's decision on the regulation.

MOE received 50 submissions from a wide range of stakeholders, including industry associations, environmental groups, waste management companies, waste generators, individual citizens, consultants and governments. Members of both the U.S. House of Representatives and Senate provided comments.

Industrial stakeholders were generally opposed to the program because they said the benefits were not clear and there were financial and capacity issues that still needed to be addressed. Many questioned the environmental benefit, stating that Ontario landfills are well-engineered systems that rely on liners and leachate collection / treatment systems to capture and treat any contaminants that leach from the wastes. Many industrial stakeholders complained that they had raised the same concerns before, and that the ministry did not adequately incorporate or respond to the input from earlier consultations.

One company claimed that some pre-treatment technologies are ineffective. The company also suggested that allowing the disposal of treated wastes in non-hazardous landfills might actually pose a greater risk to the environment than the current approach of landfilling hazardous waste in well-engineered hazardous waste landfills. According to the company, the dubious environmental benefits do not justify the increased costs to generators. Based on their experience in the U.S., they believe that implementation of an LDR program in Ontario will strain the resources of the generator community, waste treaters, disposers as well as the ministry.

While members of the public and ENGOs welcomed the regulation of landfarms, several industries strongly opposed the proposal. Their position is that the landfarms are biological treatment facilities and should not be considered disposal. They also argued that incineration of their wastes would produce increased air emissions and add significantly to their treatment costs.

Despite opposition from affected industries, MOE decided to retain the requirement for the pre-treatment of hazardous wastes before they can be disposed of in a landfarm. MOE said it made this decision to be consistent with the U.S. EPA and to minimize emissions of smog causing and odourous chemicals to air and metal concentrations to soil. MOE extended the phase-in period to allow industry time to develop alternatives to landfarming. MOE said that a 1998 report on waste management in the petroleum-refining sector showed a year-to-year trend of waste reduction and many available alternatives to landfarming.

Industrial stakeholders pointed to the very detailed and specific procedures in the U.S. to allow for industry to apply for specific variances to the treatment standards, and to allow for extensions in implementation. Many industry commenters asked for specific variances, exclusions and exemptions to be included in the regulation. For example, the mining industry asked that rock fill and mine tailings be exempted from the requirement for treatment because they are exempt from the pre-treatment standards in the U.S. In response to comments about exemptions, variances and extensions, MOE said that the program would include these in future amendments to the regulation and through certificates of approval or written approvals on a case-by-case basis.

Environmental groups expressed strong support for the program overall, but raised a number of concerns, for example about the length of the phase-in period, and the exemptions for small quantity producers and household hazardous waste. A concern was also raised that the regulation does not address the disposal of hazardous wastes into sewer systems. They were also opposed to alternative treatment standards mandating particular technologies, i.e., incineration. They suggested that technology-specific standards are an outdated approach that could stifle the innovation of more effective technology, and proposed the standards be based only on contamination levels. Industrial stakeholders shared this concern as well, but they recommended a risk-based approach.

MOE's draft regulation included an alternate treatment standard for lab packs (packages of a number of various wastes managed as one load, for example wastes from laboratories). Many commenters opposed incineration as an alternate treatment standard for lab packs, and MOE decided to remove this alternate standard.

Many commenters raised concerns about the environmental risks associated with increased incineration and highlighted the need for more rigorous operating and emissions standards for facilities burning hazardous wastes. A number of submissions were received from concerned citizens in the area of the Clean Harbors Inc. facility, currently the only commercial hazardous waste landfill and the largest hazardous waste incinerator in the Province. The residents are concerned that the regulation will result in an increase in air emissions from the incinerator. One group stressed that, before adopting requirements mandating incineration, the province should adopt operating and emission standards for hazardous waste combustion facilities similar to those in place in the U.S. under the *Resource Conservation and Recovery Act* and *Clean Air Act.* MOE did not acknowledge these concerns in its decision notice.

MOE decided to extend the phase-in time for some aspects of the regulation in response to concerns from industry. Several commenters stated that the program should be implemented as soon as possible since there is sufficient treatment capacity in North America. However, industrial stakeholders argued that they needed more time for generators to assess their waste streams, determine the type of treatment required and for facilities to be approved and built. MOE had originally proposed that the standards for inorganic wastes would take effect one year and organic wastes two years after the filing of the regulation. The proposal notice for the draft regulation included a revised timeline of two and three years respectively and specifically requested input from stakeholders on the proposed phase-in schedule. MOE's final decision was two years for inorganic wastes and almost four and a half years for organic wastes. The ministry said that, while the capacity exists North America-wide, the extension would provide time for treatment facilities to be built in Ontario, and provide an opportunity for waste generators to develop ways to reduce waste and recycle.

Members of both the U.S. House and Senate asked Ontario to reconsider the alternate treatment standard for mercury, which allows mercury to be treated by microencapsulation and placed in landfills. The U.S. Senate included material from the Association of Lighting and Mercury Recyclers (ALMR). The ALMR said that the volume of mercury wastes shipped to Canada had increased ten-fold between 1995 and 2001, while the volume of all hazardous waste shipments had only tripled. While it approved of Ontario's initiative to match the U.S. treatment standards, the association raised concerns about the proposed "mercury debris" standard. They provided a 2003 U.S. EPA study that found that microencapsulation was an unreliable and unstable method for treating mercury waste. They also stated that leachate testing incorrectly classifies mercury-contaminated waste as non-hazardous, and pointed to several states that prohibit landfilling of any mercury-contaminated wastes.

MOE acknowledged the concerns from various U.S. agencies and associations about the microencapsulation treatment and inadequacy of the leachate test for mercury contamination. MOE retained the proposed alternative treatment standard for mercury debris in the regulation but said it would pursue this issue further with the U.S. EPA and stakeholders to determine whether specific changes should be made to the regulation in the future.

SEV

MOE stated that the proposed program supports its principles of environmental protection, and ecosystem approach and resource conservation. The program will protect land, air, water and living organisms. Generators may also implement pollution prevention initiatives to reduce waste generation.

Other Information

The Canadian federal government also passed new hazardous waste regulations in June 2005, which came into force on November 1, 2005. The Export and Import of Hazardous Waste and Hazardous Recyclable Material Regulations (SOR/2005-159) harmonize federal-provincial requirements and revise definitions (for example some hazardous wastes have been redefined as low risk recyclables to facilitate recycling).

The Canadian Council of Ministers of the Environment (CCME) announced Canada-wide Standards (CWS) for emissions of mercury from incineration systems in 2000 and of dioxins and furans in 2001. These CWS have been adopted by Ontario and are reflected in ministry guidelines finalized in August 2004. The Guideline for the Implementation of Canada-wide Standards for Emissions of Mercury and of Dioxins and Furans requires that existing facilities must meet the new mercury standards by 2003 and new dioxins and furans standards by the end of 2006.

ECO Comment

The ECO supports MOE's land disposal restrictions program. It should improve Ontario's reputation by finally matching the standards in place in the U.S. since 1984. It removes the incentive for U.S.-based waste generators to export wastes to landfill in Ontario for a lower cost than meeting U.S. requirements for treatment. It will also reduce the risk of soil and groundwater contamination and encourage waste reduction and recycling.

MOE provided a generous comment period on the proposed regulation and addressed some of the concerns expressed. The key components of the regulation remained unchanged however, despite industrial stakeholders' attempts to question the fundamental objectives, rationale and benefits of the program.

It is commendable that MOE consulted thoroughly on the proposed program, but the process took a very long time, from the first call for the reforms in 1998 to full implementation at the end of 2009. MOE originally denied the 1998 and 1999 *EBR* applications for review in which the Canadian Institute for Environmental Law and Policy recommended that Ontario adopt the U.S. land disposal restrictions. In response to the ECO's recommendations in 2001, the Minister of the day stated that Ontario would introduce land disposal restrictions by the end of December 2001. A discussion paper was issued but the program stalled until November 2003 when the new government reaffirmed its commitment to the initiative.

Many commenters raised concerns about the risks of increased incineration, and called for tougher emission standards for hazardous waste facilities. While MOE did not respond directly to these comments, other MOE initiatives have introduced more stringent standards for certain substances emitted by such facilities. By the end of 2006 all incinerators in Ontario must meet the Canada-wide standards for emissions of dioxins, furans and mercury. The phase-in of O. Reg. 419/05 (see page 89 of the ECO 2005/2006 annual report) will gradually tighten air standards for other contaminants of concern and require better emissions modeling and reporting by facilities. Existing hazardous waste incinerators are expected to comply with these new rules by 2013, and new facilities must comply now. The ECO will monitor the rollout of these new rules in future years.

The ECO encourages MOE to pursue a better treatment standard for mercury debris. MOE has done a good job of strengthening the land disposal rules and the ECO encourages MOE to now look more broadly at other pathways of hazardous waste entering the environment. For example, the ECO has commented in the past on the need to control hazardous wastes to sewers and looks forward to progress in this area.

Updating Ontario's Regulatory Framework for Local Air Quality

Decision Implemented: November 30, 2005

Title	Registry number	Comment period	# of comments received	Proposal posted	Decision posted
Air Dispersion Modelling Guideline for Ontario	PA04E0009	120 days	46	June 21, 2004	August 31, 2005
Guideline for the Implementation of Air Standards in Ontario	PA04E0010	120 days	40	June 21, 2004	August 31, 2005
Updating Ontario's Regulatory Framework for Local Air Quality	PA04E0011	120 days	48	June 21, 2004	August 31, 2005
Guideline for Emission Summary and Dispersion Modelling (ESDM) Reports	PA05E0009	30 days	36	April 5, 2005	August 29, 2005

Regulation to Revoke and Replace O. Reg 346 – General Air Pollution and Amendment to O. Reg. 681/94	RA05E0008	30 days	38	May 5, 2005	June 4, 2005

Description
In August 2005, the Ministry of the Environment (MOE) finalized significant reforms to its regulatory framework for industrial air emissions.

How the Province has Regulated Industrial Air Emissions
In the late 1960s, the Ontario government began to regulate facilities that discharge air pollutants. The approval has been in the form of a Certificate of Approval (C of A) issued under s. 9 of the Ontario *Environmental Protection Act (EPA)*. This requirement has applied to a very wide diversity of facilities – everything from fossil fuel-fired power plants, foundries and pulp mills to hospitals, dry cleaners and auto body shops. Exceptions apply to a range of small generators such as motor vehicles, agricultural sources and home heating.

Since the mid 1970s, facility owners have been required to comply with Regulation 346 (RRO 1990) under the *EPA*. This regulation makes it illegal for any person to cause or permit the concentration of a contaminant at a "point of impingement" to exceed the concentration listed in a chart in the regulation. The "point of impingement (POI)" can be described as the point at which a contaminant from a given source is predicted to come into contact with an off-site location or the nearest resident. Regulation 346 also prohibits the emission of any air contaminant that causes discomfort to persons or loss of enjoyment of normal use of property and also sets out opacity limits for stack emissions.

In summary, Regulation 346 requires facility owners to predict (for each contaminant) how diluted the emissions from their facility will be once they reach either an off-site location or the nearest resident, and to compare the modelled concentration against the list of POI standards in the regulation. The prediction is done by means of a mathematical model called an air dispersion model.

Weaknesses of the Old Rules
This regulatory framework for industrial air emissions has many weaknesses, acknowledged by MOE and the regulated community, and described in the 2004/2005 (and earlier) ECO annual reports. Chiefly, the framework has relied on outdated air standards (the POI list in Regulation 346) and on seriously outdated dispersion models that were poor assessments of how emissions behave in real life situations. Depending on conditions, these old models could under-predict concentrations of contaminants by two to 20 times, with the result that the environment was not always adequately protected.

Another weakness (highlighted by the Auditor General of Ontario in 2004) is that individual Cs of A have not been subject to automatic periodic reviews or updates. Where amendments to Cs of A have occurred, they have typically been triggered either by the facility owner, or by ministry inspections, or on occasion by persistent complaints from nearby residents. The result has been that some older facilities have not updated their Cs of A for a very long time, and have operated under very outdated requirements. A connected problem is that facilities have not needed to regularly update their modeling of facility emissions – in many cases, facilities have been able to rely on one-time modeling done when the facility was first approved.

Key Features of the New Rules

MOE has struggled since 1987 to update the regulatory framework for air pollution, and the ministry's new approach, which was finalized as O. Reg. 419/05 in the summer of 2005, features some marked improvements over the old regime. The three key improvements are:

- a move to "effects-based" air standards, some of which are up to 100 times more stringent than previous standards;
- more accurate dispersion models, that can more realistically assess the concentrations of contaminants under a range of conditions; and
- more detailed emission reporting, to demonstrate compliance.

Regulation 346 was revoked and replaced with O. Reg. 419. The old provisions will gradually be phased out, while the new, tougher regulatory approach will be phased in over a decade or more. It is expected that some facilities will not be able to achieve compliance within the phase-in period, due to economic or technological constraints. These facilities will have an option to apply for case-by-case regulatory relief; termed "site specific alternative standards". Readers should refer to MOE's guidelines for detailed rules, but the general approach is sketched out below.

New "Effects-based" Air Standards

MOE's new approach relies on "effects-based" air standards, which are developed by weighing only the health and environmental effects of the pollutant in question, without weighing economic or technical difficulties of reducing emissions. Instead, these latter considerations are shifted to a later "risk management" phase, which is carried out case-by-case, and only if individual facilities find they cannot meet the standards by the specified date.

In August 2005, MOE finalized air standards for 40 pollutants, and incorporated them into O. Reg. 419/05. Of the group of 40 finalized standards, 23 were made more stringent; nine were re-affirmed at their existing concentrations, one standard was made less stringent, and seven were new, for substances not previously regulated. Existing facilities will have to comply with these more stringent standards starting February 1, 2010, but the standards do apply immediately to *new* facilities in schedules 4 and 5 (see box). The full list of 40 standards can be found on MOE's website, but the following chart provides some examples of how standards have been changed through this initiative:

Substance	**Existing POI standard (1/2 hr. average, μ/m^3)**	**New POI standard (1/2 hr. average, μ/m^3)**	**Type of change**
Chlorine	300	30	10 times more stringent
Chloroform	300	3	100 times more stringent
Trichloroethylene (TCE)	3,500	36	Nearly 100 times more stringent
Acetonitrile	No standard	210	New
Methyl isocyanate	No standard	3	New
Dichlorobenzene, 1-4	285	285	Unchanged
Carbon tetrachloride	7.2	7.2	Unchanged

Schedule 4
Targeted Industrial Sectors for the year 2010
Metal Ore Mining
Fossil-Fuel Electric Power Generation
Petroleum Refineries
Basic Chemical Manufacturing
Resin, Synthetic Rubber and Artificial and Synthetic Fibres and Filaments Manufacturing
Iron and Steel Mills and Ferro-Alloy Manufacturing
Non-Ferrous Metal (except Aluminum) Smelting and Refining
Foundries

Schedule 5
Targeted Industrial Sectors for the year 2013
Pulp, Paper and Paperboard Mills
Other Petroleum and Coal Products Manufacturing
Chemical Manufacturing
Urethane and Other Foam Product (except Polystyrene) Manufacturing
Other Non-Metallic Mineral Product Manufacturing
Primary Metal Manufacturing
Fabricated Metal Product Manufacturing
Transportation Equipment Manufacturing
Waste Treatment and Disposal

New Dispersion Models
Dispersion models are used to assess how a contaminant is diluted as it moves through the atmosphere. Under O. Reg. 419/05, MOE will phase out a set of outdated dispersion models, and replace them with more accurate and more sophisticated dispersion models developed by the U.S. Environmental Protection Agency. Facilities must use the dispersion models to predict contaminant concentrations at "points of impingement" anywhere beyond their own property lines. They must also predict concentrations at locations beyond their own property, if those locations include facilities for childcare, health care, education or senior citizens. The phase-in is on a staggered schedule, gradually capturing the existing facilities of most industrial sectors between the years 2010 and 2020. Until 2010, most existing or modified facilities (with some case-by-case exceptions) can continue to use the old dispersion models and old air standards. After February 1, 2010, facilities in Schedule 4 will have to use the new models and updated standards. After February 1, 2013, facilities in Schedule 5 will also be caught by the new requirements. However, new facilities in either Schedule 4 or 5 will have to use the new models after November 30, 2005. By February 2020, all existing facilities, including small and medium-sized businesses, will have to use the new models.

Emission Summaries will be Required More Widely
Since 1998, MOE has required facilities to prepare Emission Summary and Dispersion Modelling (ESDM) reports when applying for Cs of A under s. 9 of the *Environmental Protection Act* (air). Since 1997/98, the ministry has also been picking a handful of existing facilities (about 30 per year) and has required them to prepare ESDM reports, to demonstrate compliance with air pollution rules. MOE calls this auditing program "Selected Targets for Air Compliance" or STAC, and has dedicated about five of its engineers province-wide to review the ESDM reports.

Under the new regulatory framework, the requirement to prepare an ESDM report will gradually be broadened to apply to more types of existing facilities, and the rules on how to prepare an ESDM report have become more detailed and more prescriptive. The ministry's July 2005 guidance document on how to prepare an ESDM report runs to over 100 pages, and is titled "Procedure for Preparing an Emissions Summary and Dispersion Modelling Report, Version 2". Facilities affected by this requirement can begin by using conservative emission assumptions that are certain to be higher than actual emission rates. But if the resulting estimated POI concentrations exceed air standards, then the facility must refine the modelling exercise with more accurate data. If the more accurate data inputs still predict exceedences, then the facility must notify the ministry and submit an abatement plan. Most facilities will likely need to hire specialized consultants to prepare their ESDM reports. The ESDM report has to be kept on site, and must be made available to a provincial officer upon request. The executive summary (but not the body of the report) must be available to the public, either through the Internet or on site during regular business hours.

The minimum requirements for an ESDM report include: an executive summary (with an emissions summary table); a description of the facility; a listing of air pollution sources and contaminants and an assessment of their significance; a description of the facility operating conditions; a set of emission estimates, together with a description of the data quality; and a description of the dispersion modelling process including the type of meteorological and terrain data employed. Every contaminant emitted from a facility must be included in the ESDM report, even contaminants without published POI limits under O. Reg.419/05.

New facilities in Schedules 4 and 5 that are built after November 30, 2005, must now prepare ESDM reports and update them annually. Schedule 4 existing facilities will have to comply with this requirement by 2010, and Schedule 5 existing facilities will need to comply by 2013. However, other facilities (most small to medium-sized enterprises) will not be required to maintain an ESDM report onsite, unless directed to by MOE.

How the Regulatory Relief Option Works

MOE has invested a great deal of planning and consultation effort in the design of a regulatory relief process. MOE anticipates that only a small percentage of facilities will need to request regulatory relief, especially since the ministry has delayed the phase-in of the new tougher rules by several years, compared to earlier proposals. The regulatory relief process is set out in O.Reg. 419/05, and in the Guideline for the Implementation of Air Standards in Ontario (GIASO). This process is available if a facility owner discovers, after applying the new ESDM procedures, new dispersion models and new air standards to existing emissions, that the facility will be out of compliance with the new rules for one or more contaminants. In such a case, as long as the exceedances are not greater than a defined "upper risk threshold", the facility can apply for an "alternative standard." The alternative standard is in effect an interim, site-specific standard, based on the expectation that the facility is working on "continuous improvement towards achieving the effects-based standard over time." For each affected industry sector, MOE has set a specified window of time (e.g., 21 months) during which facilities may apply for "alternative standards". In other words, facilities have to plan ahead, and evaluate whether their emissions will be in compliance, well ahead of the regulatory deadlines.

Under O. Reg. 419/05, MOE has set out detailed and prescriptive requirements for applying for an alternative standard, to prevent this option from being perceived as an "easy out". The key requirements are a completed ESDM Report, an assessment of feasible technologies and economic feasibility, a summary of pre-submission consultations with affected local stakeholders, and an action plan to implement and monitor progress. MOE has agreed to consider facilities sharing some aspects of this work, on a sector-wide basis, including components of technology benchmarking, or stakeholder consultation.

Facilities applying for alternative standards must demonstrate that concentrations of contaminants are likely to be below the Upper Risk Thresholds beyond the property line or at on-site child care, health care or similar facilities. Unless this is demonstrated, the Director cannot approve the application for an alternative standard. O.Reg. 419/05 also sets out the triggers for determining Upper Risk Thresholds; for example, a cancer risk of one in 10,000 for carcinogens. A Director will also consider how frequently the standard is predicted to be exceeded when deciding whether to approve an alternative standard.

What Emissions Require "Timely Action"?
Regardless of the five-to-fifteen-year phase-in provisions of these rules, there are some circumstances where MOE may require facilities to take "timely action". For example, if an exceedance of an Upper Risk Threshold is suspected through either monitoring or modelling, then MOE must be immediately notified in writing. Further requirements are also triggered, including the preparation of an ESDM report within three months. Depending on the contents of the ESDM report, including the magnitude and frequency of any exceedances, MOE may expect facilities to take "timely action" to reduce concentrations to below the Upper Risk Threshold. MOE may issue orders under the *EPA* under such circumstances. This approach is softer than MOE's earlier proposals, which had envisaged that facilities exceeding Upper Risk Thresholds would have to submit an action plan "forthwith", and might have to cut back production.

Powers that MOE can use Case-by-Case in the Interim
MOE has some discretion to speed up, on a case-by-case basis, the application of new models, new air standards and ESDM reporting requirements to individual facilities. For example, an MOE Director may give notice to a facility that an ESDM report must be prepared if there are reasonable grounds to believe that an exceedence or an adverse effect is occurring, or that an ESDM report has never accounted for aggregate emissions. After February 1, 2010, MOE can issue orders requiring existing facilities to use the new dispersion models and apply the new air standards.

Implications of the Decision
Expected Benefits
As a result of this regulatory overhaul, we can expect that over the next five to fifteen years, Ontario's major stationary air pollution sources will need to compile more accurate summaries of their emissions and demonstrate that they can meet tougher emission limits for a number of air contaminants. Where facilities find that they cannot comply with the new emission limits, they will have to use pollution prevention approaches, install pollution controls or let their neighbours know that they plan to apply for an alternative standard. Through O.Reg 419/05, MOE has been able to achieve some of the reforms that were originally proposed under the 1987 Clean Air Program: such as the introduction of updated dispersion modelling; the orderly phasing in of tighter standards for existing facilities; and public participation in standard setting and certificate of approval processes. Overall, Ontarians can expect to see individual facilities gradually improve their emissions, as the new rules begin to apply to them between 2010 and 2020. Some facilities might shut down rather than be upgraded.

MOE may also be able to speed up its program to update air standards over the coming years, which would translate over time into stronger controls on toxic air emissions. Under a previous (February 2000) plan, the ministry had intended to evaluate technical and economic feasibility as part of setting each new province-wide air standard. This would have required complex consultations and negotiations with numerous industry sectors for each air pollutant. The ECO had cautioned in 1999/2000 that public consultation under such an approach would be complicated and murky, and that the public should not be left out of the loop. To its credit, the ministry reconsidered its plan, and is developing "effects-based standards" instead. This allows stringent air standards to be developed more quickly and transparently. As a compromise, MOE has decided to give facilities a longer phase-in time to comply with the more stringent standards, and has also provided an escape option; the ability to apply for an alternative standard.

Some Key Air Standards Still Missing

As of November 2005, MOE had not yet finalized air standards for a number of contaminants that the ministry calls "Group 1 - high priority candidates", based in part on toxicities and quantities emitted. These substances include: nickel, chromium, cadmium, arsenic, benzene, copper, vanadium, zinc, mercury, dioxins and furans, among others. The ministry had originally planned to complete standards for these substances by 1996/1997. Technical background documents released by MOE in 2004 underscore the need to give these substances prompt attention.

Nickel is an illustrative case in point. Over 300 tonnes of nickel were emitted into Ontario air in the year 2000, with contributions from 146 facilities. Several nickel compounds are known to give rise to respiratory cancers. Ontario's existing air standard for nickel, which is based on damage to vegetation, dates back to 1974, and is acknowledged to be out of date. In fact, Ontario's existing half-hour POI limit for nickel is two to three orders of magnitude higher than the range of limits suggested by MOE's 2004 technical background document. The ECO encourages MOE to finalize a new effects-based standard for nickel and for other Group 1 substances as a high priority, and to update its public schedule for completing this work. MOE has indicated to the ECO that the ministry hopes to finalize a standard for cadmium perhaps by early 2007, and that standards for nickel and chromium may follow in 2007. A standard for arsenic will require multi-media considerations, and may take longer.

Improvements will be Slow in Coming

In response to concerns from industry that the proposed phase-in periods were too short, MOE extended the introduction of some revised air standards from three to five years. The deadline to apply for an alternative standard was also extended. Under the new regulatory framework, only selected existing facilities that are discovered to exceed Upper Risk Thresholds will be required to take "timely action" before 2010. Many industrial sectors (in practice representing most small to medium-sized facilities) will

not need to use the newer, more accurate dispersion models until 2020. Beyond the regulated phase-in dates, facilities that are issued an alternative standard can continue to emit elevated levels of certain pollutants for at least another five years, and possibly for as much as a decade or more in extenuating circumstances. In such cases, local residents will at least be made aware of the emissions, and will have a chance to comment, which is an improvement over current MOE practices.

Aside from the gradual phase-in of the new rules, there is another reason to expect slow progress. The ministry's STAC program has revealed that many facilities are not meeting even the existing, more lenient air standards or guidelines, even when the outdated dispersion models are used. Over the period 1998 - 2004, the STAC program has found that almost 50 per cent of the audited facilities were not complying with the existing POI standards of Regulation 346 – in other words, they were exceeding air standards (including health-based air standards), based on desk-top reviews of the facilities' own emission estimates. The STAC program audits only a tiny percentage of Ontario's air emission sources, and focuses on the largest facilities, but it does suggest that non-compliance with existing limits is widespread. Moreover, the ministry's efforts to bring such facilities into compliance are often slow, with some facilities being given many years to bring their contaminant emissions into line. The Auditor General of Ontario raised concerns about these excessively long time frames in his 2004 Annual Report.

Regulatory Capacity at MOE

Over the long-term, the success of this regulatory reform will depend on a significant strengthening of MOE's inspection, compliance and enforcement capacity. The ministry's current resources allow inspections of only about 1-2 per cent of facilities with any kind (air, waste, water, etc) of environmental approvals per year, and some facilities have never had an inspector on-site. Moreover, it is estimated that up to 40 per cent of facilities may be operating without required permits. To ensure that targeted sectors comply with the phase-in schedules and have their ESDM reports completed and available for on-site review, the ministry will have to beef up its inspection levels considerably. This is important not only to achieve the intended environmental benefits, but also to provide a level playing field for law-abiding facilities.

MOE's capacity to process approvals may also be challenged by this initiative, once submissions begin for alternative standards. Although MOE has no formal predictions, some estimates suggest that about 100 such applications might be received per year. They are likely to be of a complex nature, and will each require careful review. But the ministry already receives about 8,000 applications for Cs of A of all types each year, and the backlog is growing by about 1,000/year. Industry stakeholders have long-standing concerns about the delays in processing of such approvals. By the ministry's own estimates, average turn-around time is 3.5 months, with some complex approvals taking as much as 1.5 years. However, the Auditor General of Ontario noted in 2004 that the average air approval took eight months, and could be up to two years. It appears that MOE is not planning to request or deploy new staff resources to implement these regulatory changes, but rather is planning to re-align some existing resources.

Another point of caution is that the ministry is working to streamline its approvals processes at the same time as it is phasing in the new air emissions regulation. For example in the past, a separate C of A has typically been required for each piece of equipment with air emissions. But the ministry has in recent years been encouraging a shift to facility-wide Cs of A that cover all emission points, equipment and processes. Other changes, still on the drawing board, contemplate a shift to third-party certification and inspection of lower risk facilities, or sector-based regulatory approaches for small and medium-sized facilities. The ministry will need to explain to the public how these changes will dove-tail with O. Reg. 419/05, and what the implications will be for the environment and for public consultation and leave to appeal rights under the *EBR*. The ministry has assured the ECO that regardless of the final structure of the approvals modernization framework, the public will continue to be consulted via the Environmental Registry, including posting all environmentally significant Cs of A.

Features Missing from the New Framework

There are a number of important things the new regulatory framework does not do. The continued reliance on a POI approach means that while the ministry has some control over short-term *concentrations* of contaminants (measured over minutes or hours), the ministry is not directly controlling annual *loadings* of contaminants. For some types of persistent contaminants that accumulate in the environment, such as lead or mercury or certain organic toxic substances, the annual load to the environment is a parameter with a great deal of significance. Nor does the new framework address the impacts that mixes of various contaminants may have on environment or health. It also does not offer a strong remedy for local "hot spots"; industrial airsheds with significant background concentrations of pollutants from multiple facilities. MOE acknowledges that more work is required in these areas, stating: "The regulation does not explicitly deal with background concentrations, cumulative or synergistic effects, persistence and bioaccumulation of contaminants. Future policy direction on this issue is recommended. However, a section has been added to the regulation that clarifies the existing director's authority to require more stringent standards where warranted." Regulation 419 does provide the ministry with some options (under s. 3 and s. 4) to manage local hot spots by deeming adjacent properties to be single properties for the purposes of preparing ESDM reports, but it is premature to judge how this option will be applied or whether it will work.

With regard to controlling cumulative loadings of persistent toxic substances over time, a number of commenters, including Environment Canada, have noted that MOE will never be able to assess or control cumulative loadings effectively until the point of impingement approach is replaced. Performance standards for specific sectors or specific facilities may provide a way forward on this issue. For example, MOE already applies sector-specific emission control requirements to municipal waste incinerators, through Guideline A-7. Facilities caught under this guideline must meet emission limits measured at the stack (not at the property line) for a number of persistent toxic substances as cadmium, lead and mercury. Guideline A-7 also requires that stack emissions be tested annually. With good data on stack concentrations, annual loadings for such contaminants can be calculated.

MOE's June 2004 proposed regulatory framework had intended to address odour impacts, but the ministry heard many concerns from industry that this approach was too stringent, and as a consequence decided not to include any odour-based air standards or 10-minute odour averages in the new rules. Instead, the ministry proposed to develop an Odour Policy Framework, with a proposal notice on the Registry (PA05E0007) in April 2005. As of February 7, 2006 this notice remains at the proposal stage.

Public Consultation Implications

MOE's chosen approach strengthens transparency and public consultation opportunities in several ways; the public can comment on the development of new province-wide air standards, with the support of detailed background technical information. Members of the public will also be able to access the executive summaries of ESDM reports for all facilities required to prepare them. And in cases where facilities are requesting alternative standards, there will have to be up-front consultation (including a meeting) with local residents. A major caveat however, is that these consultation opportunities will require significant additional expertise and response capacity from local residents, environmental groups and local public health units, none of whom are funded to carry out such complex, reactive reviews. The option of hiring expertise to interpret the highly technical information is largely out of the question for such groups. Several commenters urged that health-based organizations and environmental groups be provided with resources or intervenor funding to allow them to participate effectively as these regulatory changes are rolled out in coming years. The ministry responded that it lacked the means to provide such funding.

Effectiveness Monitoring Not Planned
A regulatory change of this scope is clearly expected to improve overall air emissions in the long-term. Indeed, when the changes were finalized in August of 2005, the Minister of the Environment commented that "These changes will mean cleaner, healthier air, healthier communities and healthier Ontarians all across the province." However, MOE has not indicated that it has any plans to track, aggregate, quantify or even estimate the reduced loadings of toxic contaminants that are the hoped-for outcome. Nor has the ministry signalled any intention to carry out periodic audits and publish progress reports on the percentage of facilities in compliance with the new regulations, despite a recommendation to that effect from a coalition of environmental groups. MOE staff have indicated that the ministry may publish a summary of all facilities that have received an alternative standard.

Public Participation & *EBR* Process
MOE carried out exemplary public consultation over the multi-year course of this regulatory overhaul, soliciting comments on detailed discussion documents through numerous public information sessions, through the Registry, and through focussed meetings with key stakeholders. The ministry first sketched out its new approach for setting air standards and updating the dispersion models in March of 2001, with two Registry proposals (PA01E0002 and PA01E0003) that both provided very generous comment periods. Public feedback must have been considerable, since the ministry then mulled over the issues internally for another three years before issuing a second large package of inter-connected policy proposals in June 2004, again with generous (120 days) comment periods. Day-long, well-attended technical information sessions were co-hosted by the ministry in September 2004, and April 2005, allowing for questions and discussion. Finally, in spring 2005, the ministry offered short (30 days) Registry comment windows for the ESDM guideline and the overarching draft regulation that would encapsulate and formalize all the changes.

Pilot Project Helped with Design Details
MOE's internal ruminations from 2001 - 2004 were supported by a pilot project involving five large industrial facilities, the Ministry of Health and Long-Term Care, public health groups, and one environmental organization. Participants included Ford (Windsor), Cameco (Port Hope), Dofasco and Stelco (Hamilton), Imperial Oil (Sarnia) and Pollution Probe. The group met regularly over one year, and used data from the individual facilities to test how the new rules might apply. Among other things, the group developed a risk scoring system to allow comparisons of contaminants relative to each other, based on risk. A key challenge was finding a way to compare and rank the risks of carcinogens with non-carcinogens. The pilot project evidently helped the ministry resolve a number of policy and logistical questions, and some commenters have since asked that the results of the pilot project be made public.

Stakeholder Comments and Ministry Responses
The ministry received 40 or more written comments responding to each of the three policy proposals released in June 2004. Industries, other levels of government and environmental and public health organizations submitted the bulk of comments, although some individuals also contributed. Comments showed that MOE's overall approach was well understood, despite its complexity, and was broadly supported by both industry and environmental groups. Commenters raised many thoughtful concerns, addressing both overarching policy matters and technical details.

The ministry's decision notices provided useful, succinct summaries. Some of the changes that MOE made (or decided against making) in response to comments have been mentioned above. Notably, MOE decided to provide additional years to the phase-in periods; to double certain notice periods from 15 to 30 days, and to rethink odour management in response to industry concerns. MOE also agreed to ease isocyanate standards, and to soften its abatement approach for facilities emitting contaminants suspected to be above an upper risk threshold. MOE decided not to incorporate direct controls for background

concentrations of contaminants, or persistent or bioaccumulative contaminants, and also decided against providing intervenor funding to public health units. MOE also decided against tightening the upper risk threshold for carcinogens. The ministry did commit to developing a protocol between MOE and public health units to allow information sharing.

The following summary of stakeholder comments is illustrative and not exhaustive.

Comments on the Guideline for the Implementation of Air Standards in Ontario
Most industry stakeholders as well as environmental organizations supported the establishment of air standards based solely on health and environmental effects. Only one industry association argued for consideration of economic and social aspects at the standard-setting stage. Industry commenters generally advocated longer phase-in schedules, while Environment Canada and environmental organizations wanted to shorten the proposed 10-year review cycle on facility-specific interim standards. Environment Canada and environmental organizations took issue with MOE's plan to allow facilities with alternative standards to exceed carcinogen standards by up to two orders of magnitude, since this would result in a cancer risk of one in 10,000, instead of a cancer risk of one in a million, as recommended by the US E.P.A. But MOE decided to retain the allowable threshold of one in 10,000 for cancer risk. MOE also planned to allow exceedences of the upper risk threshold up to 16 per cent of the time. Although several commenters argued that this approach was too lenient, MOE decided to use its discretion on a case by case basis, and consider the magnitude and frequency of the exceedence.

Several commenters raised concerns about MOE's staff capacity to deal in a timely way with facilities applying for interim standards, or to properly monitor the progress of such facilities over time. It was also pointed out that the new facility-specific public consultations would tax the capacities of local public health agencies, Medical Officers of Health and environmental organizations.

Comments on Updating Ontario's Regulatory Framework for Local Air Quality
Again, most commenters were supportive of the ministry's general policy direction. Environment Canada and environmental organizations recognized the value in updating the models and the standards, but voiced a need to replace the point of impingement approach altogether in the long-term, since it is hard to reconcile with some major policy concerns, such as controlling bioaccumulative toxic compounds. They also noted that it was inappropriate to assume safe threshold levels for certain pollutants. Some recommended that the reliance on modelling be reinforced by actual emissions monitoring, and that tighter point of impingement standards be set for facilities in stressed air sheds.

Comments on the Air Dispersion Modelling Guideline
Public comments showed broad support for phasing in new air dispersion models. Industry stakeholders stressed the need for a well-designed user guidance manual, given the technical complexity of the undertaking. On the issue of dealing with local air pollution hot spots, MOE had proposed that facilities would on occasion be asked to consider ambient monitoring information in their modelling exercises. Some environmental groups requested that MOE clarify under what circumstances this would occur. Environment Canada supported the consideration of cumulative contributions of other sources in the airshed, and noted that this approach was recommended by the U.S. EPA.

Comments on the Guideline for ESDM reports
The ministry received 36 comments on this guidance document, even though the comment period was only 30 days long. Commenters noted that the complexity of the guideline adds new burdens to industry, for example by requiring that all sources and all contaminants be considered. Commenters also argued that the procedure should allow for some flexibility and use of professional judgement. Some cautioned that the capacity of the air quality consulting industry could be overtaxed as facilities across Ontario scramble to meet the new regulatory deadlines. Several commenters worried that approvals would be

further slowed down, since MOE approvals staff would have to review increasingly complex ESDM reports.

Consultation on Individual Air Standards
While the ECO has not carried out individual reviews of MOE's August 2005, decisions on 40 air standards, some observations of a general nature can be made. The ministry is to be commended for: carrying out a separate public consultation process for each standard through the Environmental Registry; for linking Registry notices to very detailed contextual information on each substance; and for setting a generous 120-day public comment period. However, since the same comment period ran concurrently for a set of 29 air pollutant standards, stakeholders wanting to comment on multiple standards had to review large volumes of highly technical background information, and some found themselves overwhelmed. Posting such proposals on a staggered timetable would help alleviate this problem in future. The proposed standards for 12 air pollutants elicited a handful (one - eight) of comments each. The proposed standards for a further seven air pollutants elicited no comments, perhaps because stakeholders were under time pressure.

Some commenters argued that standards for certain substances were being set at overly stringent, conservative levels. In response, MOE confirmed its intention to use effects-based standards, and to allow for (with few exceptions) an incremental risk of one in a million for carcinogens. MOE noted that such risk levels are within the range recommended by the U.S. Environmental Protection Agency for carcinogens.

Some commenters warned that "huge implementation issues" would result if standards for certain substances (e.g., trichloroethylene) were finalized as proposed, and that facilities would not be able to meet the deadlines. MOE responded that the phase-in period for some air standards would be extended from three to five years; that implementation would be staged by targeting higher risk sectors first, and that small and medium-sized businesses would not need to use the new dispersion models until 2020.

One procedural flaw is that the nature of public feedback to the initial proposals in 2001 remains unknown, since no decision notices have ever been posted by MOE.

SEV
MOE stated that the new air standards and risk management framework would protect the environment and conserve resources, and that the ministry would apply the precautionary principle in cases of uncertainty about adequate margins of safety. Thus the ministry implied that the policy direction was consistent with its SEV.

MOE used one common SEV consideration document to apply to several policies: PA04E0009, PA04E0010, PA04E0011 as well as individual air standards.

ECO Comment
With the regulatory decisions finalized in August 2005, MOE has embarked on an ambitious overhaul of its approach to control industrial air emissions. There was consensus that the old system needed reform. The groundwork for this overhaul has taken many years to prepare, and has benefited from strong public consultation and careful listening on the part of the ministry. The new framework is built on some laudable principles, especially the intention to base air standards on environment and health effects, rather than socio-economic factors. As a result, MOE should be able to tighten up more air standards, with more speed. The new framework is also strengthened by transparency features, such as the ability of the public to access the executive summaries of ESDM reports, and the requirement to consult neighbours when facilities seek regulatory relief.

It would be premature, though, to pronounce this reform to be a success, since the roll out is only just beginning. Many observers worry, justifiably, about the capacity of the ministry to manage the numerous complexities of the implementation phase. MOE's track record on nudging problematic air emission sources into compliance has been weak under the old rules, even though the ministry audited only a tiny number of facilities per year. Under the new regulatory framework, thousands of facilities across many industry sectors are expected to examine their own emissions profile and work towards reductions, supposedly under the watchful eye of the ministry. To provide a fair and level playing field (and of course, to harvest the intended environmental gains) MOE will need to demonstrate a strong presence in approvals, inspections, abatement and enforcement operations. So far, MOE has not provided any indications that its capacity will be increased in these areas.

Above all, the ministry needs to move swiftly on updating its air standards, since they are key triggers to improve emissions. MOE had planned to set tougher standards ten years ago for a special group of "high priority" contaminants, but this remains a work in progress. MOE should get back on track by publishing a revised list and schedule for substances needing new standards.

Local public health agencies and public interest groups have noted that they will also find it challenging to engage in the expected level of site-specific public consultations on highly technical matters. MOE says it is working on a protocol to notify public health units of exceedances of air standards, but it is doubtful whether many of these public health units have the capacity to respond. The ministry should find ways for such agencies and groups to access technical expertise, and should consider the option of participant funding.

MOE has acknowledged that O.Reg. 419/05 does not adequately address background concentrations, cumulative or synergistic effects, nor does it address persistent or bioaccumulative contaminants. These are thorny policy issues as well as complex science challenges, but they cannot be ignored if the ministry's goal is truly as stated, "cleaner, healthier air, healthier communities and healthier Ontarians." Among other things, it may be helpful for the ministry to look back to some of the air policy reforms that were proposed in the late 1980s under the Clean Air Program. Those proposals included an emphasis on "bottom of the stack" controls and contaminant ranking methods to consider characteristics such as persistence, bioaccumulation and transportability. The ministry should also consider the advice of Environment Canada, which urged it to develop more sector or facility specific performance standards, to set emission limits on sources, and to factor in background concentrations in modelling.

Finally, to assess the effectiveness of its regulatory reforms over time, MOE should come up with measurable parameters to track trends and quantify changes in loadings and ecosystem accumulation of air-borne toxic contaminants. The ministry should also be able to issue periodic progress reports on the implementation of O. Reg. 419 and related changes, including the extent of compliance with the new regulatory structure.

Review of Posted Decision:
Industry Emissions – Nitrogen Oxides and Sulphur Dioxide
(O. Reg. 194/05)

Decision Information:
Emission Reductions from Ontario's Industrial Sources
Registry Number: PA0E0026 Comment Period: 90 days
Proposal Posted: October 24, 2001 Number of Comments: n/a
Decision Posted: No decision posted

Discussion Paper on Ontario's Clean Air Plan for Industry: Developing NO_x and SO_2 Emission Limits
Registry Number: PA02E0031 Comment Period: 60 days
Proposal Posted: December 20, 2002 Number of Comments: 50
Decision Posted: No decision posted but revised proposal posted – see below

Ontario's Industry Emissions Reduction Plan: Proposal for a Nitrogen Oxides (NO_x) and Sulphur Dioxide (SO_2) Regulation
Registry Number: PA02E0031 Comment Period: 60 days
Proposal Posted: June 21, 2004 Number of Comments: 31
Decision Posted: February 11, 2005

Industry Emissions – Nitrogen Oxides and Sulphur Dioxide
Registry Number: RA05E0002 Comment Period: 30 days
Proposal Posted: February 10, 2005 Number of Comments: 20
Decision Posted: July 30, 2005

Description
Ontario's industrial sector is the source of an estimated 17 per cent of the province's nitrogen oxides (NO_x) emissions and 65 per cent of the province's sulphur dioxide (SO_2) emissions to air. The province's non-ferrous smelting sector alone accounts for an estimated 41 per cent of Ontario's SO_2 emissions to air. NO_x are smog precursors that contribute to the formation of ground level ozone. Both NO_x and SO_2 serve as precursor gases that contribute to the formation of particulate matter. Ground level ozone and particulate matter have a host of human health impacts ranging from respiratory complications to cardiac disease. In addition, NO_x is a greenhouse gas and both NO_x and SO_2 contribute to the formation of acid rain.

In 2001, MOE launched an initiative aimed at curbing NO_x and SO_2 emissions from Ontario's industrial sector in an effort to ensure that industry would make a fair contribution to the province's commitment to reduce NO_x emissions by 45 per cent and SO_2 emissions by 50 per cent by the year 2015. This original October 2001 initiative also included proposals to reduce the allowable levels of sulphur in fuel oil and coal and to accelerate the implementation of codes of practice for reducing volatile organic compounds from industrial sources in the province.

This effort led to MOE's release of a 2002 discussion paper exploring the establishment of NO_x and SO_2 emission limits (caps) and the possibility of complying with these limits via emissions trading. In June of 2004, 'Ontario's Industry Emissions Reduction Plan: Proposal for a Nitrogen Oxides (NO_x) and Sulphur Dioxide (SO_2) Regulation' was released for public comment.

By May of 2005, the proposed regulation was finalized. Ontario Regulation 194/05 (Industry Emissions – Nitrogen Oxides and Sulphur Dioxide), passed under the *Environmental Protection Act* (*EPA*), sets limits on the total amounts of NO_x and SO_2 that can be emitted from the following major industrial sectors: petroleum, iron and steel, pulp and paper, flat glass, cement, carbon black, and non-ferrous smelting. The regulation establishes a set of sector-specific caps that decrease, by varying amounts, in phases over the period from 2006 to 2015 and beyond (see Table 1 - Summary Chart). In the case of SO_2 emissions from the iron and steel sector, the caps actually increase over time. The regulation also establishes rules to guide the participation of these capped industrial sectors in the province's emissions trading system.

Through the implementation phases set out in this regulation, MOE states that NO_x emission caps will be ratcheted down to 21 per cent below 1990 levels and SO_2 emission caps to 46 per cent below 1994 levels for these industrial sectors over the 2006 – 2015+ phase-in period.

The regulation also establishes a budget of 'new source set aside' (NSSA) allowances in order to accommodate expanding or new facilities while limiting their contributions to NO_x and/or SO_2 emissions. The budget of NSSA allowances increases slightly over time as shown in Table 1. The potential also exists for the NSSA budget to increase further because existing capped facilities that either sustain a decrease in production or close down completely will see their allowances transferred, after five consecutive years of reduced or no production, to the NSSA budget for acquisition by new or expanding facilities.

Background - How the System Works:
Impact of Effective Emissions Trading Systems
Emission trading systems utilize market forces with the aim of realizing the most cost-effective approaches to pollution reduction. A well-designed trading system should encourage capped facilities able to reduce emissions at a reasonable cost to do so, thereby enabling them to sell off any extra emissions allowances to capped emitters whose pollution control costs surpass the cost of purchasing allowances.

Over time, the system should reach a point where, as the numbers of allowances become more scarce with the ratcheting down of emissions caps, the cost of allowances increases to a level where it becomes more economical for *all capped emitters* to reduce emissions rather than purchase credits. At this point, increased allowance costs can also force the closure of any remaining outdated, polluting facilities.

Evolution of Ontario's Emissions Trading System
The NO_x/SO_2 emissions reduction trading system for industry is an extension of the trading system already in place for Ontario's electricity sector. The ECO reviewed O. Reg. 397/01 (Emissions Trading), the regulation establishing NO_x/SO_2 caps and an emissions reduction trading system for the electricity sector, in our 2001/2002 annual report. An Ontario Emissions Trading Code was developed for this system and subsequently modified to govern the expanded electricity and industry trading system (see www.ene.gov.on.ca/programs/5295e.pdf). An on-line emissions trading registry is described as providing a transparent mechanism whereby owners and traders can trade, track, and document their transactions. The registry also facilitates public comment on applications for emissions reduction credits.

Ontario's Hybrid System for Emissions Trading
Ontario's emissions reduction trading system is a hybrid system, combining a *cap and allowance* and a *baseline and credit* approach to trading. The cap and allowance approach establishes emission caps for all capped emitters, requiring that capped emitters either take action to reduce their own emissions in order to stay within their cap or purchase allowances from capped emitters who have reduced their own emissions and, subsequently, have excess allowances available for sale. Capped emitters can also bank excess allowances for future use. A baseline and credit system allows uncapped emitters who voluntarily reduce their emissions beyond what they are obligated to do to receive emission reduction credits (ERCs) for these efforts. These ERCs can be sold to capped emitters who may use them, in combination with allowances, to meet emission caps.

The province's hybrid system allows capped electricity and industrial sector emitters to purchase excess allowances from other capped emitters *or* to purchase ERCs from non-capped emitters in order to balance emission levels with allowances. However, the system does not allow capped emitters to exceed their emissions cap by more than 33 per cent for NO_x and 10 per cent for SO_2 through the purchase of ERCs. A 10 per cent environmental discount is applied to ERCs when utilized ('cashed in') by a capped player to meet its cap requirements under the regulation. Finally, non-capped emitters may only generate ERCs from an emissions reduction initiative for a seven-year period from the time of implementation.

Methods for Allowance Allocation to Industry Sectors
The regulation establishes a mix of both fixed and intensity-based allocations of emission allowances. Fixed allocations set out an allowable annual quantity of NO_x or SO_2 that a facility can emit in a given year while an intensity-based allocation establishes an allowable level of emissions per tonne of product generated. With intensity-based limits, individual facilities must submit production estimates to MOE prior to the start of the trading year and, based on this information, the facility is given what is essentially a fixed allocation for that year. Regardless of the method of allocation, there is a fixed cap set out in the regulation for each industrial sector.

Capped emitters subject to an intensity-based allowance allocation are also subject to a clawback provision in the regulation that is applied if the annual fixed cap for that sector is exceeded. A clawback involves reducing the intensity-based allocations of *all* facilities within that sector to ensure the cap is not exceeded in future years, even if not all capped emitters were responsible for the sector cap being exceeded. All of the industrial emitters subject to the new regulation receive intensity-based allowance allocations, except the petroleum sector, which is subject to a fixed annual allocation of both NO_x and SO_2.

Monitoring of Emissions
A critical component of an emissions trading system is the reliable measurement of emissions. The regulation requires both the cement and base metal smelting sectors to use continuous emissions monitors (CEMs) to track their emissions, or a monitoring method deemed by MOE to be equivalent to CEMs. Further, all capped emitters must report annual emissions of NO_x and SO_2 as per the requirements of O. Reg. 127/01 (Airborne Contaminant Discharge Monitoring and Reporting).

Implications of the Decision
MOE's decision to pursue industry sector SO_2 and NO_x emission reductions through O. Reg. 194/05 has a host of implications. This section will focus on some of the major environmental implications of this decision. Several of these implications were previously identified by the ECO as emerging out of the electricity sector emissions trading regulation (see the ECO 2001/2002 annual report, page 84), and remain unaddressed in this regulation.

Trading with Uncapped Sectors

Expanding the province's emissions trading system to include electricity producers and industrial sectors amplifies concerns about the system allowing trading to occur between capped and uncapped emitters (hybrid trading system). Uncapped emitters can generate ERCs and sell these credits to capped emitters, but they are not prevented from creating new sources of NO_x/SO_2 emissions. The net effect is that overall emissions of NO_x and SO_2 could continue to grow under this system.

O. Reg. 194/05 also allows capped emitters to exceed NO_x caps by 33 per cent and SO_2 caps by 10 per cent via the acquisition of ERCs. Should all facilities in a given sector choose to acquire ERCs to the maximum allowable level, this could result in emissions from some industry sectors actually exceeding the 2006 sector cap in 2015 and beyond. The graphs in Figure 1 and Figure 2 have been prepared by the ECO to illustrate the potential for increasing sector emissions under the regulation. The vertical bars illustrate that the ability of polluters to acquire ERCs could result in a 33 per cent increase for NO_x and a 10 per cent increase for SO_2 emissions. However, it should be noted that this is the most extreme scenario; some sectors will likely be unable to secure the significant quantities of ERCs that would be required to reach the 10 per cent or 33 per cent maximums.

The United States Environmental Protection Agency (US EPA) continues to be concerned about Ontario's approach to emissions trading. The US EPA first raised concerns when Ontario established emissions trading for the electricity sector. It identified shortcomings with emissions monitoring requirements and the fact that the Ontario system permits trading between capped and uncapped emitters as central concerns. To date, these concerns have not been adequately addressed by MOE, and so, the US EPA continues to prohibit U.S. emitters from acquiring and using Ontario-generated allowances in the United States. However, Ontario-based companies are not subject to the same restriction. This has created the potential for a system of one-way trading with U.S. emitters (i.e., acquiring and using U.S.-generated allowances in Ontario) and, subsequently, is additional cause for concern that Ontario's emissions caps will be exceeded over the long term.

Although MOE states that the regulation will achieve a 46 per cent reduction in the NO_x cap and a 10 per cent reduction in the SO_2 cap from reference year levels by 2015, this does not mean that these reductions will be realized in the industry sectors capped by this regulation. In the most extreme case, emissions trading could lead to increases in NO_x and SO_2 emissions from these sectors.

Emergence of Local Hotspots

O. Reg. 194/05 lacks any provisions to prevent the maintenance of local pollution hotspots as a result of emissions trading. In its comments, the Ontario Public Health Association underscored the fact that NO_x and SO_2 have very localized impacts on both human health and the environment and, as a result, steps need to be taken to ensure the regulation does not lead to local concentrations of emitters. Current provincial air quality regulations are also unlikely to prevent this problem as these regulations fail to consider cumulative impacts of multiple sources of air emissions. In some trading systems, safeguards are included to ensure that trading does not result in a geographic concentration of facilities that choose to acquire allowances and emit rather than reduce emissions. This is done by requiring emitters to demonstrate that the trade will not lead to unacceptable increases in ambient air levels of the pollutants in question prior to approval of a trade.

Weak Caps & Ontario's Commitments to Reduce SO_2 & NO_x Emissions

A central critique of the electricity sector trading system under O. Reg. 397/01was the NO_x and SO_2 caps were not stringent enough. The same criticism has emerged regarding O. Reg. 194/05. Many stakeholders, including Environment Canada, argue that the caps need to be more stringent to ensure that Ontario satisfies its various air pollution reduction commitments. These include commitments to reduce

ground level ozone and fine particulate matter through Canada-wide Standards. In the case of SO_2 caps for the iron and steel sector, the caps actually *increase* over time. Further, with few exceptions, the 2006 – 2015+ phase-in period involves cap reductions for most industrial sectors that are minimal to non-existent (see Figures 1, 2 and 3). In the cases where more significant reductions are imposed on sectors, these tend to occur either right at the start of the initiative or right at the end.

Penalties for Failure to Balance Emissions with Allowances and Credits
O. Reg. 194/05 contains no penalties – but the general EPA provisions apply should a capped player fail to balance its emissions and allowances at the end of a trading year. The closest approximation to a penalty in the regulation is the clawback provision that applies to facilities whose allowances are intensity-based. If the sector cap is exceeded through higher than expected emission levels, the cap is reduced in future years. The impact is shared across the sector, even if it is only one sector player who is responsible for the increase. Beyond this, a player that fails to 'true up' (balance emissions + allowances/ ERCs) is not subject to any penalty beyond penalties that might arise through possible violations of air quality standards set out in provincial air quality regulations. Further, there are no penalties associated with fraudulent reporting of emissions. The lack of penalties was raised as a concern by Environment Canada.

Other emissions trading systems include a host of penalties designed to discourage capped emitters from failing to balance emissions and credits at the end of a trading year. These include imposing substantial fines for failure to comply with the regulation or docking future allowance allocations. Ontario's lack of penalties may create challenges with respect to successful implementation of the regulation as it creates the possibility that there are not suitable deterrents to discourage non-compliance.

Public Participation & *EBR* Process
The Public Consultation Process
A multi-phased consultation process was used to develop and finalize O. Reg. 194/05. The initiative began with a policy proposal for 'Emission Reductions from Ontario's Industrial Sources', which was first posted on the Environmental Registry in October 2001. It is not known how many comments were received on this Registry proposal because MOE chose not to post a decision notice.

A second policy proposal was posted to the Environmental Registry in late December 2002. The notice invited the public to submit comments on a discussion paper entitled "Ontario's Clean Air Plan for Industry: Developing NO_x and SO_2 Emission Limits." Again, no decision notice was posted for this Registry proposal. Instead, a revised proposal notice was posted in late June 2004, inviting public comment on another document entitled "Ontario's Industry Emissions Reduction Plan: Proposals for a Nitrogen Oxides (NO_x) and Sulphur Dioxide (SO_2) Regulation". A total of 31 comments were received in response to this proposal notice. MOE also indicated in its decision notice that 50 submissions were received in response to the December 2002 Registry proposal notice.

Finally, in February 2005, a notice of proposal for a regulation appeared on the Environmental Registry with a 30-day public comment period. A decision notice was posted on July 30, 2005, indicating that a total of 20 comments were received from the public and stakeholders on the draft regulation.

MOE also indicated in the two decision notices associated with this initiative that, since 2001, it has consulted one-on-one with a variety of stakeholders regarding these policy proposals and the subsequent proposal for a regulation. Consultation included seeking advice from representatives of industry, and environment and health non-governmental organizations.

Concerns Raised by Public Commenters and MOE Responses
While MOE's decision notice for O. Reg. 194/05 confirms that some changes were made to the final regulation as a result of public comments, any changes made appear to be minor in comparison with the many significant concerns raised but left unaddressed in the final decision. Comments and concerns fell into a number of major categories and are presented below.

Concerns About Emission Caps
Some industry stakeholders raised concerns about the proposed emission caps being too aggressive too early in the initiative, making it difficult for them to undertake the necessary capital planning to achieve required emissions reductions. Some also expressed fears that, in the early stages of the initiative, credits and allowances would not be readily available for purchase if needed.

Many other stakeholders, including environmental groups, health groups, municipal public health departments, and Environment Canada, argued that the emissions caps are not stringent enough. Environment Canada expressed concern that this approach will fall short of what is required for the province to meet other commitments – particularly the commitment made through the Canada-wide Standards for particulate matter and ground level ozone to achieve a 45 per cent reduction in NO_x emissions by 2010. Commenters representing independent electricity generators argued that industry sectors are being held to far less stringent caps than the electricity sector, even though the two sectors generate comparable amounts of NO_x and SO_2 emissions.

MOE responded by indicating that the caps recognize the need for industries to research and plan for technology or process changes required to achieve reductions as well as the need to accommodate any potential growth in industry production levels over the emission caps phase-in period. Further, MOE noted that some individual facility caps include rewards for early action in the form of additional allowances acknowledging voluntary emission reductions efforts pursued prior to the regulation. In several instances, MOE responded to industry concerns by making the caps for certain sectors less aggressive. For instance, SO_2 caps for the iron and steel sector decreased over time in the draft regulation but increase over time in the final regulation.

Concerns about Hybrid Trading System
Many commenters raised concerns about the hybrid nature of Ontario's emissions trading system, arguing that trading should only be permitted between capped emitters. Some argued that fundamental flaws such as this one should have been corrected before expanding the system to include industrial sectors. Environment Canada indicated that sector emissions caps are likely to be exceeded because the system allows uncapped emitters to generate and sell emission reduction credits and it allows one-way trading with entities outside of Ontario. MOE did not address these concerns.

Several commenters suggested that there are additional industry sectors that should have been covered by the regulation such as lime and white cement producers. MOE responded by indicating that it will continue to examine the possibility of capping additional industries under the regulation. MOE made specific reference to the following industries: white cement, lime kilns, paper mills, mini-steel mills, and the chemical sector.

Allocation of Allowances
A widespread concern expressed by industry stakeholders was a perceived lack of transparency in MOE's process for establishing facility-specific emission allowance allocations. Many wanted to ensure that information used was as accurate as possible to ensure that appropriate allowances would be allocated to them and were concerned that a reliance on 2001 emissions data was not a good idea as, in many instances, the quality of that data was questionable.

A coalition of environmental groups questioned the size of some of the allocations, pointing out that some facilities received allowance allocations for 2006 that surpassed 2003 emission levels reported to NPRI. These commenters worried that these excessive allocations would mean that capped emitters would not need to take any action to comply with the regulation. They also suggested that MOE should have auctioned off some of the allowances, rather than simply giving them to industry.

MOE did not respond to any of these concerns. However, during follow-up research by the ECO, MOE did clarify that all emitters subject to an intensity-based approach to allowance allocations would have to submit production data before the start of a given trading year. This data would be used to determine a suitable allowance allocation for that year. In other words, although caps are set out in the regulation, this does not mean that a facility will automatically receive or use the full cap. MOE also added that 2006 – the first year of the program – has been treated as a 'business as usual' year with caps being set at a level that MOE felt would not create any hardship for industry.

Potential for the Emergence of Pollution Hotspots from Emissions Trading
Several commenters, including a group of environmental not-for-profit organizations and the Ontario Public Health Association, expressed concern that the regulation does not include any safeguards to prevent the creation of local hotspots – geographic concentrations of facilities that choose to acquire credits rather than reduce emissions in order to comply with the regulation. They argued that MOE must consider NO_x and SO_2 impacts within local airsheds. One commenter added that there should be a general prohibition against the trading of allowances for smog precursors. MOE did not address these concerns in its decision.

Problems with Penalties (or Lack Thereof)
Environment Canada expressed concern about the regulation lacking any clear articulation of the penalties imposed if a player fails to balance emissions with allowances or if fraudulent reporting of emissions data is confirmed. MOE did not respond to this concern.

Several industry commenters subject to an intensity-based allowance allocation criticized the clawback provisions in the regulation. They argued that the clawback approach penalizes all emitters when it should only punish those emitters who have caused a sector to exceed its cap. MOE did not respond to this concern.

Concerns about New Source Set Asides
Several concerns were raised about NSSAs, and all of them by industry commenters. Many commenters were concerned about what they described as the 'first-come, first-served' nature of NSSA allowance allocations. MOE did not address this concern.

Some industry stakeholders worried that the test that must be met to apply for allowances from the NSSA was too onerous. In the draft regulation, MOE required that expanding facilities must demonstrate a 30 per cent increase in production and a capital expenditure equivalent to 30 per cent of the replacement cost in order for a facility to apply for allowances from the NSSA. In response to industry concern, MOE changed this to a 20 per cent increase in production and completely eliminated the capital expenditure equivalent requirement.

Life of Allowances after Plant Closure or Reduction in Production
Several commenters from not-for-profit environmental and health groups raised concerns about the provisions in O.Reg.194/05 that allow for the on-going allocation and use of emission allowances for a two-year period after a facility has closed or significantly reduced production. These commenters felt any allowances should be lost as soon as the closure or reduction takes place. MOE did not respond to this concern.

In contrast, some industry commenters argued that the budget of NSSAs is inadequate for industry growth; therefore, closed facilities should be able to keep their allowances. MOE did not comment on this concern. But it should be noted that allowances from closed facilities do transfer over to the NSSA budget after five years, as do allowances from facilities that have reduced their production by 50 per cent or more over five years. These allowances then become available to new or expanding facilities.

Many commenters, including environmental and health not-for-profit organizations, asked MOE to clarify what will happen to emission allowance allocations for coal-fired power plants as the province implements its commitment to close all of these plants (a commitment that the Ontario government indicated, in June 2006, would be delayed due to concerns about power supply shortages). These commenters expressed fear that these allowances would remain available in the trading system, essentially canceling out any emissions reductions achieved through closure of the province's coal-fired plants. MOE did not address this concern in its decision. However, MOE has indicated to the ECO that it has imminent plans to amend O. Reg. 397/01 (Emissions Trading) to address this concern. MOE officials also indicated to the ECO that allowances from the Lakeview Coal-fired Electricity Generating Plant, which was closed in 2005, were completely retired from the emissions trading system when the plant was closed.

Emissions Monitoring Requirements
In earlier stages of the development of this initiative, MOE proposed that continuous emissions monitoring (CEM) equipment be installed on large sources (those sources that are 250 mm BTU/hr heat input and greater). Many industry stakeholders raised concerns about the cost, feasibility, and whether CEMs were really necessary to monitor emissions. In response, MOE modified the regulation so that only large sources in the base metal smelting and cement industries must install CEMs or utilize a method deemed to be equivalent to CEMs to monitor their emissions.

Some commenters, including Environment Canada and an environmental non-governmental organization, argued that, if alternative means of measuring emissions are deemed to be equivalent to CEMs, these alternative means should be subject to third party audit to confirm that the monitoring results are reliable. MOE did not address this concern. In addition, one of the U.S. EPA's biggest concerns with Ontario's system is its perception that monitoring requirements are too weak.

Variable (Intensity-based) vs. Fixed Allocations of Emission Allowances
Many industry stakeholders commented on intensity-based versus fixed allocations of emission allowances. Many pushed, during this process, to be allocated allowances via an intensity-based approach. They argued that the intensity-based allocation approach is more equitable because it does not make assumptions about the growth potential of a given industrial sector. Several argued against this method of allocation. MOE indicated that, in the final regulation, it used the intensity-based approach for all facilities for which it was feasible to do so.

Risks to Business of Emissions Trading
Several industries raised concerns about the risks to industry of an emissions trading approach to pollution reduction. Some argued that, in the development of this framework, MOE underestimated the costs associated with reducing emissions through pollution control. Others were fearful there would be a lack of credits for sale, particularly early on in the implementation of the system and that, as a result, these credits would be costly to purchase. One industry stakeholder spoke very strongly against the regulation's requirement that a 10 per cent environmental discount be applied when a capped player cashes in an ERC. This commenter indicated that this discount is inappropriate because "it only serves to meet MOE goals."

SEV
MOE considered its SEV in making the decision on O. Reg. 194/05. In the SEV information statement submitted to the ECO, MOE indicated that, by limiting emissions of SO_2 and NO_x, this initiative contributes to environmental protection. Further, MOE claims that the initiative supports the ecosystem approach by curbing emissions of pollutants that contribute to acid rain and the formation of fine particulate matter. Finally, MOE asserts that this effort contributes to the preservation of the air resources of Ontario.

However, it is debatable whether the decision is completely consistent with MOE's SEV. The SEV states that MOE will consider **cumulative effects** on the environment, however this regulation fails to consider the potential for local airshed impacts that might be concentrated as a result of the lack of provisions in this regulation to prevent such local hotspots. The SEV also commits MOE to the precautionary approach and one could argue that the weak caps contained in O. Reg. 194/05 fail to promote this approach.

Other Information
MOE posted a proposal in 2001 indicating its desire for the province to tighten the timeframe within which it would achieve its *overall* NO_x and SO_2 emission reduction commitments. The current target is to reduce NO_x by 45 per cent from 1990 levels and SO_2 by 50 per cent from Countdown Acid Rain cap levels by 2015. The 2001 proposal pitched a shortening of this timeframe to 2010. To date, no decision has been posted on this policy proposal. MOE has indicated to the ECO that it is very aware of this outstanding policy proposal and is still considering whether to proceed with this plan to fast track the timeframe for overall reductions in NO_x and SO_2.

ECO Comment
The ECO lauds MOE's decision to expand the provincial emissions trading system to include major industrial emitters of SO_2 and NO_x, but remains concerned about the many unaddressed shortcomings of Ontario's emissions trading system.

The ECO shares the concerns expressed by many stakeholders, including Environment Canada, about the hybrid nature of Ontario's emissions trading system. Allowing capped and uncapped emitters to participate in the system limits MOE's ability to ensure any significant emission reductions actually occur within capped industrial sectors. Further, allowing non-capped emitters to generate and sell ERCs to capped emitters while, at the same time, not being prevented from increasing their own emissions of these pollutants, creates a system where overall NO_x and SO_2 levels may well increase over time. The emissions trading system would be a far more effective tool for NO_x and SO_2 emission reductions if trading occurred between capped emitters only.

The ECO is also concerned about emissions caps established for industry sectors. For many of the sectors included in the regulation, emission caps appear to hold emissions close to current levels over the next 10+ years or, in the case of the iron and steel sector and SO_2 emissions, caps actually increase over time. Where cap reductions are most significant, as is the case with base metal smelters and SO_2, those reductions were already embodied in MOE orders and so, arguably, are not an outcome of this effort. Given the problematic impacts of NO_x and SO_2 emissions on the environment and human health, more aggressive steps must be taken to reduce these emissions from Ontario's industrial sector.

Concerns were also raised, and not addressed by MOE, regarding the potential for this trading system to contribute to the creation of local hotspots. MOE representatives have indicated to the ECO that O. Reg. 419/05 will prevent this problem from emerging. However, O. Reg. 419/05 explicitly does not address issues related to cumulative or synergistic impacts leaving the ECO confused as to how it will confer such protections against the emergence of trading hotspots.

Many questions and concerns were raised regarding the fate of emissions allowances from coal-fired plants and how this might impact on the emissions trading system. The stated goal of coal-fired power plant closures is to reduce emissions of pollutants including NO_x and SO_2, but a failure to pull these allowances out of the trading system might lead to other, new sources contributing equivalent amounts of pollutants. MOE has indicated to the ECO that the allowances from the Lakeview Generating Station have been completely retired from the emissions trading system. Further, MOE has indicated that it has imminent plans to amend O.Reg. 397/01 governing electricity sector emissions in order to clarify what the fate will be of allowances from remaining coal-fired plants. The ECO recommends that the allowances from these remaining plants also be completely retired from the system, as MOE has indicated was done with the Lakeview Generating Station allowances.

The ECO will continue to track MOE efforts to reduce NO_x and SO_2 emissions from the industrial sector, and will monitor the larger emissions trading program over time. At the same time, the ECO encourages MOE to pursue reduction initiatives within other sectors that are significant contributors of these pollutants. For instance, off-road vehicles such as farm tractors, ATVs, etc. are responsible for 30 per cent of Ontario's NO_x emissions to air. Attention must also be directed to future problem sources of No_x/SO_2 emissions, including new sources and growing combined vehicle emissions with increasing numbers of vehicles on Ontario roadways.

The ECO also encourages MOE to re-examine initiatives that emerged as parts of this effort but that appear to have been lost along the way. These include the original proposal by MOE to review the existing regulations governing sulphur in fuel oil and coal (Regulation 361, R.R.O. 1990 – Sulphur Content of Fuel and Regulation 338, R.R.O. 1990 – Boilers) and its proposal to accelerate the implementation of industry codes of practice for reducing emissions of volatile organic compounds.

Finally, the ECO shares the concerns raised by several stakeholders regarding the lack of penalties should capped industrial sectors fail to comply with the requirements of O. Reg. 194/05. The ECO believes the regulation should include penalties such as fines or the docking of future emission allowances as measures to ensure capped industries achieve the required emission reductions.

Table 1 – NO_x & SO_2 Sector Annual Emission Allowance Budgets & NSSA Budgets (Tonnes)

NO_x Emission Allowances – Sector Budgets (tonnes)						
Sector	**2006**	**2007**	**2008**	**2009**	**2010-2014**	**2015+**
Cement	19,872	19,136	19,136	19,136	17,835	14,875
Flat Glass	2,100	1,953	1,953	1,953	1,805	1,805
Pulp & Paper	7,170	6,836	6,836	6,836	6,558	6,558
Iron & Steel	10,974	10,352	10,352	10,352	9,855	9,855
Petroleum	12,213	12,163	10,579	9,715	9,665	9,665
NSSA NOx allocation or all sectors	2,200	2,200	3,000	3,100	3,100	3,100
SO_2 Emission Allowances – Sector Budgets (tonnes)						
Sector	**2006**	**2007**	**2008**	**2009**	**2010-2014**	**2015+**
Cement	22,339	21,820	21,820	21,820	20,773	16,139
Iron & Steel	18,623	18,710	18,710	18,710	19,384	19,384
Pulp & Paper	10,337	9,269	9,269	9,269	8,339	8,339
Petroleum	49,387	49,387	39,024	28,750	28,750	28,750
Carbon Black	11,100	10,850	10,850	10,850	10,700	10,700
Chemical	7,000	7,100	7,100	7,100	7,100	7,100
Base Metal Smelting	331,000	241,000	241,000	241,000	241,000	91,000
NSSA SO_2 allocation for all sectors	9,800	10,100	10,100	10,100	10,100	10,100

Chart compiled by ECO with data found in O. Reg. 194/05

Figure 1 - SO2 Emission Allowances - Sector Budgets (tonnes)
(Source of data: O. Reg. 194/05)

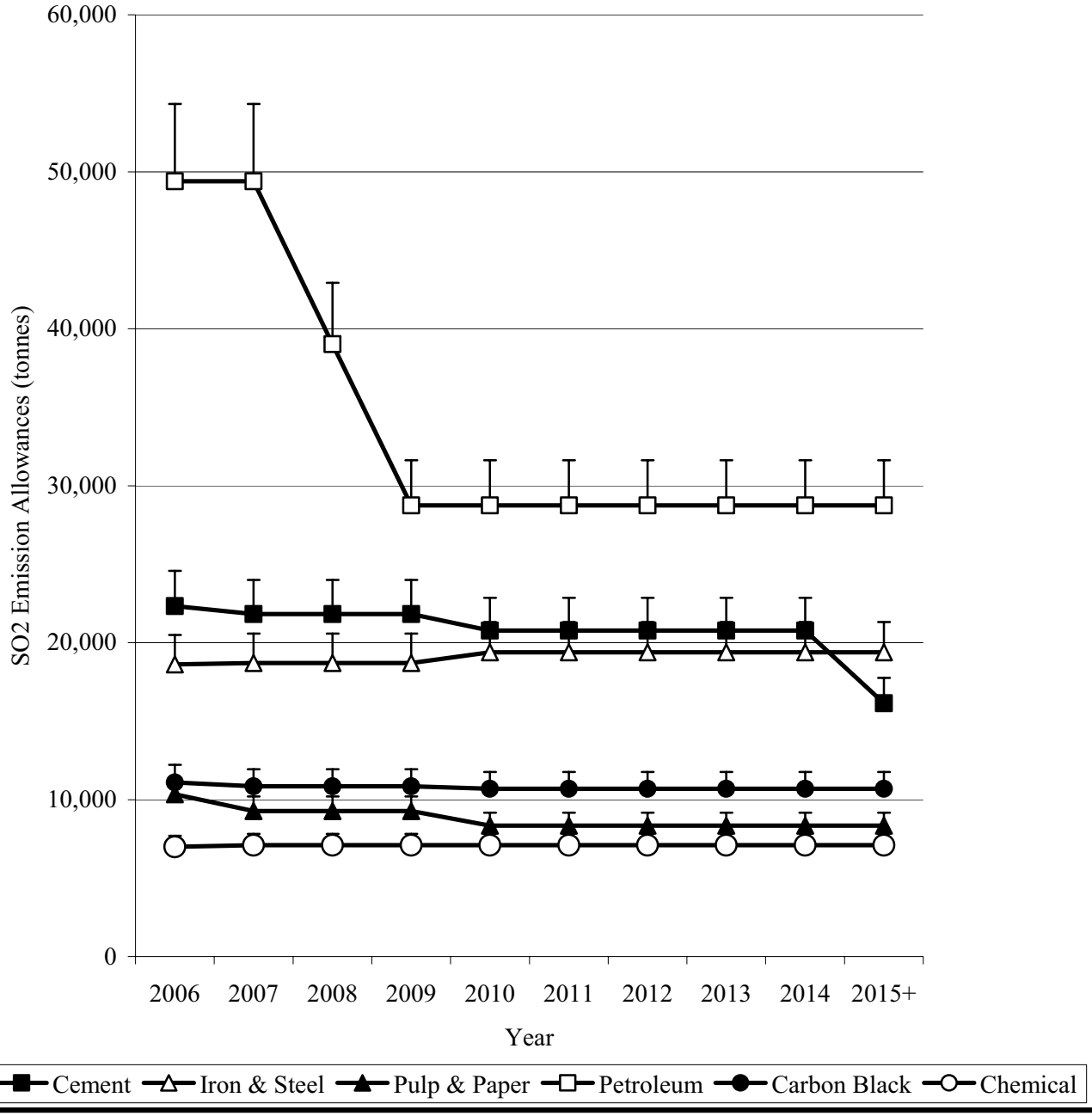


Figure 2 - NOx Emission Allowances - Sector Budgets (tonnes)
(Source of data: O. Reg. 194/05)

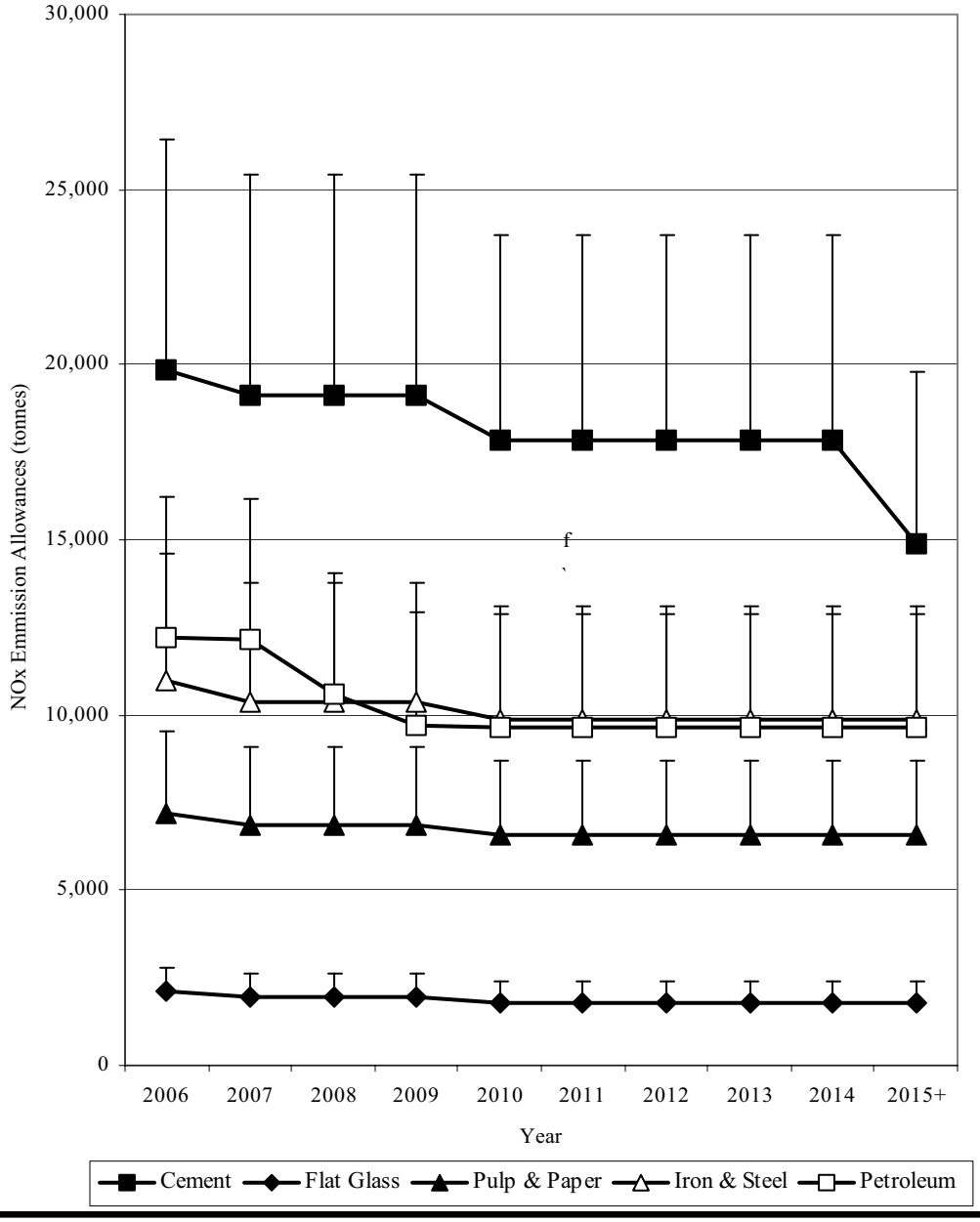
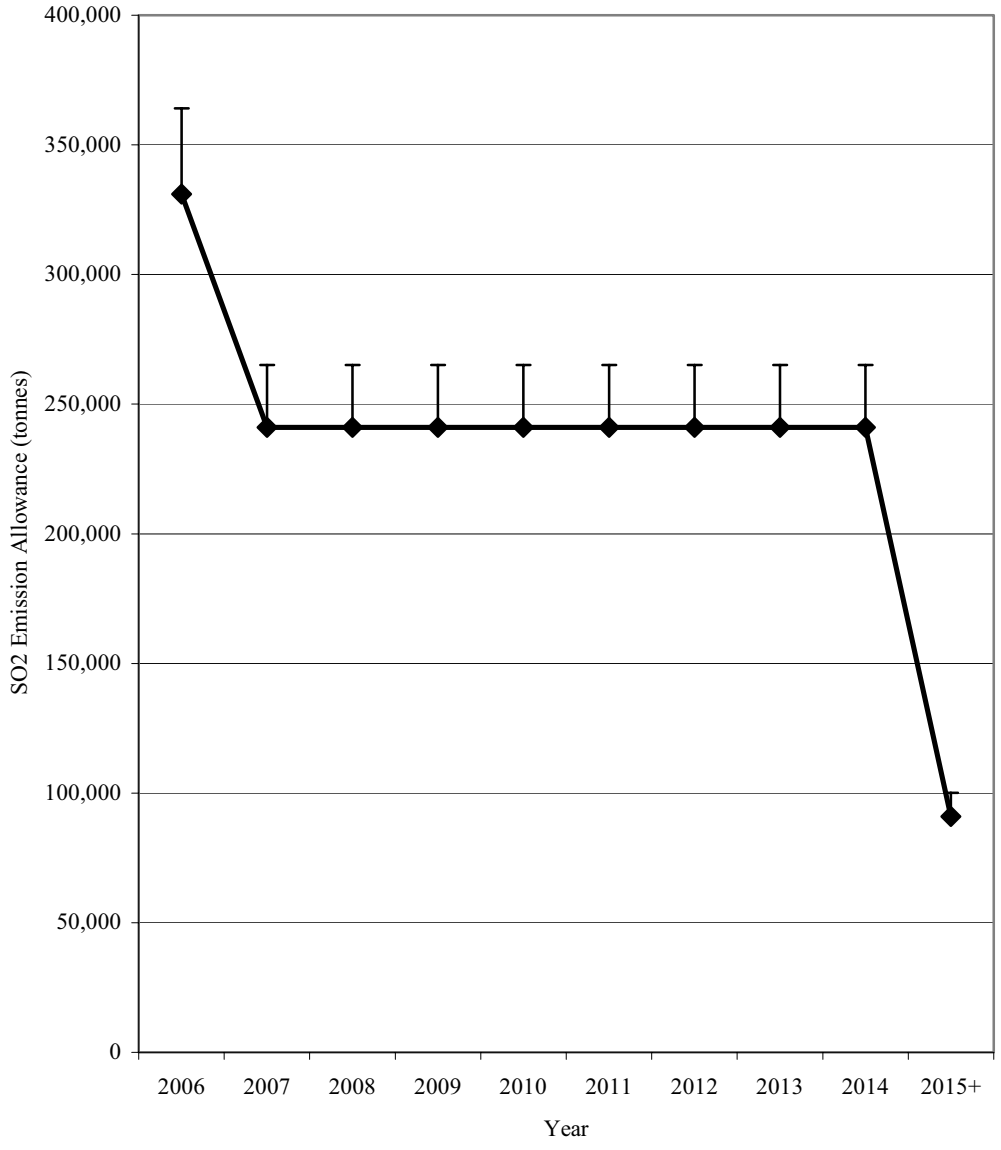


Figure 3 - Base Metal Smelting SO2 Emission Allowances (tonnes)
(Source: O. Reg. 194/05)



Review of Posted Decision:
Bill 133 - Environmental Enforcement Statute Law Amendment Act, 2005

Decision Information:

Registry Number: AA04E0003	Comment Period: 71 days
Proposal Posted: October 28, 2004	Number of Comments: 160 (approx.)
Decision Posted: Not posted	Came into Force: In Part on June 13, 2005

Description

In June 2005, the Ontario government passed the *Environmental Enforcement Statute Law Amendment Act* (*EESLAA*) and proclaimed into force certain sections of the new law. This *Act*, also known as Bill 133, follows through on the government's "you spill, you pay" promise to Ontarians that was made after several high profile spills occurred along the St. Clair River in 2003 and 2004, causing considerable concern and anger amongst the local residents on both sides of the border and the temporary closure of water treatment plants.

The *EESLAA* is part of an evolution of environmental law in Ontario and expands the Ministry of Environment's powers to deal with industrial polluters in a number of important ways. The *EESLAA* included numerous other amendments that have come into force such as lowering the threshold in the *EPA* for certain provisions to be applicable, expanding on the criteria for determining if water is impaired under the *OWRA*, increasing the maximum daily penalties for offences under the *EPA* and *OWRA* and changing the burden of proof obligations. There are also amendments that provide additional direction to the courts regarding sentencing and that expand the duties of directors and officers of corporations.

Under the *EESLAA*, Ministry of the Environment (MOE) Directors also can impose financial penalties, called environmental penalties (EPs), on regulated persons for contraventions related to the *Environmental Protection Act* (*EPA)* and/or the *Ontario Water Resources Act* (*OWRA).* EPs replace the administrative penalty provisions in the *EPA* and the *OWRA*, which were never proclaimed. The *EESLAA* includes provisions that identify the types of contraventions for which EPs can be imposed, the types of persons on whom EPs can be imposed and the maximum daily amounts of EPs that can be imposed, and describe the appeal rights and burden of proof obligations related to EPs. But, as of May 2006, none of the above EP provisions have come into force.

Although the *EESLAA* contains numerous amendments, only some of the most significant provisions are discussed in detail below. Prior to discussing the *EESLAA,* it is necessary to review some of the background related to this new law.

Background

The regulation of spills and discharges of pollutants into air and water and onto land is complex and multi-faceted. For centuries accidental and planned spills of wash-water, cleaning fluids, chemicals and various wastes and other by-products of manufacturing have been part of business activities. The ability to discharge these wastes onto land, into sewers and into water can produce large cost savings for many industries because the cost charged by licenced commercial operators for properly handling and disposing of some types of waste can be significant (e.g., for hazardous waste, in the range of $2,000 to 3,000 per tonne). In the past 60 years, the quantities of toxic and chemical residues in spilled materials has escalated, thus increasing threats to drinking water and the natural environment and attracting increased attention from regulators.

The common law contains important causes of action that can be used by property owners and tenants to sue polluters and dischargers who release spills into the environment. The two most common causes of action are private nuisance and negligence. Nuisance, negligence and other private law actions share a common element: reasonableness. If harmful polluting activities are considered to be reasonable, then the courts often allow the polluting activities to continue. What is reasonable depends upon the circumstances in each case and the generally accepted conduct in the community. Courts, in deciding what is reasonable, consider the social importance and economic benefit of the activity in question, the locality in which the action took place, the sensitivity of the property owner to the discharger's conduct and the type and severity of the damage caused.

In the past, these factors tended to work against claims where property owners asserted that the environmental quality of their property was being interfered with. If the damage was being caused by industrial or commercial activity, courts were inclined to take the view that this conduct was of great social and economic benefit; the severity of the damage caused to the environment was often considered to be inconsequential in relation to the benefit of the activity. This was especially true where the damages were spread out over a long period of time and/or were cumulative in nature. Another related problem, and a continuing challenge facing plaintiffs who want to sue about environmental disputes, was that it often proved very difficult to provide sufficient evidence and show how the problem was caused.

To address deficiencies in the common law regime, in the 1960s, governments in North America began to enact statutory regimes to regulate pollution. The *EPA* and *OWRA* have been two of the cornerstones of environmental law in Ontario since the early 1970s. Some key features of these laws, and how they have evolved in the past 30 years, are briefly outlined below.

1) *The OWRA Provisions*
The *OWRA* is Ontario's principal law for controlling water pollution. It was first enacted as the *Ontario Water Resources Commission Act (OWRCA)* in 1956, mainly in response to rapid post-war industrial and population growth. Urban-industrial growth in southern Ontario had put enormous pressure on municipal sewage treatment plants, many of which were seriously inadequate. The Ontario Water Resources Commission was created to begin to address these problems and regulate drinking water quality and water pollution.

In 1961, the *OWRA* prohibition on the discharge of any material that may impair water quality in any well, lake, river or watercourse was strengthened. Contained in s. 30(1), it states that "every person that discharges or causes or permits the discharge of any material of any kind into or in any waters or on any shore or bank thereof or into or in any place that may impair the quality of the water of any waters is guilty of an offence." A discharge was defined as a deposit, addition, emission or leak of a contaminant. If the discharge is not a normal event, MOE must be notified. Prior to the enactment of Bill 133, water quality was deemed impaired under s. 28 if the material discharged or any derivative of the material discharged causes or may cause injury to any person, animal, bird or other living thing as a result of the use or consumption of any plant, fish or other living matter or thing in the water or in the soil in contact with the water.

Between the mid 1990s and 2004, lower court judges and the Ontario Court of Appeal (OCA) made numerous rulings on impairment and toxicity that restricted the scope of s. 30(1) of the *OWRA* and made it a less useful tool for regulating spills and discharges to water. A key precedent that governed for many years was *R*. v. *Toronto Electric Commissioners* (1991). In that case, Justice Corbett of the Ontario Court of Justice had ruled that the nature of the material discharged was important in determining whether s. 30(1) had been contravened, and it was appropriate for MOE to prosecute based on a discharge of PCBs into Lake Ontario. In 1997, the OCA weakened the *OWRA* impairment test in a ruling called *R*. v.

Imperial Oil. The Crown had proved, based on the quantity and concentration of the discharge and the short time frame over which the discharge took place, that the discharge had the potential to impair water under the *OWRA* despite expert evidence provided by the defence that activated sludge was not inherently harmful to the environment. In the *Imperial Oil* decision, the OCA said that it was appropriate to look at the surrounding circumstances of the discharge such as the nature of the receiving water and the volume discharged. In 2001, the OCA followed up with another decision, *R*. v. *Inco*, which stated that although s. 30(1) of the *OWRA* does not require proof that water was actually impaired, it requires proof that a discharge has a capacity to impair as a result either of the inherent toxicity of the substance, or the conditions of its discharge – that is, the quantity and concentration of the discharge as well as the time frame over which it took place. This significantly increased the evidentiary burden on the Crown with respect to prosecuting alleged contraventions of s. 30(1) of the *OWRA.*

In a case decided in May 2004 involving a former landfill in the City of Kingston, the OCA ruled that, under s. 36(3) of the *Fisheries Act*, it is sufficient to show that a deleterious substance has been discharged into waters inhabited by fish. One implication of this decision was that s. 36(3) of the *Fisheries Act* was a far superior tool when compared with s. 30(1) of the *OWRA,* prior to the enactment of Bill 133, because prosecutors faced a lower evidentiary burden. In sum, the *Inco* and *Imperial Oil* decisions created pressure on MOE to address the issues raised by the OCA.

2) *The EPA Provisions*
In 1971, the Ontario government passed the *Environmental Protection Act*. This law requires all polluters and dischargers to obtain permits from the government to legalize their discharging activities and also gave the newly created MOE innovative and extensive powers and discretion to regulate pollution. Administrators within MOE are legally delegated to carry out the functions of the Minister as set out in the legislation, including the power to: order individuals and companies to undertake remedial actions, install pollution control equipment, conduct tests and implement monitoring programs; and set standards for pollutants and environmental quality.

The *EPA* also established provisions that prohibit the discharge of a contaminant into the natural environment (land, water or air) at a concentration above regulated levels or that causes or is likely to cause an adverse effect. Examples of an adverse effect include impairment of the quality of the natural environment or injury or damage to property or to plant or animal life. However, the original law did not contain any express provisions for regulating spills and ensuring victims of spills were compensated. Moreover, while the *EPA* distinguished between a contaminant, a pollutant, and a discharge it did not define a spill. A contaminant is defined as any solid, liquid, gas, odour, heat, sound, vibration, radiation or combination of any of them resulting directly or indirectly from human activities that may cause an adverse effect. A pollutant is any contaminant other than heat, sound, vibration or radiation and includes any substance from which a pollutant is derived. Similar to the *OWRA*, a discharge is defined as a deposit, addition, emission or leak of a contaminant.

3) *The Spills Bill (Part X of the EPA)*
In 1979, the Ontario government passed but did not proclaim into law provisions on spills which amended the *EPA*. These provisions, now contained in Part X of the *EPA*, were dubbed the "Spills Bill" by observers. The Spills Bill was intended to address gaps in the regulatory system and provide a statutory compensation scheme for victims of spills.

The Spills Bill was very controversial and many industry stakeholders opposed its proclamation. The provisions languished un-proclaimed by Ontario governments for six years until 1985 when a new coalition government decided to proclaim the 1979 law and establish related regulations (see below). This decision was an important breakthrough in the evolution of Ontario's environmental laws.

One of the key provisions of the 1979 Spills Bill was s. 92, a provision that created a duty to notify MOE and other agencies and municipalities when a pollutant is spilled that causes or is likely to cause an adverse effect and to do everything practicable to prevent or ameliorate adverse impacts; the duty to report applies to parties who caused the spill and parties who had control of the pollutant. A spill was defined as a discharge of a pollutant that is abnormal in quality or quantity into the natural environment.

Part X of the *EPA* also includes a range of other important powers and duties. For example s. 101 entitles parties (other than parties who owned or were in control of the pollutant or the parties who caused the spill) who took steps to prevent or ameliorate adverse effects to compensation from the Crown for their costs. For further discussion, see below under "Other Information."

Regulation 360, RRO 1990 (Spills), which was first passed into law in 1985, exempted some types of spills from s. 92 of the *EPA*. For example, planned spills are exempted from s. 92 of the *EPA* if an MOE Director was notified in advance of the planned spill, consented to the spill, and if the owner of the pollutant and the person who had control of the pollutant monitored the effects of the spill. Under Regulation 360, some classes are exempted not just from s. 92, but from the entirety of Part X. The types of Part X exempted spills include those approved under the *OWRA*, *EPA*, or the *Pesticides Act* and spills of up to 100 litres of fluid from a motor vehicle's fuel system or other operating system.

4) *1998 Revisions to the Classification and Exemption of Spills (O. Reg. 675/98)*
In 1996, MOE proposed to cut the number of spill reports required from industry by 20 per cent: from 5,000 annually to 4,000 annually (Registry number RA6E0009). MOE stated that the purpose of the new regulation was to avoid trivial spills being reported, as long as the discharger complies with clean-up requirements and documents the spill, so that more serious spills can be given priority by MOE. MOE noted that a further purpose is to give dischargers an incentive to develop a contingency plan so they are better prepared for and responsive to spills, and to identify spill prevention opportunities.

In April 1998 MOE posted the detailed proposed changes to Regulation 360 on the Registry, and the decision to finalize the new regulation was made in late 1998. The amendments contained in O. Reg. 675/98 extended the number of classes exempted from Part X and the s. 92 *EPA* duty to notify various parties. This regulation organized and clarified spill reporting requirements. Three classes of spills are exempted from all of Part X of the *EPA*, which sets out requirements for reporting spills, responding to spills and liability for spills. For some additional types of spills, the regulation broadened the exemptions to s. 92 of the *EPA* contained in Regulation 360. Under O. Reg. 675/98, regulated companies are able to specify some spills as "non-reportable" under their contingency plans for spills. They continue to be responsible for cleaning up such spills in a timely manner and for notifying MOE if they could not successfully clean up such spills. Contingency plans can be reviewed by an MOE Director, but the regulations do not require the Director to review plans.

5) *Industrial Pollution Action Team*
On April 19, 2004, the Minister of the Environment announced the formation of the Industrial Pollution Action Team (IPAT) after several spills occurred along the St. Clair River that angered local communities in both Ontario and Michigan who were required to shut down their water treatment systems but not always adequately informed of the risks. The IPAT based its analysis and recommendations on the belief that "affected communities must be fully and meaningfully involved in all decisions that affect their environment, their health and their well-being, including decisions about acceptable risk." On July 30, 2004, the IPAT released its findings regarding the causes of industrial spills and dangerous air emissions and its recommendations on preventive measures that industry and others could undertake. The IPAT reported that companies in the area were largely in compliance with regulatory requirements and made a number of recommendations, such as introducing regulations that require pollution prevention plans, spill

prevention plans, and spill contingency plans. The IPAT found that Ontario's environmental management framework was "largely reactive, not preventive" and that there were no regulatory requirements for pollution and spill prevention plans, although MOE had attempted to develop pollution prevention plans with several industry sectors in the 1990s. The report noted that the *EPA* requires directors and officers of a corporation to take "all reasonable care to prevent the corporation from causing or permitting" an unlawful discharge of a contaminant into the natural environment, but it does not require them to develop and implement plans to prevent, eliminate or ameliorate adverse effects from such discharges, nor does it require them to develop and implement such plans for spills unless ordered to do so by MOE.

During the spring and summer of 2004, MOE's Sector Compliance Branch (SCB; formerly called SWAT) conducted an inspections sweep of petrochemical facilities, including some facilities regulated under the Municipal-Industrial Strategy for Abatement (MISA) program along the St. Clair River. The SCB found that 25 per cent of the inspected facilities did not have spill prevention plans and/or spill contingency plans.

EESLAA Provisions that have been Proclaimed
The *EESLAA* is part of an evolution of environmental law in Ontario and attempts to address some of the concerns that were raised by IPAT and deficiencies identified by the courts. Many key sections of the new law were proclaimed on June 13, 2005, including the provisions described below.

1) *Threshold for Triggering MOE Action or a Possible Prosecution*
Many existing provisions of the *EPA* require that, in order to establish a contravention or authorize MOE action, something must be "likely" to occur or "expected" to occur. The *EESLAA* amends several of these provisions to reduce the threshold so that it is sufficient if something "may" occur. A number of the proposed changes to thresholds did not survive the legislative process, as noted under the "Public Participation" section below.

2) *Notice to MOE of Spills*
The *EESLAA* extends the requirements under the *EPA* to notify MOE of a spill of a pollutant that causes or is likely to cause an adverse effect to include all spills even if they do not cause an adverse effect, unless they are exempt by a regulation such as O. Reg. 675/98. However, the requirement to report a discharge of a contaminant that causes or is likely to cause an adverse effect remains the same. There is no requirement to report a discharge that may cause an adverse effect.

3) *Reverse Onus Due Diligence Requirements for Corporate Directors*
Prior to 1978, failure to comply with many provisions of the *OWRA* and the *EPA* was viewed by judges and legal experts as an absolute liability offence. Thus, it was unnecessary for Crown prosecutors to prove intent to commit a crime, thereby making it easy to obtain convictions for contraventions of these regulatory laws. In contrast, normally the Crown must prove both the offence (*actus reus*) and the intent (*mens rea*) to offend if it wants to convict an accused person of having contravened most provisions of a criminal law such as the *Criminal Code*.

In 1978, the Supreme Court of Canada (SCC) relaxed rules related to certain public welfare and regulatory offences and clarified, in a decision on the *OWRA* titled *R.* v. *Sault St. Marie*, that the defence of reasonable care (or due diligence) would be available to defendants in certain quasi-criminal prosecutions, including those for environmental discharges. Offence provisions (such as s. 30(1) of the *OWRA)* that allow defendants to avoid liability by showing that they acted with due diligence to prevent the offence from happening are called strict liability offences. However, in certain circumstances, the *EPA* (s. 194) and the *OWRA* (s. 116) impose a positive duty on officers and directors to exercise due diligence. Whereas the *Sault St. Marie* decision provided that the exercise of due diligence was a defence to an offence charge, these provisions make the failure to exercise due diligence an offence in itself.

The *EESLAA* expands and broadens due diligence responsibilities of officers and directors of corporations by imposing a duty on them to take all reasonable care to prevent the corporation from:

- operating waste management facilities or depositing waste without approval, where the waste is hauled liquid industrial waste or hazardous waste;
- discharging a contaminant in contravention of the *EPA,* the *OWRA*, regulations or a certificate of approval (C of A) or permit;
- contravening s. 93 of the *EPA* by failing to adequately respond to a spill or by obstructing MOE officials under s. 184 of the *EPA*;
- failing to notify MOE of a discharge as required by s. 15 and s. 92 of the *EPA*; or
- failing to install or maintain equipment as required by a C of A, licence or a permit.

The *EESLAA* also provides that officers and directors of corporations charged under these provisions will have the onus of proving that they discharged their duty. Previously, in order to find a director or officer liable, the Crown had to prove that all elements of the offence had been committed, including that the defendant failed to exercise due diligence. The *EESLAA* amendment removes that burden from the Crown and shifts the onus of proving due diligence back to the defendant. This change is consistent with a lower court decision in *R*. v. *Bata* (1992) which was confirmed by the OCA in 1995.

4) *Enhanced MOE and Municipal authority to issue preventive orders*
Prior to the *EESLAA,* MOE Directors could issue: preventive orders that require owners and/or operators responsible for contaminants to implement measures to prevent the discharge of contaminants to the natural environment that cause or are likely to cause an adverse effect; control orders to reduce and stop orders to stop the discharge; and remedial orders to require the clean-up of contaminated sites. In addition, the courts could issue restitution orders requiring guilty persons to pay for expenses related to the offence.

The *EESLAA* increases the authority of MOE Directors to require owners and/or operators to develop and implement plans to prevent or reduce the amount of a spill and reduce the amount of a contaminant that is discharged. MOE can also require plans to prevent, decrease or eliminate any adverse effects that not only will result or are likely to result, but also may result from a spill or a discharge into the natural environment. Analogous provisions were not included in the amendments to the *OWRA*.

Prior to the *EESLAA*, only the courts could impose restitution orders on owners, including owners who had taken all reasonable steps to prevent a spill, to compensate the government for direct losses and damages, and costs. However, with the *EESLAA* amendments, MOE Directors and municipalities are now also authorized to impose restitution orders to pay for costs associated with the spill incurred by the Ontario government and by the municipality even if the spill does not cause nor is likely to cause an adverse effect.

Under the previous wording of the *EPA*, MOE could not issue orders under s. 18 (Director's order) and s. 157.1 (provincial officer order) in relation to a discharge unless the Ministry could demonstrate on a balance of probabilities that the discharge had more than a 50 per cent chance of causing an adverse effect (the interpretation by courts of "likely to cause an adverse effect"). The *EESLAA* amends the wording to make it easier for MOE Directors to issue orders to require companies to install technology to prevent pollution.

5) *Deemed Impairment of Water*
The *EESLAA* clarifies and expands on the definition of water that is "deemed impaired" in the *OWRA* to include discharges of material that enter water or may enter water indirectly that cause or may cause injury to or interference with any living organism that lives in or comes into contact with the water or the soil or sediment that is in contact with the water. Water will also be "deemed impaired" if:

- the material (or its derivatives) causes or may cause interference with any living organism that either is in contact with water or consuming the water, soil or sediment that is in contact with the water;
- peer-reviewed scientific literature indicates the material (or its derivatives) can cause injury to aquatic organisms;
- the material or its derivatives degrades or may degrade in the appearance, taste or odour of the water; or
- the material or its derivatives in diluted or undiluted form are toxic.

The new provision also establishes a presumption of impairment when the above circumstances are met, making it easier for the Crown to prove alleged contraventions of s. 30(1) of the *OWRA*. Now where a violation of s. 30 of the *OWRA* leads to an environmental penalty or order against a regulated corporation, the onus is on the corporation to prove that the discharged material did not impair water quality.

6) *Increased Penalties and New Sentencing Considerations*
The *EESLAA* has increased the penalties in both the *EPA* and the *OWRA* that can be imposed by the courts. For example, the maximum penalties for less serious offences under the *EPA*, such as failure to comply with conditions in an approval, have increased from $20,000 per day to $50,000 per day for a first offence by an individual; and from $100,000 per day to $250,000 per day for a first offence by a corporation. For more serious offences under the *EPA*, such as discharging a contaminant that causes an adverse effect or failing to notify MOE of a spill, the *EESLAA* establishes minimum penalties that can be imposed. For instance, the minimum penalty for a first offence by an individual is $5,000 per day and for a corporation is $25,000 per day. The maximum penalties for the most serious offences have not been increased. The *EESLAA* has added new provisions to the *EPA* and the *OWRA* that require the courts to consider certain aggravating factors before deciding on the amount of a penalty. Aggravating factors that may increase the amount of the penalty include: the offence caused an adverse effect or impaired the quality of water; the behaviour of the defendant was intentional or reckless, or the defendant attempted to conceal the offence. If the court decides not to consider one or more of the aggravating factors, it is required to state the reasons for its decision. A court may reduce the penalty imposed to less than the minimum amount if an environmental penalty has been imposed for the same offence.

7) *Removal of Offence on Packaging Waste*
The *EESLAA* also repealed an offence on packaging waste that gave MOE the power to deal with packaging and waste material that posed waste management problems (*EPA*, s. 90). To our knowledge, this offence provision had not been used by MOE in the past 15 years. In our 2003/2004 annual report, the ECO suggested that MOE consider using s. 88 (prohibition, use or sale of packaging) to manage wastes.

EESLAA Provisions that have Not Been Proclaimed
Numerous provisions in the *EESLAA* have not been proclaimed as of June 2006 including those discussed below.

1) *Threshold under Section 14 of the EPA*
Section 14 of the *EPA* is the general prohibition which MOE prosecutors rely on when they charge a company for pollution. Applicants filing requests for investigation under the *EBR* also often rely on this section. Currently, MOE prosecutors must prove three key elements of an offence to succeed with a prosecution. First, there must be a contaminant. Second, there must be a discharge of the contaminant. Third, the discharge of the contaminant must cause, or be likely to cause, an adverse effect. Although the *EESLAA* did not amend the definition of "adverse effect" in the *EPA*, it did extend the general prohibition in s. 14 against discharging a contaminant into the natural environment to include discharging a contaminant that may cause an adverse effect. The amendments exempt discharges of contaminants for which there are approvals, such as certificates of approval for air, if the discharge does not cause and is not likely to cause an adverse effect.

Under the current wording of the *EPA*, the Crown can only prosecute when there is a discharge of contaminant that causes or is likely to cause an adverse effect. The effect of this change should be to make it easier for MOE to secure convictions when they prosecute under s. 14 of the *EPA*. Some industry lawyers have argued that the effect of the amendment is to remove the third element of an offence, but this characterization is misleading. Dropping the threshold to "may" under s. 14 the *EPA* should mean that MOE will be able to focus mainly on the nature of the material discharged – as opposed to the surrounding circumstances of the discharge (how much was discharged and the nature of the natural environment into which it was discharged).

2) *Environmental Penalties*
Under a new section of the *EPA* (s. 182.1), MOE Directors will be able to issue orders to pay an "environmental penalty" (EP) for specified contraventions in relation to discharges or spills. This proposal builds on the administrative monetary penalty provisions that were enacted as part of Bill 82 in 1998 but never brought into force. An important difference between the Bill 82 administrative monetary penalty provisions and the EP provisions contained in Bill 133 is that the defence of due diligence is not available to individuals or corporations with respect to EPs. Thus, a regulated person can be required to pay an EP even if the person took all reasonable steps to prevent the contravention. However, MOE Directors must reduce the amount of the EP if the regulated person had an environmental management system in place at the time of the contravention. This approach will re-establish a type of absolute liability for regulated persons that are subject to EPs and has the effect of taking these penalties out of the model for environmental offences that has been applied in Canada since the SCC decision on *Sault St. Marie* was released in 1978.

The EP regime has not been finalized and a number of crucial details are to be disclosed in future regulations. Instead of simply referring to the generic "person," the wording specifically targets Ontario businesses, and not other potential sources of discharges such as municipal sewage treatment plants. EPs can only be imposed on regulated persons who are defined as corporations or persons who are required to hold an approval, licence or permit under the *EPA* or the *OWRA* and who are prescribed by regulation. According to its Stakeholder Consultation Paper: Developing Environmental Penalties (November 2005), MOE plans to introduce a draft regulation on environmental penalties in 2006. Moreover, MOE plans to designate only Municipal/Industrial Strategy for Abatement (MISA) facilities as regulated persons and stated during public hearings on Bill 133 that it has no intention of designating municipalities, agricultural operations or other industries. Currently, 139 facilities in nine sectors are designated under MISA regulations. The nine sectors are organic chemical manufacturing, inorganic chemical, iron and steel manufacturing, electric power generation, petroleum, metal mining, industrial minerals, metal casting and pulp and paper. MISA regulations require the designated facilities to monitor and control the quality of effluents that they discharge to water.

Only MOE Directors can issue orders to pay EPs to regulated persons and only for specified contraventions of the *EPA* or *OWRA*, some types of orders, some provisions in the regulations, and approvals, licences and orders that establish numerical limits (including zero) on the amount, concentration or level of anything that may be discharged to the natural environment. The maximum amount of the EP that can be specified is $100,000 a day. MOE Directors must issue orders to pay EPs within one year of the date the contravention occurred or of the date evidence of the contravention first came to the attention of MOE Director or a provincial officer. An order to pay an EP can be appealed to the ERT, but the burden of proof resides with the regulated person, not MOE.

MOE Directors can cancel an order to pay an EP or reduce the amount specified in an EP if the regulated person enters into a settlement agreement with MOE that outlines steps that must be taken within a specified timeframe. MOE must publish each settlement agreement on the Environmental Registry and publish an annual report that lists each penalty and agreement imposed in the previous year. In addition, MOE is required to conduct five-year reviews of the operation of the EP provisions and their effect on prosecutions. Funds collected from environmental penalties can only be used to compensate persons who incurred costs or losses as a result of a spill or who undertake environmental remediation projects.

Provisions in the *EESLAA* also allow MOE to develop regulations that specify the types of contraventions that will not be subject to EPs, require public consultation on agreements, determine the amounts of the EPs and factors that the MOE Director is required to consider when deciding on the amounts of the EPs. If a regulated person pays an EP or enters into an agreement, the regulated person has not admitted guilt and can still be charged for the contravention. If the regulated person is subsequently found guilty of the contravention, the court may impose a penalty that is less than the minimum penalty after considering the payment of an EP as a mitigating factor.

3) *Onus Shifted to Owners and Operators at ERT Appeal Hearings*
The *EPA* and *OWRA* provide owners and/or operators with the right to appeal some orders and approvals to the Minister of the Environment and the Environmental Review Tribunal (ERT), and places the onus on MOE to prove its case before the ERT.

Although the *EESLAA* has retained the right of owners and/or operators to appeal orders under the *EPA* and the *OWRA* to the ERT, the *EESLAA* will require owners and/or operators to prove to the ERT why the orders should not have been imposed or why they should be amended or revoked, shifting the onus from MOE to polluters. For instance, an owner that receives an order related to a contravention of the general prohibition in the *EPA* against discharging a contaminant into the natural environment that causes or is likely to cause an adverse effect is now required to prove that the discharge did not cause and is not likely to have caused an adverse effect. Previously, MOE would have been required to prove to the ERT that the discharge caused or was likely to have caused an adverse effect.

4) *Spill Prevention and Spill Contingency Plans*
As discussed above, the *EPA* requires directors and officers of a corporation to take "all reasonable care to prevent the corporation from causing or permitting" an unlawful discharge of a contaminant into the natural environment, but does not require them to develop and implement plans to prevent, eliminate or ameliorate adverse effects from such discharges or spills unless ordered to do so by MOE. As previously discussed, the *EESLAA* amended s. 14 of the *EPA* to provide MOE Directors with authority to issue orders to require the development and implementation of plans to prevent, decrease or eliminate discharges and spills and their adverse effects. In addition, the *EESLAA* includes new provisions requiring regulated persons to have spill prevention and spill contingency plans; however, the regulation that designates persons subject to these provisions has not been drafted. Once the regulation has been passed, regulated persons will be required to develop and implement these plans to prevent or reduce the

risk of spills and to prevent, eliminate or ameliorate any adverse effects that resulted or may have resulted from the spills.

Implications of the Decision

In a presentation on Bill 133 to the Standing Committee on the Legislative Assembly, the then Minister of the Environment indicated that there was one objective for Bill 133 – to reduce the number of spills in Ontario by "encouraging companies to do more to prevent spills and to ensure fast, effective cleanup when mishaps do occur." The Minister noted that, despite the threat of prosecution, some companies had not taken the steps needed to prevent spills. In 2004, approximately 3,900 spills were reported to MOE, of which, industrial facilities accounted for 1,062 spills or 27 per cent, and MISA facilities accounted for 86 per cent of reported liquid spills from industrial sources (ignoring one exceptionally large spill of 18,000,000 L of washwater).

The ECO expects that the number of reported spills will increase now that all spills, even those that do not result in adverse effects, must be reported unless they are exempted by regulation. The ECO also expects that MOE will impose more preventive orders that include requirements to develop and implement plans to reduce the amount of a contaminant that is discharged to the natural environment or pollutant spilled, or to prevent a spill or to decrease the adverse effects of a spill. Although the courts are now allowed to impose higher penalties than before, it is unlikely that the courts will exercise this authority except in exceptional circumstances. However, the provisions related to sentencing considerations should provide judges, lawyers and regulated entities both greater clarity and transparency with respect to court decisions.

The *EESLAA* provisions on impairment of water are an important breakthrough, as noted above. The new definition of water "deemed impaired" in the *OWRA* to include discharges of material that enter water or may enter water indirectly makes the *OWRA* comparable to the *Fisheries Act*. Under s. 36(3) of the *Fisheries Act*, it is sufficient to show that a deleterious substance has been discharged into waters inhabited by fish to establish an offence.

Public Participation and the *EBR* Process

Bill 133 was introduced in the Ontario Legislature on October 27, 2004 and MOE provided an initial 30-day Registry comment period. MOE had provided an earlier period of consultation between April and September of 2004 related to the formation and work of the Industrial Pollution Action Team (IPAT). To MOE's credit, the description of the bill in the proposal notice clearly explained the nature of the proposed reforms and the potential impacts on the environment. However, the scope of the *EESLAA* was different than many of the proposals outlined in the IPAT report released in July 2004. Moreover, this was the first opportunity for the public to see the specific provisions of the *Act*. Many stakeholders contacted the ECO and requested that the comment period for the *EESLAA* be extended. After requests from the ECO and other stakeholders in mid November 2004, MOE increased the comment period to 71 days.

Since MOE had not posted a Registry decision notice by the time this review was completed in late May 2006, the ECO is uncertain as to exactly how many comments were submitted. Based on an electronic version of the comments provided to the ECO in May 2006, it appears that more than 160 comments were submitted during the comment period.

Commenters were either strongly for Bill 133 or strongly against Bill 133. Supporters included environmental groups, such as the Canadian Environmental Law Association (CELA), the Sierra Legal Defence Fund (SLDF) and the Lake Ontario Waterkeeper, and other groups, such as the Chatham Kent Public Health Unit and the Wallaceburg Advisory Team for a Cleaner Habitat. In contrast, dozens of mining, forestry and petrochemical companies and industry associations, such as the Ontario Mining

Association and the Canadian Petroleum Producers Association, had numerous concerns with Bill 133 and strongly criticized MOE for its work on the bill.

Most environmental groups supported the use of EPs, and noted that EPs have been used effectively in other jurisdictions in Canada and the U.S. However, CELA cautioned that EPs should not be considered as a replacement for prosecutions, noting that legal commentators who have examined the role of prosecutions as a regulatory tool have concluded that an emphasis on prosecutions has served as a powerful catalyst in promoting regulatory compliance. They quoted one expert who has observed that "prosecutions have benefits that are not available from any other administrative remedies." They also cited an empirical study showing that companies that have been prosecuted tend to allocate significantly more of their resources towards environmental protection in comparison to those that have not been prosecuted.

Bill 133 supporters also urged the government to require agreements to settle disputes about EPs (or reduce or even cancel them) to be made public, to require pollution and spill prevention plans and to produce annual reports on the use of EPs, investigations and prosecutions. In addition, supporters agreed with MOE's plans that the Bill 133 requirements should apply only to MISA facilities initially and then to other sectors based on their spill records. They also supported the proposed amendments that reduced the threshold for prosecutions from "likely to cause" to "may cause" under the *EPA*, observing that these amendments would make the threshold under the *EPA* consistent with the existing threshold in the *OWRA*. They also praised the proposed definition of "deemed impaired" citing the problems encountered by MOE prosecutors in proving impairment of water since *R*. v. *Inco* was decided by the OCA in 2001. The Lake Ontario Waterkeeper noted that companies "have been granted the privilege of using public waterways in their industrial processes" and that polluters are "forcing taxpayers to clean up." The Lake Ontario Waterkeeper also suggested that MOE provide funding to groups and communities who wish to participate in ERT appeals so that the process will be fair.

Commenters that expressed concerns noted the lack of consultation prior to the release of Bill 133 and the targeting of MISA facilities and sectors which are already regulated rather than other sectors including the public sector. In addition, they believed that Bill 133 would deter future economic development in Ontario. Opponents to Bill 133 were very concerned with the proposed amendments to change "likely" to "may" in the *EPA* since they argued that "may" cannot be measured and would undermine the scientific basis for conditions in certificates of approval. They were particularly concerned with the proposed "reverse onus" amendments that would require companies to prove why they are in compliance instead of MOE proving that they were not in compliance, and that companies would not be allowed to use a due diligence defence before the ERT. Some opponents were concerned that proposed amendments to hold directors and officers of companies accountable were out of line with good business standards and believed that Bill 133 would result in numerous and lengthy court challenges.

The lack of a due diligence defence for EPs attracted criticism from many companies, industry associations and the Ontario Bar Association (OBA). In its comments on the Registry proposal, the OBA said "[i]t is our strong view that there should be a defence of due diligence available to both individuals and corporations with respect to EPs. Some minimum requirement of fault would strike a better balance between fairness and the compelling need to protect our environment. We are not aware of any evidence that a higher standard of care results from absolute liability." Thus, they recommended that MOE reconsider its proposal to impose absolute liability.

Changes Made at First Reading

In an unusual move, the Ontario government agreed to conduct public hearings before the Standing Committee on the Legislative Assembly during first reading of Bill 133. This allowed the government to make significant changes to the bill. Hearings took place during a three-week period in May 2005 and

more than three dozen stakeholders and individuals made presentations. The Ontario government also agreed to have two days of public hearings after second reading of Bill 133.

During first reading, the Ontario government made numerous changes to Bill 133 in response to comments. For instance, provisions were added to the bill to require regulated persons to prepare spill contingency and spill prevention plans, and clarified that only MOE Directors would be allowed to impose EPs and only to companies, not to employees or individuals.

Changes were made on the threshold requirements for providing notice to MOE and for issuing orders. Initially the Ontario government had proposed to make the notification requirement under s. 15 of the *EPA* subject to the "may" standard. After public hearings held during first reading, the government reverted back to the "likely" standard. This means that companies and individuals will only have to report discharges which are "likely to cause an adverse effect." In contrast, the government retained the "may impair" wording for spills reporting under *EPA* s. 92 as proposed at first reading of Bill 133. The implication of this is that there will be two different standards for reporting – one for spills under s. 92(1) of the *EPA* and another for discharge of a contaminant under s. 15 of the *EPA*. As some observers noted, this seems contradictory and somewhat confusing since the key purpose of s. 15 of the *EPA* is to ensure that MOE officials can become aware of discharges and quickly respond.

Similarly, Bill 133 had proposed to amend s. 16(3)(g) of the *OWRA* to allow MOE officers to issue Provincial Officer's Orders (POOs) requiring alternate water supplies to be provided where a contravention of the *OWRA* may have caused damage to or endangered existing water supplies. However, the government reverted back to the "likely" standard after public hearings on first reading. This means that a s. 16(3)(g) POO can only be issued if there is evidence that a contaminant is "likely to endanger water supplies." Some environmental groups challenged this reversal, arguing that the change in approach was fundamentally at odds with the direction it was proposing to move in relation to source water protection and the proposed *Clean Water Act.*

SEV

In its SEV Briefing Note, MOE stated that the new law is consistent with MOE's SEV commitment to prevent the release of pollutants to the environment as well as its commitment to take action to ensure that those responsible for the harm remediate it. The MOE also stated that Bill 133 "has been designed to encourage violators to immediately respond to spills and other non-compliance situations that could result in environmental impairments. Penalty reductions for actions taken to correct the non-compliance and to prevent the reoccurrence of contraventions will be spelled out in regulations."

Other Information

Part X of the *EPA* also includes a range of other powers and duties related to spills. These include the following:

- s. 93 creates a duty to act to prevent or ameliorate adverse effects;
- s. 94 empowers the Minister to direct staff of MOE to take action to prevent or ameliorate adverse effects;
- s. 95 allows persons exercising a duty under Part X (whether an MOE employee or not) to enter private premises upon application without notice to a judge;
- s. 96 prevents anyone acting under Part X from disposing of a pollutant – or things in the natural environment affected by the pollutant – without direction from the Minister
- s. 97 empowers the Minister to make orders directing other parties to prevent or ameliorate adverse effects;
- s. 98 limits the liability of parties for offences committed while carrying out their duties with good faith and in a reasonable manner;

- s. 99 creates a civil right for compensation for loss or damage that occurs as a direct result of a spill, and in some cases for losses caused by actions taken to ameliorate the adverse impacts of a spill;
- s. 100 authorizes municipalities or other parties designated by the regulations to take steps to prevent or ameliorate adverse impacts; and
- s. 101 entitles parties (other than parties who owned or were in control of the pollutant or the parties who caused the spill) who took steps to prevent or ameliorate adverse effects to compensation from the Crown for their costs.

ECO Comment

The *EESLAA* responds to a number of concerns that the ECO and other stakeholders have raised with MOE, and the ministry should be commended for its work on the legislation. The increase in the potential fines that can be handed out to individuals and corporations under the *EESLAA* is an important and positive decision by the MOE. The threat of fines at higher levels will likely serve as a deterrent for many potential infractions. However, the effectiveness of the legislation is compromised by the lack of resources for compliance staff to work with companies on compliance issues and to enforce the statute. The province's poor success rate in collecting environmental fines is also a concern.

The ECO believes that the changes in the *EESLAA* that potentially could lead to greater liability *(*e.g., the change from "likely" to "may" in some sections) will probably induce industries to re-think their industrial processes so as to minimize the discharges of contaminants that are taking place. The increased prospect of a penalty for unlawful discharges of contaminants should induce some companies and industries to re-examine their processes and begin to implement pollution prevention, product redesign and leading technologies like closed-loop industrial waste processes.

The *EESLAA* strengthens the preventive measure order provisions of s. 18 of the *EPA* to allow ministry officials to require spill contingency and prevention plans. The policy behind this change is that the ministry should be able to require these plans without having to wait (or demonstrate) that the discharge of a contaminant into the natural environment is likely to cause an adverse effect.

The ECO noted in our 1997 annual report that a good understanding of spills occurrence trends can be used to target problem areas and focus prevention programs. At the time, we expressed concern that a reduction in the reporting of spills could compromise MOE's ability to monitor the total volume of spills, to understand and model cumulative impacts and to identify chronic sources of small spills. We also stated that O. Reg. 675/98 could have a negative impact on pollution prevention work by MOE and by industry, and that MOE's focus on setting quantity limits for exempting spills within specific industries was inappropriate because the type of contaminant and the circumstances of a spill must also be considered. To this end, the changes in the *EESLAA* are positive because they emphasize the importance of forcing industry and regulators to focus their attention on spills and their adverse effects.

In our 2001/2002 annual report, the ECO urged MOE to amend s. 30(1) of the *OWRA* to clarify that the Crown need only prove that the discharged material itself may impair, as in the case of s. 36(3) of the *Fisheries Act* (i.e., absent any consideration of the actual discharge or the receiving water body). The ECO is pleased that MOE has responded to this concern.

Some amendments made at first reading of Bill 133 that reversed the shift from the "likely" to "may" standard are troubling. As noted above, the Ontario government had proposed to make some sections of the *EPA* and the *OWRA* (e.g., s. 16(3)(g) of the *OWRA*) subject to the "may" standard. After public hearings held during first reading, the government reverted back to the "likely" standard. From a public policy standpoint, some of these changes seem contradictory and somewhat confusing.

The ECO also strongly supports the development of EPs by MOE. Environmental penalties will provide MOE with a tool to promptly address spills as well as a broad range of non-compliance situations. As noted in the ECO 1999/2000 annual report, EPs provide a number of advantages over prosecution. They can provide regulators with a more expeditious, less resource intensive and less costly means of bringing violators into compliance. Despite concerns that MOE Directors will retain enormous discretion on how EPs are administered and revoked, the ECO regards EPs as an important additional tool for achieving compliance with the province's environmental laws. At the same time, the ECO recognizes that it is essential that MOE clearly define those circumstances when EPs will be utilized and when it will proceed with enforcement action.

The *EESLAA* will also establish a community cleanup fund that would use monies received through EPs to help fund environmental remediation and cleanup activities in the communities that are affected by spills. In addition, the revised sentencing provisions of the *EPA* and the *OWRA* should send a strong message to the regulated community that these revised laws must be taken seriously.

In response to requests from environmental groups, MOE agreed to publish every agreement made to reduce or cancel an EP on the Registry. The provisions to publish settlement agreements and an annual report and to conduct a five-year review of the program will ensure that MOE's implementation of environmental penalties is transparent. It isn't clear whether MOE intends to post the agreements as regular notices subject to s. 15(1) of the *EBR* or as information notices under s. 6 of the *EBR*. Since the EP regulation is still under development, the ECO will reserve further comment until the regulation is passed.

Comments on Process Issues

As noted above, many stakeholders contacted the ECO and requested that the comment period for the *EESLAA* be extended from 30 days to at least 90 days. After requests from the ECO and other stakeholders, MOE did increase the comment period to 71 days. While it is understandable that the government probably wished to pass the *EESLAA* quickly, the *Act* was far too controversial and complex for the minimum comment period. Since the *EESLAA* was not passed into law until late June 2005, a much longer comment period should have been provided for comments on the *Act*.

When ministries post notices of environmentally significant proposals for Acts on the Registry, they must also post notices of their decisions on those proposals, along with explanations of the effect of public comment on their final decisions. In this case, MOE failed to post a decision notice promptly. As of May 2006, MOE still had not posted a decision notice for Bill 133, nearly one year after the bill had been passed into law. Moreover MOE also failed to provide comments submitted through the Registry consultation process to the ECO until early May 2006. (For further discussion, see Ministry Cooperation of this year's annual report, page 203)

In conclusion, the *EESLAA* represents an important shift in MOE's approach to regulating industrial polluters. The ECO will carefully monitor how the new EPs and other facets of the law are administered and provide updates in future annual reports.

Review of Posted Decision:
Regulating Non-Residential and Seasonal Drinking Water Systems

Decision Information:
Registry Number: RA05E0004
Proposal Posted: May 17, 2005
Decision Posted: June 3, 2005
Comment Period: 12 days
Number of Comments: 30
Came into Force: June 3, 2005

Description
In the spring of 2005, a new drinking water regulation was proposed and quickly passed into law, changing the rules for small and rural drinking water systems across Ontario. Following widespread complaints from drinking water system owners about regulations passed in June 2003, the Ministry of the Environment (MOE) filed O. Reg. 252/05, Non-Residential and Non-Municipal Seasonal Residential Systems That Do Not Serve Designated Facilities. This new regulation under the *Safe Drinking Water Act* (*SDWA*) simplifies rules and reduces drinking water protection requirements for tens of thousands of drinking water systems across the province.

O. Reg. 252/05 removes five classes of drinking water systems from O. Reg. 170/03, the Drinking Water Systems Regulation. It lowers the requirements for licensing and approvals, operator training, water treatment, water quality testing, and reporting.

Drinking water systems subject to O. Reg. 252/05:

- **Small non-municipal non-residential** (e.g., motels, bed & breakfasts, churches, gas stations and restaurants)
- **Large non-municipal non-residential** (e.g., large resorts, industrial facilities)
- **Small municipal non-residential** (e.g., community halls, libraries, ball parks and arenas)
- **Large municipal non-residential** (e.g., municipally-owned airports and large sports complexes)
- **Non-municipal seasonal residential** (e.g., campgrounds, communal cottage systems, seasonal trailer parks)

Municipal residential systems remain subject to O. Reg. 170/03. Other, non-municipal systems serving residential developments also remain subject to O. Reg. 170/03, if they are in operation year-round rather than seasonally (e.g., private year-round trailer parks). The water systems for "designated facilities" – retirement homes, nurseries, children's camps, hospitals and other facilities serving higher-risk populations – also remain under O. Reg. 170/03.

Neither O. Reg. 252/05 nor O. Reg. 170/03 applies to the smallest drinking water systems in Ontario: those serving five or fewer residences, and not capable of supplying more than 2.9 litres/second of drinking water.

The number of systems subject to O. Reg. 252/05 is unknown, but estimated at tens of thousands*. Many of these systems were not registered with MOE in the past, and MOE has largely been relying on their owners to voluntarily sign up to be regulated.

Looming Deadline, Interim Solution
On May 17, 2005, a proposal for a new regulation to govern non-residential and seasonal residential systems was posted to the Environmental Registry, with an abbreviated consultation period of 12 days. This proposal for O. Reg. 252/05 was posted only fifteen days before the June 1 deadline, under O. Reg. 170/03, for small non-municipal, non-residential drinking water systems to begin testing for bacteria. MOE presented this proposed regulation as a short-term arrangement, to relieve smaller drinking water systems from some requirements while a new approach for regulating these systems was under development.

The proposed new approach – a new overall framework for drinking water protection – was also posted on the Registry on May 17, 2005. This "Broad Policy Proposal for the Regulation of Drinking Water Systems in Ontario" was posted as a policy proposal notice (PA05E0011) with a 90-day comment period closing on August 15, 2005. The notice indicated that the government intended to transfer agency responsibility for non-residential and non-municipal seasonal residential systems from the Ministry of the Environment to the Ministry of Health and Long-Term Care

(MOHLTC). Regulation of these systems under the *Safe Drinking Water Act* would be replaced with regulations under the *Health Protection and Promotion Act* (*HPPA*). Across-the-board treatment and testing rules for each of these five classes of drinking water system would be dropped in favour of individualised requirements for individual systems, to be set by a local public health inspector based on a risk assessment of the system.

MOE did go ahead with filing O. Reg. 252/05 as an interim measure on June 3, 2005. However, no decision on the overall policy proposal has yet been posted as of May 2006.

Background
After the Walkerton tainted water tragedy of May 2000, the provincial government – in particular, the Ministry of the Environment – began to take on a far more active role in drinking water protection. MOE was reorganized to create a specialized division devoted specifically to drinking water, and headed by a new "Chief Drinking Water Inspector." MOE introduced a more comprehensive inspections regime for municipal residential drinking water systems. Labs that test drinking water were subject to new accreditation and licensing requirements, and drinking water quality "objectives" were passed into law as enforceable standards. The province provided funds to municipalities to study their groundwater, and to conservation authorities to prepare for watershed-level protection of drinking water sources. The Minister of the Environment created an Advisory Council on Drinking Water Quality and Testing Standards, as recommended in the Part Two Report of the Walkerton Inquiry. The minister also established committees to provide advice on how to implement the Walkerton Inquiry's recommendations on watershed-based protection of the sources of drinking water.

A series of new acts, regulations and policies were introduced, governing the owners and operators of drinking water systems. The government passed a *Safe Drinking Water Act* (*SDWA*) in 2002. In 2003, the Drinking Water Systems Regulation, O. Reg. 170/03 under the *SDWA*, defined eight classes of drinking water system and established specific rules for each. Different water treatment, testing and reporting requirements were set for the various classes of drinking water system. Requirements were to be phased in at a different pace for the different system classes. Deadlines for meeting some of the requirements also depended on whether the source water was groundwater or surface water. The rules to protect drinking water in Ontario were stricter and more detailed than they had ever been.

Some claimed that these new rules were *too* strict: too expensive, complex and confusing.

The owners of the smaller drinking water systems were vocal in their concerns about O. Reg. 170/03 and the other new requirements under the *SDWA*. Installing treatment equipment, collecting water samples, paying for lab tests, training and licensing staff, hiring consultants, submitting reports – and simply figuring out all the rules – would increase the financial and staffing costs of operating a small drinking water system. For some rural businesses, churches, trailer parks and other facilities, the increased costs of water supply might force them to shut down their operations altogether.

Ontario's drinking water protection rules have gone through several iterations, as MOE continues to come to grips with the complicated reality of the province's diverse water supply systems, and the particular challenges faced by small and non-municipal systems. Drinking water systems in rural and northern Ontario may be located far from the nearest water testing lab, may be open for only part of the year or for occasional community events, may be primarily in use for non-drinking-water purposes, or may be servicing consumers and small organizations that cannot afford rate hikes to cover new expenses.

O. Reg. 252/05 is intended to accommodate some of the limitations faced by many of Ontario's smaller systems. Of the eight classes of drinking water system formerly under O. Reg. 170/03, five are governed,

for now, by the new regulation. This interim regulation applies to all four classes of non-residential drinking water systems in Ontario – large and small, municipal and non-municipal. These are the systems that supply water to the public in facilities such as rural bed and breakfasts, campgrounds, churches, hotels, roadside restaurants, industrial parks, community centres, and sport and recreation facilities. O. Reg. 252/05 also applies to non-municipal systems that do serve residences, but that operate for only part of the year, such as seasonal trailer parks and communal cottage developments.

Deadlines Delayed
MOE responded to some of the regulated industries' concerns by delaying the phase-in of treatment and testing requirements not once, but several times:

Summer, 2004: On June 18, 2004, less than two weeks before the July 1 deadline for large non-residential and non-municipal seasonal residential systems using a surface water source to begin treating their water, MOE amended O. Reg. 170/03. The amendments extended these systems' treatment deadlines by six months, to December 31, 2004. The deadline was extended to June 1, 2005, for small non-municipal, non-residential systems to notify MOE of intent to either comply with treatment requirements, post warning notices, or apply for treatment relief on the basis of a history of good water quality test results. The amendments also allowed owners of small municipal non-residential systems to post warning notices instead of testing their water, until December 31, 2004. The Minister of the Environment at the time, in announcing the June 2004 delay, stated: "The previous government didn't consider the effects of the regulation on rural Ontario. Our plan, in extending the treatment deadline by six months, is to meet with associations representing these stakeholders over the next couple of months to find solutions that will work for rural drinking water systems."

Winter, 2004: On December 16, 2004, only two weeks before the December 31 deadline for surface water systems to begin treating their water, MOE once again revised O. Reg. 170/03 compliance timelines. "Small and rural communities that would be affected by these deadlines have expressed concerns about the requirements of the regulation," the Minister stated. "As a result, our government responded to these concerns and committed to consulting fully on making the regulation workable." The deadlines for treating drinking water were extended by six to 18 months, depending on the category of drinking water system and on whether its water came from surface or groundwater sources. Various classes of systems also saw their deadlines extended, by between six and 12 months, for notifying the ministry of owners' intent to treat, post signs, or seek relief from treatment.

Summer, 2005: With some of the requirements for smaller drinking water systems about to come into force on June 1, 2005, MOE backtracked again. This time, the changes – under the new O. Reg. 252/05 – were passed not shortly before the compliance deadline, but two days past it, on June 3, 2005. The Minister of the Environment presented

Regulatory compliance: a shifting target

Since June 2005, when O. Reg. 252/05 was passed, MOE has already amended this interim regulation, to exempt small municipal non-residential systems from the requirement for a licensed operator.

Many of the other drinking water regulations created since Walkerton have also undergone revisions – in some cases, several rounds of revisions to correct errors, update standards, change policies, and delay implementation dates – during the past few years. Examples of regulations under the *SDWA* include:

- The Ontario Drinking Water Quality Standards Regulation (O. Reg. 169/03), amended in 2003, 2004, and again in 2005
- Definitions of Words and Expressions Used in the Act (O. Reg. 171/03), amended in 2003 and again in 2004
- Drinking-Water Testing Services (O. Reg. 248/03), amended in 2004 and again in 2005

Most notable, however, are the many revisions to O. Reg. 170/03, the Drinking Water Systems Regulation. It was amended seven times between 2003 and 2005. More changes were proposed in May 2005, but are not yet finalised as of May 2006.

the regulation as a victory for drinking water safety: "For the first time all facilities that serve water to the public will be regulated and required to test their water. We are ensuring that people can trust the water they drink wherever they travel in the province."

O. Reg. 252/05 does not, in fact, require all facilities serving the public to test their water. Testing was to be required under O. Reg. 170/03; under O. Reg. 252/05, most small non-residential systems are exempted if they choose to advise users that the water is not potable. The reduced requirements for testing are among the many changes to the regulatory requirements for the classes of drinking water system subject to this interim regulation.

Reduced Requirements Under the New Regulation:

- *Eliminated: Mandatory testing* – Water quality testing is no longer a requirement for small non-residential systems (other than food service establishments). Instead, they may post signs warning users that the water is not tested and should not be consumed. Previously, posting a warning notice was permitted as a short-term solution only; testing was to be phased in eventually for all categories of system. Large non-residential systems, and non-municipal seasonal residential systems, must still provide testing (unless the system doesn't use electricity).
- *Eliminated: Mandatory treatment and certified operators* – Systems are no longer required to install water treatment equipment, if they have not already done so. For systems that have already installed equipment (as large non-residential systems should have done), they must continue to provide proper disinfection by a certified operator.
- *Eliminated: Testing for chemicals* – System owners are no longer required to test the treated water for any of the suite of chemical parameters listed under the Ontario Drinking Water Quality Standards Regulation, O. Reg. 169/03.
- *Reduced: Testing for bacteria* – The only water quality tests required are for the bacteriological parameters *E. coli* and total coliform. Checking the Heterotrophic Plate Count (HPC), another marker for bacteriological quality, is no longer required.
- *Reduced: Sampling in the distribution system* – Sampling frequencies are decreased, with testing in the distribution system or plumbing (for *E. coli* and total coliform) reduced to:

    - weekly sampling for all large non-residential systems, whether municipal or non-municipal (e.g., large resorts, industries, airports)
    - bi-weekly sampling for small municipal non-residential systems (e.g., community centres, libraries, ball parks) and for non-municipal seasonal residential systems (e.g., campgrounds, seasonal trailer parks and cottage resorts). For the seasonal residential systems, additional sampling is required for each additional 100 service connections.
    - monthly sampling for small non-municipal, non-residential systems (e.g., rural churches, B&Bs and gas stations)

- *Reduced: Chlorine residual testing* – For systems using chlorine, chlorine residual readings are only required when samples are collected for *E. coli* and total coliform sampling.
- *Eliminated: Raw water quality testing* – Monitoring the microbiological quality of the raw (intake) water is no longer required.
- *Eliminated: Annual reports to MOE* – Owners are no longer required to submit an annual report to the ministry. Previously, all system owners were required to report annually to the ministry and to the public on the operation of their system, and on its water quality test results.

Implications of the Decision

Lowered Costs, Lowered Protections

The new regulation is designed to reduce the financial and administrative burdens faced by many of Ontario's small and rural drinking water systems. It does this by significantly reducing requirements related to water quality testing, treatment, and operator certification, for tens of thousands of community centres, churches, campgrounds, and other non-residential or seasonal drinking water systems across the province.

Reduced testing for microbiological parameters will have implications for drinking water safety. Only periodic testing for coliform bacteria (*E. coli* and total coliforms) is required for the estimated tens of thousands of drinking water systems subject to O. Reg. 252/05. In fact, some classes of system may omit even these tests, and post warning signs in lieu of mandatory testing. Coliform bacteria in drinking water are generally not dangerous in themselves (the strain of *E. coli* called *O157:H7,* responsible for much of the devastation in Walkerton in 2000, is a notable exception). Rather, these bacteria are indicators of the risk of biological pathogens in drinking water – the contaminants most likely to pose acute (immediate) human health risks. Reducing or eliminating bacteriological testing therefore increases the risks of an acute drinking water issue – of bad water being consumed and making someone sick.

While bacterial testing is reduced, chemical testing requirements are eliminated altogether for systems subject to O. Reg. 252/05. This too may have implications for the safety of drinking water systems serving the Ontario public. Ontario's drinking water standards include limits on approximately 160 organic, inorganic and radiological chemicals. A few are primarily aesthetic concerns but the rest, from the herbicide alachlor to the radionuclide zirconium-95, are regulated because of risks they pose to human health. Most chemicals that pose a water quality concern are likely to manifest as long-term, statistical increases in population health problems (cancer, hypertension, etc). Without chemical testing, harmful chemicals in water supplies could go undetected.

Some drinking water quality problems can also arise in the distribution system. Reduced sampling in the distribution system could allow problems to go unnoticed for longer.

The elimination of raw water testing, too, has implications for drinking water safety, since characterisation of raw water quality allows for the design and operation of drinking water treatment systems for optimal protection. Changes in the quality of raw water signal potential problems in the safety of drinking water.

With the elimination of annual reports, system operators and owners are no longer required to regularly compile and report information on the status and operation of their systems. These reports provided both the water consumers and MOE with the opportunity to be informed of changes and issues in the operation of the system and the quality of the water. Compiling the data allowed system operators and owners to spot trends of potential significance to the quality of the drinking water they supplied.

O. Reg. 252/05 was designed as an interim solution to address the high cost of regulatory compliance for some drinking water systems. In its June 3, 2005, press release announcing the interim regulation, the Ontario government announced that a transfer of responsibility to the public health units would happen "as early as fall 2006," and that a risk-based framework detailing the public health units' roles would be released for public consultation in the fall of 2005. This would be accompanied by consultations on the proposal that drinking water system owners pay an inspection fee to the health units. As of May 2006, no such proposal has been posted on the Registry, nor has it been made available in some other forum for broad public consultation. O. Reg. 252/05 and its minimal standards may be in effect for longer than was intended. Without a structure in place to impose stronger testing or treatment requirements for the higher-

risk drinking water systems among those governed by this regulation, the regulation can be expected to put some water consumers at higher risk of consuming water below the Ontario standards for potability.

Consistency with Past Commitments
Both the current and the previous governments have repeatedly and publicly committed to implementing all of Justice O'Connor's recommendations from the Walkerton Inquiry. With this decision, however, MOE appears to be moving away from some of the Inquiry's recommendations. For example, consider the following recommendations from the Inquiry's Part II report:

- Recommendation 30 states: "All raw water intended for drinking water should be subject to a characterization of each parameter that could indicate a public health risk. The results, regardless of the type of source, should be taken into account in designing and approving any treatment system." Yet this decision removes the requirement to sample raw water for five classes of drinking water system (all four classes of non-residential system, as well as non-municipal seasonal residential systems).
- Recommendation 66 calls for MOE to be the lead ministry responsible for developing and implementing Ontario's drinking water policy. Justice O'Connor's report discusses why he rejected suggestions to name the Ministry of Health as the lead agency. He explained that so dramatic a change in responsibility would inevitably come with significant costs. He also noted, "it is critical that lead responsibility go to a ministry that can devote substantial attention to it," and suggested that drinking water might get lost among other important and controversial matters under Ministry of Health responsibility, such as health care. Maintaining MOE as the lead agency also allows for a better link between drinking water protection and source protection.
- Recommendation 67 calls for a provincial *Safe Drinking Water Act (SDWA)* addressing drinking water treatment and supply. The report states: "The purpose of the *Safe Drinking Water Act* is to gather in one place all legislation and regulation relating to the treatment and distribution of drinking water," and calls again for MOE to be the lead ministry.

In contrast, the Ontario government has now decided to transfer the regulation of five classes of drinking water system from the *Safe Drinking Water Act* to the *Health Protection and Promotion Act*, and from MOE to MOHLTC responsibility.

Public Participation & *EBR* Process
After MOE filed O. Reg. 170/03 in June 2003, many owners of small waterworks such as rural trailer parks, churches and campgrounds resisted the new requirements. Groups representing small and rural municipalities, such as the Association of Municipalities of Ontario and the Rural Ontario Municipal Association, recommended that O. Reg. 170/03 requirements be delayed, reduced and simplified, and that more assistance be provided to regulated facilities. In MOE's own words, "the testing and treatment requirements for small and rural systems have been severely and widely criticized as being too stringent and financially onerous."

Prior Consultations: Drinking Water Advisory Council
In June 2004, responding to such criticisms, the Minister of the Environment asked her newly formed Advisory Council on Drinking Water Quality and Testing Standards to provide advice on regulating small systems, in particular privately-owned systems.

Before making its recommendations to the ministry, the Council held 12 regional consultation sessions across Ontario, between October 25, and November 8, 2004. These sessions were not announced until October 20, 2004, a few days before the consultations began. Three information notices were posted to the Environmental Registry during this process: inviting the public to consultation sessions

(XA04E0016), providing summaries of the consultations (XA05E0002), and informing the public of the advisory report provided by the Council to the Minister of the Environment (XA05E0007).

The Advisory Council's summaries of its regional consultation sessions listed numerous concerns among session participants. Participants' comments were largely focused on the financial costs of compliance:

- *High costs of treatment, testing, and engineer's reports* – Respondents asked for more technical assistance from MOE to reduce reliance on expensive consultants, and suggested testing by public health labs instead of by private labs. Some parties asked that posting warning signs, rather than treating the water, be a permanent option. Simplified or reduced requirements for reporting water quality test results were also suggested.

- *Systems of particular concern* – Many groups asked for exemptions from regulatory requirements, or for special consideration. For example, mobile home owners asked for support because if a park closes due to costs of drinking water upgrades, mobile home residents may lose their homes. Another problem raised was the availability and expense of testing for water systems in rural and remote areas.
- *Assistance needed from MOE* – Participants called for: better explanations of requirements for the different categories of drinking water system; training for owners and operators, and reduced educational requirements for operators; technical advice; guidance on treatment technologies and suppliers to help waterworks owners make the right equipment investments; financial aid. Some called instead for assistance from an arms' length body that does not also do compliance.
- *Enforcement by public health inspectors* – Some suggested that public health units be made responsible and given the resources for enforcement, and for providing advice, for small systems. They suggested replacing expensive across-the-board rules with individualized requirements from a risk assessment by the public health unit.
- *Extended timelines* – Longer timelines allow owners to spread out the costs of treatment equipment, and give systems more time to notify the government of whether they will comply.
- *Well inspections* – Participants emphasized a need for better well installation, better protection of groundwater, and testing of wells' structural integrity. Well permitting was suggested. Some also called for source water regulations to be integrated with drinking water regulations.
- *Chlorination* – Concerns were raised regarding possible effects of chlorine on health, the environment, and septic systems.
- *Liability and insurance* – This was a concern for several churches, community centres, and owners of private communal wells.

The Advisory Council's summary of the consultations did *not* include one major complaint raised at many of the meetings: people felt they were not given enough notice about these consultation sessions.

On March 22, 2005, after both the ministry and the minister had vetted the Advisory Council's report, it was released to the public. The Council made 22 recommendations. They called for a new regulation under the *Safe Drinking Water Act* to govern these five classes of system (including the "designated facilities" in each class), rather than addressing these systems' particular needs through amendments to O. Reg. 170/03. The Council recommended that responsibility for overseeing drinking water regulation remain under the *Safe Drinking Water Act*, under the overall authority of MOE's Chief Drinking Water Inspector; however, they called for a transfer of administrative responsibility for the new regulation, from MOE to the public health units. Inspection protocols should be developed, and "public health water inspectors" trained, to set individualised, risk-based testing and treatment requirements for each system.

MOE's decision on O. Reg. 252/05 was not fully in keeping with the Advisory Council's advice. The Council's report noted that the current testing requirements should remain in place until the new approach is implemented. However, MOE chose to proceed with lowering the testing requirements in its interim regulation, O. Reg. 252/05, pending development of a new approach. With its "Broad Policy Proposal for the Regulation of Drinking Water Systems in Ontario" (PA05E0011), MOE also disregarded the suggestion that a new regulation for these five classes of systems be passed under the *Safe Drinking Water Act* and remain under the authority of the Chief Drinking Water Inspector.

Other Council recommendations, which the province does not appear to have implemented as of May 2006, include:

- Municipalities, supported by provincial grants, should help non-municipal year-round residential systems upgrade their performance to the same standards as municipal systems.
- Site-specific risk assessments by the public health units should be largely financed through user fees.

- MOE should work with industries to develop alternative test methods where traditional sampling and testing is not feasible (e.g., remote systems), and to pre-approve or certify treatment equipment.
- MOE should inventory the number of drinking water systems in each category in Ontario.
- The province should report regularly on progress in implementing these recommendations.

Consultation on the New Regulation for Non-Residential and Seasonal Systems

MOE failed to meet its minimal consultation obligations under the *Environmental Bill of Rights* before passing O. Reg. 252/05, Non-Residential and Non-Municipal Seasonal Residential Systems That Do Not Serve Designated Facilities. The proposed regulation was posted on the Environmental Registry for only 12 days, not the 30 days required by law. Many commenters complained about the short posting period. Several pointed out that the comment period only included seven business days, because it spanned the May long weekend, and was too short a time for those affected to learn of the proposal, read and understand it, and send in an informed response. Some indicated that they would have provided more considered comments if they had more time to respond.

Despite the short comment period, 30 comments were submitted. Some comments were supportive of many elements of the proposal. For example, most agreed with the removal of heterotrophic plate count testing. Other aspects of the proposal, such as the reduced frequency of bacteriological testing, drew mixed reviews from commenters. However, most of the respondents raised concerns about the proposal:

- *Penalizing good actors* – Some pointed out that those who have already complied with requirements to install treatment equipment are now being penalized, relative to others operating similar drinking water systems who are now able to avoid the expense of treatment equipment.
- *Trailer parks and other small year-round systems* – The proposal to keep small non-municipal year-round residential systems such as trailer parks and small apartment buildings under O. Reg. 170/03 was decried by several respondents, who said the expenses of treatment and testing would put many low income tenants out of their homes.
- *Water wells* – Some questioned what requirements would apply to the wells, citing confusion over the Wells Regulation (Regulation 903, R.R.O 1990, under the *Ontario Water Resources Act* (*OWRA*)).
- *Elimination of annual reports* – This aspect of the proposal drew some criticism, since annual reports forced an operator to review a year's data and made it easier to notice trends.

- *Testing requirements eliminated* – Many criticized elimination of raw water microbiological testing, and elimination of chemical testing requirements. Some pointed out the dangers of allowing permanent signs in lieu of treatment and testing. For example, a water user might be unable to read or might misunderstand such signs. Some respondents criticized elimination of the background colony count during lab testing, pointing out that labs already obtain this result at no extra cost when they do the total coliform test, and that background counts are useful to understand the overall health of the water system. Others were supportive of the change.
- *Designated facilities* – Some suggested that designated facilities be transferred from O. Reg. 170/03 to the new risk-based regulation.
- *Residual chlorine* – The lack of standards for residual chlorine levels, both under normal operations and after taking corrective actions, was criticized. There is also no parameter for reporting adverse chlorine levels (when chlorine levels are too low, in systems that use chlorine to disinfect).
- *Operator training* – Mandatory training for small system operators should not be eliminated, according to several respondents.
- *Microbiological "presence/absence" tests* – There was some strong disagreement with the use of *E. coli* and total coliform "presence/absence" tests. One commenter called the cost-saving from the presence/absence test an "illusion," explaining: "our experience has been that there are far too many false positive P/A results, causing unnecessary remediation action, and time investigating the cause…"
- *Operational parameters* – Some disagreed with the proposal to eliminate operational checks.
- *Lab testing costs* – Many pointed to the high cost of using private labs and called for public (MOHLTC) labs to provide the testing for small systems that serve the public.

MOE's decision notice on the Registry did not reflect the public concerns that were submitted: "The comments received were generally supportive of the ministry's proposal as written. As a result, no changes were made to the ministry's proposal." The decision notice then went on to assert that "misunderstanding or concern expressed by some stakeholders" was unnecessary, since these systems will be transferred to MOHLTC and the public health units by late 2006, at which point the need for treatment and testing will be addressed on a site-specific basis by public health inspectors.

SEV

MOE provided the ECO with a terse statement indicating that this regulation will not affect environmental protection, ecosystems, and water conservation.

Note, however, that MOE's Statement of Environmental Values commits it to safeguarding not only ecosystems but also human health. MOE's SEV calls for it to consider "the interrelations among the environment, the economy and society" and to take social and economic considerations into account. In this decision, MOE has shifted the balance between social/environmental goals (maximizing drinking water safety) and social/economic considerations (limiting the expenses associated with regulatory compliance, in particular to protect the viability of rural churches, community centres, businesses and other facilities).

Other Information

Safe Water Program at the Ministry of Health and Long-Term Care

MOHLTC posted decision notices on the Registry for two drinking water policies on May 12, 2005 – a few days before MOE released its proposed new regulation, and more than a year after the comment periods closed on MOHLTC's proposals. One Registry notice was a decision on a finalized Memorandum of Understanding between MOE and MOHLTC, to clarify the roles of each ministry in protecting the safety of drinking water. The other was a decision on a companion document, MOHLTC's "Protocol Respecting Safe Water Program." Both documents are dated February 2005.

Reviewing the Capacity of Public Health Units
The proposed approach to regulating drinking water in non-residential and seasonal systems will replace O. Reg. 252/05 with a regulation under the *Health Protection and Promotion Act*. Public health inspectors will be expected to conduct risk assessments, set individualized treatment and testing requirements for drinking water systems. The capacity of public health units to deliver this program, which will require considerable staff expertise, and to manage the data on drinking water systems' requirements and compliance, will therefore be key.

Ontario's public health system is currently in flux. The Ontario government created a Ministry of Health Promotion in June 2005, and a new Ontario Health Protection and Promotion Agency is in development. In January 2005, a Capacity Review Committee was struck by the Chief Medical Officer of Health and the Minister of Health and Long-Term Care to examine the capacity of Ontario's public health system. In its interim report (November 2005), the committee found that mechanisms for health unit accountability both to the public and to the government are lacking. Provincial tools for monitoring compliance were described as inadequate.

Non-Municipal Year-Round Residential Systems
Owners of these non-municipal residential systems remain governed by O. Reg. 170/03, and are not subject to the lower requirements of O. Reg. 252/05. For example, these facilities are required to have treatment in place as of July 1, 2006. They must have the treatment system inspected by an engineer, and are required to report back to MOE that they have done so (but not to provide MOE with a copy of the engineer's report), and must have a certified operator.

Proposed Revisions to O. Reg. 170/03 for Residential Systems and Designated Facilities
On June 22, 2005, shortly after O. Reg. 252/05 was passed, MOE posted a proposal (RA05E0005) to amend provisions of O. Reg. 170/03. The ministry proposed to simplify and reduce some of the testing, treatment and reporting requirements for systems that remain subject to this regulation – residential drinking water systems and designated facilities. MOE also proposed developing rules to allow certain residential systems to use "point of entry" disinfection (i.e., disinfection at the tap, as an alternative to centralized drinking water treatment).

A 90-day comment period for this proposal ended on September 20, 2005; as of May 2006, no decision has yet been posted.

Other Drinking Water Protection Developments:

- On July 22, 2005, a "Water Strategy Expert Panel" appointed by the Minister of Public Infrastructure Renewal (PIR) released a report regarding financing of Ontario's water and wastewater systems. The panel's report included recommendations such as the amalgamation of small systems, a switch from prescriptive to results-based regulations, and more active support by the province for cost-saving technologies. This report will help guide the implementation of the *Sustainable Water and Sewage Systems Act* (*SWSSA*), a framework statute which, once proclaimed, will require that municipalities assess the full cost of providing water and waste water services and prepare a "cost recovery plan" for provincial approval.
- On November 28, 2005, MOE proposed a new "Drinking Water Quality Management Standard" (PA05E0033), which is to be a mandatory component of forthcoming licenses for municipal drinking water systems.

- In December 2005, after several years of public consultation on source protection planning, MOE posted proposed legislation for protecting drinking water sources (the *Clean Water Act*, Registry notice AA05E0001, and proposed matters for regulation under the *Act*, RA05E0022) (see the ECO 2005/2006 annual report, pages 23-26.)
- Despite ongoing expressions of concern from environmental groups and the regulated industries, and assurances to the ECO from the Ministry of the Environment that changes are forthcoming, MOE has not yet posted a proposal to revise the Wells Regulation, Regulation 903, R.R.O 1990, under the *OWRA*, as of May 2006. (See page 51 of the ECO 2005/2006 annual report.)

ECO Comment

In our 2003/2004 annual report, the ECO pointed out that the cost and complexity of requirements under O. Reg. 170/03 might create difficulties for the owners of smaller drinking water systems. Many of the owners of smaller drinking water systems were clearly in agreement.

The ECO recognises that MOE, in amending the requirements for non-residential and seasonal systems, was responding to that feedback from drinking water system owners and operators. Allowing non-residential facilities to choose between testing their water or posting warning signs at the tap, for example, is a compromise intended to protect public health while recognising the financial limitations faced by rural businesses, parks, community centres, and other small water system owners.

The ministry made a sincere attempt to consult with drinking water system owners through various industry groups and other representatives, and through the Advisory Council on Drinking Water Quality and Testing Standards, and to find creative solutions to some of the problems it has encountered while attempting to regulate Ontario's highly diverse suite of drinking water systems. MOE is to be commended for its willingness to accept the feedback of waterworks operators, system owners and other stakeholders and experts, and to review and revise the applicable laws and policies as necessary, as it attempts to develop a drinking water protection framework of unprecedented sophistication.

However, the government's frequent changes in drinking water regulations and compliance deadlines also create difficulties, in particular because of the last-minute timing of some changes. By altering rules on water treatment and testing at the eleventh hour, the decision serves to reward those system owners who delayed compliance. The decision on O. Reg. 252/05, and the manner in which it was made, raise a number of other concerns.

Transparency and Public Consultation

This decision was designed to begin to solve the problem MOE created in setting regulatory requirements that smaller drinking water systems were not prepared to meet. It is extremely disappointing that MOE repeatedly delayed making a decision on how to address this issue, and then rushed to pass the amending regulation, O. Reg. 252/05, without respecting the *EBR* requirement for formal public consultation through a 30-day Registry posting.

In a news release on May 17, 2005, when the new regulation was proposed, the Minister of the Environment called O. Reg. 170/03 "a sad attempt to quickly fix years of neglect," and added: "By not consulting with stakeholders, the new rules often made things worse, especially in small communities." It remains to be seen whether the government's latest approach, again an attempt to quickly fix problems that had been recognised for some time, will prove to be a happier attempt.

In terms of public participation, the ECO is particularly concerned that MOE's posting on the Registry appears to have been merely a token show of consultation, and not a true opportunity for the decision-makers to benefit from the input of the public. On the same day that the proposal was posted on the

Registry for public consultation, an MOE press release presented the proposed changes as a *fait accompli*. The regulation was essentially unchanged between the draft and final versions.

Moreover, MOE's decision notice stated that no changes had been made to the proposed regulation before it was finalised as O. Reg. 252/05 because most commenters had been supportive of the regulation as proposed. In fact, the ECO's review determined that commenters raised many concerns with the proposed regulation. Despite the truncated comment period, 30 respondents hurried to provide feedback; clearly, there were members of the public who felt their voices had not yet been heard on these issues through previous consultation opportunities, and who were not satisfied with the proposed regulation. Until such time as the ministry develops an Environmental Registry on which all responses submitted become publicly accessible, the public must rely on ministries to accurately summarize the comments received on a proposal. It is deeply disturbing to the ECO to be put in the position of having to police the accuracy of such summaries in ministries' decision notices.

Safety of Ontario's Drinking Water
This decision creates a three-tiered system for protecting drinking water supplies. Residential systems will continue to be regulated by the Ministry of the Environment under its *Safe Drinking Water Act* and O. Reg. 170/03. Very small systems – private individual water wells or those serving five or fewer residences – will remain outside the scope of the *SDWA*, governed by the limited requirements of Regulation 903, the Wells Regulation under the *OWRA* (for more on the issue of the Wells Regulation, see page 51-54 of the ECO 2005/2006 annual report). And in between these two tiers are the drinking water systems governed by O. Reg. 252/05 – those serving non-residential facilities, or operating for only part of the year.

These drinking water systems are, under the interim regulation, governed by only very cursory requirements for testing, treatment and reporting. From the risk-averse framework of mandatory protections under O. Reg. 170/03, the pendulum for regulating these systems has swung in another direction, to a cost-averse framework that imposes only minimal requirements. The ECO recognises that most such facilities are not a primary drinking water source for the users, so exposures are limited. However, these are drinking water systems which serve the public, and the ECO therefore encourages MOE and MOHLTC to expeditiously develop a framework for a more balanced approach, one that takes into account both the costs of compliance and the risks and costs of tainted water.

Role of Public Health Units
The proposed transfer of responsibility from MOE staff to public health units, and the proposed shift from category-wide requirements to individualised requirements based on site-specific risk assessments, is likely to pose a capacity challenge to the public health units. Since a decision on how to implement the shift in responsibility was not made in fiscal 2005/2006, it is beyond the scope of this report. However, it is worth noting that the success of such an approach will hinge on providing the public health units with adequate implementation capacity, including inspections staff and inspection protocols, training and technical expertise, and information management systems.

The *Health Protection and Promotion Act* is currently not a prescribed Act under the *EBR*. Transferring much of MOE's drinking water responsibility to MOHLTC therefore would remove many of the public's *EBR* rights. If O. Reg. 252/05 is replaced with a regulation under the *HPPA*, that new regulation will be one of several environmentally significant regulations under that Act. The ECO recommends that MOE work with MOHLTC to begin prescribing the *HPPA* under the *EBR*, including all regulations of environmental significance under the Act.

Review of Posted Decision:
Nutrient Management – O. Reg. 267/03 as amended by O. Reg. 511/05

Decision Information:

Registry Number: RC05E0001	Comment Period: 30 days
Proposal Posted: June 24, 2005	Number of Comments: 33
Decision Posted: October 24, 2005	Came into Force: September 29, 2005

Description

On September 29, 2005, the second major set of changes, O. Reg. 511/05, to the nutrient management regulation, O. Reg. 267/03, was filed. O. Reg. 267/03, which is the only regulation under the *Nutrient Management Act* (*NMA*), sets out requirements for the management of nutrients. Under the *NMA*, nutrients are defined as materials, such as manure, biosolids (e.g., sewage sludge) and washwater, which are applied to land for the purpose of improving crop growth. Although a few of the requirements apply to all farms, livestock operations and municipal sewage treatment plants are the primary stakeholders. The original regulation came into force on September 30, 2003, and was amended for the first time on December 19, 2003, by O. Reg. 447/03. For the ECO's review of the original regulation and the first amendment, refer to the ECO 2003/2004 annual report, pages 74-78. For additional information on O. Reg. 267/03, refer to the website of the Ministry of Agriculture, Food and Rural Affairs (OMAFRA).

Under O. Reg. 267/03, each livestock operation is classified according to the number of nutrient units it generates. One nutrient unit (NU) is defined as the amount of nutrients that gives the fertilizer replacement value of the lower of 43 kg of nitrogen or 55 kg of phosphate. This measure makes it easier for OMAFRA and stakeholders to compare hog farms with poultry farms. For instance, a farm with 1,800 finishing pigs and a farm with 45,000 laying hens are considered to be the same size, 300 NUs, under the *NMA*. O. Reg. 267/03 only applies to livestock operations that generate more than five NUs.

Nutrients are classified as either agricultural source materials (ASMs) that are generated by livestock operations, such as manure, or as non-agricultural source materials (NASMs), such as biosolids that are generated by the pulp and paper industry and municipal sewage treatment plants. If NASMs are to be spread on agricultural land, a Certificate of Approval for an Organic Soil Conditioning Site issued under the authority of the *Environmental Protection Act* is required from the Ministry of the Environment (MOE) in addition to the requirements defined under the *NMA*.

O. Reg. 267/03 also makes reference to two protocols – Nutrient Management and Sampling and Analysis – that provide additional information and are legally enforceable. Both of these protocols were revised when O. Reg. 267/03 was revised. The Nutrient Management Protocol provides technical and scientific details and standards relevant to the regulation. However, information about record-keeping was deleted from the protocol. The Sampling and Analysis Protocol describes the techniques to be used for sampling and analyzing soil and nutrient materials. However, the revised regulation no longer makes reference to a third protocol – Construction and Siting – that described the requirements for nutrient storage facilities.

Although another protocol – Local Advisory Committee – that outlined the procedures to be used by the committee has been deleted, the regulation still allows municipalities to establish advisory committees for the purpose of resolving local nutrient management issues.

O. Reg. 511/05 did not change the regulatory requirements that apply to all farms. In particular, no crop or livestock farm is allowed to apply NASMs within 20 metres from the top of the nearest bank of surface water; nor can they apply sewage biosolids to land between December 1 and March 31 of the following year or when the land is snow-covered or frozen. In addition, the use of high trajectory irrigation guns to spread manure or NASMs is prohibited. With the exception of these requirements, crop farmers are

exempt from complying with O. Reg. 267/03. Although O. Reg. 511/05 made numerous changes to O. Reg. 267/03, only a few of the more significant changes are discussed below.

Livestock Operations Phased-in Under O. Reg. 267/03 as Amended by O. Reg. 511/05
Under O. Reg. 267/03 as amended by O. Reg. 511/05, livestock operations are considered to be phased-in if they are required to prepare a nutrient management strategy (NMS). The NMS includes a description and sketch of the farm, a list of the types and quantities of nutrients produced and of the storage facilities, and to whom the nutrients are distributed. Livestock operations may also be required to prepare a Nutrient Management Plan (NMP) if they apply nutrients to their land. The NMP includes information about the farm and its fields; an analysis of the nutrients to be applied, how much will be applied and at what rate; setbacks from sensitive features, such as wells; and how the nutrients will be stored. NMSs and NMPs must be renewed, i.e., updated, every five years or earlier if certain scenarios arise. Some NMSs and NMPs including renewed NMSs and NMPs, require OMAFRA approval. Livestock operations that are not phased-in may be subject to municipal by-laws where they exist.

As described in Table 1 below, O. Reg. 511/05 amended which livestock operations are required to prepare NMSs and NMPs, and which NMSs and NMPs must be approved by OMAFRA. It also amended the scenarios under which NMSs and NMPs must be renewed and possibly re-approved.

Table 1: Preparation and approval requirements for NMSs and NMPs before and after O. Reg. 511/05.

Scenarios	Before O. Reg. 511/05 (before Dec. 31, 2005)	After O. Reg. 511/05 (on or after Dec. 31, 2005)
If the livestock operation is new and capable of generating more than 5 and less than 300 NUs annually.	NMS and NMP required; OMAFRA approval required every 5 years if the operation generates 150 or more NUs.	NMS and NMP not required unless captured under another scenario.
If the livestock operation is capable of generating 300 or more NUs annually on or after July 1, 2005.	NMS and NMP required; OMAFRA approval required every 5 years.	NMS and NMP required; OMAFRA approval of the first NMS required if the operation is located within 100 metres of a municipal well.
If the livestock operation applies for a building permit for a structure that is used to house farm animals or to store manure.	NMS and NMP not required unless captured under another scenario.	NMS required; OMAFRA approval of the subject NMS required
If the livestock operation constructs a permanent nutrient storage facility made of earth.	NMS and NMP not required unless captured under another scenario.	NMS required; OMAFRA approval of the subject NMS required.
If the livestock operation has an NMS and changes in ownership/control affect its capacity to implement the NMS.	NMS must be updated; OMAFRA approval required if previous NMS was approved.	NMS must be updated; OMAFRA approval of the subject NMS required.
If the livestock operation requires an NMS and is	NMS and NMP not required unless captured under another	NMP required.

located within 100 metres of a municipal well.	scenario.	
If the livestock operation requires an NMS and receives NASMs.	NMP required; OMAFRA approval required every 5 years.	NMP required*; OMAFRA approval required every 5 years.
If the livestock operation has an approved NMS or NMP and there are significant changes to the NMS or NMP.	NMS and/or NMP must be updated. OMAFRA approval required.	NMS and NMP may need to be updated.
Annual updates of NMS and NMP.	Annual updates not required.	Annual updates required.

*Livestock operations that generate less than 300 NUs and receive NASMs under a valid Certificate of Approval for Organic Soil Conditioning Sites are exempt from the NMP requirements until January 1, 2007, unless they are located within 100 metres of a municipal well. In July 2006, OMAFRA posted a proposal on the Registry to amend O. Reg. 267/03 to extend this exemption until December 31, 2008.

O. Reg. 511/05 added two new requirements. First, NMSs and NMPs must now be reviewed and updated annually and records of the review and update must be kept. Second, livestock operations that are not required to obtain OMAFRA approval of their NMSs are required to register their operations with OMAFRA. Although, O. Reg. 511/05 retained the requirement that livestock operators keep copies of their NMSs and NMPs, it revoked the requirement to keep records with respect to the day-to-day implementation of their NMSs and NMPs.

NMAN

NMAN refers to a software application and workbook that was developed by OMAFRA for the purpose of preparing NMSs and NMPs. It includes information about Ontario soil types, typical nutrient results for various types of manure, and crop nutrient requirements. NMAN can be used to calculate appropriate nutrient application rates, size of nutrient storage facilities and the number of hectares over which a given quantity of nutrients generated/received should be spread. NMAN provides a means for owners/operators to enter data regarding their livestock operations, such as type and number of livestock, results of soil and nutrient analyses, field descriptions and crop practices, and automates the calculations and preparation of their NMSs and NMPs. NMAN alerts owners/operators of potential problems, such as excessive application rates and insufficient manure storage capacity.

Prior to O. Reg. 511/05, owners/operations were required to use NMAN to prepare NMPs. However, with O. Reg. 511/05, they are now allowed to use any software application provided it complies with the regulation or none.

Implications of the Decision

According to OMAFRA, O. Reg. 267/03 as amended by O. Reg. 511/05 protects the environment without placing an "unbearable burden on farmers" and retains "priority standards that have a strong effect in risk reduction and moves a number of other standards from the regulation to recommended voluntary best practices."

Prior to O. Reg. 511/05, O. Reg. 267/03 primarily targeted new livestock operations that built a structure to house animals, existing livestock operations generating 300 or more NUs, livestock operations expanding to generate 300 or more NUs and operations that receive NASMs. With this amendment, the regulation targets any livestock operation that generates 300 or more NUs, or that builds a structure to house animals or store manure, or builds a permanent nutrient storage facility made of earth. In addition, it includes specific requirements for any phased-in operation that receives NASMs or that is located

within 100 metres of a municipal well. As a result, some existing and expanding livestock operations, which were previously exempt, are now required to have a NMS and possibly a NMP. According to OMAFRA, this amendment accelerates the phase-in of livestock operations under *NMA*.

Prior to this amendment coming into force on September 29, 2005, OMAFRA had approved 777 NMSs. Based on statistics provided to the ECO by OMAFRA in February 2006, the vast majority of the approximately 53,000 livestock operations in Ontario will remain subject to municipal by-laws where they exist. OMAFRA estimates that:

- about 750 livestock operations generate 300 or more NUs and will be/have been phased-in;
- fewer than 25 livestock operations, which generate 300 or more NUs, will need to be registered;
- between one hundred and two hundred livestock operations will be required to prepare NMSs annually due to the new requirement that livestock operations, which generate over 5 NUs, and construct livestock housing or a nutrient storage facility have an approved NMS;
- about 500 livestock operations will apply NASMs and will require approved NMPs in 2007.

OMAFRA indicated that it is still compiling statistics on the number of livestock operations that are located within 100 metres of a municipal well or that are expected to build permanent nutrient storage facilities made of earth.

Although it will continue to be difficult for the public to know whether a particular livestock operation is required to comply with O. Reg. 267/03 or with municipal by-laws, where they exist, OMAFRA advised the ECO that MOE will have access to NMSs and will be able to verify compliance by livestock operations, including those located near municipal wells or that build permanent nutrient storage facilities made of earth, to O. Reg. 267/03.

O. Reg. 511/05 has made a number of changes that reduce the amount of paperwork that owners/operators of livestock operations must prepare and maintain. For instance, prior to the amendment, owners/operators were required to maintain records that demonstrated which components of their NMSs and NMPs they complied with and which components they were not able to comply with, and how they addressed the non-compliance. With this amendment, they are no longer required to keep these records, which may make enforcement of O. Reg. 267/03 impossible. Owners/operators will be required to keep records related to the annual update of NMSs and NMPs. It is the ECO's understanding that farm organizations and OMAFRA are advising owners/operators to continue to maintain implementation records.

O. Reg. 511/05 also changes which NMSs and NMPs OMAFRA is required to approve. For instance, OMAFRA is no longer required to approve NMSs for livestock operations that generate 300 or more NUs unless they are expanding or are located within 100 metres of a municipal well, and NMPs unless the operations receive NASMs. In addition, routine ministry review and approval of renewed NMSs and NMPs is no longer required except for NMPs for livestock operations that receive NASMs.

Although there is no longer a legal requirement to use NMAN to prepare NMPs, the ECO has been advised that there is no other software package available that complies with O. Reg. 267/03. Furthermore, if another software package was available, anyone preparing NMPs using it would need to demonstrate that it complies with O. Reg. 267/03.

Public Participation & *EBR* Process

On June 24, 2005, OMAFRA posted a proposal notice on the Environmental Registry and provided a 30-day comment period. In the notice, OMAFRA indicated that it had met with the farm, environmental and municipal sectors and with the Provincial Nutrient Management Advisory Committee – a committee that OMAFRA had established in 2003 to make recommendations regarding technical issues related to nutrient management. OMAFRA received 33 comments on the proposed amendment and summarized their effect on its decision. A few of the comments are discussed below.

In general, farm organizations supported registration of NMSs instead of requiring OMAFRA approval, elimination of the requirement for most NMPs to be approved by OMAFRA, and allowing the use of alternatives to NMAN. They did not agree with the elimination of the Local Advisory Committee Protocol since it may suggest a lack of government support for these committees that provide owners/operators and the public with a means to resolve complaints locally.

Other commenters expressed concern that many NMSs and, in particular, NMPs would no longer be approved by OMAFRA. In general, the environmental non-government organizations recommended that all livestock operations generating or receiving nutrients be required to prepare NMPs, and that NMPs and NMSs for existing large livestock operations, i.e., livestock operations that generate 300 or more NUs annually, be approved by OMAFRA.

Several commenters expressed concern that if livestock operations were allowed to use software other than NMAN for nutrient management, NMPs would be inconsistent. Several commenters did not support changing record-keeping from a mandatory requirement to a recommended activity.

In general, commenters representing generators of NASMs were concerned that land application requirements for NASMs were not the same as for ASMs. For instance, livestock operations can only apply NASMs that meet stabilization and pathogen limits, and at rates that comply with phosphorus loading and liquid loading limits. Many of the commenters noted that the prohibition on spreading liquid nutrients of any type to land within 150 metres from the top of the bank of surface water should not have been changed to only apply to liquid NASMs.

Several commenters expressed concern that the comment period for the proposal was only 30 days.

SEV

OMAFRA and MOE provided the ECO with a joint statement indicating that they considered their Statements of Environmental Value (SEVs) during the review, development and revision of the regulation. In particular, they indicated that they assessed "how to first maintain protection of the environment and then to minimize the creation of pollutants that can damage the environment" and retained "those standards in the regulation which provided the most security for the safe containment of nutrients." They advised that a committee, the Nutrient Management Science-Based Standards Committee, has been created and has been asked to develop a shortlist of science-based standards for nutrient management that would apply to livestock operations according to risk. They also advised that they are funding a three-year research program coordinated by the University of Guelph that will investigate and field test requirements where the science is lacking related to the application of manure and NASMs to land.

In response to ongoing concerns about the additional requirements imposed on generators and receivers of NASMs in comparison to ASMs, OMAFRA and MOE indicated that they will immediately review this issue and will "look at eliminating the overlap between the *Environmental Protection Act* and the *NMA*."

Other Information
In December 2005, MOE posted a notice (AA05E0001) on the Registry regarding the proposed *Clean Water Act* that was developed in response to a recommendation from the Walkerton Inquiry and is intended to protect existing and future sources of drinking water. It is expected that regulations developed under this Act will address some of the same risks to water as O. Reg. 267/03

In February 2006, OMAFRA posted an information notice (XA05E0012) on the Registry announcing the establishment of the Nutrient Management Science-based Standards Committee. The Committee, comprised of six experts from various fields including agriculture, hydrogeology and land use planning, has been asked to make recommendations to OMAFRA and MOE regarding standards which are to be consistent with the source protection risk-based model and which would apply to all farms beginning in 2008. According to the information notice, the standards "will reduce the risk posed by nutrients, such as nitrogen and phosphorus, pathogens and bacteria to the environment, while ensuring sustainable agricultural practices on all farms."

In July 2006, MOE posted a notice (RC06E0001) on the Registry indicating that it plans to propose a revised regulatory framework later in the year that will eliminate the duplicate requirements for NASM management.

ECO Comment
The *NMA* was first conceived as a means to ensure that all Ontario livestock operations were subject to the same requirements and not to the disparate nutrient management by-laws that municipalities were passing in response to concerns from the public about large livestock operations. However, since its enactment in 2002 and the passing of O. Reg. 267/03 in 2003, the agricultural community in particular has viewed the regulation as being onerous and has questioned the scientific justification of some aspects of the regulation. In addition, questions have yet to be answered about the potential overlap with anticipated regulations that will be developed under the proposed *Clean Water Act*. The revisions to O. Reg. 267/03 by O. Reg. 511/05 are a step towards a more risk-based approach, which is the same approach that will be used to protect sources of drinking water. More revisions to O. Reg. 267/03 may be required when the shortlist of nutrient management requirements and regulations under the *Clean Water Act* are drafted and when the results of the University of Guelph research program become available.

The ECO is supportive of a risk-based approach that ensures that the largest livestock operations, i.e., operations that generate 300 or more NUs annually, are subject to the most stringent requirements and the smallest operations to less stringent requirements. However, the ECO is concerned that changes to several of the requirements for large livestock operations have weakened accountability and assurance of compliance with O. Reg. 267/03. Moreover, critical sections of the amended regulation related to which livestock operations are phased-in and which NMSs and NMPs require ministry approval are exceedingly more complex than the previous version and will be very difficult for most people to understand.

As noted above, O. Reg. 511/06 only requires OMAFRA approval of the first NMSs for large livestock operations located within 100 metres of a municipal well; renewals of NMSs for these operations will not be required unless another part of O. Reg. 267/03 is triggered. Prior to this amendment, OMAFRA approval was required for renewed NMSs for all large livestock operations. The ECO believes that unless NMSs for all large livestock operations, regardless of their location, are approved by OMAFRA at least every five years, the NMSs may become stale or may no longer reflect current conditions.

Since environmental risks related to land application of nutrients are addressed in NMPs, the ECO is concerned about some of the weakened requirements related to the preparation and approval of NMPs. The ECO does not believe that the requirement to use NMAN should have been deleted from the

regulation. NMAN was developed and maintained by OMAFRA, and provided livestock owners/operators, OMAFRA, MOE and the public with some assurance that NMPs prepared using NMAN were compliant with O. Reg. 267/03. It is the ECO's understanding that although the agricultural community has some concerns with NMAN, they are being addressed, and that OMAFRA has strongly recommended owners/operators to continue to use it. The ECO also notes that OMAFRA approval of NMPs for large livestock operations located near wells and other sources of drinking water are no longer required unless they have been phased-in and receive NASMs. The ECO believes that all NMPs, including NMPs for large livestock operations that do not receive NASMs, and renewed NMPs should be approved by OMAFRA.

In addition, despite OMAFRA's contention that livestock operations are required to keep records throughout the year that demonstrate compliance with their NMSs and NMPs, the ECO notes that this requirement was deleted. As a result, it will be much more difficult for OMAFRA or MOE to verify compliance or to conduct an investigation and may make the *Act* and its regulation unenforceable. With the exception of the few NMSs and NMPs that require OMAFRA approval, the only mechanism to assure the public that NMSs and NMPs have been prepared, are current and comply with O. Reg. 267/03 is a site visit by OMAFRA or MOE. Although the ECO understands that OMAFRA and various farm organizations continue to recommend that owners/operators keep implementation records, the ECO does not believe the legal requirement to keep these records and information about the nature of these records should have been deleted.

In January 2006, the ECO was pleased to learn that the *NMA* and its regulations were prescribed for notice and comment and for applications for review. However, since *NMA* and its regulations were not designated for applications for investigation and NMSs and NMPs were not designated as instruments, the public and municipalities will still not be notified on the Registry of local nutrient management activities that may affect them, nor will anyone be able to request an investigation under the *EBR* into possible non-compliance with the *NMA* or its regulation. The ECO continues to urge MOE and OMAFRA to prescribe the *NMA* for applications for investigation and to designate NMSs and NMPs for large livestock operations as instruments.

Review of Posted Decision:
Great Lakes Water Management Agreements

Decision Information:

Registry Number: PB04E6018	Comment Period #1: 91 days
Proposal Posted: July 19, 2004	Number of Comments: 175
Proposal re-Posted: June 30, 2005	Comment Period #2: 60 days
Decision Posted: March 24, 2006	Number of Comments: 137

Decision Implemented: December 13, 2005 (agreement signed)

Description
On December 13, 2005, the government of Ontario signed an agreement with Quebec and the eight U.S. states that border the Great Lakes, titled the Great Lakes – St. Lawrence River Basin Sustainable Water Resources Agreement ("the Agreement"). The Agreement is designed to strengthen protection of the waters of the Great Lakes Basin. It sets out a "decision-making standard" for new or increased water takings within the Great Lakes Basin, and strictly limits water diversions.

Among the listed objectives of the Agreement are:

- Jointly protecting, conserving and restoring the waters of the Great Lakes – St Lawrence River Basin ("the Basin");
- Facilitating collaborative approaches to water management across the Basin, and providing common mechanisms to evaluate water withdrawal proposals;
- Creating co-operative arrangements for future water management challenges;
- Retaining state and provincial authority within the Basin;
- Facilitating data exchange and strengthening scientific information on the effects of water losses;
- Promoting adaptive management to address uncertainties and evolving scientific knowledge;
- Preventing significant adverse impacts of water takings or water losses.

The parties agree to ban most new or increased water diversions. Exceptions to the diversion ban are allowed in limited circumstances – for example, to supply needed water to a community near, but not entirely within, the Basin. An "exception standard" is defined for determining when to approve such proposed diversions. For takings, the Agreement specifies a process called "regional review" through which all ten parties will be consulted (though not allowed a veto) by the responsible jurisdiction before it grants an exception to the diversion ban.

The state and provincial signatories to the Agreement describe it as a good-faith agreement, noting that provinces and states cannot themselves sign treaties across international boundaries. Under the Canadian constitution, the power to sign international agreements is within federal jurisdiction, not provincial. The eight Great Lakes states (Illinois, Indiana, Michigan, Minnesota, New York, Ohio, Pennsylvania and Wisconsin) signed a second, binding accord, which the provinces are not party to: the Great Lakes – St. Lawrence River Basin Water Resources Compact ("the Compact"). The Compact mirrors the provisions of the Agreement, but provides stronger limits on water diversions by giving all of the states veto power over approving new or increased large-volume water diversions on the U.S. side of the Basin. The Compact must be ratified by all the signatories as well as the U.S. federal Congress in order to come into effect.

History of the Great Lakes Charter Agreements
In 1985 an agreement called the Great Lakes Charter ("the 1985 Charter") was signed between Ontario, Quebec and the Great Lakes states. The parties committed to notifying and consulting with one another about new or increased large-volume (greater than 19 million litres/day) water takings from the Basin.

In the U.S., the federal government passed the *Water Resources Development Act of 1986* (*WRDA*), which gave each of the eight Great Lakes states a veto over any proposals to divert surface water out of the Basin (the two Canadian provinces neither held nor were subject to such veto power). While *WRDA* required the consent of all eight states for water diversions, it did not establish a consultation mechanism, an oversight body, or a standard for making such decisions, nor did it apply to in-basin consumptive uses. Regulation of water uses varied greatly among the states.

A number of Great Lakes water quantity issues were drawing government and public attention in the late 1990s and early 2000s:

- In 1998, Ontario issued a controversial Permit to Take Water for a proposal to ship water in bulk from Lake Superior to Asia. Ontario quickly revoked the permit, before any water shipments had begun, but the incident highlighted anxieties about bulk water diversions from the Great Lakes. The fear was not that any particular water diversion would affect the water levels of the Lakes, but rather that it might set a legal precedent for future large-scale diversions;

- Ontario passed a Water Taking and Transfer Regulation under the *Ontario Water Resources Act* in 1999, which banned large water diversions from the Great Lakes basin, and the Canadian federal government amended its *International Boundary Waters Treat Act* in 2001 to prohibit water removal from boundary water basins in Canada;
- The 1998 proposal to ship water in bulk from Lake Superior focused attention on whether international trade agreements such as the North American Free Trade Agreement would lead to loss of government control over water diversions;
- In 1999, the governments of Canada and the United States referred the issue of Great Lakes water consumption and water diversions to the International Joint Commission (IJC), the bilateral body that monitors the Boundary Waters Treaty of 1909. The IJC's 2000 report recommended that states and provinces inform one another of proposals for water diversions and major consumptive uses, and that decisions on approvals take into account practical alternatives, cumulative impacts, and water conservation. The Commission emphasized the need for a Great Lakes-wide water conservation program targeting in-Basin uses. The report also recommended that governments commit to improvements in collecting water use data, conducting Great Lakes science, monitoring groundwater, and mitigating climate change;
- By 2001, water levels in three of the five Great Lakes – Superior, Michigan and Huron – had been lower than normal for four years in a row (with many factors, especially precipitation patterns, contributing to this situation).

In 2001, the ten parties to the 1985 Charter added an "annex" to it, to clarify what criteria they would use for approving large water-taking proposals. Principles of the "Annex 2001" agreement included minimizing water loss, protecting water quantity and quality, and improving the waters and water-related resources. Annex 2001 committed the parties to developing new binding agreements, within three years, laying out a decision-making standard for the review of water taking proposals. The Annex specified that public participation was to be part of the process to design the agreements.

The signing of Annex 2001 in June 2001 was followed by three years of negotiations between the ten parties, as they attempted to develop the binding agreements called for in the Annex. The Ministry of Natural Resources along with the Ministry of Intergovernmental Affairs represented Ontario in these negotiations.

Draft agreements were released for a 91-day public review in July 2004 and posted to the Environmental Registry. The agreements proposed an environmental standard for deciding on proposed large water uses, specified the triggers for conducting a "regional review" of a proposed water taking, and addressed concerns such as cumulative impacts of water takings and the importance of water conservation.

Many Ontarians criticized the draft agreements, calling for tougher rules to prevent water diversions from the Basin. In November 2004, the Minister of Natural Resources announced that Ontario would not sign the July 2004 drafts. (For more on the 2004 proposal and public response, see the ECO 2004/2005 annual report and supplement.) Ontario returned to the bargaining table in early 2005, to negotiate a stronger agreement.

Ontario, Quebec and the Great Lakes states released a new set of draft agreements on June 30, 2005. This time, the draft agreements were not presented with unanimous approval by the ten negotiating parties. Indiana – having installed a new Governor in January 2005 – consented to bringing the drafts to the public for a 60-day consultation. In Ontario, MNR posted the draft agreements to the Environmental Registry on June 30. The ministry also hosted 11 meetings across the province between July 5 and August 10, 2005, to present the draft agreements and hear public comments.

After the 60-day consultation, the ten parties returned to the negotiating table to seek a final agreement. Consensus was announced on November 10, 2005, subject to a 30-day review by each of the jurisdictions. MNR announced on November 28, 2005, that a final version of the Agreement was available for public viewing (Environmental Registry notice XB05E6807) and would be signed shortly. The Agreement was signed by all ten provincial or state governments on December 13, 2005.

Implications of the Decision

The Agreement is designed to strengthen the powers of the Great Lakes provinces and states to protect water, and in particular water quantity, of the Great Lakes Basin. It explicitly invokes concerns such as cumulative impacts, climate change, the need for water conservation, and the importance of improved science and information to support water management decisions.

Water Diversions

The parties agree to ban water diversions from the Great Lakes Basin, with limited exceptions for two specific situations.

"Straddling communities" located partly inside and partly outside the Great Lakes Basin boundary can divert water from the Great Lakes for use in their public water supply, if they are able to return that water back to the watershed it came from. Depending on the size of a proposed diversion, stricter rules may also apply: New or increased withdrawals greater than 379,000 litres/day must meet the exception standard test (see sidebar, below), and large withdrawals above 19 million litres/day must first undergo regional review.

Similar provisions apply for "straddling counties": When a community outside the Great Lakes Basin, but in a county partially within the Basin, wants access to Great Lakes water for its water supply, the proposal must undergo regional review. Although the Agreement's boundary line for being inside or outside the Great Lakes Basin is based on surface water flows, decisions under the "straddling counties" exception will also take groundwater into account. Some communities just outside the Basin may be relying on groundwater that is hydrologically connected to the Great Lakes, and want this fact taken into account if they apply for a permit to draw their water supply from a source within the Basin boundary line.

Standards under the Agreement

The **decision-making standard** states that a water withdrawal should:

1. All water be returned to its source watershed, less an allowance for consumptive use
2. Have no significant individual or cumulative impacts on water quality, quantity, or water-dependent natural resources
3. Include "environmentally sound and economically feasible" water conservation measures
4. Comply with all applicable laws (municipal, state and federal), and with agreements such as the 1909 Boundary Waters Treaty
5. Be reasonable in terms of: efficient water use and minimal waste; balancing economic and social development and environmental protection; sharing the resource; minimizing impacts on other water uses and on the Basin waters and related resources. If hydrological restoration of the watershed is part of the proposal, that may be taken into account.

The **exception standard** – for deciding whether to allow an exception to the ban on diversions – includes the following criteria:

- *The exception can't reasonably be avoided* by efficient use of existing water supplies.
- *Only as much water as is reasonable* for the stated purpose will be diverted.
- *All water withdrawn will be returned* to the Basin, less an allowance for consumptive use. Water from outside the Basin cannot be used to meet this criterion – except if it cannot be avoided because the water supply system combines water from inside and outside the Basin (in which case the water should be treated to prevent the transfer of invasive species).
- *No significant individual or cumulative impact* to the quantity or quality of Great Lakes waters and related resources should result from the diversion. The impacts of any precedent-setting consequences of the proposal must also be considered.
- *Water conservation measures* should be used to minimize amount withdrawn or consumed.
- *All applicable laws, agreements and treaties must be complied with*, including the 1909 Boundary Waters Treaty.

Diverted water can only be used within the limits of the community, as defined when the Agreements come into force. In other words, Great Lakes water cannot be used to facilitate urban sprawl outside the Basin.

Regulating Intra-basin Diversions
Some of the growing communities in southwestern Ontario – a region nestled between Lakes Huron, Erie and Ontario – are beginning to exceed the water supply capacity of their local aquifers and rivers, and to consider "big pipe" solutions using Great Lakes water instead. Rules that constrain the diversion of water from the watershed of one Great Lake to another are therefore of particular interest to Ontario. Proposed new or increased water takings that divert water from one Great Lakes watershed to another must meet the following requirements:

- *Smaller intra-basin diversions*: for takings that do not exceed an average of 379,000 litres/day over any 90-day period, a state or province has sole jurisdiction over whether to approve the proposal.
- *Large diversions*: If the average daily withdrawal is between 379,000 litres/day and 19 million litres/day, the province or state is to notify the other parties. The applicant must demonstrate that there is no feasible, cost-effective alternative to the proposed intra-basin transfer. All tests of the exception standard must be met, other than the requirement to return water to the source watershed.
- *Very large diversions*: For proposed intra-Basin diversions exceeding 19 million litres/day for any 90-day average, all clauses of the exception standard apply: water must be returned to the source watershed. The proposal must also undergo regional review.

Great Lakes Regional Body
The Agreement assigns a number of roles to a "Regional Body" composed of the premiers and governors or their designates. For example:

- In the first year of the Agreement and at five-year intervals, the Regional Body will review and report on whether each party's water management and water conservation and efficiency programs are meeting the provisions of the Agreement and, if not, will lay out options for improvement.
- If requested at any time, the body will issue a "declaration of findings" on whether a party is meeting the provisions of the Agreement.
- The Regional Body can make recommendations to the parties to develop or improve water management and water conservation and efficiency programs, and may recommend establishing lower thresholds for the regulation of water withdrawals.

Notification and Consultation
The "regional review" process under the Agreement is an opportunity for all ten parties to raise concerns about a water taking proposal. Regional review is required for some water takings under this Agreement, but can also be specifically requested by the originating party, by a majority of the parties, or by the Regional Body. The originating party provides the others with the applicant's information and with an analysis of the proposal and whether it meets the exception standard, and a 90-day review is initiated. Public participation provisions include:

- public notification of the proposed water taking
- opportunity for public comment in writing
- opportunity for comment at a public meeting in the state or province of the proposed water taking
- consultation with First Nations

The Regional Body will then meet and issue a public declaration of findings. However, this declaration is not binding on the originating party.

Regulating Water Takings

Most of the negotiating parties, including Ontario, already had a system in place at the time to issue permits for water takings. Michigan, in contrast, had no laws governing water withdrawals. The Agreement committed each of the parties to establishing a program for regulating water takings, to protect the physical, chemical and biological integrity of the Great Lakes. However, it was left up to each party to decide the volume threshold above which water takings will be regulated. As a backstop, if any party fails to establish a water withdrawals management program within ten years, the threshold for managing new or increased withdrawals in that jurisdiction will be set at 379,000 litres/day.

This backstop is not a minimum, merely a default in case of non-action; when Michigan passed a water regulating law on February 28, 2006, it was far more permissive than the default. Michigan set 5 million gallons/day (approximately 19 million litres/day) as the permit requirement threshold for Great Lakes withdrawals. For comparison: this is hundreds of times higher than the 50,000 litres/day threshold for requiring a Permit to Take Water in Ontario.

In the July 2004, draft Agreement, consumptive uses above 19 million litres/day were to be approved by the originating jurisdiction only after regional review. This provision is dropped in the final Agreement, and the other parties have no control, other than a 90-day comment period before such large consumptive uses are approved. The originating party must provide a response to comments by the other states/provinces, but need not address their concerns in its final decision on whether to allow a water taking. This provision will begin to apply five years after the Agreement comes into force.

The Chicago Diversion
Chicago, Illinois, is the site of the largest water diversion out of the Basin – a canal that, since 1900, has diverted Lake Michigan water into the Mississippi River. This diversion remains under the jurisdiction of a U.S. Supreme Court Decree, and is not captured by the diversion provisions of the Agreement. If any modification to the decree – which currently caps the diversion at 3,200 cubic feet/second (7.8 billion litres/day) – is proposed, formal input of Ontario and Quebec will be allowed.

Federal Agreements
The impact of a state-province Agreement on existing federal arrangements such as the Boundary Waters Treaty of 1909 and the role of the International Joint Commission (IJC) remains to be seen. The Agreement explicitly acknowledges the federal governments' roles under the Boundary Waters Treaty and other international agreements, notes the valuable role of the IJC, and indicates that the Agreement does not alter the powers of the federal governments. Federal laws and international agreements are also recognised under the decision-making standard and the exception standard. Because the Agreement recognises that the Lakes are interconnected, forming a single hydrologic system, it may bolster the call for Lake Michigan – located entirely within the U.S. – to be regulated as "boundary waters" and subject to IJC governance. However, by creating its own dispute resolution process, the Agreement may displace the IJC role to some extent. This is a particular concern for Ontario because the IJC consists of an equal number of appointees from Canada and the U.S., whereas the Agreement creates an 8-2 split between American and Canadian representation (moreover, the provinces have only non-binding "good-faith" influence on the process while the states, through their Compact, also hold legal powers such as veto rights over one another's water allocation decisions).

Water Conservation
The Regional Body is committed to developing Basin-wide water conservation objectives, with the goals of: ensuring improvement of the Basin waters and water-dependent natural resources; protecting and restoring Basin hydrologic and ecosystem integrity; protecting water quantity; ensuring sustainable use of waters; and promoting water use efficiency and reducing loss and waste. Ontario and the other parties must develop water conservation programs and report annually to the public on their progress in meeting these goals and the Basin-wide conservation objectives. Conservation programs need to adjust to new water demands, cumulative impacts and climate change. Every five years, all of the parties will provide an assessment of their conservation programs to the Regional Body, which will review the Basin-wide objectives.

Public Participation & *EBR* Process
During the 2004 round of public consultation, the Ontario public raised many concerns with the draft Agreement. They submitted 175 written submissions through the Environmental Registry during a 91-day consultation period, and provided numerous oral and written comments at regional public meetings. Some called for a longer public consultation period and more forums for public consultation, because of the significance of the proposed agreement. The Council of Great Lakes Governors received over 10,000 comments.

When the parties returned to the negotiating table at the start of 2005, Ontario established an "Annex Advisory Panel" with experts representing 55 different environmental, municipal, industrial, agricultural and First Nations groups and other institutions, to assist the Ontario negotiators.

In 2005, the new draft Agreement (and Compact) were subject to a shorter 60-day consultation period, and some parties again called for a longer consultation period. The public submitted 137 comments through the Registry consultation process.

Major concerns raised in the consultations included:

- *The "resource improvement" trade-off* – A proposed "resource improvement" standard in the 2004 drafts would have made water-taking approvals conditional on funding for improvements to water-dependent resources such as wetlands. Some argued that this was a key innovation: By requiring improvements to Great Lakes ecosystems when approving water takings, the losing battle of cumulative impacts could be reversed. Economic activities in the Basin could be harnessed to protect and remediate the Lakes. For many groups, however, the "resource improvement" standard was a "ducks for water" sell-off. Detractors feared that it would lead to unpalatable trade-offs and a *de facto* marketing of Great Lakes water, allocating water-taking permits to those who could afford to pay for ecosystem remediation activities. Some also warned that a "resource improvement" standard would make the Lakes vulnerable to disputes under the North American Free Trade Agreement, and argued that if bulk water became subject to provisions of the NAFTA, governments might lose their powers to limit water diversions. This standard was dropped from the final Agreement.
- *Preventing diversions* – A primary public concern, leading to Ontario's rejection of the 2004 drafts, was the need for a strong ban on water diversions. The parties addressed this concern with a "virtual ban" on diversions. However, in order to accommodate the interests of Great Lakes states in which near-basin communities are facing groundwater problems and looking to the Lakes for a water supply solution, the diversions ban makes exceptions for "straddling communities" and communities in "straddling counties." Because this uses political rather than biophysical boundaries to determine who can divert water from the Lakes, some critics fear that the Agreement leaves the Great Lakes vulnerable to challenges – by private investors, foreign interests or thirsty southern states – under the terms of trade agreements such as the NAFTA.
- *Federal jurisdiction* – Some critics called for a stronger role for the federal governments and questioned whether a state-province pact would weaken the Boundary Waters Treaty and the International Joint Commission.
- *First Nation:* – First Nations representatives argued that they were inadequately represented in this process, and that the Agreement and Compact would undermine their legitimate land claims and rights. During the 2005 consultations, First Nations umbrella groups in the Basin publicly protested against the Agreement. A new body was formed by the Basin's First Nations and Tribes, the United Indian Nations of the Great Lakes, to give voice to shared concerns on Great Lakes protection and governance.
- *Addressing existing problems* – Commenters also called for: stronger water conservation requirements for both new *and existing* users in the basin; more commitment to Great Lakes science to identify problems and solutions; better information gathering and information management to support water management decisions.
- *Binding powers* – Some Ontarians were concerned with a framework that gave the states veto power over one another's water taking approvals, but did not provide Ontario with equivalent power.
- *High thresholds* – Many commenters called for lower water volume thresholds for triggering the Agreement provisions. The final Agreement set the triggers at lower thresholds than did the original drafts.
- *Implementation timelines* – In response to concerns about the draft Agreement's long implementation timelines, the final Agreement establishes shorter phase-in periods (two- and five-year windows) for most provisions.

On November 28, 2005, MNR posted an information notice to inform the public that the revised draft Agreement and Compact were available for viewing (XB05E6807). The notice stated that once a decision was made on these drafts, a decision notice for the Great Lakes Water Protection Agreements proposal (PB04E6018) would be posted to the Registry. The notice added: "MNR anticipates this will occur in December 2005." Although the Agreement was signed on December 13, 2005, it took MNR until March 24, 2006, to post a decision notice for its policy proposal on the Environmental Registry.

SEV

MNR provided its statement on how its SEV was considered in late April 2006, several months after the decision was made. However, the statement included a detailed discussion of how the Agreement supports the ministry's environmental goal and objectives, how it addresses MNR's sustainable development principles, and how specific purposes of the *EBR* are served by this decision. Greater sustainability of Great Lakes Basin water resources was cited as critical to the economic, social and environmental well-being of Ontario and of the entire Great Lakes region.

ECO Comment

Public Consultation

The ECO congratulates all of the parties for their hard work and political courage in achieving consensus on an Agreement and Compact to implement the 1985 Charter and Annex 2001. In particular, the Ministry of Natural Resources and supporting ministries are to be commended for their leadership in negotiating this important new agreement to protect the Great Lakes. MNR actively encouraged public participation in shaping the Agreement. Ontarians were consulted during two rounds of formal public consultation, which included Environmental Registry postings and public meetings. When the Ontario public expressed dissatisfaction with the 2004 drafts, Ontario's government listened, and returned to the bargaining table to negotiate stronger protection against water diversions.

Ontario's negotiators also chose to create a large, broad-based Annex Advisory Panel of experts and stakeholders, and to share sensitive information and respond to the panel's feedback during the negotiation process. MNR credits this panel with influencing Ontario's negotiators to push for key environmental protections such as the ban on diversions, a commitment to setting Basin-wide conservation goals, and shortened implementation timeframes for the Agreement.

Not everyone was satisfied with the process – First Nations groups did not have the representation they wanted at the bargaining table, some advocacy groups in Ontario were excluded from the advisory panel, and the consultation period in the summer of 2005 was decried by some as too short relative to the complexity and importance of the issues at stake. Nevertheless, the ECO recognises this Agreement as an example of successful public consultation, through which a responsive government was able to significantly improve public policy on environmental protection.

Environmental Protection

The provisions of the new Agreement (and its companion document, the states-only Compact) do not, in fact, satisfy the first directive of Annex 2001: to develop a Basin-wide binding agreement, through whatever arrangements are necessary. Instead, Ontario finds itself with a non-binding "good faith" agreement. However, the Agreement is a significant and very welcome development in Great Lakes protection.

The Great Lakes are enormous. They hold nearly one-fifth of the fresh surface water on planet Earth. It is hard to imagine that the water could ever 'run out.' But the Lakes are a legacy of the last Ice Age; less than one percent of their water is renewed by rainfall each year, and if water is extracted above the rate of renewal, the seemingly inexhaustible Great Lakes will indeed shrink.

Already, Basin residents have seen several recent years of lower-than-normal water levels, and scientists are warning that we can expect climate change to result in lower water levels in the future and to create problems such as shallower shipping lanes, decreased drinking water source quality, loss of some wetlands, changes in ecosystem structure and function, and inadequate urban infrastructure (e.g., for stormwater management). Demands for increased water supply to serve a growing human population in the Basin – now over 40 million people – will only add to the challenge.

But for many observers, the greatest threat to sustaining the Great Lakes waters comes from outside the Basin, as population growth in other watersheds, overuse and pollution of groundwater and surface water sources, and a changing climate all create pressure to divert Great Lakes water, in bulk, to water-short areas of the continent or beyond.

The significance of the Agreement and Compact are the power that they give to the Great Lakes provinces and states to protect the resource. With an environmentally-based standard for deciding which water taking proposals to approve, and clear rules for keeping water in the Basin, the Agreement decreases the risk of draining the Great Lakes to meet the appetites of an increasingly thirsty world. The Agreement is also ground-breaking in formally recognising cumulative impacts, in invoking the threat of climate change, and – although the phrase "precautionary principle" did not make it into the final Agreement – in containing language about exercising caution, and taking action against environmental risks even in cases of uncertainty. Other notable elements of the Agreement are the commitment to setting water conservation goals, reporting publicly on progress in water conservation, and improving Great Lakes science.

Ontario was able to take a strong stand at the bargaining table, in part because the province was already ahead of neighbouring jurisdictions in terms of its water permitting and a diversion prevention framework. Ontario has laws in place that meet many of the specific requirements of the Agreement. The Water Taking and Transfer Regulation, O. Reg. 387/04 under the *Ontario Water Resources Act*, bans water diversions out of the Basin, and regulates water withdrawals. (See pages 116-120 of the ECO 2004/2005 annual report for more information on the revised regulation.)

Unfortunately, Ontario is in a much shakier position in terms of meeting other very important commitments of this Agreement, such as increased Great Lakes science for improved decision-making, and a stronger water conservation framework. Also unfortunate is the vagueness of these commitments, which creates difficulties for tracking whether Ontario has lived up to its obligations. The ECO is very concerned that the Agreement should be more than an on-paper success. Implementation is key.

While MNR was the lead ministry negotiating the Agreement, implementation will be led by the Ministry of the Environment. The ECO is very concerned about MOE's limited capacity for Great Lakes monitoring, data sharing and environmental remediation. The province was proud to announce the signing of this Agreement, and rightly so. But without an announcement of any new capacity for implementation, the ECO questions how Ontario will live up to its Great Lakes obligations.

Review of Posted Decision:
Permit to Take Water Manual

Decision Information:

Registry Number: PA04E0036
Proposal Posted: December 14, 2004
Decision Posted: April 14, 2005
Comment Period: 45 days
Number of Comments: 34
Came into Force: April 2005

Description

Permits to Take Water (PTTWs) are government approvals for large-volume water uses, and are administered by the Ministry of the Environment (MOE). They specify how much water permit holders may take, for what purpose, and from which wells or surface water bodies.

In April 2005, MOE issued a new "Permit To Take Water (PTTW) Manual." The manual's stated purpose is to set out MOE's decision making process on PTTWs, "to explain to applicants, proponents, and the public the requirements and considerations that are generally taken into account" when MOE evaluates a proposed or existing water taking.

A New PTTW Manual for a New Regulation

PTTWs are regulated under the *Ontario Water Resources Act* by O. Reg. 387/04, the Water Taking and Transfer Regulation. The regulation was passed in December 2004, replacing a 1999 regulation of the same name. It introduced new factors to be taken into account when deciding whether to issue a PTTW, including: ecological impacts of the proposed water taking; the purpose for which water is to be used; and whether the taking is in an area of the province that is already water-stressed. The practical details, explaining how these factors would be considered when MOE makes decisions on issuing PTTWs, were to be addressed in a new manual.

What activities require a Permit to Take Water?

Under the *Ontario Water Resources Act* (*OWRA*), s. 34, a PTTW is required for water takings above 50,000 litres per day. Examples of such water takings include: drinking water supply; irrigation; electricity generation or other dams and reservoirs; manufacturing and industry; de-watering of mines, aggregate pits or construction sites; water storage for watering livestock and poultry; and wildlife conservation projects such as wetlands creation. The Act exempts firefighting, individual household use, and the direct watering of livestock and poultry. Large private sector water takings that were ongoing as of March 29, 1961 (when the *OWRA* was amended to create the PTTW provisions) are grandparented, and do not need a permit.

PTTWs are issued, amended or revoked by MOE staff designated as "Directors" for the purposes of administering s. 34 of the *OWRA*.

The Registry proposal notice for the new manual was posted in December 2004, when the new Water Taking and Transfer Regulation was finalized. The new manual replaced the 1999 "Permit to Take Water Program, Guidelines and Procedures Manual" that guided MOE staff when reviewing PTTW applications under the 1999 version of the Water Taking and Transfer Regulation (O. Reg 285/99 under the *OWRA*). Despite some cosmetic changes in 1999, the PTTW Manual had remained largely unchanged since 1984.

(For more on O. Reg. 387/04, see pages 116-120 of the ECO 2004/2005 annual report and pages 96-104 of that year's supplement.)

Implications of the Decision
The manual reprints and briefly explains many sections of the Water Taking and Transfer Regulation, while providing additional details on the ministry's PTTW policies. It describes the approval process for PTTW applications and the type of supporting information that applicants must provide to MOE.

Principles of the PTTW Program
The manual cites the *OWRA*, the ministry's Statement of Environmental Values under the *EBR*, and MOE's "Water Management Policies, Guidelines, Provincial Water Quality Objectives" (also known as the Blue Book) as setting out underlying principles of the PTTW program, then spells out six principles more specifically:

1) MOE will use an ecosystem approach that considers both the water takers' reasonable needs and the natural functions of the ecosystem.
2) Water takings are controlled to prevent unacceptable interference with other water users wherever possible, or to resolve such problems if they occur.
3) MOE will employ adaptive management to better respond to evolving environmental conditions.
4) The ministry will consider cumulative impacts of water takings.
5) The ministry will incorporate risk management principles into permit application and review processes.
6) MOE will promote public and agency involvement.

The "principles" section of the manual also notes that the ministry will post designated applications (i.e., instruments prescribed by O. Reg. 681/04 under the *EBR*) on the Registry and will consider public comments in its decisions. MOE will notify municipalities, conservation authorities (CAs) and other local agencies of these designated permit applications, to increase local awareness and consider their advice.

Risk-based Classification of PTTWs
The manual introduces a three-tiered classification system for permit applications, requiring more information for water taking applications that are classified as higher risk.

The manual provides a table summarizing MOE's criteria for categorising three types of permits. Criteria are related to the potential for a water taking to have adverse environmental impacts or to interfere with other water uses:

- Category 1 takings are those anticipated to pose the lowest risk. Permit renewals for existing takings will be Category 1 if they have had no known adverse impacts in the past and if MOE has not previously requested the holder to submit additional studies for MOE's review. New takings from agricultural irrigation ponds, and takings of less than one million litres/day from the Great Lakes and their connecting channels, will normally qualify as Category 1. The ministry will conduct a technical screening of information provided in such PTTW applications, but not require supporting scientific studies to be submitted.
- Category 2 takings are water takings that pose a greater risk of adverse impacts, but for which a "qualified person" has certified that certain criteria are met, and submissions may be audited by the ministry. For groundwater takings, the Category 2 criteria require that this be either a very short-term taking (less than 7 days, e.g., a pumping test) or both short-term and low-volume (less than 30 consecutive days and less than 400,000 L/day, e.g., construction dewatering). For surface water takings, classification as Category 2 is triggered by a range of factors. Category 2 surface water takings include those that:

- Draw from the Great Lakes and connecting channels, exceed one million L/day, and are below the Great Lakes Charter volume threshold (the volume limit is not specified in the manual);
- Have already been subject to an assessment;
- Occur no more than twice a week, and that draw less than one million L/day from a lake or pond larger than 10 hectares, provided that the lake or pond is not connected to a river or stream;
- Draw less than five per cent of low flow water volume from a river or stream; or
- Return the water quickly to its source and have little impact on water quantity and quality (e.g., for cooling water).

- Category 3 takings are those for which such mitigating circumstances do not apply. They including takings from smaller streams, wetlands, new on-stream reservoirs and ponds, and groundwater sources that may affect surface waters. To obtain a PTTW for a Category 3 taking, the applicant is required to have a qualified person prepare a hydrogeological or hydroecological study, which MOE staff will then review.

This section also provides for a "pre-submission consultation" process during which MOE can assist applicants in determining what other permits or approvals they may need. Other parties (local agencies and the Ministry of Natural Resources) may be identified through this process, and MOE may consult such agencies when evaluating a permit application.

Considerations for Evaluating PTTWs
This section starts by both quoting s. 4 of O. Reg. 387/04 (Matters to be considered by Director) in its entirety, and restating all of these factors as listed in the regulation:

1) Natural functions of the ecosystem, e.g., flows, water levels, and relationships between groundwater and surface water;
2) Water availability, including low water conditions and potential impacts on municipal, agricultural and private domestic users;
3) Uses of water, e.g., whether water conservation practices will be implemented, and the purposes for which water is being used; and
4) Other issues such as "the interests of other persons who have an interest in the water taking" if the Director is made aware of that interest.

These factors apply to all categories of water takings, "to the extent that they are relevant and information is available to the Director." The manual describes typical information sources, including data submitted by the applicant, provincial data sets and information in MOE files, and information from other agencies that were consulted and from comments on Environmental Registry postings. The Director will impose standard conditions as well as site-specific conditions on permits to address factors such as protection of natural ecosystem functions and water availability.

Evaluating PTTWs – Surface Water and Groundwater
The surface water section describes types of surface water takings that will be considered Category 1, 2 and 3, providing a descriptive explanation of the scope of scientific work required for Category 2 and Category 3 takings. It includes mention of approvals that might be required by agencies other than MOE, such as MNR approval under the *Lakes and Rivers Improvement Act*, and approvals under the federal *Fisheries Act*.

The groundwater section, similarly, describes the technical screening and scientific evaluation and review that apply to proposed groundwater takings. It provides explanations, but not comprehensive descriptions or definitions, of terms such as "sensitive areas" and "potential contaminant sources" that MOE will consider when reviewing Category 3 applications. The manual encourages applicants to consult with MOE's regional hydrogeologists before conducting more detailed scientific studies to support PTTW applications.

While the PTTW program aims to prevent interference by new takings with existing water uses, the manual does refer to MOE's Guideline B-9 for responding to interference complaints, and explains what measures may be necessary in such instances. In cases where interference can be predicted before a permit is issued, the manual allows, but does not appear to require, terms and conditions on the permit to prevent such interference.

Low Water Conditions
The "low water conditions" section of the manual refers to the Ontario Low Water Response (OLWR) methodology, and notes that in cases of low water conditions, MOE may refuse permit applications or impose specific conditions on permits. MOE may require that water conservation practices be documented by permit holders, or may impose other conditions on water takings, in watersheds that are or have recently been declared as Level I, II or III (mild, intermediate or escalated drought conditions) under the OLWR. Level I conditions call for voluntary conservation with a goal of 10 per cent reduction in water use by all sectors. Responses to Level II conditions include more targeted water conservation messaging and ensuring compliance with restrictions, to achieve 20 per cent reduction. Level III calls for the development and implementation of water use priorities among users, to mitigate drought effects.

Conservation
The manual encourages, but does not require, all water users to adopt and document water conservation best practices. Requirements may be placed on existing takings if they are located in a high or medium use watershed or a watershed with low water conditions, if the water taking triggers the Great Lakes Charter, if the water taking is a large municipal residential supply, or if the Director has information regarding water quantity supply issues. A permit applicant may be required to demonstrate that the new or increased water taking being applied for could not be reduced or avoided through water conservation measures. The manual cites examples of industry associations that represent specific water sectors (municipal water works, golf courses) that can provide information on published best practices, and refers applicants to the Ontario Ministry of Agriculture, Food and Rural Affairs and the Ontario Federation of Agriculture to seek best management practices for agricultural water conservation. The manual does not provide an MOE-recognised list of best management practices for all sectors, and does not specify what it would consider appropriate information sources on such practices for many PTTW-using sectors.

Water Use
The PTTW Manual provides little information on how MOE will implement the regulatory requirement to consider "the purpose for which the water is being used or is proposed to be used, and if the water is not currently being used, whether there is a reasonable prospect that the person will actually use the water in the near future" (O. Reg. 387/04, s. 4(2)(3) ii and iii). The manual specifies that the intention is not to discourage the efficient use of water, nor is it intended to set out a hierarchy of water uses. The manual suggests that the information on the purpose of the water taking is only of interest for determining the amount and timing of water likely to be needed, for determining whether other approvals might be necessary (e.g., for wastewater discharge), and for identifying uses that remove water from the watershed.

High Use Watersheds
The Water Taking and Transfer Regulation maps out "High Use Watersheds" (both seasonally high use, and year-round), and in such watersheds special restrictions apply to new or increased water takings. The manual restates which water uses will, under O. Reg. 387/04, be refused new or expanded water takings in such watersheds. Examples include beverage and water bottling, ready-mix concrete factories, and other product manufacturing that incorporates more than 50,000 litres/day of water into products. For uses other than those specifically restricted by the regulation, the classification of a watershed as high use will also be taken into account when reviewing PTTW applications.

The manual explains that the designation of Ontario's watersheds as either high-, medium- or low- use in the regulation was calculated by comparing water demand to water supply, minus a reserve for in-stream needs. Both the regulation and the manual deal exclusively with classifying surface waters by watershed use; the parallel issue of designating and protecting groundwater in high-use aquifers is not addressed.

Great Lakes Charter
The manual addresses the Great Lakes Charter signed between Ontario, Quebec and the eight Great Lakes states in 1985, and the 2001 annex to that charter which committed the parties to develop binding agreements to protect and improve the waters of the Great Lakes Basin. The manual states: "Great Lakes States and Provinces are currently working on developing such agreements." In fact, Ontario and the other parties signed such agreements on December 13, 2005, several months before the PTTW Manual was finalized. The specific requirements (for water conservation, consultation with all parties for proposed large-volume water takings from the Great Lakes, etc.) are not reflected in the 2005 PTTW Manual. (For more on the Great Lakes water quantity agreements, see pages 20-23 of this year's annual report and pages 133-141 of this supplement.)

Notice and Consultation
This section lists the types of PTTW applications that are exempted from Registry notice and comment requirements under the *EBR*. Permits do not have to be posted if they are for less than one year's duration, or are for irrigation of agricultural crops. Posting is not required for urgent situations that would result in danger or damage (to people, the environment or property) if the taking was delayed to allow time for public consultation. Water takings already approved through parallel public consultation such as an environmental assessment process are also exempt from Registry instrument notice requirements.

In all other cases, the *EBR* and its regulations require that MOE post proposals for PTTW applications. In addition, O. Reg. 387/04 requires that municipalities and conservation authorities be notified. The manual notes that MOE might consult other interested parties "where requested," such as First Nations communities, if the proposed water taking might affect existing takings or the environment. The manual does not address provisions in the *EBR* for enhanced public participation on Class II instrument proposals, nor does it note opportunities under the *EBR* for the public to request that a PTTW be "bumped up" (treated as a Class II instrument).

The manual does not specify when or how the ministry will exercise the options, set out in the regulation, of requiring an applicant to notify or consult with interested parties, and of requiring a report back to MOE on how the applicant resolved or attempted to resolve other parties' concerns.

Data and Reporting
This section restates provisions in O. Reg. 387/04 for a phase-in of reporting requirements. Permit holders will be required to collect and record data on the volume of water taken daily, and to report every year to MOE. The manual provides no additional information: no explanation of what form such data must be provided in, nor of what methods for calculating water volume would be acceptable.

Water Transfer
This section reiterates the prohibition, spelled out in O. Reg. 387/04, on transferring water out of any of the three major water basins in Ontario (the Great Lakes-St. Lawrence Basin, the Nelson Basin, and the Hudson Bay Basin), and the exceptions set out in the regulation for specific uses such as water bottles of less than 20 litres' volume, ballast water, and water transfers or diversions that pre-date 1998. The additional explanation supplied by the manual is a list of the information that should be provided by the proponent of a project excepted from the water transfer ban, in addition to the PTTW application: the location of the water taking or diversion location and any relevant bottling or manufacturing plant locations; proof that the proponent has legal rights to the land on which the bottling or manufacturing plan or water diversion is planned; the size of containers to be used and list of destinations, if water will be transported in bulk; and the date that water takings or diversions are expected to start.

Summary of the Application Process
The manual includes a step-by-step description of the PTTW assessment process. First, the application is screened for completeness, then for whether the taking is located in a high use watershed. Next, the MOE reviews the application to determine whether it triggers the Great Lakes Charter, and whether an Environmental Registry proposal notice and notification of local agencies are required. Then the application is assigned to Category 1, 2 or 3 and reviewed accordingly, and the Director decides whether to issue the permit and what conditions should be set on it. The decision is posted to the Registry if required. The processes for permit appeals at the Environmental Review Tribunal (by either the permit holder or a third party) are also briefly described.

Responsibilities of MOE and the Applicant
This section commits the ministry to taking responsibility for elements of the program including:

- Ensuring that the interests of others are considered by posting proposals on the Registry, notifying CAs and municipalities, and considering the comments received from these and other agencies and from the public.
- Evaluating the supporting hydrogeology, hydrology and/or hydro-ecology information prepared by qualified persons to support water taking applications, in accordance with any technical Terms of Reference established. No specific Terms of Reference are established by the PTTW Manual or referred to in it.
- Coordinating consultations with other agencies on matters related to the permit application, and helping the applicant address concerns raised by municipalities and CAs. The ministry may also seek clarification from other agencies about specific concerns which the applicant needs to address.
- Ongoing compliance and enforcement of the PTTW program.

The applicants also have responsibilities, including:

- Consulting with the ministry before submitting a permit application to identify issues that may need to be addressed.
- Classifying the proposed water taking, and providing the necessary supporting information and details when submitting an application. For Category 1 takings, which do not require supporting studies or information from qualified persons, applicants must still provide details on the water source, surrounding water uses, local sensitive receptors and major pollution sources. (The ultimate sources for such data are not specified.)
- Management and stewardship of water after a permit is granted: "They must fulfill permit conditions, undertake standard environmental protection requirements for environmental monitoring, report on the water taking, and be proactive about opportunities to further reduce impacts and increase water use efficiencies."

Public Participation & *EBR* Process

Prior Consultations on the PTTW Program

MOE consulted on changes to the PTTW program through its White Paper on Watershed-based Source Protection Planning released in February 2004, and received reports from two advisory committees on source protection in November 2004 that included advice on PTTWs. The ministry carried out consultations on the proposed revisions to the Water Taking and Transfer Regulation using the Registry notice and comment process and by holding stakeholder meetings in both 2003 and 2004 before finalizing the amended regulation, O. Reg. 387/04, in December 2004.

In its Registry proposal for the new Water Taking and Transfer Regulation, MOE had specified that a draft of the new PTTW Manual would also be posted for consultation before the regulation was finalized. However the draft manual was not released for consultation until December 14, 2004, the day when the decision was posted for O. Reg. 387/04.

Comments on the PTTW Manual Proposal

MOE received 34 comments on the proposed manual. Commenters raised numerous suggestions and concerns. The ministry appears to have made an effort to address many of the concerns raised, but some contentious issues are still unresolved.

Many comments focussed on the following issues:

- *Technical guidelines* – Many commenters were critical of the lack of technical specificity in the manual, pointing out that clearer guidelines would help both applicants and reviewers. MOE did provide some additional information in a new "Guide to Permit To Take Water Application Form" in April 2005, replacing the 1994 "Guide for Applying for Approval of Permit to Take Water" and the June 2000 "Interim Guide for Applying for a Permit to Take Water." The new application guide was not posted as a Registry proposal, nor did the decision notice on the new PTTW Manual refer to it.
- *Source water protection* – The integration of the PTTW program with the province's nascent drinking water source protection framework was a concern raised by many commenters. For example, the PTTW Manual does not include a formal role for Source Protection Boards in reviewing permit applications.
- *Cumulative impacts* – Several commenters criticized the manual for not requiring a water balance assessment in all cases, and asked what conditions would trigger a consideration of cumulative impacts. Some also asked for clarification on whether MOE or the applicants would prepare and pay for such assessments. The final manual appears deliberately vague on who will be responsible for conducting and funding cumulative impact and water balance assessments for subwatersheds, watersheds or aquifers.
- *Definition of terms* – Many comments focussed on lack of clarity in terms used in the manual. As examples, a permit may include a requirement for monitoring wells if a water taking is in "close proximity" to an area of known groundwater contamination, and cumulative impacts to water balance may be addressed if the Director knows of a pattern of "significant decline in hydraulic head" in an aquifer. These terms and phrases remained undefined in the final manual. Other concepts criticized by commenters as excessively vague were clarified somewhat in the final manual. For example, the definition of a "qualified person" for surface water studies was expanded beyond a list of relevant bachelor degree specializations to also say: "The type of scientific work that a qualified person performs must be consistent with that person's education and experience." MOE did not take up one commenter's suggestion that the ministry maintain and distribute a list of people or organizations considered "qualified" for conducting the water assessments.

- *Notifying conservation authorities* – Many commenters approved of the policy of informing CAs and municipalities of Registry postings for PTTW proposals. Some suggested a more formal set of consultation requirements, beyond mere notification.
- *Great Lakes* – Several commenters disagreed with the proposal, in the draft manual, that water takings from the Great Lakes Basin of less than one million L/day could be classified as Category 1, and that takings of less than 19 million L/day from the Basin be subject only to a scoped Category 2 assessment and not to detailed study. Some called for all Great Lakes takings (of any duration) to be posted to the Registry. The finalised manual maintains the proposed arrangement of classifying Great Lakes water takings as low concern (Category 10 if they draw less than one million L/day. The manual puts Great Lakes takings into Category 2 if they are above one million L/day but below the "Great Lakes Charter threshold," and at that threshold water conservation may be required even for existing water takings. The manual doesn't address the different volume thresholds set out in the Great Lakes agreements (takings of 379,000 L/day and 19 million L/day, averaged over a 90-day period, are thresholds triggering different provisions of the agreements). It simply states that administering these agreements is an MNR responsibility, and that MOE will consult with MNR. (See pages 133-141 for a review of the Great Lakes Charter implementing agreements, including thresholds for triggering regional review of proposed water takings.)
- *Drought response and conflicting priorities* – Some commenters called for larger cuts to water use when "level II" low water conditions are triggered under the Ontario Low Water Response, for clearer and more enforceable water use reduction requirements for "level III" (the highest level of drought condition), and for stronger water conservation provisions in general. Some commenters suggested that in times of drought, agricultural uses should trump uses such as manufacturing, water bottling and aggregate operations. Others promoted the protection of planned municipal uses (not only existing municipal uses) in situations of water scarcity, and called for priority setting and dispute resolution mechanisms.
- *Data gaps and burden of proof* – Inadequate data for water management decisions was a theme among many of the commenters. Several commenters called on MOE to provide research and data on water conditions instead of relying on PTTW proponents. Their rationales varied: some cited the excessive cost that data collection places on applicants, while some were focussed on the greater accountability of publicly-collected data. Other commenters, in contrast, supported using permit applications as an opportunity to acquire much needed data, for example by requiring proponents to install monitoring wells for all groundwater takings. Some commenters suggested that it would help applicants to conduct necessary assessments if MOE made a database of water takings publicly available; however, the confidentiality of data supplied to MOE by permit applications or permit holders was a concern raised by some industry and agricultural groups.
- *Registry postings* – One commenter criticized the draft manual's chart setting out how an application is processed, and suggested that greater clarity should be provided on which applications require a Registry notice and how comments will be considered. The final version of the chart contains the suggested additions and clarifications. The revised chart also indicates that for applications triggering the Great Lake Charter, if requirements of that agreement are not met, the permit will be denied.
- *Category 1 or 2 (or 3)* – Many questioned a key element of the PTTW program: how MOE would review and evaluate the different categories of applications. Some commenters felt that too many permits would be processed as Category 1 applications. They called for a more precautionary approach that assumes a use to be high risk unless adequate data exists to indicate that the water taking would be low-impact. Another suggestion was to allow local agencies such as conservation authorities to "bump up" applications to a higher level of review, and to require scientific studies to support all categories of water taking. In the final manual water takings are grouped into three categories, whereas the draft allowed for only two, and there is some additional explanation of MOE's role in reviewing the applications.

- *Special exceptions* – Many commenters suggested special exceptions for certain industries or activities, such as: expedited approvals of water takings for heat pumps, protection of agricultural water takings from third-party appeals, exemption of waterpower from PTTW requirements, or exemption of ecological projects from monitoring and reporting requirements.
- *Permit duration* – Several applicants asked for clarification on the duration of permits under the new PTTW program framework. Some preferred longer permit timeframes because of the workload and application fees for permit renewals, while others suggested shorter durations to promote adaptive management.

Many commenters used the PTTW manual proposal as an opportunity to criticize aspects of the PTTW program that are dictated by O. Reg. 387/04, or by the *OWRA* itself. For example, the manual reprints s. 4(2) of the regulation, which calls for the MOE Director to consider certain ecological factors "to the extent that information is available to the Director," and some found this provision inadequately protective of the environment, and called for a more precautionary approach that puts the burden of proof on the proponents when data is lacking. Some called for no new water bottling to be allowed, asked that PTTWs to be required for large private water uses that draw from municipal systems, and called for an end to the exemptions to permit requirements that are listed in the *OWRA*. Many concerns were raised with the delineation of high use watersheds, set out in the regulation.

Commenters were critical of new PTTW processing fees, and of the lack of public consultation on these fees. Several commenters asked for clarity about (or reductions in) MOE's processing time for PTTW applications.

Commenters also called for MOE to allocate resources towards enforcement, to ensure that water users don't ignore the requirement to obtain a permit. Some questioned whether MOE had the capacity to implement the manual's stated principles, such as the principle of employing an adaptive management approach to changing environmental conditions. Many suggested that MOE needed to improve its data management systems and databases to support implementation of the PTTW program and integrate it with source protection initiatives.

SEV

The ministry provided a cursory assessment of how MOE's Statement of Environmental Values was taken into account, briefly citing the principles of environmental protection, the ecosystem approach, and resource conservation.

ECO Comment

The ECO has long been concerned with gaps in the PTTW program. Not all water takings require a permit; not all PTTW proposals and decisions are posted to the Environmental Registry; PTTW notices that are posted are often incomplete or inaccurate. These permits continue to be the most contentious of all instruments subject to *EBR* notification and appeal provisions. We have seen general improvements in the program over the last decade, and consider the requirement for permit holders to report on volumes of water taken – a requirement being phased in over three years since O. Reg. 387/04 was passed in December 2004 – to be an important step forward in Ontario's water management framework.

With a revised regulation and a new manual, the ECO looks forward to further improvements in the program. In our 2004/2005 report (page 119) we pointed to a number of outstanding questions that might be addressed through the new PTTW manual: how and when applicants will be required to conduct consultations with people who have an interest in the proposed water taking; the extent of applicants' responsibility for providing information on ecosystem function, water availability and water use considerations; and which water conservation measures would apply to different types of water takings. The manual has provided some direction, but appears deliberately vague on certain matters. There is no

specification of how consultations with interested parties are to be conducted. No explanation is provided for when MOE will require water balance and cumulative impacts studies, nor is there clarity on who will be responsible for conducting such studies. The manual provides very little guidance on what activities constitute water conservation best practices.

The manual's provisions related to adaptive management and low water response are also vague. Neither the PTTW Manual nor the regulation makes mention of climate change. There is no protocol for review of the "high use watersheds" maps, no timeline for their review, and the maps appear to focus only on surface water pressures, ignoring groundwater conditions. With aquifers in some of southern Ontario's highly populated areas under increasing stress, the PTTW program is in clear need of guidance on how to protect groundwater as well as surface water from over-extraction. The manual explicitly avoids setting water use priorities to guide ministry staff, water users and other parties in responding to drought conditions and resolving conflicting claims in times of water shortage. The ECO reiterates our 2004/2005 comment on the importance of setting policy on the hierarchy of water uses under low water conditions, and of maintaining ecosystem protection as the highest priority.

The PTTW program, with its provisions for collecting water use data, protecting ecosystem functions, preventing interference between users, promoting conservation, and consulting with municipalities and conservation authorities, will be an important element in Ontario's source protection framework. The 2005 PTTW Manual makes no mention of source protection, and does not assign a review and comment role to source protection committees. The ECO expects that, as source protection legislation and regulations are finalized, further revisions to the PTTW program will be necessary. Collecting and managing water use data and making information available to source protection committees, permit applicants and other interested parties will be a key MOE contribution to source protection.

Meeting Ontario's commitments under the Great Lakes Charter Annex 2001 implementing agreement signed in December 2005 may also require refinements to the PTTW program. The new PTTW manual does not specify the review and approval activities (such as regional review by Great Lakes states, Quebec and Ontario) required under this December 2005 agreement when large water takings from the Great Lakes are proposed. The PTTW program is likely to become the implementing tool for Ontario to meet other commitments under the Great Lakes agreement, such as reporting on Great Lakes water consumption and meeting targets for water conservation.

The PTTW program attempts to put much of the burden for technical studies and water use reporting on the applicants, resorting to a vague definition of who is a "qualified person" to conduct such studies on behalf of PTTW proponents. The ultimate responsibility continues to rest with MOE for verifying self-reported data and proponent-supplied studies, reviewing applicants' submissions and setting conditions on permits, identifying areas of possible over-extraction and potential environmental harm, ensuring compliance with the act and the regulation, and balancing the competing interests of different water users and the environment. The ECO encourages MOE to ensure that sufficient resources are devoted to the PTTW program to provide not only timely application processing services, but effective water management and environmental protection.

Dofasco's Acid Regeneration Plants Approvals

Decision Information:

New Fan at #1 Acid Regeneration Plant – Amended Certificate of Approval (C of A) for Air Emissions

Registry Number: IA04E0817	Comment Period: 30 days
Proposal Posted: May 25, 2004	Number of Comments: 2
Decision Posted: February 15, 2005	Decision Came into Force: February 4, 2005

New #3 Acid Regeneration Plant – C of A for Air Emissions

Registry Number: IA04E1454	Comment Period: 30 days
Proposal Posted: October 13, 2004	Number of Comments: 1
Decision Posted: May 18, 2005	Decision Came into Force: May 12, 2005

Extension for Operation of #1 Acid Regeneration Plant – Amendment to C of A for Air Emissions

Registry Number: IA05E1835	Comment Period: 30 days
Proposal Posted: December 1, 2005	Number of Comments: 1
Decision Posted: January 19, 2006	Decision Came into Force: January 18, 2006

Description

In 2005 and 2006 MOE made decisions on a number of separate *Environmental Protection Act* (*EPA*) applications by Dofasco Inc. related to the Acid Regeneration Plants (ARPs) at its integrated steel mill in Hamilton, Ontario. Acid Regeneration Plants treat the materials used to pickle metal at the steel mill. "Pickling" is the use of hydrochloric acid solutions to clean oxides off steel strips before they are further processed. The spent pickle liquor is re-conditioned in the ARPs and returned to the pickling process.

Acid Regeneration Plants produce air emissions including acid aerosol and iron oxide particulate emissions. Dofasco had two existing ARPs (#1 and #2 ARPs). The #1 ARP is 30 years old and has been the source of community concerns about visible emissions, odours and health effects.

In late 2002 Dofasco announced plans to build a new pickle line and replace the existing ARPs with a new state-of-the-art facility. According to Dofasco, the new Acid Regeneration Plant (#3 ARP) will double capacity to treat spent pickle liquor and improve environmental performance. MOE says that the closure of the old ARPs and operation of the new plant will result in a net reduction in ground level concentrations of air contaminants from Dofasco.

Changes to the Existing Plant

In May 2004 MOE posted notice on the Environmental Registry that Dofasco had applied for an amendment of its C of A for the #1 ARP. They were seeking approval for installation of a new fan to push the stack discharge higher. MOE said this would help correct occasional down drafting of the stack plume, addressing health and safety concerns in the area. The fan had actually been installed and was operational when the ministry posted notice of the proposal on the Environmental Registry. The Ministry approved the amendment and posted a decision notice on the Registry in February 2005.

Approval for New Plant

In May 2005, MOE issued a new C of A for the air emissions associated with the new #3 ARP.

Extension for Operation of Existing Plant
The C of A for the #1 ARP was set to expire on December 31, 2005, because the plant was scheduled to be decommissioned once the #3 ARP and the new pickle line were operating. Dofasco applied to MOE in December 2005, for an extension to operate the #1 ARP because of delays encountered during commissioning the new ARP and pickle line. MOE amended the C of A on January 18, 2006, to permit the operation of only one of the four reactors until June 30, 2006. MOE informed the ECO in April 2006 that the extension was not used and the #1 ARP stopped operating by the end of 2005 as scheduled.

Implications of the Decisions
The installation of the fan at the #1 ARP addressed the health and safety risk of workers at an adjacent Dofasco construction site, but may have shifted the emissions to another off-site location such as adjacent residential neighbourhoods. The new plant, while more efficient than the old, doubled Dofasco's processing capacity and will still have significant emissions. Homes, a school, and nursing home are all located within a 200-metre radius of exhaust stacks and fans at the new facility.

MOE did not build into the new C of A for the #3 ARP more stringent emission standards, but the ministry says that operation of the new plants and shut down of the old ones will reduce ground level concentrations of contaminants. As of April 2006, the #3 ARP is fully commissioned and #2 ARP is still in operation. MOE had previously said that #2 ARP would also be shut down "upon completion and start up of the #3 ARP," but in April 2006, said it expects the #2 ARP to be in operation until the end of 2006. It is unknown what impact this will have on planned emission reductions.

The air C of A for the #3 ARP includes a requirement for source testing to determine the emission rates of total suspended particulate, hydrogen chloride, ferric oxide, nitrogen oxides and chlorine and to demonstrate compliance with Ontario's air standards. Dofasco is also required to report emissions of many contaminants to the National Pollutant Release Inventory. Dofasco's reported emissions of hydrochloric acid increased substantially between 1999 and 2004, and Dofasco's action plan to reduce these emissions was to shut down the older facilities. Hopefully future emissions reports will demonstrate reductions in Dofasco's emissions in 2006 and beyond.

Public Participation & *EBR* Process
MOE provided 30-day comment periods for each of the proposed amendments and new certificates of approval related to the ARPs. One person commented on all four proposals and another member of the public also commented on the first proposal, to install the fan at the #1 ARP.

Comments on Proposal for New Fan at #1 ARP
The commenters asked MOE to impose tighter emission standards on ARP #1 as long as it continued to operate, describing a history of concerns about emissions from the plant. One of the commenters had been told by MOE in 2002 that Dofasco had first committed to rectify the situation by January 2003. The commenter was informed by Dofasco staff that the company installed the fan to address concerns by construction workers in Dofasco's "P" yard, located adjacent to the acid regeneration plant. Dofasco was concerned about the risk of exposing construction workers to the acid discharge and the threat of eye, nose and throat irritation from the hydrochloric acid.

One commenter provided a copy of the U.S. Environmental Protection Agency's National Emissions Standards for Hazardous Air Pollutants for Steel Pickling Process Facilities and Hydrochloric Acid Regeneration Plants, asking for similar protective measures in Ontario. The U.S. rules set very stringent emission standards for stack discharges of hydrogen chloride and chlorine. MOE responded that it does not impose specific performance requirements for the operation of Acid Regeneration Plants and the

facility must only meet the requirements of the General Air Regulation – Local Air Quality (Regulation 346/90, replaced in 2005 with Regulation 419/05) under the *EPA*.

One commenter asked whether the ministry was going to apply the Canada-wide Standards (CWS) for ozone and PM2.5 (fine particulates), which MOE adopted in 2000. The Ministry responded that the CWS have been agreed to by MOE but have not been adapted by the ministry as a requirement for Cs of A.

The commenters both raised concern about shifting the pollutants onto nearby residences. One commenter suggested that instead of pushing the emissions higher into the air, Dofasco should cut back on the reactor flows, reducing scrubber losses and emissions of hydrochloric acid and red oxide particulates. The other commenter requested a condition be added to the C of A to set a one Odour Unit limit at the closest residential receptor. MOE acknowledged these comments in the Registry decision notice, but did not provide specific responses. Instead MOE repeated that the Emission Summary and Dispersion Modelling Report submitted with the application demonstrated net reductions in ground level concentrations of contaminants from the stack, and that the plant would cease operation by the end of December 2005.

One commenter was very concerned that the fan had already been installed and was operating at the time the proposal was posted on the Environmental Registry. The commenter indicated that would be a violation of s. 9(1) of the *EPA*, and a violation of the right of the public under the *EBR* to comment on proposals for prescribed instruments before they are implemented. MOE stated in the Registry decision notice that the Ministry's Hamilton District Office had forwarded the alleged EPA offences to the Ministry's Investigations and Enforcement Branch for investigation. In response to the concerns raised during the *EBR* comment period the Hamilton District Office did prepare an "occurrence report" and forward it to the IEB, however the IEB did not assign the case or move forward with it. MOE's rationale was that the modification of the equipment did not increase contaminants or cause environmental impairment, and that the company fully cooperated with the ministry in applying for a C of A for the amendment.

Comments on Proposal for New #3 ARP and Extension for #1 ARP
The commenter reminded MOE that they had acknowledged health and safety concerns with the existing #1 ARP, and went further to allege compliance and fugitive emission problems, with no stack tests ever. The commenter urged the ministry not to extend the approval for #1 ARP and to rescind the Cs of A for the two existing ARPs. MOE responded that upon completion and final commissioning of the new pickle line and ARP, that both old ARPs would be decommissioned.

The commenter also requested that only Dofasco's spent pickle liquor be processed at the new plant, but MOE responded that the pickling process at Dofasco requires that process losses be replaced by imported spent pickle liquor. The new waste site C of A permits Dofasco to receive spent pickle liquor from anywhere in Canada or the United States.

The commenter asked for continuous emission monitors to be installed in the new facility to determine the actual concentration of acid gases and oxidants leaving the stacks, and a process to inform the authorities, the adjacent community and employees of any release of gases in a timely fashion. MOE responded that the C of A doesn't require a continuous emission monitor, but the company is required to respond to spills under the *EPA*, including notifications.

The commenter also requested that the maximum flow rates and emission rates be determined via source testing to ensure compliance with the General Air Regulation and to include these rates in the C of A. MOE responded that the C of A includes the requirement for source testing the exhausts from one of the two units to determine emission rates and to demonstrate compliance with the Regulation.

SEV
MOE does not consider its SEV when making decisions on instruments.

Other Information
MOE also issued a decision notice on the Registry in April 2006 for the s. 27 *EPA* waste site Certificate of Approval for the #3 ARP (IA05E1484).

MOE posted a proposal in 2004 to proactively amend another C of A at the steel mill for Dofasco's Electric Arc Furnace to restrict emissions of dioxins and furans. The proposal was to impose an interim reduction in emissions by the end of December 2006 and a further reduction by the end of 2010, consistent with the CWS for dioxin/furan emissions from steel mill electric arc furnaces.

ECO Comment
The ECO is concerned about the *EBR* implications of processing applications (including providing a Registry comment period) after proponents have already installed the equipment. Under the *EBR*, proposals are supposed to be posted for comment before decisions are made, and the public has the right to expect that comments may influence the decision. In this case, equipment was already installed and operating before the public was asked for comment – a poor approach for consultation. The ECO suggests that MOE develop a process to deal with the *EBR* posting requirements when the ministry discovers situations where a proponent has made changes before receiving approval.

MOE decided against tighter rules for the old plant while it continued to operate, but this was probably a reasonable judgement call.

It is unfortunate that MOE also decided against tougher emission requirements for the new facility, given its doubled capacity and close proximity to a residential area. MOE provided a weak response to suggestions from commenters that Canada-wide Standards for ozone and fine particulates be incorporated into the C of A.

This review also highlighted a broader issue in regulating air emissions. It is unclear to the ECO why MOE has chosen not to incorporate the CWS for ozone and fine particulates into Cs of A to meet Ontario's emission reduction targets, yet has moved to incorporate CWS for other contaminants into Cs of As for certain sectors and facilities that are major contributors. MOE proposed in 2004 to revise the Cs of As for electric arc furnaces at all steel mills, including Dofasco's, to incorporate the CWS for dioxins and furans. MOE says that a decision on this proposal is imminent. This would be a positive step. The ECO will continue to monitor MOE's implementation of CWS.

SECTION 5

ECO REVIEWS OF APPLICATIONS FOR REVIEW

SECTION 5: ECO REVIEWS OF APPLICATIONS FOR REVIEW

MINISTRY OF ENERGY

Review of Applications R2005005, R2005006, R2005007, R2005008: *Comprehensive Land Use Planning in the Northern Boreal* (Review Denied by MNR, MNDM, ENG; Response Pending by MOE)

Background/Summary of Issues

In September 2005, Sierra Legal Defence Fund (SLDF) filed an application for review on behalf of the Wildlands League requesting that several ministries consider the need to create a comprehensive land use planning system for northern Ontario. The applicants asserted that a wide array of evidence suggests that landscape level planning is needed in advance of resource development decisions in Ontario's Northern Boreal region. The application for review was sent to the Ministry of the Environment (MOE), the Ministry of Natural Resources (MNR), the Ministry of Northern Development and Mines (MNDM), and the Ministry of Energy (ENG).

Ontario's boreal forests begin just north of the Great Lakes. The boreal forests to the north of the 51st parallel have global significance, identified by the World Resources Institute as remaining frontier forests, relatively unimpaired by development. The United Nations Environment Programme recognizes this region of Ontario as one of the world's remaining significant 'closed canopy' forests. The Northern Boreal comprises approximately one-third of Ontario's land-base at almost 400,000 km^2 – an area equivalent to New Brunswick, Nova Scotia and Prince Edward Island combined. SLDF and the Wildlands League contend that the current lack of policy with respect to comprehensive land use planning puts this area at risk of irreversible environmental harm. The applicants assert that the Northern Boreal contains:

- one of the last strongholds of species-at-risk, such as woodland caribou and wolverine. These species are wide-ranging, require large habitat areas and have demonstrated sensitivity to human disturbances, such as industrial activity;
- habitat for populations of commercially important furbearer and game species, such as beaver, American marten and moose, and crucial breeding habitat for countless songbirds and waterfowl;
- wild river and lake systems supporting more than 60 species of fish, including many that sustain subsistence and fly-in fisheries in the region;
- large intact watersheds that are critical to maintaining healthy, clean sources of water for local communities and all citizens of Ontario;
- traditional land use areas, beyond that of reserve land, of at least twenty eight First Nations;
- the full complement of biodiversity existing in the region for approximately the last 8-10,000 years;
- valuable ecosystem services, including filtration, soil, nutrients, store carbon, produce oxygen, control flooding and erosion, support species, mitigate climate change; and
- natural capital that supports an internationally significant wilderness tourism industry.

SLDF and the Wildlands League believe that MNR's on-going Northern Boreal Initiative (NBI) does not address all of the planning issues at hand, as it only covers a small portion of the area in question and it is primarily focused on commercial forestry activities. Further, the applicants contend that the NBI does not address landscape level planning and MNR does not have jurisdiction over all of the possible development projects which include, but are not limited to, roads, coalbed methane exploration, mineral staking and prospecting, hydro generation projects and transmission corridors for electricity. As

illustration of some of their concerns, the applicants took issue with the "piece-meal" approval process for the Victor Diamond Mine near Attawapiskat.

The applicants note that planning rules do exist for other areas of Crown land, such the Declaration Order regarding MNR's Class Environmental Assessment Approval for Forest Management on Crown Lands in Ontario. However, this Declaration Order does not extend into the Northern Boreal.

MNR's Northern Boreal Initiative (NBI) was established in 2000 in response to the expressed interest of several First Nations communities in developing commercial forestry opportunities. It was intended to address community-led planning for potential forestry operations in the area approximately 150 kilometers north of the current Declaration Order. In part, NBI was initiated due to the Ontario Forest Accord which was an agreement signed by MNR, the forest industry and a coalition of environmental groups in 1999. One of the commitments of the Forest Accord was to open up these northern lands to commercial forestry as quickly as possible, subject to the full agreement of affected First Nations communities, approval under the *Environmental Assessment Act*, and with the regulation of new protected areas.

SLDF and the Wildlands League believe that a comprehensive land use strategy must include proper engagement of First Nations communities in the Northern Boreal and the public-at-large, environmental assessments of each project, proper land use planning with consideration of the ecosystems in question and the designation of protected areas before resource allocations are made. The applicants assert that such a strategy must take an inter-ministerial approach and comprise the following elements:

- comply with the Statements of Environmental Values of each ministry;
- ensure the long-term health of ecosystems;
- continued availability of natural resources (planned and managed in an orderly, sustainable and fair way);
- protect natural heritage and natural features;
- employ the precautionary principle;
- respect partnership arrangements;
- properly value resources (including commercial and non-market values);
- improve the knowledge base;
- protect significant features and landscapes;
- rehabilitate degraded ecosystems;
- promote environmentally sustainable development activity which is preceded by sound conservation planning and adequate public input, and gives high priority to environmental protection and minimizes environmental disturbances; and,
- require collaboration with other ministries leading to joint sign-off mechanisms.

The applicants stress that a strategy should address the cumulative impacts of all proposed developments in the Northern Boreal including the impacts of developments already proceeding further south.

SLDF and the Wildlands League also argue that landscape-level plans should be complete before any areas are licensed to industry or allocated for development. They believe that land use plans should be required to have large core protected areas, wildlife movement corridors, buffer zones, traditional use areas, protected sacred areas, and areas designated for other uses.

In March 2003, the current Premier, then the Leader of the Official Opposition, promised to "institute meaningful, broad-scale land-use planning for Ontario's Northern Boreal Forest before any new major development, including ensuring full participation by native communities. Land use planning must protect the ecological integrity of this natural treasure and help to provide a sustainable future for native people and northern communities."

Ministry Response

Ministry of the Environment (MOE)

As of May 2006, MOE had not provided a decision to the applicants and the ministry was approximately six months beyond the deadlines prescribed by the *EBR*.

Ministry of Natural Resources (MNR)

MNR denied the application in November 2005, stating that the public interest did not warrant a review for a new comprehensive land use policy in advance of resource allocation decisions being made. The ministry also asserted that the existing environmental assessment approvals and permitting processes are sufficient to address, mitigate, and minimize potential harm to the environment.

The ministry stated that it was responsible for a relatively limited number of approvals with regard to the Victor Diamond Mine. The ministry asserted that these decisions were based on "approved land use planning documents for the region and numerous scientific studies conducted by the MNR and the disposition applicant DeBeers Canada to ensure environmental effects were considered during project evaluation."

MNR stated the Northern Boreal Initiative directs community-based land use planning. The ministry asserts that NBI allows First Nations to take a leading role in land use planning "with an important objective of fostering sustainable economic opportunities in forestry and conservation." MNR claims that this local-level process also "utilizes a landscape-scale approach to ensure that achievements are measured appropriately and that impacts beyond the planning area are adequately considered."

Despite denying the application, MNR stated that it was working on a policy that addressed the concerns raised by the SLDF and the Wildlands League. The ministry informed the applicants that "in early 2005 MNR began exploring potential approaches for land use planning in Ontario's far north and has initiated discussions with the first nation treaty organizations and tribal councils, as well as several non-governmental organizations. This exercise is continuing and MNR would welcome discussions regarding the land use planning elements proposed in the review application."

Ministry of Northern Development and Mines (MNDM)

MNDM denied the application in November 2005, stating that the public interest did not warrant a review. The ministry also asserted that it was not the lead ministry for the development of such a strategy, but that it would actively participate with MNR in developing and implementing its approaches to land use planning.

With respect to the applicants' concern regarding the Victor Diamond Mine, MNDM stated that it participated in the review of a Comprehensive Study Environmental Assessment under the *Canadian Environment Assessment Act*. The ministry also stated that three environmental assessments processes occurred for activities related to the mine site, as well the signing of an Impacts and Benefits Agreement between the Attawapiskat First Nation and DeBeers.

The ministry stated that "mining is a temporary land use, and mining regulations ensure that a mine site is rehabilitated to natural, recreational or commercial land uses." MNDM asserted that Ontario's *Mining Act*, along with other permitting processes, ensures that mineral exploration and development endeavours to mitigate the short-term effects of mining on the environment; eliminate the long-term effects of mining on the environment; ensure continuing availability of mineral resources for the long-term benefit of the people of Ontario; and, protect natural heritage and biological features of provincial significance.

Ministry of Energy (ENG)
ENG denied the application in November 2005, stating that the public interest did not warrant a review. The ministry did not specifically address the concerns raised by the applicants, but, rather, it described the numerous regulatory processes that must be followed for new energy projects. ENG also stated that "Ontario must confront a massive shortfall between supply and demand for electricity within the next 15 years" and the solution to this shortfall "will require the consideration of major energy projects." The ministry also stated that "possible northern Ontario energy projects include small hydro projects, wind turbines, and a major new electricity transmission line from northern Manitoba to southern Ontario."

Themes and Links
In our 2002/2003 annual report, the ECO provided extensive commentary on the need for comprehensive planning in northern Ontario. The ECO wrote that "landscape level planning should inform community-by-community decision-making" and that "it is imperative that MNR assess the ecological implications of industrial logging in the northern boreal forest." In that report, the ECO also made two formal recommendations related to resource development in northern Ontario:

- The ECO recommends that the Ministry of Natural Resources conduct gap analyses and develop objectives and targets in order to establish a protected areas network for the Northern Boreal Initiative area as a whole.

- The Ministry of Natural Resources should carry out a thorough assessment of forest management approaches that are ecologically suited to the northern boreal forest and make the research results available to the public.

As of the spring of 2006, the ECO notes that the environmental impacts of permitting forestry in the northern boreal forest have not yet been assessed formally, and will require either approval or exemption under the *EAA*.

ECO Comment
The ECO concurs with the applicants that significant changes should be made to the way in which the Ontario government regulates and plans for the Northern Boreal. The existing approval processes typically operate in isolation from one another and they do not take a comprehensive "big picture" approach. This "silo mentality" does not effectively serve Ontarians nor provide adequate assurances of environmental protection in the path of resource development. The Northern Boreal has a unique and varied ecology that merits the same – if not higher – standard of planning than applies to the rest of the province.

Unfortunately, the ECO is unable to substantively comment on this application as the Ministry of the Environment, has failed to provide a response within the timelines prescribed by the *Environmental Bill of Rights*. While the ECO acknowledges that the issues raised by the applicants are complex, excessive delays frustrate the public interest and undermine the *EBR*. The ECO is also disappointed that MNR denied this application for review, especially in light of the fact that the ministry is developing new approaches to land use planning in Ontario's far north. The ECO commits to fully report on this application in a forthcoming annual report, following the legally required response by MOE.

Review of Application R2005010:
Act that Promotes Energy Conservation through Pricing
(Review Denied by ENG)

Background/Summary of Issues
The applicants asked for a review of the need for legislation which ensures that electricity prices do not discourage conservation. The applicants made the point that an increase in the price of a good or service (e.g., electricity) can be a powerful stimulus to conserve that good or service. The price signal concept would and could apply to both electricity generation and distribution resources, according to the applicants. Appropriate pricing for both generation and distribution would ensure that these resources are used efficiently. The applicants drew particular attention to the price differentials between different classes of electricity consumers (large users vs. residential and small users) for both the price of electricity and its distribution. They felt that the Ontario Energy Board which has a major role in reviewing rate applications by electricity distribution companies ought to do a better job of ensuring that the price of electricity takes into account its full cost to the environment when it approves rates and issues licences.

Without appropriate pricing of generation and distribution resources, the applicants noted that consumers, particularly large users, will not alter operations, behaviour, equipment or appliances to reduce their consumption. If growth in electricity consumption is not contained, then the environmental impacts of the electricity sector will continue to grow, e.g., adverse air quality and greenhouse gas emissions.

The applicants cited the work of the Ontario Medical Association, Chief Energy Conservation Officer, energy expert Amory Lovins, and Canada's support of the Kyoto Protocol in support of their call for new legislation. The applicants felt that Ontario should feel obligated to contribute to greenhouse gas reduction efforts under the Kyoto Protocol (coal-fired electricity generation contributes a significant amount of Ontario's greenhouse gas emissions and therefore electricity conservation would help with emission control). They noted that fossil fuel emissions also contribute to respiratory disease and have multiple adverse effects on life, buildings and the environment.

Ministry Response
The Ministry of Energy (ENG) denied the application and the need for an Act that promotes energy conservation through pricing. In its one-page letter response to the applicants, ENG made reference to a number of pieces of legislation "…there have been two key pieces of legislation introduced in the past year and a half – the *Electricity Restructuring Act, 2004* (Bill 100) and the *Energy Conservation Responsibility Act, 2005* (Bill 21) – that focus on promoting and removing barriers to conservation." ENG noted that Bill 100 also established a Conservation Bureau for Province of Ontario, which has the role of leading and encouraging energy conservation.

Going back further ENG cited 2003 legislation, such as the *Ontario Energy Board Amendment Act (Electricity Pricing), 2003* (Bill 4). ENG wrote that this legislation appropriately returned price-setting to the independent, quasi-judicial Ontario Energy Board (OEB), and Bill 100 that followed, reinforced this direction. These pieces of legislation now ensure that electricity prices, as well as other electricity charges, are regularly reviewed and approved by the OEB. ENG wrote that the rate-setting process it has established will ensure that the rates consumers pay continue to be just and reasonable, and reflect the true cost of electricity. Further, the ministry highlighted the openness of the OEB process "All electricity rate applications are subject to a transparent review process, which includes public notification, the opportunity to comment, intervene and participate in public hearings." Finally, ENG noted in its denial of this application for review that "…in 2005 the OEB approved electricity distribution rates that incorporated $160 million in new spending on conservation and demand management programs across Ontario."

ECO Comment

Ontario has for almost all of its history ensured that electricity rates were among the lowest in the world and has made electricity pricing a deliberate industrial development policy. Governments have shown only limited willingness to adjust rates upward to ensure the real cost of electricity generation and distribution is factored into its price, to eliminate the subsidy this creates, and to push consumers toward conservation, self-generation, self-reliance and responsibility for their own consumption patterns.

The Ontario government's approach as well as its record on electricity conservation are apt to leave the public somewhat confused. Ministries like Energy and Government Services and others have been pursuing in-house energy conservation measures with an aim of reducing electricity consumption by ten per cent by 2007 – a sort of "lead-by-example" approach. ENG through its legislation is also promoting conservation programs at local utilities and through the newly created Conservation Bureau.

However, the Ontario government has also been criticized for sending the wrong signals on conservation in two ways. Firstly, in early February 2006 ENG announced that it would continue a rate cap on the price per kilowatt hour that is charged to large industrial consumers of electricity that was put in place by the previous government in 2002. The rate cap will keep the price of electricity charged to large users somewhat below the average wholesale price of electricity (and some observers would argue well below the true cost of electricity generation when all external costs are accounted for). The rate cap was continued on the basis of providing rate stability for the manufacturing and resource sectors. From an *EBR* process perspective, the ECO is disappointed to learn that ENG was most likely considering options on the rate cap while this application for review was also under consideration at the ministry. ENG denied the application, citing some examples of conservation efforts, and then proceeded to announce the extension of the rate cap.

The second area in which the Ontario government appears to be sending a signal that undermines conservation efforts is its support for major new generating facilities as proposed by the Ontario Power Authority (OPA). While new facilities will be needed in Ontario simply to replace those which need to retire, the OPA's supply mix advice calls for increasing the in-province capacity above the current installed generating capacity. Critics of the OPA plan have characterized this as putting the provision of new supply ahead of conservation.

The ECO has written on numerous occasions about the importance of appropriate pricing of electricity in order to underpin efforts to get consumers to conserve. It's true that the current Ontario government is moving forward with a number of measures including smart meters and net metering that offer consumers the means to more readily conserve and even generate their own electricity from renewable sources.

However consumers will have only limited incentive to focus their efforts on conserving and generating their own electricity so along as its price remains capped at a relatively low price.

The ECO believes that pricing electricity appropriately is critical to getting the supply and demand relationship right. Environmentalists and economists generally agree that the price of electricity, for most consumers in Ontario, has been below cost and that this pattern has undermined the full potential of any conservation programs. The ECO believes the applicants made a valid point and that ENG should do more to ensure that price signals enhance the uptake of conservation programs in the province.

MINISTRY OF THE ENVIRONMENT

Review of Application R0334:
Classification of Chromium-containing materials as hazardous waste
(Review Undertaken by MOE)

Background/Summary of Issues:
The applicants requested that Regulation 347 under the *Environmental Protection Act* be reviewed. Under the current regulation, a waste is considered toxic if the total chromium extracted from it during a leachate test exceeds 5 mg/L. The applicants said the legislation should differentiate between toxic and non-toxic forms of chromium. Treating a non-toxic material as hazardous places an unnecessary economic burden on industry.

Ministry Response:
MOE decided in 1996 to conduct a review.

In December 1997, MOE told the ECO that proposed changes to a federal Transport Canada regulation will deal with this issue. MOE indicated that in the interests of federal/provincial harmonization work, and to avoid duplication of effort, it was waiting for the federal regulation to be finalized before doing its own review.

In December 1998, MOE indicated that this review would be part of the national harmonization initiative review related to the definition of hazardous waste. The ministry stated that it exercises no control over the timing of this federal initiative.

MOE contacted a representative of the applicants in June 2002 and ascertained that the applicants continue to be interested in pursuing this review.

In June 2005, MOE updated the ECO, indicating that the latest published draft federal hazardous waste regulations do not contain an exemption for blue leather tanning waste (the subject waste to which this application pertains) and that it appears the federal government does not intend to exempt it at this time. The ministry says that it will continue to work with Environment Canada to determine whether they intend to pursue such an exemption.

ECO Comment:
While the ten-year delay in completing this review seems unreasonable, ECO recognizes that MOE progress is linked to harmonization between provincial and federal standards on hazardous waste regulation. ECO will continue to seek updates from MOE on this process.

Review of Application 2003004:
Request to Expand EBR Powers over the Ministry of Transportation
(Review Undertaken by MOE)

Background/Summary of Issues
In June 2003, the applicants requested that the Ministry of Transportation (MTO) be made subject to Part IV of the *Environmental Bill of Rights* which, if granted, would permit residents of Ontario to request reviews of MTO's policies and prescribed Acts, regulations, and instruments (permits, licences etc.). If granted, this request would also allow the public to ask MTO to review the need for new Acts, regulations and policies. (Since inception of the *EBR* in 1994, MTO has been one of a number of ministries that is not subject to all of the provisions of the *EBR*. To date, MTO's participation has been limited to creating a Statement of Environmental Values and posting proposals for new environmentally significant Acts and policies on the Registry for public comment.) The applicants believed that the *EBR*'s application for review procedure should apply to MTO and its activities because of the environmental impacts of highway development and use, and the need for MTO to consider and/or promote modes of travel other than highway-based, including alternatives such as rail.

Granting the applicants' request would require amending a regulation administered by the Ministry of Environment (MOE), O. Reg. 73/94 under the *Environmental Bill of Rights* (*EBR*). This regulation specifies the ministries of the Ontario government which are subject to all or parts of the *EBR*. The regulation as written at the time of this application (2003-2005) did not include MTO as one of the ministries subject to Part IV of the *EBR*.

Ministry Response
The ECO forwarded this application to the MOE in July 2003. MOE subsequently advised the applicants and the ECO that a notice of decision as to whether a review will be conducted, along with the rationale for this decision, would arrive in a letter by September 9, 2003. In that letter, MOE confirmed that the ministry would conduct the requested review and that it expected to take 6 months. Between September 2003 and April 2005, MOE wrote to the applicants and the ECO on five separate occasions to extend the timeline to carry out this review. The last advisory of April 12, 2005, indicated that the applicants could expect the review to be completed by June 30, 2005, and a written response to arrive by the end of July 2005. The response arrived on September 28, 2005, nearly two months later than promised. MOE wrote:

> *"The Ministry of Transportation undertakes a variety of policy and legislative activities that the public has an interest in, and that are potentially environmentally significant. Most visible amongst these would be activities related to the creation, maintenance and operation of transportation infrastructure. While the public is currently able to comment on environmentally significant policy and legislative proposals initiated by the ministry through the Environmental Registry, the public would benefit from being able to more actively participate in environment-related transportation decisions by proposing ideas for improving the environment to the Ministry of Transportation for its consideration. As a result of these findings, the Ministry of the Environment recommends prescribing the Ministry of Transportation for the purposes of applications for review under the* Environmental Bill of Rights*."*

Furthermore, MOE and MTO identified some Acts administered by MTO which the ministries agreed had environmentally significant aspects:

- *Airports Act, 1990*

- *Public Transportation and Highway Improvement Act, 1990*
- *Railways Act, 1950* (as amended)
- *Short Line Railways Act, 1995*

The ministries acknowledged that since these *Acts* provide for the construction and implementation of massive scale infrastructure projects, activities conducted under the powers of these *Acts* could have a significant effect on the environment.

ECO Comment
The transportation sector in Ontario has a substantial impact on the province's natural environment. The sector is responsible for about a quarter of the province's greenhouse gas emissions and is a large contributor of emissions that lead to smog. Ontario's road network leaves a major footprint on the landscape, resulting in altered waterways and fragmented ecosystems. The road network in Ontario demands enormous amounts of aggregate and salt for maintenance and/or expansion each year. This application (R2003004) plus another (R2004010) on the same theme raised many of these issues. The ECO recognizes that the applicants' issues are valid and shares many of their concerns. Because the ECO also receives complaints directly from the public, we are aware of other transportation-related concerns and issues from across the province. For these reasons, the ECO welcomes the opportunity for the public to initiate reviews of MTO's policies, and hopes that it brings about a new era of openness to Ontario's system of transportation planning and environmental protection. We commend the Ministries of Environment and Transportation for moving forward in the manner they did.

However, further to the ministries' analysis which concluded that it would be worthwhile to prescribe MTO and these four *Acts* for reviews:

- *Airports Act, 1990*
- *Public Transportation and Highway Improvement Act, 1990*
- *Railways Act, 1950* (as amended)
- *Short Line Railways Act, 1995*

We urge MOE and MTO to also prescribe the following *Acts* under Part IV of the *EBR*:

- *The Ministry of Transportation Act, 1990*
- *The Highway Traffic Act, 1990*
- *GO Transit Act, 2001*
- *Dangerous Goods Transportation Act, 1990*
- *Toronto Area Transit Operating Authority Act, 1990*

This is because specific Acts must be prescribed for reviews (not just the ministry itself) in order for applicants to submit reviews of those *Acts* and any regulations that may flow from them. Also, MOE and MTO should consider ensuring that certain future legislative initiatives, e.g., legislation involving transportation in the Greater Golden Horseshoe Area, are captured by the *EBR's* Request for Review provisions.

Review of Application R2004002: (Review Accepted)
Prescribing the Ministry of Education under the EBR

Background/Summary of Issues
This May 2004 application requested that the Ministry of the Environment (MOE) review O. Reg. 73/94, the General Regulation under the *EBR*, to determine whether the Ministry of Education (EDU) should be added as a prescribed ministry under the *EBR*. When the *EBR* was first proclaimed in February 1994, the Ministry of Education was not listed as a prescribed ministry in O. Reg. 73/94. Thus, the Ontario government of the day decided not to require EDU to develop a Statement of Environmental Values (SEV) and post notices on the Registry inviting public comments on proposed decisions for environmentally significant Acts and policies. The applicants believe that the decision to exempt EDU from the *EBR* has had a negative impact on ministry decision-making related to the financing and support of environmental education and outdoor education.

Background on the 1999 EBR Application
In late 1999 a similar request for a review under the *EBR* was filed by one of the May 2004 applicants. MOE accepted the review but took more than one year to complete it, and concluded that the purposes of the *EBR* would not be furthered by making EDU subject to the *Act*. MOE's rationale was that in practice, few if any of EDU's policies, Acts or regulations would need to be posted on the Registry, nor would they be open to review under the *EBR*. MOE also noted that the public already has an existing right to send letters to the Minister of Education, requesting changes in policy decision.

While the 1999 request was denied by MOE, the ECO published an article about the issue of prescribing EDU in our 2000/2001 ECO annual report (see pages 165-166). The ECO did not agree with MOE's conclusions, noting that EDU is similar to a number of other currently prescribed ministries which do make some decisions that can have an effect on the environment, even though their core mandate is not environmental protection. The ECO also argued that the right to mail a letter to a minister is not a reasonable replacement for the right to request a review under the *EBR* which is a much more transparent, public process including timelines, oversight by the ECO and accountability to the Ontario Legislature and the public.

The May 2004 Application:
The applicants drew on the previous 1999 application and the 2000/2001 ECO annual report in formulating their May 2004 application. They noted that many things had changed since the original 1999 application was filed. The applicants pointed to research delineating a decline in environmental literacy in Ontario and linked this to real world problems:

1) *Province-wide research on ecological literacy at secondary level*
   The applicants made reference to a number of research studies conducted between 1999 and 2004 by a team of researchers. One of the applicants, Dr. Tom Puk of Lakehead University, was the principal researcher for all of the studies. While the applicants did not provide copies of all of the studies, some of them were available in published journals. The application also provided extensive extracts from the studies.

   The key research study referred to by the applicants was a 2001 report on ecological literacy at secondary school level demonstrating that "students in Ontario are not ecologically literate because they are not being taught ecological education" because it is absent from the curriculum.

The applicants explained that between 1988 and 1998 Environmental Science was a discrete subject in the secondary school program in Ontario with its own provincial curriculum guideline for students in grades 10 and 12. In 1998, the Ministry of Education decided to remove Environmental Science from the secondary school curriculum as single-focus, stand-alone courses. Instead, the Ministry decided to integrate or "infuse" environmental concepts in other science and geography courses.

To determine the effects of this change, the applicants undertook a research project in 2000 and 2001 to examine the elimination of Environmental Science from the grade 9/10 and 11/12 secondary school curriculum. Two surveys were sent out to science and geography teachers across the province, one survey for 9/10 and one for 11/12. In both surveys, topics from the previous Environmental Science guidelines were utilized. Teachers were asked whether or not they taught each topic, how much time they spent teaching these topics and how much time they spent per course teaching outdoors. As well, an analysis of the number of environmental science topics found in the provincial science curriculum guidelines is reported.

The applicants stated that the results of the surveys "are a cause for grave concern." They argue that "the data collected from the surveys demonstrate that grade 9/10 and grade 11/12 science and geography teachers are in fact spending very little time teaching ecological concepts," primarily because "there is only a small percentage of curriculum expectations in the current guidelines that involve ecological concepts." Moreover, even after the tragic lessons of Walkerton, the vast majority of grade 9/10 teachers (ranging from 80-90 per cent) are either not teaching topics such as "growing conditions for bacteria," "types of micro-organisms," and "role of micro-organisms," or are spending very little time teaching some of these topics. The applicants also cited evidence that a majority of grade 11/12 teachers (50-60 per cent) are either not teaching topics such as "characteristics of the atmosphere," "atmospheric contaminants," "particulate matter" and "air monitoring and pollution control" or are spending very little time teaching some of these topics. The main reason for this, according to the applicants, is that teachers must teach what is in the guidelines and there is a limited and ineffective emphasis on learning about environmental science topics or promoting ecological literacy in the current curriculum guidelines.

According to the applicants, the results of their 2001 study indicate clearly that the "infusion model" for environmental/ecological education has been a failure. They believe that Ontario residents are in danger of becoming ecologically illiterate under the present educational system.

2) *Province-wide research on ecological literacy at elementary level*
The applicants also described elementary teacher surveys indicating that 70 per cent of teachers do not believe their students are ecologically literate, 92 per cent felt schools needed to spend more time teaching ecological literacy, and 88 per cent said they spend two hours or less per week (36 per cent not at all) teaching ecological literacy. The research also revealed that 83 per cent of respondents said they would teach it more if they received more training.

3) *The Ministry of Education has failed to develop a discrete, mandated curriculum for Ecological Literacy in Ontario*
The applicants note that Ontario, once a leader in creating environmental education, has now fallen far behind the major initiatives taken by other jurisdictions, and put forward various reasons for the decline. The applicants state that "there currently is no environmental/ecological curriculum in Ontario schools, either at the secondary or the elementary level." Consequently the applicants felt that students are not being provided with the "knowledge, skills and values that will help reduce environmental degradation." There also is "no subject area" taught in Ontario

schools that would make Ontarians "much more aware of how we could behave" in an ecologically-responsible manner and there is no program to "provide lifelong ecological literacy to the general public." The applicants go on to argue that "there are few things we can do as a society to protect the environment better than through public education."

The applicants recommended the creation of a new discipline called "ecological education;" compulsory, ecological education courses at the secondary school level and a sequenced and sensitive curriculum, covering Kindergarten to Grade 12. The applicants suggested that in light of the serious challenges the ecosphere faces in the future, "ecological literacy must become the first imperative."

Problems Associated with Declining Ecological Knowledge
The applicants cited several examples of problems associated with declining ecological knowledge including:

- The Walkerton deaths and the O'Connor Inquiry, which demonstrate the consequences of inadequate ecological knowledge. The applicants quoted a 2001 article that stated "Not being aware of the facts about environmental problems (such as those that led to the Walkerton crisis), indicates a lack of knowledge (i.e., lack of education), and a problem with the failure of our institutions to promote an awareness of that knowledge."
- Lack of action on the Kyoto Agreement. The applicants contend that the imperatives of climate change should provide a strong motivation to policy-makers to improve environmental education programs in Ontario's schools. (For further discussion, see the ECO 2005/2006 annual report, page 59).
- The continual abysmal assessment of Canada as one of the lowest ranked countries in the OECD in terms of environmental performance.

Ministry Response
MOE accepted this review in June 2004. In October 2005, MOE released the results of its review. After consulting with EDU staff and management, the MOE recommended that EDU should prepare a SEV and consider it when making environmentally significant decisions but that other provisions of the *EBR* should not apply to EDU. MOE prepared a detailed nine page analysis, and attached seven pages of appendices, offering a wide range of arguments to support its position. These are summarized below.

The Mandate of the Ministry of Education
The MOE described EDU's mandate, noting that its responsibilities include: developing curriculum policy; determining provincial standards for student achievement; evaluating and approving learning materials for use in the schools; and distributing funds allocated by the provincial legislature to assist school boards with the operation of schools. A number of other EDU responsibilities related to standards setting in the schools and school boards, student testing, governance and accountability also were described.

Public Interest in the Making the Ministry of Education Subject to the EBR
MOE noted that strong public interest was expressed, during the course of its review, in making the Ministry of Education subject to the *EBR,* primarily because the applicants publicized their application and urged some groups to support it. MOE noted that approximately 120 individual letters were written to the ministry. In addition, the Toronto District School Board (TDSB), the Waterloo Regional District School Board and a number of non-governmental organizations (NGOs) also either passed formal motions or expressed support for the application. Moreover, the TDSB issued a press release in May 2005 strongly supporting prescribing EDU under the *EBR* and stating that this would send a strong signal to all

the school boards of Ontario that sustainability is important. MOE went on to note that making EDU subject to "at least some provisions of the *EBR* would acknowledge the potential" for EDU to make environmentally significant decisions, and improve the transparency of those decisions.

The Environmental Significance of Ministry of Education Activities
While MOE recognized that EDU makes "a small number" of policy decisions relating to curriculum and facilities management that could have a significant effect on the environment, it also suggested that most of its decisions are financial and administrative in nature and thus outside the purview of the *EBR*.

Aspects of the EBR Relevant to the Ministry of Education
MOE's response also examined relevant aspects of the *EBR* to determine how these might apply to the mandate of EDU. MOE determined that four aspects of the *EBR* are relevant to EDU: the purposes of the *EBR* set out in s. 2; the provisions on SEVs set in Part II of the *EBR*; public participation in environmentally significant decision-making related to policies and Acts; and the application for review process. MOE's analysis concluded that the activities undertaken by EDU could have an environmental impact and the ministry should be expected to play a supporting role in meeting the purposes of the *EBR*.

The Ministry of Education and the SEV Consideration Process
All prescribed ministries have had to apply their Statements of Environmental Values or SEVs when making environmentally significant decisions since November 15, 1994. The key threshold for government officials in determining whether a proposed decision must be subject to SEV consideration and must be placed on the Registry is whether it is environmentally significant. Section 14 of the *EBR* sets out three factors that should be considered and then also allows decision-makers to consider any other matter they feel is important.

MOE did recognize that SEV consideration could improve decisions at EDU but did not provide much detail on how this would be achieved. Presumably this detail will be forthcoming once EDU develops its draft SEV. In its response, MOE neglected to point out that the ECO reviews how this discretion is exercised and reports to the Legislature when a prescribed ministry fails to consider its SEV in making an environmentally significant decision.

Education Should not be Subject to the Registry Notice and Comment Process
MOE concluded that EDU should not be subject to the notice and comment process in Part II of the *EBR*. This consultation process, undertaken by posting notices on the Environmental Registry, is one of the main features of the *EBR*. Before making a final decision, the Minister must consider the public comments and indicate how she or he has taken the comments made on Registry proposals into account. In its annual reports, the ECO reviews how well ministries consider public comments in relation to a sample of decisions made using the Registry notice and comment process.

MOE's rationale was that in practice, few if any of the policies, Acts, regulations or instruments developed or issued by the Ministry of Education would need to be posted on the Registry. In a subsequent passage, MOE states that EDU has "processes in place for public participation in curriculum development that largely mirror the requirements of the *EBR*" and subjecting EDU to the *EBR* public consultation process would "duplicate these processes." MOE goes on to conclude that the *EBR* "was not intended to duplicate existing processes, as evidenced by specific exemptions contained in the *Act*...."

Education Should not be Subject to the EBR's Review Process
MOE also concluded that EDU should not be subject to the application for review process in Part IV of the *EBR*. This process allows any two residents of Ontario to request that a minister review a current prescribed policy, Act, regulation or instrument, or request a review of the need for a new Act, policy or regulation

In its response, MOE noted that EDU established an ongoing five year cycle of curriculum review in 2003. The review process is intended to ensure that the curriculum remains current, relevant and is age-appropriate from kindergarten to grade 12 (K-12). Each year the ministry commences reviews in number of subject areas. These reviews allow lead time for development and updating of curriculum and supporting materials. MOE also stated that "[e]ven if curriculum decisions were subject to the application for review process under the *EBR*, it is likely that nearly all applications would be denied on the basis of the recent decision exemption or on the basis of the established review cycle."

MOE Posts Proposal to Prescribe EDU in November 2005

In mid-November 2005, partly in response to concern about its October 2005 decision on the application for review, MOE posted a proposal to amend O. Reg. 73/94, to make EDU subject to the SEV provisions of the *EBR*. The proposal notice appeared to hint that the scope of the application of the *EBR* to EDU might be expanded when the final decision was made. As of June 2006, MOE had not posted a decision notice.

Stakeholder Reaction to MOE's Decision

Stakeholder reaction to MOE's decision was mixed. Some stakeholders and one of the applicants viewed the decision as a modest breakthrough. Others saw it as narrow and overwhelmingly negative. Earthroots developed an Action Alert in early November 2005, that requested its members to write MOE and urge that EDU be prescribed for a full range of *EBR* rights. Earthroots challenged MOE's position, arguing that making EDU subject to the *EBR* notice and comment process "would allow the Ontario public to have a say on whether or not environmental education should be part of the school curriculum, comment on the closing of an outdoor education centre and support the ability of educators to teach our youth about the importance of being stewards of our natural environment." Environmental Education Ontario (EEON), a non-government organization dedicated to promoting environmental education in Ontario, also launched an e-mail campaign to alert its members. Dozens of letters were forwarded to the Ministers of Education and the Environment, requesting that they reconsider their decision and make Education subject to the full array of *EBR* processes described above. The issue was also covered in a detailed article by an environmental columnist who writes for the *Toronto Star*.

Building a Conservation Culture in Ontario

MOE's response failed to mention the Ontario government's plan to create a "culture of conservation" in the province. In January 2004, the Ontario government created a Conservation Action Team (CAT), comprised of twelve parliamentary assistants from eight Ontario government ministries responsible for a broad range of policy and program areas and charged CAT with creating a "culture of conservation" in the province. The CAT has been working on initiatives to promote the government's conservation initiatives across the province by engaging stakeholders from a variety of sectors to seek out and promote the best in conservation ideas and practices, developing an action plan to help the government meet its conservation targets, and identifying barriers to conservation in existing government policies and programs.

In the spring of 2004, a web site was created (<http://www.ontarioconserves.gov.on.ca>). The site provides information and resources aimed at encouraging Ontario residents to become part of Ontario's culture of conservation, and provides tips on reducing the amount of garbage that goes into landfills, on saving energy and lowering energy bills and making small lifestyle changes that help protect the air we breathe. In the fall of 2004, the Ontario government also enacted legislation creating the Conservation Bureau at Ontario Power Authority and appointing Ontario's first Chief Energy Conservation Officer to help Ontarians make energy efficiency and conservation a more important part of their lives.

In May 2005, the Ministry of Energy released a report titled Building a Conservation Culture in Ontario. The report was compiled by the CAT based on meetings with more than 300 groups and individuals across Ontario to seek out best practices, identify barriers to conservation and explore ways for the government to incorporate energy conservation in policies and programs. The report's recommendations included the following:

- Accelerate the introduction of conservation and sustainability into the kindergarten to grade 12 curricula by encouraging partnerships between teachers and the Ministries of Education, Energy, Environment, Natural Resources, Agriculture and Food to ensure the school curriculum successfully develops a conservation ethic in children. (Recommendation 16)
- Rejuvenate the energy management training capabilities among community colleges. Increase apprenticeships in energy management occupations leveraging the training centres established by some trade unions. (Recommendation 17)

It is noteworthy that MOE failed to note the work of CAT and its May 2005 report in formulating its response to the applicants.

Support for Ontario Working Group
One very positive initiative undertaken in 2006 by MOE and EDU is that both agreed to provide financial support for an Ontario Working Group on Education for Sustainable Development. The UN Decade of Education for Sustainable Development (UNDESD) began in 2005 and runs to 2014. Internationally, Canada has signaled its support for the UNDESD. In March 2005, 200 UNDESD delegates participated in a high-level meeting of Environment and Education Ministries to adopt the Strategy for Education for Sustainable Development and the Vilnius Framework for its implementation. In Canada, Learning for a Sustainable Future (LSF), in partnership with Environment Canada, and several Manitoba public agencies, have been charged with creating a National Education for Sustainable Development Expert Council and establishing Education for Sustainable Development Working Groups (ESDWGs) in Canadian jurisdictions in support of the UNDESD.

In 2005, working groups were established in seven jurisdictions across Canada, including British Columbia, Saskatchewan, Manitoba, Ontario, Nova Scotia, New Brunswick, and Nunavut. The provincial/territorial ESDWGs are intended to foster the creation of a culture of sustainability by engaging senior educational stakeholders in determining the goals, priorities and objectives for education activities and working together to support their regional advancement. Two to three members of each provincial/territorial Working Group will sit with other stakeholders on a National Education for Sustainable Development Expert Council. The Council is intended to support systemic change within the formal and informal education sectors, addressing cross-cutting activities such as sustainability literacy and tracking, research, communication, and sharing of best practices. In early 2006, Ontario organizers and the LSF received modest financial support and a commitment to participate in the Ontario Working Group from both EDU and MOE.

ECO Comment
The ECO, the applicants, several ENGOs, academics and some school boards have for a long time been asking the Province to make the Ministry of Education subject to the public participation provisions in Part II and the applications for review process under the *EBR*. To this end, MOE's recommendation was disappointing and perplexing. The applicants submitted evidence that demonstrates that supposed integration of environmental science at the secondary level is a failure and that many teachers teaching biology, chemistry, physics and geography lack the capacity to do the kind of teaching they would like to. The ministry disregarded some of the evidence submitted in support of the application and did not respond to some of the issues raised. Defending the existing framework for curriculum review, MOE

dismissed the applicants' request to make decisions on environmental and science curriculum subject to *EBR* processes.

It is important to note that, in the past decade, successive Ontario governments have implemented key changes in the mandate of EDU, and these tend to strengthen the argument for prescribing EDU under the *EBR*. Prior to 1996, many decisions about curriculum development were made by school boards and not by the Minister of Education and EDU staff. In 1996, EDU assumed a stronger role in curriculum development, partly because the ministry's Education, Quality and Accountability office began to administer standardized testing of children at several grade levels. While EDU consults with school boards and stakeholders on Ontario's curricula, the ministry has gradually taken on a more direct responsibility for curriculum content and delivery, including environmental curriculum. MOE did not mention these developments in its response to the applicants.

With respect to the obligation to consult using the Registry, MOE failed to explain that there are many financial and administrative exceptions contained in the *EBR*, e.g., subs. 15(2), that may be invoked and the vast majority of EDU decisions would fall under them. No notice on the Registry is required for these exceptions. Thus, the burden on EDU to consult using the Registry would likely be minimal if it were prescribed for the Registry consultation process but key decisions would be caught. For example, the ECO has learned that EDU is beginning a review of science curriculum in Ontario and it would be logical, at an appropriate stage in the process, to provide an opportunity to the public to comment on this new curriculum using the Registry.

This MOE decision is also highly unusual because no other ministry has ever been prescribed solely for SEV consideration. To date, all ministries have been prescribed for SEV consideration and for posting proposals for new policies and Acts on the Registry under the *EBR*'s notice and comment process. These two requirements were seen as basic elements of the new system of accountability and transparency that was developed by the Task Force on the Environmental Bill of Rights in 1992.

Nevertheless SEV consideration is an important first step and the ECO welcomes this development. The ECO intends to carefully monitor the development of EDU's SEV. This process will begin once O. Reg. 73/94 is amended, and the ECO urges MOE to complete this process as soon as possible. The ECO also plans to carefully scrutinize how EDU applies its SEV when it makes some key decisions and will make requests to EDU for regular updates and annual reports on how it is applying its SEV.

The recommendation not to make EDU subject to applications for review is a significant disappointment for the ECO. In the past decade, applications for review have been used to build awareness of environmental problems and this can eventually lead to reforms to legislation and policy. In its 2000/2001 annual report, the ECO contemplated that if EDU was subject to applications for review "the public would have the right to request improvements to the ministry's approach to environmental curriculum. The public might also want to ask for monitoring and reporting on how effectively schools are teaching existing environmental components of the curriculum."

Environmental Education May be one of our Most Important Neglected Obligations

As events in the past five years have shown, environmental education may be one of our greatest social and cultural challenges. In March 2005 the Millennium Assessment, a comprehensive global study by thousands of environment experts, was released. This stunning and detailed report shows that current human activities are permanently harming global ecosystems and risking the welfare of future populations. There are many indications that our current consumption patterns are leading to rapid environmental degradation.

The ECO applauds the efforts by the Ontario government to begin to develop a culture of conservation in Ontario, and the work of the CAT. These are important steps but they require full engagement of our formal and informal education system. Allowing public scrutiny of Ontario's educational system through the *EBR* is bound to strengthen this engagement. Moreover, as noted in the ECO 2000/2001 annual report – "there is a critical need for Ontario's public to understand complex environmental issues that affect their day-to-day lives. The *EBR* is predicated on the value of informed public comment on government decision-making." These are some of the reasons why the CAT report recommendations on EDU curriculum are so important to the long-term success in our efforts to promote sustainability.

Has EDU's Infusion Experiment been a Success?
It is unclear whether the infusion experiment launched by EDU in 1998 (and described by the applicants as a failure) is working. The ECO notes that some of the "exemplars" (i.e., examples of student work, prepared to assist teachers as they give instructions to students on assignments) that have been developed by EDU and its stakeholders for secondary school science courses are very high quality. These exemplars, which deal with topics such as climate change, can effectively promote positive environmental values. However, exemplars are only part of the puzzle and may not make the infusion model a success. The ECO may decide to explore how to improve the infusion model and bolster exemplars in future annual reports.

School Boards are Making Progress But They Need More Support
Research by the ECO suggests that many school boards in Ontario are making progress on sustainability projects but they need more resources and support. For example, the TDSB has demonstrated its environmental leadership by implementing a formal Environment Policy (2000), a board-wide "EcoSchools program", where schools make a commitment to implement waste reduction and energy conservation programs and implement initiatives to integrate environmental education in the curriculum. As of April 2006, 53 TDSB schools had been certified as EcoSchools. Another school in Shelburne has pioneered important innovations in energy conservation and many others in other parts of Ontario are implementing innovative recycling and waste reduction programs and activities such as tree-planting.

In May 2005, the TDSB unveiled its first ever Environment Report, detailing its efforts around energy conservation, waste reduction, school ground greening, and ecological literacy. According to experts, the TDSB is believed to be the first school board in North America, and maybe even the world, to produce this type of report. Much more could be done to promote sustainability in Ontario's schools.

Outdoor Education is a Vital but Neglected Obligation
Experiential and outdoor education will play vital roles in achieving sustainability. As noted in the ECO 2000/2001 annual report, most of Ontario's population now lives in urban settings, and "children in urban settings have far less contact with the natural environment on an everyday basis than children of previous generations. Without an appreciation of our natural heritage, new generations may not see the value of protecting it. Therefore, it is important that some of this education be provided through the formal school system."

Prior to the 1990s, Ontario enjoyed one of the best environmental and outdoor education traditions in North America. Outdoor education programs at schools boards has been increasingly subject to cutbacks throughout the last decade. In 2002, several provincial-government-appointed supervisors of school boards instituted significant cuts of environmental education at many school boards. For example, more than $4 million of TDSB spending on outdoor education was cut and the TDSB was required to sell several of its outdoor education centres and related facilities. These types of cuts will probably serve to undermine ecological literacy in the long-term.

Conclusion
Environmental sustainability is a critical issue for all Ontarians. Our informal and formal education systems, and the values they promote, are at the very heart of our unsustainable lifestyles and practices. If Ontario is to make progress towards sustainability, we must transform our social, cultural, economic and political systems as well as our technical ones. Increased EDU accountability under the *EBR* and regular commentary by the ECO would be an important step in this transformation.

One starting point for such a dialogue should be increased EDU accountability under the *EBR* and regular commentary by the ECO. The burden on EDU to consult using the Registry would likely be minimal if the ministry was prescribed for posting proposals for Acts and policies as are all other *EBR* ministries. MOE's approach – exempt all decisions from the Registry consultation process and the *EBR* application for review process – is too sweeping and unjustified.

Several non-government organizations (NGOs) have worked hard for decades with many stakeholders to provide leadership in the area of environmental education for sustainability. The ECO believes that making EDU more fully subject to the *EBR* will send an important message to the boards of education in Ontario and the schools under those boards that more can and should be done to promote sustainability. As noted above and in previous annual reports, many Ontario children and adult residents have limited contact with nature and natural environments. The ECO believes that education, both formal and informal, is crucial to the transformation that our economy and society must undergo in the next decade.

Review of Application R2004005
Review of Certificate of Approval for the Kitchener Street Landfill Site
(Review Undertaken by MOE)

Background/Summary of Issues
The Kitchener Street Landfill is a municipal landfill located in and serving the City of Orillia. The site is located near Lake Simcoe and bounded by two waterways that discharge into the lake. It has no leachate collection system and no liner, relying instead on an underlying layer of peat and adjacent buffer lands for natural attenuation or management of landfill leachate. The site first received a certificate of approval (C of A) in 1981 and is currently approved to receive domestic, commercial and solid non-hazardous industrial waste.

On September 19, 2004, an application for review was submitted, requesting that MOE review four of the conditions in the landfill's C of A. On the same day, the applicants also submitted an application for investigation alleging contraventions of the C of A for the Kitchener Street Landfill. This second application was denied by MOE in November of 2004 (see 2004/2005 ECO annual report supplement at page 298).

The application for review raised concerns regarding the sufficiency of C of A condition #7, prohibiting the receipt of liquid industrial waste or hazardous waste at the landfill, and an associated condition #19, which requires the formulation and implementation of a comprehensive plan for the receipt of contaminated material directed to the site by order of the Minister of the Environment. The comprehensive plan was prepared by the municipality and approved by MOE in 1992. It defines contaminated material as including "cleanup material from any spill which is reportable or which is reported under Part X of the *Environmental Protection Act* RSO 1990 or material which is registerable non-hazardous waste under Regulation 347 RRO 1990" and, further, that "only contaminated waste generated within the City of Orillia….can be received at the Landfill site." As the municipality's own

record of waste receipt explains, the plan requires that "registerable non-hazardous waste must pass a Leachate Extraction Procedure Test," and "if it does not, it is considered hazardous waste and cannot be disposed of at the Waste Diversion Site."

The applicants indicate that attempts were made, during a 1992 Environmental Appeal Board (EA Board) hearing related to a proposal to expand the service area of the Kitchener Street Landfill, to restrict the receipt of contaminated materials at the site but the EA Board was told that "…it could not prohibit the delivery of these materials to the landfill, or require pre-treatment before delivery, as the Ministry has the authority under the *EPA* to order otherwise." The applicants expressed concern that the municipality has received large amounts of contaminated soil at the landfill site. Their application includes a memo from the city of Orillia listing contaminated materials deposited at the Kitchener Street Landfill site between 1988 and 2003. They also raised concerns about the landfill having received over 40,000 cubic metres of contaminated soil from a brownfield site redevelopment currently underway in the city. Finally, they referred to evidence presented during the 1992 EAB hearing indicating that groundwater within the boundaries of the landfill site was contaminated by landfill leachate and that some contaminant levels measured at surface water quality monitoring stations located in the water bodies adjacent to the site exceeded Provincial Water Quality Objectives (PWQOs). They argued that the increasing levels of contaminants in the landfill's leachate are problematic because, as reported in the 1991 EAB hearing, large quantities of leachate are known to migrate from the landfill into these adjacent water bodies.

The other two C of A conditions included in this application for review, conditions #17 & #18, require the development of a waste minimization plan and strategy respectively for municipalities serviced by the Kitchener Street Landfill. The applicants raised concerns about the need to conserve space in the Kitchener Street Landfill, particularly since landfill capacity is scarce in Ontario, and suggested that the municipality needs to enhance efforts to promote waste reduction and waste diversion as per the *Waste Diversion Act*.

The above concerns form the grounds for the applicants' request that these four conditions of the landfill C of A be reviewed by MOE.

Other Information

The 1992 Environmental Appeal Board Hearing & the Kitchener Street Landfill

The written decision from the 1992 Ontario EA Board hearing regarding the proposal to expand the Kitchener Street landfill's service area included some comments from the EA Board that are very relevant to the concerns raised by the applicants.

In its decision, the EA Board acknowledged that the evidence presented established that there was a problem with groundwater within the landfill's boundaries being contaminated by landfill leachate. The EA Board confirmed that there were exceedences of PWQOs within the site and at the site's boundaries, and expressed concerns about the impact of this migrating leachate on the surface waters of adjacent water bodies including Lake Simcoe.

During the 1992 EA Board Hearing, evidence was presented that led to concerns being raised about the Kitchener Street landfill site's dependence on peat for leachate management. In particular, reference was made to a Gartner Lee Consulting study underway for MOE. An expert from Gartner Lee stated at that point in time that:

- We have no projection of how long the peat will work. The reason for this is that peat soils are just now (1992) becoming subject to this kind of research.

Throughout the hearing, the EA Board raised concerns about the fact that the site is dependent on natural attenuation for landfill leachate management:

- Ideally, this landfill and Kitchener Park (the old landfill) should have leachate intercepted and collected before it escapes into Lake Simcoe.
- In our view, this is not a site with a high degree of natural protection. We were told that if monitoring indicates that leachate collection and treatment is necessary, a system will be installed. Yet, given the size of Lake Simcoe and its dilution potential for the leachate discharge, it may be unlikely that the City or its consultants will feel the need to request that a leachate system be installed. As the issue of leachate treatment and cost was not explored in detail by the parties during the hearing, we prefer not to deal with it as a condition of approval. *Nevertheless, we agree with the aphorism that "an ounce of prevention is worth a pound of cure", and recommend to the City and its waste advisory committee (referred to in condition 16) that the cost of installing and operating a leachate collection system, or a pre-treatment system, be explored and given serious consideration. [emphasis added]*

Landfills & Natural Attenuation
The Kitchener Street Landfill continues to be wholly dependent on the natural attenuation abilities of peat to manage landfill leachate generated at the site. It is very unlikely that this method of leachate management would be viewed as being acceptable if the Kitchener Street Landfill was being approved as a new landfill site today. O. Reg. 232/98 (Landfilling Sites) outlines requirements for new landfill sites, including the establishment of minimum hydraulic capacity (flow through rate) for the natural materials serving to attenuate leachate generated at a site. The regulation sets out minimum requirements to ensure groundwater and surface water will be protected. With respect to groundwater protection, the regulation suggests that a peat layer alone is not adequate for this purpose. Peat is not an ideal natural attenuator as it appears to allow liquids to move through more quickly than is desirable for landfill leachate management purposes. The hydraulic conductivity of peat falls within a range of 1×10^{-7} to 1×10^{-5} meters per second. In order to ensure adequate groundwater protection, O. Reg. 232/98 requires that any natural material used for leachate attenuation have a hydraulic conductivity of 1×10^{-7} m/s *or less* and that a .75 meter thick clayey liner exist below this layer and a high-density polyethylene geomembrane must exist above this layer. Therefore, peat alone does not appear to offer an adequate level of protection.

Ministry Response
The ECO received this application on September 21, 2004, and forwarded it to MOE. On November 23, 2004, MOE notified the applicants that it would be undertaking a review under the *EBR* process. Further, MOE indicated that it would be reviewing all of the conditions in the landfill C of A, not just the four conditions highlighted by the applicants. A full review was warranted, according to MOE, because "while the landfill continues to meet provincial standards and shows no off site adverse effect… there is an increasing trend in concentrations of the contaminants in groundwater and surface water." MOE also informed the applicants that the review might require that changes be made to the landfill C of A if any deficiencies were identified in the C of A itself or if there were any deficiencies associated with the operation of the landfill site. Potential changes might include "change to the operation of the landfill, leachate collection and/or treatment at the landfill." The applicants were informed that the review would be completed by April 30, 2005, and that they would be notified, in writing, of the results of the review within 30 days of its completion. On March 15, 2005, a first draft of an amended version of the Kitchener Street Landfill C of A was forwarded by MOE to the City of Orillia for review. City staff forwarded a copy of this draft to the applicants for feedback on April 12, 2005. Both the applicants and the ECO were notified of the completion of this review on June 28, 2005.

There was a significant level of community interest in this review, because of the connection between the landfill and the development of the City of Orillia's MURF. Because of this interest, MOE posted two information notices to the Environmental Registry. Each information notice stated that MOE is not obligated to post C of A amendments for comment because the operation of the landfill is considered to be an undertaking for the purposes of the *Environmental Assessment Act*. The first notice, which appeared on June 28, 2005, alerted the public to the fact that a review of the landfill C of A had been completed and that MOE planned to revoke existing C of A conditions and impose new terms and conditions. The public was invited to comment on the proposed amendments and was given a 30-day period within which to do so. The second posting appeared on November 3, 2005, informing the public that new conditions for the landfill C of A had been finalized. This second posting included a link to the finalized C of A for the site.

MOE's decision to undertake a full review of the Kitchener Street Landfill C of A resulted in a substantial number of changes to this C of A. In the letter notifying the applicants the review was complete, MOE explained that existing conditions were being revoked and new terms and conditions imposed as per MOE's authority under s. 39(2) of the *Environmental Protection Act*, which allows these modifications "where there is evidence that upon probable grounds the use and operation of this waste disposal site may create a nuisance, is not in the public interest, or may result in a hazard to the health and safety of any person in the future." This is significant as it represented confirmation from MOE that issues exist at the landfill that require attention.

In response to the applicants' concerns about C of A condition #7, which states that "No liquid industrial wastes or hazardous wastes shall be disposed of in the landfill", MOE amended the wording of the condition in order to more clearly define the type of waste that can and cannot be deposited at the landfill site to overcome some confusion that existed regarding the public's understanding of MOE's definitions of hazardous versus contaminated wastes. This condition, now #20 in the new C of A, reads as follows:

- Only municipal and solid non-hazardous waste material may be landfilled at the site. No liquid industrial waste or hazardous waste shall be disposed of at the landfill.

The amended certificate also includes a definition of "Solid Non-Hazardous Waste".

In response to concerns raised about condition #19, which requires the preparation of a plan for the receipt of contaminated material at the landfill, MOE reported that the municipality prepared this plan as required. However, MOE has included a new condition in the C of A – condition #30 – that clarifies the requirements of the plan prepared as a result of the original C of A's condition #19. Further, MOE has required that the plan for receipt of contaminated materials be appended to the new C of A. In addition, MOE has added a new condition #17 that requires the site owner to "present in the updated Design, Operations and Maintenance Plan (Operations Plan) a comprehensive plan for the receipt of contaminated materials directed to the landfill." This amounts to a requirement that an updated plan for the receipt of contaminated materials at the landfill site be prepared to replace the existing plan.

In response to the applicants' concerns about perceived inaction on the part of the municipality regarding the C of A's requirements for the development of a waste minimization plan, MOE amended conditions #17 & #18 into a single condition #28 which requires that "a five-year waste minimization plan and strategy be prepared by the Owner, every five years." The previous condition simply required the preparation of a plan and a requirement that the municipality satisfied. The changes introduced in condition #28 require that this plan be updated every five years.

MOE's review of all of the other conditions of the C of A led to a host of additional amendments to the C of A. Some of the significant new requirements arising from the expanded review include:

- A new Operations Plan for the landfill site accompanied by requirements for the implementation phase for this Plan.
- Preparation and approval of an updated environmental monitoring program
- Continued annual reporting based on the new Operations Plan.
- Updating of the C of A to include a set of new standard administrative conditions addressing "general compliance, information and record retention, inspections, and interpretation matters."
- New conditions to facilitate the use of alternative cover at the site in order to "reduce the risk of operational problems."
- A new condition requiring the site owner to "clearly define the boundaries of the limit of waste" so as to ensure that waste is not placed outside of this boundary.

Another change to the C of A is a new condition requiring the site owner to conduct a study of "the leachate attenuation capacity of the peat layer around and underneath" the landfill site. MOE has included this requirement in order to "determine or predict the attenuation capacity and provide guidance on future landfill operations and designs."

New conditions were also added to ensure the site owner develops a plan that includes an organized set of procedures to identify and notify stakeholders, and to respond to potential issues relating to groundwater or surface water contamination near or at the contamination attenuation zone limit. These conditions include requirements that the site owner:

- Prepare a trigger mechanism plan for surface water and groundwater quality for the purpose of initiating investigative activities into the cause of increased contaminant concentrations at the site's Contamination Attenuation Zone;
- Prepare a contingency plan to be implemented in the event that the surface water or groundwater quality exceeds the trigger mechanism identified in the trigger mechanism plan outlined above;
- Provide notification to the MOE District Manager of any confirmed exceedance of a trigger mechanism. Any such confirmation also requires the initiation of an investigation into the cause(s) as well as the implementation of remedial and/or contingency actions by the site owner; and
- Enhance record keeping requirements "to ensure record keeping is completed in accordance with Ministry standards." Standard administrative report keeping conditions have been added to the C of A to accomplish this.

MOE also indicated that it was eliminating several conditions from the landfill's C of A. Condition #15 required the site owner to prepare a plan for the improvement in the water quality in two adjacent waterbodies (Mill Creek & Ben's Ditch) in order to eliminate the impact of the landfill. Condition #22 required the site owner to prepare a plan to study the potential for surface water flow from the landfill into surrounding surface waters, especially during storm events and spring run-off. MOE indicated that the site owner had met both of these requirements and, on this basis, the conditions could be removed from the C of A.

ECO Comment

The ECO is pleased that MOE made the decision to review the Kitchener Street Landfill C of A, and commends MOE for committing to undertake a review of the entire certificate and not just the four conditions highlighted by the applicants. The review yielded many positive updates and additions to conditions in the C of A as outlined above.

The MOE's voluntary use of information notices to inform the public of the proposed changes to the landfill's C of A was positive, particularly since the first notice extended an opportunity for the public to submit comments on the proposed C of A amendments. The ECO has raised concerns about the use of s. 32 of the *Environmental Bill of Rights* in order to exempt instrument amendments such as this one from public comment and leave to appeal rights (see ECO AR 2003/04 – *EBR* Rights Lost: Behind the Veil of s. 32, on page 52).

The review provided MOE with an opportunity to undertake a much-needed update of the landfill's C of A. Many of the elements set out in MOE's 2002 "Protocol for Updating Waste Management Certificates of Approval" were incorporated into the landfill's C of A as a result of MOE's review. Incorporating standard requirements is a good approach as it ensures that there is consistency in environmental protection measures from one landfill site to another. However, the ECO notes that several critical requirements set out in the protocol were left out of the Kitchener Street landfill C of A update – the development of a landfill closure plan and post-closure care provisions for eventual site decommissioning. Given the environmental challenges at this site, identified by the applicants, the ECO believes the site owner's obligation to fulfill closure and post-closure requirements is critical and should be spelled out via conditions within the landfill C of A.

As noted, the MOE review also resulted in the removal of conditions #15 and #22, both mandating certain water quality studies, from the C of A. These conditions required the site operator to undertake water quality studies and these were provided to MOE in 1992. The ECO believes it would have been beneficial for MOE to provide at least a general sense of the impact, if any, of the findings of these studies on the operation of the Kitchener Street Landfill, particularly since the applicants raised concerns about the impact of the site's leachate on surrounding waterways.

The C of A requirement to prepare a 'Design, Operation and Maintenance Plan' raises questions about how the public will be consulted on key decisions related to the site. The plan must clarify important details like total waste capacity of the site, daily fill rate, remaining life expectancy of the landfill, etc. However, the C of A does not indicate that the public will have any opportunity to review and comment on these details. Ideally, some of these important details should have been established and incorporated into the draft C of A for public review and comment. In other instances, MOE has confirmed total landfill site capacities via administrative changes to Cs of A, thereby avoiding the requirement to post to the Environmental Registry for public comment under the *EBR* (this was done with the Edwards landfill in Haldimand County – reviewed in the ECO annual report supplement 2004/2005 at page 66). At a minimum, MOE should have required that the Waste Advisory Committee affiliated with the Kitchener Street Landfill have an opportunity to review and comment on this plan.

The ECO believes that the outcome of this review also underscores the great need for MOE to pursue a comprehensive initiative to update the Cs of A of all older landfills in the province. Given that this review led to so many changes to the Kitchener Street Landfill's C of A, it is very likely that there are other sites in desperate need of similar updates (see the ECO 2005/006 annual report, page 33-37 for more details on ECO concerns about Ontario's older landfills).

In its response to the applicants, MOE acknowledges that it was motivated to review the entire C of A because of rising levels of contaminants in the landfill's ground and surface water. As documented in a number of previous ECO reports (see the ECO 2004/2005 annual report, page 127) and described by the applicants, leachate management is a serious problem at many Ontario landfills. MOE's solution to this problem was to require the owner to assess the ability of the site's peat layer to act as an effective leachate management system. However, given that MOE's own updated landfilling regulations suggest that a peat layer alone is not ideal for natural attenuation of landfill leachate in combination with the fact that

concerns were being raised back in 1992 about leachate management at this site, the ECO believes MOE should have required preventive measures for leachate management at the site rather than or in combination with additional study. There are other older landfill sites in the province, such as the side-by-side Rennie and Brampton landfills in Hamilton, where leachate collection systems have been installed to intercept and treat contaminated landfill leachate.

The ECO also questions the appropriateness of continuing to allow contaminated materials (solid non-hazardous waste and spills material) to be deposited at the site. At a minimum, this practice should be suspended until there is evidence that natural attenuation is working to effectively manage landfill leachate generated at the site.

Review of Application R2004007:
Review of EPA and Reg 347 Requirements for Septage Haulers
(Review Denied by MOE)

Background/Summary of Issues
On October 12, 2004, the ECO received an application that focussed on the kinds of approvals required by septage haulers. The applicants represent approximately 200 small companies who pump septic tanks and portable toilets and handle biosolids. Some companies use a small tank truck to pump out septic tanks and portable toilets, then pump the contents of the small tank truck into a larger tank truck to be hauled to a sewage treatment plant or to land application sites for disposal. In some cases the contents of the small tank truck are pumped into a temporary holding tank on the owner's property for future transportation to sewage treatment plants or land application sites.

The applicants requested a review of Regulation 347, R.R.O 1990 under the *Environmental Protection Act* (the General Waste Management Regulation). The applicants dispute the Ministry of the Environment (MOE) position that a Certificate of Approval (C of A) for a waste disposal site is required where a transfer of hauled sewage occurs prior to transport for final disposal. The applicants alleged that MOE officials are incorrect in their interpretation of "transfer" and "transfer station" under Regulation 347. Noting that "transfer" is defined in Regulation 347 as a "physical transfer of possession," the applicants questioned whether the transfer of waste between vehicles or tanks owned by the same company is considered a physical transfer of possession. They also questioned how a transfer station could be considered a waste disposal site. This application is almost identical to application R2003010, which was reviewed in the ECO 2003/2004 annual report supplement, pages 234-236.

Ministry Response
Results of the Ministry's Consideration of the EBR Application for Review
On April 5, 2005, MOE denied the request for review, stating that there is no potential for harm to the environment if the review is not undertaken. The ministry maintained its position that a C of A is required, but offered to look into ways to reduce the administrative burden on haulers.

In its detailed "Decision Summary" MOE explained the *EPA* and Regulation 347 requirements and definitions to counter the applicants' interpretation. The ministry explained that "waste disposal site" is defined broadly in the *EPA* as:

- any land upon, into, in or through which, or building or structure in which, waste is deposited, disposed of handled, stored, transferred, treated or processed, and

- any operation carried out or machinery or equipment used in connection with the depositing, disposal, handling, storage, transfer, treatment or processing referred to in clause (a).

MOE stated that transferring waste from one vehicle to a holding tank, regardless of whether there is a change in possession, is an activity which triggers the need for a C of A to protect the environment. Sites used for storing, handling and transferring hauled sewage require a C of A to ensure environmental protection because they fall under the definition of a waste disposal site.

MOE explained that Cs of A perform a preventative role. The Director includes terms and conditions in a C of A to protect the health and safety of people and the environment, after considering the environmental constraints of the site and the public interest.

Certificates of approval are intended to accomplish the following objectives:

- To provide protection to the natural environment by minimizing discharges or spills which could occur when waste is deposited, disposed of, handled, stored, transferred, treated or processed;
- To describe the site and process reflecting sound engineering and design principles as well as adequate controls and contingencies;
- To encourage sound environmental practices;
- To require the submission of adequate financial assurance so that financial resources are available for site cleanups;
- To ensure compliance with Acts, regulations, policies, objectives and guidelines;
- To act as a compliance mechanism to make applicable standards legally binding;
- To identify administrative responsibilities to proponents.

MOE did offer to review the administrative burden, stating that "as part of the ministry's management of septage, Waste Management Policy Branch and the Environmental Assessment and Approvals Branch will assess opportunities to reduce the paperwork associated with a system C of A in situations where septage is transferred from one mode of transportation to another, such as truck to truck." MOE stated that the manager of the Policy and Special Projects would be contacting the applicants to arrange a meeting to discuss this non-*EBR* review.

Results of the Ministry's non-EBR Review

The ECO discovered in May 2006 that MOE had completed the review of opportunities to reduce the paperwork to address the applicants' concerns. In a fact sheet issued in February 2006, MOE describes "improvements the ministry has made to streamline the approval process for owners of hauled sewage waste management systems":

MOE has made a number of changes to provide more flexibility to sewage haulers, including a complete reversal of the decisions made in the April 2005 response to the *EBR* Application for Review. "The EAAB has concluded that in-transit storage, treatment and processing prior to final disposal are activities integral to the transportation of hauled sewage." Sewage haulers are now permitted to incorporate in-transit storage as part of their system C of A, and hauled sewage transferred from one truck to another will no longer require a separate waste disposal site C of A.

Existing C of A holders will be required to obtain an amendment to their system C of A from the ministry to be allowed the flexibility of the new system. Other changes that the ministry made as part of this review include: allowing haulers to dewater or stabilize hauled sewage as part of their system C of A; to deposit hauled sewage at any site in Ontario that has been approved by the ministry to receive this type of waste, without being listed on the sewage hauler's C of A; to undertake pilot projects; and increased flexibility in the labelling of trucks, documentation, operating procedures and record keeping. Because

hauled sewage management system Cs of A are not prescribed instruments under the *EBR*, new or amended hauled sewage waste management systems having in-transit storage, processing and system-to-system transfers will not be posted on the Environmental Registry.

ECO Comment

In the 2003/2004 ECO annual report supplement, the ECO agreed with MOE's decision to turn down a similar Application for Review: "The MOE correctly interpreted the provisions of the EPA and Reg. 347 in deciding that the sewage haulage company was required to obtain a C of A in order to transfer sewage in its yard" and "MOE made an appropriate decision that it was in the public interest not to conduct this review." The ECO also agreed with the Ministry's April 2005 decision to maintain the requirement for Cs of A for septage transfers. MOE's stated rationale for not conducting the review was sound; the ministry provided a clear and thorough explanation of the existing regulatory regime and fair reasons for deciding not to make changes. The ECO was surprised to learn that the ministry subsequently reversed its 2004 and 2005 *EBR* decisions and decided to streamline the approvals as requested by the applicants. After saying in the *EBR* response that a review is not in the public interest because the requirement for a separate C of A for the transfer of septage protects the environment, the ministry now states that the approvals process was streamlined "in consideration of the limited environmental impacts associated with these systems."

The ministry's offer to meet with the applicants to discuss opportunities to "reduce the paperwork" instead of undertaking the review requested under the *EBR*, was problematic. The ECO generally commends ministries for taking steps to address applicants' concerns, however we would prefer that ministries conduct such reviews under the provisions of the *EBR* so that the applicants and ECO are appraised of the outcome of the review in a formal, transparent process. In this case the ministry clearly did undertake the review requested by the applicants, and it should have been undertaken under the auspices of the *EBR*.

MOE also committed a serious breach of the *EBR* in failing to provide notice of its decision whether or not to carry out a review within 60 days of receiving the application. In fact MOE's response was almost four months late. The ECO reminds ministries that the time limits are legislative requirements and should not be disregarded.

Review of Application R2004010:
Request to Expand EBR Powers over the Ministry of Transportation
(Review Undertaken by MOE)

Background/Summary of Issues

In late October 2004, the applicants requested that the Ministry of Transportation (MTO) be made subject to Part IV of the *Environmental Bill of Rights (EBR).* This would permit residents of Ontario to request reviews of MTO's policies and prescribed Acts, regulations, and instruments (permits, licences etc.). If granted, this request would also allow the public to ask MTO to review the need for new Acts, regulations and policies. (Since inception of the *EBR* in 1994, MTO has been one of a number of ministries that is not subject to all of the provisions of the *EBR*. To date, MTO's participation has been limited to creating a Statement of Environmental Values and posting proposals for new environmentally significant Acts and policies on the Registry for public comment). The applicants put forward the argument that the *EBR*'s application for review procedure should apply to MTO because of the environmental impacts of MTO policies and operations. The applicants stated that MTO policies and operations can impact the local environment by reducing the size and/or quality of natural habitats and by increasing the number of vehicles that use highways, thereby increasing air emissions which affect human health.

Granting the applicants' request would require amending a regulation administered by the Ministry of Environment (MOE), O. Reg. 73/94 under the (*EBR*). This regulation specifies the ministries of the Ontario government which are subject to all or parts of the *EBR.* The regulation as written at the time of this application (2004/2005) did not include MTO as one of the ministries subject to Part IV of the *EBR*.

Ministry Response
The ECO forwarded this application to MOE in November 2004. MOE advised the applicants and the ECO, that a notice of decision as to whether a review will be conducted, along with the rationale for this decision, would arrive in a letter by January 9, 2005. In a letter dated January 17, 2005, MOE informed the applicants that the ministry was already reviewing the need to prescribe the MTO for the purposes of applications for review, and would therefore combine this application (R2004010) with review that was underway (R2003004, see page 166-167 of this supplement.) In its January 2005 letter to the applicants, MOE indicated that the review should be complete by April 12, 2005, and a written response sent to the applicants by May 15, 2005 (or notification that the timeline would need to be extended). The ECO is unaware of any further correspondence to the applicants of R004010, until a response dated September 28, 2005, was sent to the applicants. In it, MOE wrote:

> *"The Ministry of Transportation undertakes a variety of policy and legislative – activities that the public has an interest in and that are potentially environmentally significant. Most visible amongst these would be activities related to the creation, maintenance and operation of transportation infrastructure. While the public is currently able to comment on environmentally significant policy and legislative proposals initiated by the ministry through the Environmental Registry, the public would benefit from being able to more actively participate in environment-related transportation decisions by proposing ideas for improving the environment to the Ministry of Transportation for its consideration. As a result of these findings, the Ministry of the Environment recommends prescribing the Ministry of Transportation for the purposes of applications for review under the* Environmental Bill of Rights."

Furthermore, MOE and MTO identified some Acts administered by MTO which the ministries agreed had environmentally significant aspects:

- *Airports Act, 1990*
- *Public Transportation and Highway Improvement Act, 1990*
- *Railways Act, 1950* (as amended)
- *Short Line Railways Act, 1995*

The ministries acknowledged that since these Acts provide for the construction and implementation of massive scale infrastructure projects, activities conducted under the powers of these Acts could have a significant effect on the environment.

ECO Comment
The transportation sector in Ontario has a substantial impact on the province's natural environment. The sector is responsible for about a quarter of the province's greenhouse gas emissions and is a large contributor of emissions that lead to smog. Ontario's road network leaves a major footprint on the landscape, resulting in altered waterways and fragmented ecosystems. The road network in Ontario demands enormous amounts of aggregate and salt for maintenance and/or expansion each year. This application (R2004010) arrived in November 2004 while MOE was already in discussions with MTO about being prescribed for applications for review under the *EBR* because of another application

(R2003004) which had arrived in July 2003. This application, the second, was essentially resolved by the response to the first application.

Between the two applications most of the key environmental concerns about the transportation sector were raised. The ECO recognizes that both sets of applicants raised valid points and the ECO shares many of the applicants' concerns. Because the ECO also receives complaints directly from the public, we are aware of other transportation-related concerns and issues from across the province. For these reasons, the ECO welcomes the opportunity for the public to initiate reviews of MTO policies, and hopes that it brings about a new era of openness to Ontario's system of transportation planning and environmental protection. We commend the Ministries of Environment and Transportation for moving forward in the manner they did.

However, further to the ministries' analysis which concluded that it would be worthwhile to prescribe MTO and these four Acts for reviews:

- *Airports Act, 1990*
- *Public Transportation and Highway Improvement Act, 1990*
- *Railways Act, 1950* (as amended)
- *Short Line Railways Act, 1995*

We urge MOE and MTO to also prescribe the following Acts under Part IV of the *EBR*:

- *The Ministry of Transportation Act, 1990*
- *The Highway Traffic Act, 1990*
- *GO Transit Act, 2001*
- *Dangerous Goods Transportation Act, 1990*
- *Toronto Area Transit Operating Authority Act, 1990*

This is because specific Acts must be prescribed for reviews (not just the ministry itself) in order for applicants to submit reviews of those Acts and any regulations that may flow from them. Also, MOE and MTO should consider ensuring that certain future legislative initiatives, e.g., legislation involving transportation in the Greater Golden Horseshoe Area, are captured by the *EBR's* Request for Review provisions.

Review of Application R2004012:
Review of Provisional Certificate of Approval Issued to Sheldrick Sanitation Ltd.
(Review accepted by MOE)

Background/Summary of Issues
In November 2004, the applicants requested that MOE review the Certificate of Approval (C of A) for the use and operation of a waste disposal site (transfer and processing station) in Smithville by Sheldrick Sanitation Limited. Sheldrick currently operates under a Provisional C of A No. A650112 issued in 1996 (and amended October 25, 1999) which permits the facility to receive, process, temporarily store and transfer 300 tonnes of municipal and non-hazardous solid industrial waste per day.

This application for review was accompanied by a separate application for investigation by the same applicants. The ministry denied the investigation in February 2005. The ECO reviewed MOE's handling of this application in the 2004/2005 annual report supplement (see Review of Application I2004005, page 259).

The applicants believe that Sheldrick Sanitation's C of A should be amended for the following reasons, among many:

1) *Severe Odour Problems.* The applicants state they have been subject to adverse effects related to foul garbage odours experienced on numerous occasions on properties located near the waste transfer station, and a contravention of s. 14 of the *Environmental Protection Act (EPA)*. Section 14 of the *EPA* states that "Despite any other provision of this *Act* or the regulations, no person shall discharge a contaminant or cause or permit the discharge of a contaminant into the natural environment that causes or is likely to cause an adverse effect." Under the *EPA*, the definition of "adverse effect" includes loss of enjoyment of normal use of property and interference with the normal conduct of business.

2) *Sheldrick has extended its waste disposal site without approval of MOE.* Specifically, the applicants alleged that the operator had been using waste bins on the property of another company, Global-GIX Canada Inc., to store waste that was destined to be handled by Sheldrick at its processing and transfer site. Section 27 of the *EPA* states that no person shall use, operate, or establish a waste disposal site "unless a C of A has been issued by the Director and except in accordance with any conditions set out in such certificate."

3) *The operator submitted false and misleading information to the Environmental Assessment and Approvals Branch of MOE.* The applicants allege that the operator submitted false and misleading information to the Environmental Assessment and Approvals Branch (EAAB) when it applied for amendments to its C of A in 1996 and 1998 in contravention of subs. 184 (2) and (3) of the *EPA* and s. 34 of the *Environmental Assessment Act (EAA)*. Subsection 184(2) of the *EPA* states that no person shall submit false information to the ministry in respect of any matter related to the Act or its regulations. Subsection 184(3) prohibits the submission of false information to the ministry in any document or data required to be created to comply with the *Act* or its regulations.

The applicants also outlined concerns about the need for a requirement for an outdoor containment system, alleging that liquid discharges from the site were being deposited in the sanitary sewers operated by the local municipality. The application also raised concerns about the risk of fire and explosion at the transfer station. Moreover, the applicants contend that, due to proximity to a school and residential subdivision, MOE must impose higher standards on the site operator than would normally be required under applicable laws and policies. The applicants also raised a number of zoning issues, and indicated that MOE has a duty to ensure the site meets appropriate ministry and local requirements.

The application was submitted in November 2004, and included copies of letters written to local residents between 2001 and 2003 by MOE and other provincial and municipal officials, partly responding to complaints filed and concerns raised by local residents. The applicants and members of their local group had previously sent most of these letters to the local office of MOE between 2001 and 2003.

Background on the Site and Previous EBR Applications
This waste transfer station is located at a site that is zoned industrial, and shares the area with other light industrial uses including a food processing plant. In 1996 Sheldrick filed an application for use and operation of a transfer and processing station on one hectare of land. According to Sheldrick's application, the site was intended to handle solid non-hazardous and blue box wastes. MOE posted a proposal notice on the Registry in April 1996, including a single 26-word sentence to describe the project. No comments were submitted on the proposal and the facility was constructed in 1997. The MOE posted its decision notice related to the approval in November 1997, more than 18 months after Sheldrick's application.

In early 1998, Sheldrick applied to MOE for an amendment to the C of A for the site to: 1) allow the operator to accept and process greater quantities of industrial, commercial and institutional (IC&I) waste and reduce the quantities of blue box recyclable wastes processed at the site; and 2) allow for the handling of white goods and wood waste at the site. The company proposed to start the new operation in May 1998. The MOE did not post a Registry proposal notice about Sheldrick's requested amendment and granted the amendment to its C of A in October 1999. The applicants allege that MOE's decision to approve this change in the nature of the wastes handled by Sheldrick (i.e., from dry recyclables generated by households to IC&I wastes containing an increased range and amount of compostable and wet wastes) partially explains why odour problems have increased in the past five years. Between 1998 and 2000 when the facility primarily was accepting dry recyclables, there were a total of two odour complaints. The complaints increased in each of the following years, and in 2003 the ministry recorded 68 odour complaints.

In 2000, the transfer station announced plans to expand its waste processing facility, and its expansion proposal was designated under the *EAA* in 2001. According to the MOE, Sheldrick has proposed to:

- increase the amount of waste received from 300 to 900 tonnes per day;
- increase the storage volume to 1350 tonnes;
- increase the outbound volume of waste to 1350 tonnes per day;
- increase the storage time for curbside municipal waste to one week and other waste to 90 days;
- accept asbestos waste;
- accept all municipal solid waste;
- remove service area restrictions; and
- adjust the receiving hours and the activity hours.

To meet the requirements of the *EAA*, the company has prepared Terms of Reference for the planned expansion. There is significant public concern about the proposed expansion, and MOE notes that complaints about odours have increased substantially since the expansion plans were announced in 2000.

Concerned residents submitted three previous *EBR* applications about this facility (two in 2001 and one in October 2003), and MOE denied all three applications. A brief summary of these applications follows below:

The first was an application for review of the Certificate of Approval (R2001013) for the Sheldrick Sanitation waste transfer/processing facility, which was reviewed in the supplement for the ECO 2001/2002 annual report (page 253), and is summarized below. This request was submitted because the applicants believed the existing C of A had inadequate safeguards for storm water collection, odour control, dust and vector control, landscaping or financial assurance. The ministry denied the application but conducted a partial review of the C of A based on the issues raised by the applicants.

The supplement to the ECO 2002/2003 annual report (page 195), outlined a second application for review requesting new waste management regulations under the *EPA*. This request (R2001017) was submitted because the applicants believed that the Sheldrick Sanitation facility was inappropriately sited in a light industrial area, adjacent to a school and residential area. The applicants also had concerns about traffic impacts and the adequacy of MOE's monitoring and enforcement.

The supplement to the ECO 2003/2004 annual report outlined an October 2003 request that MOE investigate alleged contraventions by Sheldrick Sanitation of its C of A. In response to the October 2003 application for investigation, the ministry noted that its abatement staff had conducted a large number of site visits in 2002 and 2003, and had also issued a Provincial Officer's Order to the company in November 2003. The Order required the company to produce and implement an odour abatement plan by March 31, 2004.

As noted in the ECO 2003/2004 annual report supplement, MOE's decision on the October 2003 application was supported by a Provincial Officer's Report, dated November 5, 2003. This report provided a detailed description of an MOE site visit on July 15, 2003. The MOE Provincial Officer concluded from his site visit that on the day in question, odours from Sheldrick were causing the company to contravene the *EPA*, s. 14, by adversely impacting off-site property owners. The report also documented that shortly after the site visit on November 5, 2003, Sheldrick proposed to voluntarily undertake an odour assessment. When the company failed to adequately follow through on this commitment, despite frequent reminders from MOE staff in the late summer of 2003, MOE decided to issue a Provincial Officer's Order in November 2003.

The November 2003 Provincial Officer's Report also noted that the company had taken a number of steps to control odour, including the:

- purchase and installation of new deodorizing equipment in the building;
- purchase of a deodorizing truck with positive pressure spray;
- purchase of new truck for removing IC&I waste as soon as possible;
- establishment of an odour control program;
- establishment of an odour complaints procedure; and
- new rule that north and south overhead doors of facility not be opened simultaneously.

In their November 2004 *EBR* application for investigation, the applicants alleged that Sheldrick Sanitation contravened a number of laws administered by the MOE including:

- s. 14 of the *Environmental Protection Act* by emitting odours causing an adverse effect.
- s. 27 of the *EPA* because Sheldrick has extended its waste disposal site without MOE approval. Specifically, the applicants alleged that the operator had been using waste bins on the property of another company to store waste that was destined to be handled by Sheldrick at its processing and transfer site.

The applicants relied on information that was similar to the information presented in their current application for review.

MOE denied the November 2004 request for an investigation on February 9, 2005, on the grounds that it would be redundant. (For further information, see the ECO 2004/005 annual report supplement, page 259.) In its response the ministry described the site history and provided a detailed response to most of the alleged contraventions outlined by the applicants.

With respect to the alleged contraventions of s. 14 of the *EPA*, MOE stated that the alleged violation was not "serious enough to warrant an investigation due to insufficient evidence." The ministry noted that the current C of A "in no way abrogates Sheldrick's legal obligations to take all reasonable steps to avoid violating the provisions of all applicable legislation and regulation", including the provisions of s. 14 of the *EPA*.

The ministry also acknowledged that it had received nine separate odour complaints during a 14-day period following publication of an article in the Hamilton Spectator in August 2004 but was unable to substantiate any of them.

Ministry Response

The ministry accepted this review in early 2005 but agree to review only two conditions rather than the entire C of A. In its response, MOE noted that it "will look at odour concerns through a review of conditions 14 and 18 which relate to odour control and will codify the intent and operation procedures of the Odour Control Plan prepared by Sheldrick."

The MOE also stated that the zoning issues raised by the application "are more appropriately dealt with through the municipal planning process and/or the environmental assessment process." MOE made enquiries to the local municipality and was informed that the "site met zoning criteria for the municipality."

The MOE rejected the argument that a full review of the C of A should be conducted because of alleged contraventions of the *EAA* and the failure of the company to provide information to the MOE about certain aspects of its operations. MOE stated that "an assessment of the application found that failure to investigate the alleged contravention of s. 34 of the *EAA* is not likely to cause harm to the environment." The ministry went on to point out that pursuant to O. Reg. 398/01 Sheldrick is required to prepare an individual environmental assessment before it can expand the site, and that this "is the most extensive review process possible" under the *EAA*.

The applicants wrote to MOE in February 2005 stating that they are pleased that MOE has agreed to review conditions 14 and 18 of the C of A but they noted they remain concerned about whether the site has an appropriate storm water management system. MOE responded to the applicants' concerns about the need for a requirement for an outdoor containment system by pointing out that existing conditions in the C of A are in place to address concerns with potential wash waters, leachate and storm water run-off discharges from the site. Condition 21 stipulates that all discharges from the site including storm water run-off shall be managed according to municipal, provincial and/or federal legislation and by-laws. They also noted that no "substantiated complaints related to off-site discharges" have been recorded by local MOE abatement staff.

In late March 2005 MOE added that an abatement inspection would be conducted at the site and that concerns about discharges from the site would be reviewed.

The MOE conducted its review in the spring of 2005 and completed work in the summer of 2005. The ministry decided to make changes to Condition 18 of the C of A but to leave condition 14 unchanged.

In late September 2005, MOE sent its official notice about completion of its review of the instrument to Sheldrick, the applicants and the ECO, more than one month after the ministry posted a proposal notice to amend Sheldrick's C of A on the Registry.

The review did not mention the status of the EA planning process that Sheldrick has undertaken or explain whether some of the applicant's concerns could be addressed as part of the EA process.

MOE Posts Proposal in August 2005
On August 16, 2005, MOE posted a proposal to amend Sheldrick's C of A (Number A650112) and provided a 30-day public comment period ending September 15, 2005. There is no indication that MOE provided notice of the Registry proposal notice to the applicants in August even though their application for review triggered the Registry proposal notice. Indeed, it appears that the applicants were not formally alerted by MOE until after September 25, 2005, when the MOE sent its official notice that its review had been completed.

In its proposal notice, the MOE noted the application for review and proposed to amend Condition 18 of the C of A Number A650112 as follows:

- Condition 18 (1), shall be revoked and replaced with a new condition which clearly states that the site shall be operated and maintained such that vermin, vectors, dust, litter, odour, noise and traffic do not create a nuisance.
- Condition 18 (3) through (8) shall be added to codify the intent and operational procedures of the Odour Control Plan (OCP). These proposed additional conditions to the Certificate of Approval will require Sheldrick to:
  - respond to complaints received following an established procedure;
  - advise the local ministry District Manager of all complaints received within one week;
  - apply Standard Operating Procedures related to odour control to each area of waste handling operations at the site;
  - complete additional requirements for daily visual inspections of the site and documentation;
  - obtain written concurrence of the District Manager or approval of the Signing Director to change the Odour Control Plan;
  - submit to the District Manager, within 30 days, the second report of odour data for the period July to December 2004; and
  - annually submit to the District Manager an annual review of the effectiveness of the Odour Control Plan, commencing March 1, 2006.

The proposal notice was originally posted on the Registry on August 16, 2005, with a 30-day public comment and review period ending September 15, 2005. In October, MOE updated its proposal and re-started the comment period in order to provide the public with additional time to comment. As of June 2006, MOE had not posted a decision notice.

Continuing Problems with Access to Information
One of the applicants contacted the ECO in April 2006 to express frustration about continuing problems local residents have experienced with gaining access to information about odour testing being done at the site and obtaining a copy of the Odour Control Plan Report prepared for Sheldrick covering the period between July through December 2005. The applicant expressed concern that this shows that the company has a tendency "of not following through on its commitments" and the handling of the Odour Control Plan Report is just another example of this pattern.

ECO Comment
The ministry's response to this application was reasonable. While MOE agreed to conduct a review, its scope was restricted to two conditions in the C of A related to the Odour Control Plan for the site. While MOE did respond by detailing the complaints it has received about the site, the ministry implied that it is generally satisfied Sheldrick is complying with its C of A, and that adequate follow-up occurs when complaints are made and when site operators are advised or directed by MOE to follow a course of action.

In this November 2004 request for review and in other related applications, the applicants have detailed a number of problems and alleged contraventions they have observed related to the operation of the Sheldrick waste transfer and processing site. As explained in previous ECO reports, the applicants believe that they are experiencing a loss of enjoyment of property because of adverse effects from Sheldrick's operations. As noted by the ECO in the supplement to the 2003/2004 annual report, it appears that the applicants in this case have a valid concern about odours from the transfer station causing adverse effects. Indeed, MOE staff agreed with this conclusion after a site visit in July 2003 and issued an Order to deal with odours emanating from the site in November 2003.

MOE did respond to most of the concerns the applicants raised, and explained what has been done in the past to deal with the problems. Furthermore, MOE did provide a person to contact and a phone number should the applicants require more information.

The ECO commends MOE for extending the comment period on the proposal to amend Sheldrick's C of A. However, MOE should have provided written notice of the Registry proposal notice to the applicants in August when the proposal was first posted, especially in view of the long history of contact between the applicants and MOE on Sheldrick's operations. The ECO also encourages MOE to consider establishing a requirement in the revised C of A for the proponent to establish a public liaison committee and allow for regular dialogue between local residents and Sheldrick.

The ECO also urges MOE to ensure that the applicants and local residents are provided with timely access to copies of the Odour Control Plan reports and testing results prepared for Sheldrick. The ECO will monitor MOE's handling of the instrument proposal and we may review the final decision on the C of A amendments in a future ECO annual report supplement.

Review of Application R2005001:
Certificate of Approval Amendments for Dormant Landfills
(Review Denied by MOE)

Background/Summary of Issues
On May 9, 2005, an application for review was received by the ECO requesting that MOE review the legislation and associated regulations pertaining to certificate of approval (C of A) amendments that allow the alteration, extension, expansion or enlargement of dormant waste disposal sites in Ontario. The following Acts and regulations were included in the request: Ontario Regulation 347 (General Waste Management); Ontario Regulation 206/97 (Waste Disposal Sites & Waste Management Sites Subject to Approval Under the *Environmental Assessment Act*); s. 25, s. 30(1), s. 32(1), and s. 39 (2) of the *Environmental Protection Act*; and s. 5 of the *Environmental Assessment Act*.

The applicants, representing the Grand River Conservation Authority (GRCA), described concerns about MOE's February 2005 decision to amend the certificate of approval (C of A) for the Edwards Landfill in

Haldimand County. This amendment is the most recent in a series of amendments that have transformed what once was a rural landfill site approved to receive only 10 tonnes of waste per day from nearby communities and dormant from 1974 to 1988. The transformation began in 2001, when a site investigation and waste characterization were completed for the Edwards Landfill. In 2002, MOE made an administrative amendment to the site's C of A in order to confirm the total waste capacity of the landfill, a detail that was not included in any previous C of A. In 2004, the C of A was amended again to allow a site redesign, including the installation of a leachate collector, to proceed. Finally, in February of 2005, MOE approved the C of A amendment that led to this application for review, increasing the daily waste fill rate at the Edwards Landfill from 10 to 500 tonnes per day and expanding the service area to include all of Ontario. A detailed review of MOE's decision to approve the 2005 C of A amendment can be found in the supplement to the ECO 2004/2005 annual report, page 66. It should also be noted that area residents sought and were granted leave to appeal MOE's decision on the 2005 C of A amendment, and as of June 2006, a preliminary hearing was underway at the Environmental Review Tribunal. In addition, a community organization called Haldimand Against Landfill Transfers (HALT) has submitted an application for judicial review to the Ontario Divisional Court, arguing that the proposal for increased capacity and service area of the Edwards Landfill should have triggered a public hearing under s. 30 (1) of the *EPA*. As of June 2006 the court had not made any ruling in this case.

In justifying their request for review, the GRCA indicated that MOE must ensure that the deposition of waste occurs in appropriate locations with adequate regard for environmental protection in order to prevent the loss of provincially significant natural features and to prevent negative impacts on both aquatic and terrestrial habitats. Historically, the applicants pointed out, landfill Cs of A were granted without the same level of regard for the environment or the same set of stringent controls that apply to newer sites under current landfill regulations and policies. Further, some of these old sites have experienced periods with very little or no waste deposition. The applicants acknowledged that, under s. 39 of the *EPA*, MOE may require owners to redesign these sites so that they are consistent with MOE's newer landfill standards and seek any associated necessary C of A amendments prior to re-commencing operations. However, the applicants are concerned that these sites are not subject to mandatory Environmental Review Tribunal hearings under s. 30(1) of the *EPA* or ministerial approval for an undertaking under s. 5 of the *EAA*. Hence, there is no opportunity for any comprehensive public review of the social, economic and environmental impacts that may result from reactivating a dormant site. As a result, they argue, it is then possible for these site owners to redesign their sites and obtain MOE approval, and then recommence landfilling in areas that may not be appropriate for waste disposal activities (e.g., Provincially Significant Wetlands, high groundwater table areas, fractured substrate), a situation that could result in negative environmental impacts and the loss of significant natural features.

The applicants believe that historic approvals should not automatically result in negative environmental impacts, especially if these impacts are avoidable.

The applicants suggested that MOE consider adding provisions to s. 39(2) of the *EPA* requiring that conditions be added to a landfill's C of A to repeal an approval should that landfill become dormant for a certain period of time. The added conditions would require the site owner to implement closure plans and site remediation unless a C of A amendment or extension was approved following an MOE site investigation.

The applicants requested the application of existing mechanisms within the *EPA* and *EAA* in order to require comprehensive public reviews of certain projects that might negatively impact on the environment. The applicants see this as an effective method for addressing the problem of "piecemeal decision-making" as they believe has happened with the transformation of the Edwards Landfill.

The applicants also requested that MOE update the 1991 Provincial Waste Disposal Site Inventory; not only because an update will assist MOE and other stakeholders in better characterizing the severity of the problem associated with dormant waste disposal sites, but also because this would facilitate the identification of potential threats to source water areas and will be useful information for implementation of the requirements of the *Safe Drinking Water Act*. They called for the inventory to be updated to include a site's total approved waste capacity, available capacity and actual fill rates in order to facilitate the identification of sites that are currently dormant.

The applicants urged MOE to address the problem with piecemeal decision-making, in order to prevent transformations such as the one that the Edwards Landfill has undergone, resulting in an approval that they argue exceeds the intent of the original approval granted for this site in 1971.

Ministry Response
In a response dated September 26, 2005, MOE informed the applicants that the requested review of the legislation and regulations was not warranted.

MOE Obligation to Ensure Disposal of Waste in Appropriate Locations
In response to the applicants' concern that waste should be disposed in appropriate locations in order to ensure protection of the environment, MOE stated that it has existing authority and procedures for updating Cs of A to ensure that dormant landfill sites do not pose any potential harm to the environment. MOE added that under s. 39(2) of the *EPA*, the Director of waste approvals (Part V approvals) has broad authority to impose, alter or revoke C of A terms and conditions and can use this authority should any potential environmental concerns arise from the reactivation of a dormant landfill site.

MOE added that, in the case of the Edwards Landfill, the reactivation of the site was deferred through the issuance of a C of A notice of amendment prohibiting the site owner from carrying out landfill operations until redesign reports were prepared and submitted to MOE setting out how the site would be brought up to current standards of design and operation. MOE also noted that 95 conditions were imposed in the site's C of A to regulate all aspects of its operation. Further, MOE indicated that the procedures in place for updating waste management Cs of A will help in the process of determining whether a landfill meets current standards (For a description of the protocols for updating Cs of A, see the ECO annual report supplement 2004/2005 at pages 81-84).

MOE also indicated that it has well established guidelines, standards and policies for regulating landfill sites that are applied to all C of A applications and that these measures are intended to protect human health and the natural environment. MOE noted that the applicants did not request a review of any of these landfill guidelines, policies or standards.

Amending s. 39(2) of the EPA
In response to the applicants' suggestion that s. 39(2) of the *EPA* be amended to require the addition of conditions to a landfill's C of A calling for closure plans and site remediation should the landfill remain dormant for a certain period, MOE indicated that such changes are not necessary because it already has the authority to impose conditions on a C of A and issue orders to deal with dormant landfill sites. Further, MOE stated that revoking Cs of A would make the regulation of these dormant sites difficult, if not impossible.

Subjecting Proposals for Reactivation of Dormant Sites to a Comprehensive Public Review
In response to the applicants' concerns about dormant sites such as the Edwards Landfill not being subject to comprehensive public review under the *EPA* or *EAA*, MOE stated that if reactivation of a site involves

an amendment which fundamentally changes the original proposal (e.g., increasing the approval rate of fill or approved size of fill area) this triggers the requirement for a Part V approval under the *EPA*. Such an approval includes the consideration of a comprehensive public review under the *EAA* or the *EPA*. Private sector proposals are not subject to the requirements of the *EAA*, unless specifically designated by regulation.

MOE's response included an explanation of the *EPA* s. 30(1) mandatory hearing requirements and the *EPA* s. 32(1) discretionary hearing requirements. It explained that it is ministry practice to designate private landfill proposals under the EAA if a fundamental amendment to the C of A is proposed and the waste to be disposed in the site is municipal solid waste where the landfill volume is greater than 40,000 cubic meters (e.g., a large landfill). But the Minister considers a host of implications before making a decision regarding designation, including: staff review/analysis of implications of designation to public interest and the environment, the potential for adverse effectis, and whether or not legislation or approvals will adequately address environmental concerns.

With respect to the Edwards Landfill site, MOE indicated that, in December 2002, it received requests to designate the proposal to redesign the site under the *EAA*. In order to decide whether designation was necessary in the case of the Edwards Landfill, the Minister considered environmental impacts, design, and health and safety aspects of the redesign proposal. MOE required the site owner to demonstrate: how the redesigned landfill will be constructed and operated; how leachate will be contained and treated; how surface and groundwater will be protected; how landfill gas emissions will be considered; and how general operational issues such as noise, odour, and dust will be managed. A Government Review Team also assessed the environmental effects of the redesign application and concluded that any potential environmental impacts could be mitigated through the *EPA* and the *Ontario Water Resources Act (OWRA)*. Ultimately, a decision was made not to designate the site redesign under the *EAA*.

MOE also indicated that the 2004 application for an amendment to the Edwards Landfill C of A under Part V of the *EPA* did trigger the requirement to consider a discretionary hearing under s. 32(1) of the EPA, but the Director determined a hearing was not necessary because:

- Substantial public consultation had already occurred;
- Many of the comments received were beyond the scope of the application;
- A significant concern with an increase in the site's daily fill rate is increased truck traffic but it was determined there were no outstanding technical issues that would warrant a hearing on this issue; and,
- It was the Director's opinion that it is in the best interests of the public and the natural environment that the site owner commence with cleanup of the site by removing all hazardous wastes and installing a properly engineered facility as soon as possible.

MOE added that if the reactivation of a dormant site does not trigger an *EPA* Part V application, the Director could consider and address potential effects issues such as those raised by the applicants – e.g., impact on PSWs, areas of high groundwater table, fractured substrate. MOE argued that, given the Director's broad powers to impose conditions to the C of A, the review of a proposal to reactivate a dormant site can be quite comprehensive.

Finally, MOE stated that the Edwards Landfill is not a new or an expanding site. Instead, the site owner was applying to make alterations to the landfill within an already approved capacity and that redesign of the site would allow the site owner to utilize the remaining approved site capacity and address a number of environmental issues such as on-site contamination.

Request for MOE to Update the 1991 Waste Disposal Site Inventory
In response to the applicants' request that MOE update the 1991 Provincial Waste Disposal Site Inventory, MOE indicated that it has no current plans to do an update. The last inventory was prepared using information gathered by reviewing MOE files and conducting site inspections, both of which required significant ministry resources. MOE explained that updating that inventory would also require significant resources in order to: develop a new inventory/database; obtain and input data; develop any necessary regulations to compel landfill owners to report information; operate, maintain and continuously update the inventory/database; and, to continuously audit information provided by landfill owners.

Resources Required
In its response to the applicants, MOE also argued that the resources required to undertake the review were not warranted in this situation because, according to staff, there "have only been two applications involving the reactivation of "dormant" landfill sites" and, further, that "(T)he expenditure of government resources to review the circumstances surrounding these two events does not appear to be justified." MOE added that "(S)hould the reactivation of dormant landfills become a more frequent occurrence in the future or the management of impacts from reactivated landfills becomes challenging, the ministry could consider this matter during the next periodic review of legislation and waste management regulations."

ECO Comment
The ECO disagrees with MOE's decision not to undertake this review. However, while MOE did not address all of the concerns raised by the applicants, the ECO is pleased by the thorough manner in which it responded to the concerns that it did address. It should be noted that a decision from MOE on this application for review was required by July 17, 2005, but response was not provided to the applicants until September 26, 2005.

The applicants' concerns about the recommencement of landfilling in areas that are unsuitable, from an environmental point of view, were not wholly or directly addressed by MOE in its response. While MOE did indicate that the Director has broad powers, under s .39(2) of the *EPA,* to impose, alter or revoke C of A terms and conditions, it did not provide any indication of whether this method was actually used to protect any of the significant natural features located within the footprint of the Edwards Landfill site. Therefore, it is unclear whether the Director did or will utilize s. 39(2) *EPA* powers to protect features such as the provincially significant wetlands and Carolinian forest at this site.

In response to the applicants' request that the 1991 Waste Disposal Site Inventory be updated, MOE focused on the lack of available resources to undertake such an initiative. But MOE failed to address some of the very valid points raised by the applicants regarding the usefulness of an up-to-date inventory for environmental protection purposes. Lack of resources aside, it would have been useful for MOE to provide some insight into whether it believes its current database of information on Ontario's waste disposal sites is adequate or not. The ECO is very concerned that MOE's last published inventory is now over 15 years out-of-date and strongly supports the applicants' call for a new and improved inventory (see article in the ECO 2005/2006 annual report, page 33, for more details regarding this concern). This is important for sourcewater protection, even if no waste sites are reactivated.

The applicants' proposed additions to s. 39(2) of the *EPA* and MOE's response to this proposal emphasize a central concern of the ECO regarding the current provincial framework for the management of landfills. The applicants' suggestion amounts to a push for a proactive method for addressing dormant landfill sites; once a site is inactive for a certain period of time, C of A conditions come into play that would require the development of a closure plan and site remediation work. MOE prefers to rely on the fact that the Director *could* impose additional conditions of this nature – arguably a far more reactive and discretionary approach than what the applicants proposed. When considered in light of other

shortcomings of the MOE's framework for landfill management – the out-of-date inventory, the fact that the Protocol for Updating Waste Management Cs of A expressly omits dormant landfill site Cs of A from consideration by identifying "inactive" Cs of A as cases where the 'existing approach is appropriate – the applicants' pitch for a proactive approach to addressing dormant landfill sites is an attractive idea.

One of MOE's justifications for exercising its discretion not to undertake a hearing under s. 32(1) of the *EPA* for Edwards Landfill C of A amendments approved in 2004, was that "it is in the best interests of the public and the natural environment that the site owner commence with cleanup of the site by removing all hazardous wastes and installing a properly engineered facility as soon as possible." The MOE's 1991 Waste Disposal Sites Inventory identified the Edwards Landfill as a site of concern at that time. Yet it appears that no significant action was taken to address the problems at this landfill until the site owner pursued plans to reactivate and modify the operation of the site. This reality leaves the ECO skeptical about MOE's claims, in its response to the applicants, that s. 39 of the *EPA* is an adequate tool for ensuring appropriate measures are implemented at sites such as the Edwards Landfill. If anything, the Edwards Landfill case demonstrates the failure of the current system.

At a bigger picture level, the ECO has many concerns about the shortcomings of the existing MOE framework for managing Ontario's landfills. The ECO's concerns are outlined in detail in an article in the ECO 2005/2006 annual report that this supplement accompanies (see pages 33-38). Very generally, the provincial framework tends to be reactive and piecemeal rather than proactive, particularly where older landfills are concerned. The Edwards Landfill provides an illustrative example of some of these problems. The applicants' request included a call for MOE to introduce some proactive elements to its framework. The ECO believes it is regrettable that MOE did not take advantage of this opportunity.

Review of Application R2005002
Review of Sewage Works Certificates of Approval issued to the City of Kingston
(Review Denied by MOE)

Background/Summary of Issues
In June 2005, two environmental organizations submitted an application requesting reviews of all the Certificates of Approval (Cs of A) for the City of Kingston's sewage works. The applicants, representing the Canadian Environmental Law Association and Lake Ontario Waterkeeper, also posted the application on their organizations' web sites, and issued a news release asserting that Kingston's existing sewage approvals were inadequate to protect the environment and public health and safety.

The applicants noted that the 113,000 inhabitants of the City of Kingston are served by an aging sewage system, which often experiences sewage bypass incidents. Such bypass incidents usually occur during rainfall or snow melt, and result in untreated sewage discharging into either Lake Ontario, the Cataraqui River or the St. Lawrence River. A summary of bypass incidents for the years 1996-2001 was appended, showing that an average of 10 bypass incidents occurred annually.

Of particular concern to the applicants was a major bypass incident on April 2 and 3, 2005, resulting in Kingston's untreated sewage washing up over roughly a kilometre of shoreline downstream along Wolfe Island and Simcoe Island. Syringes, condoms, tampons and other debris were spread along the shore. Kingston Utilities staff indicated to the press at the time, that the bypass incident lasted on and off for most of that weekend, amounting to nearly a whole day's worth of sewage from the inner city, or 52 million litres.

The applicants emphasized the inadequacy of the existing Cs of A for Kingston's sewage works, and appended copies of the instruments. The applicants pointed out that the Cs of A explicitly allow bypasses, but impose only minimal requirements for sampling, testing, disinfection and logbook records when bypasses do occur. It was the view of the applicants that the Cs of A should be strengthened by adding requirements to:

- provide timely warnings to downstream residents and communities;
- monitor and report on the movements of raw sewage released during bypasses;
- clean up sewage debris along watercourses and shorelines after incidents;
- provide compensation to those affected, or undertake mitigation measures;
- do public education on how to properly dispose of syringes, personal care products, etc.; and
- put in place measures to remove such items from sewage prior to bypasses.

While the applicants recognized that upgrades to the city's sewage infrastructure systems were planned or underway, they noted that some of the upgrades were at very early stages and years from completion, and in any case would not totally eliminate bypass incidents. The applicants were also aware that the city and the Ministry of the Environment (MOE) were privately discussing ways to address bypass incidents, but stressed that such discussions should involve the public and should lead to formal amendments to the Cs of A. Voluntary abatement approaches were not appropriate, in the view of the applicants, and to underscore this position, they cited a recommendation from the Part 2 Report of the Walkerton Inquiry, made in the context of drinking water safety:

- Recommendation 74: The Ministry of the Environment should increase its commitment to the use of mandatory abatement.

The applicants noted that Kingston's situation is by no means unique in Ontario – on the contrary, sewage bypasses are a systemic problem across the province, and solutions developed for Kingston might well be applied elsewhere in Ontario.

The applicants also argued that MOE's Statement of Environmental Values commits the ministry to adopting an ecosystem approach, and applying the precautionary principle. As well, they noted that there is no alternative formal public review mechanism for the sewage system Cs of A; the Cs of A have no formal expiry dates, and there exists no public liaison committee to comment on the on-going management of the city's sewage works. They also cautioned that surface water resources downstream of Kingston serve as the sole drinking water source for many area residents and cited Recommendation 75 from the Walkerton Inquiry, encouraging "strict enforcement of all regulations and provisions related to the safety of drinking water."

Finally, the applicants drew attention to an existing policy direction of MOE regarding sewage treatment bypasses (Procedure F-5-1): that such incidents shall not be allowed except in "emergency conditions". An average bypass frequency of 10 incidents per year is too frequent to be interpreted as an "emergency condition", the applicants asserted. Procedure F-5-1 also states that:

> *It is the goal of the ministry to abate all discharges of untreated sanitary wastewater… All municipalities serviced by combined sewerage should, however, prepare a staged program leading towards the ultimate goal of total containment for treatment of all sewage flows.*

The ECO forwarded this application to MOE on June 11, 2005.

The applicants later submitted two supplementary packages of documentation, on July 12 and again on September 6. The ECO forwarded each of these packages on to MOE, and in both instances the ministry decided to re-start the 60-day timeline provided by the *EBR* for ministries to decide whether or not to conduct a review. Upon receipt of the second package, the ministry informed the applicants that it had set itself a revised decision deadline of November 7, 2005.

Ministry Response
In mid December 2005, MOE informed the applicants of its decision not to carry out the requested review, and appended an 18-page rationale document. The key argument of the ministry was that there was not sufficient evidence that environmental harm would ensue if the requested review was not undertaken. The ministry also put forward numerous additional arguments, including that:

- Seven of the ten relevant Cs of A had been amended or issued within the past five years, in a manner consistent with the intent and purpose of the public participation provisions of the *EBR*
- when Cs of A are reviewed, public consultation rules follow the Class Environmental Assessment framework
- the ministry had considered other evidence, including the fact that all surface waters are expected to contain some level of bacteria
- Utilities Kingston had made a submission addressing many issues raised in the application
- the requested review would duplicate some past efforts by staff and would have resource implications for the ministry
- the ministry is already reviewing its own policies F-5-1 and F-5-8 to support the development of a management framework for Ontario sewage treatment plants
- the city has spent over $41 million over the last 13 years and is carrying out a number of programs to help reduce future sewage bypass events
- the ministry is already evaluating the adequacy of Pollution Prevention Control Plans for Kingston and three other cities with respect to meeting the objectives of Procedure F-5-5 (Determination of Treatment Requirements for Municipal and Private Combined and Partially Separated Sewer Systems).

With reference to the sewage bypass event on April 2, 2005, MOE noted that the incident had been referred to the ministry's Investigation and Enforcement Branch, and explained that the investigation file had been closed without charges being laid. The ministry acknowledged that it had not considered the specific April 2005 bypass incident during the reviews of the relevant Cs of A, since the reviews occurred before this particular event. But the ministry pointed out that sewage bypasses are not a new occurrence, and that they had been considered as a general issue.

The ministry also acknowledged that Cs of A are not subject to periodic reviews, but argued that when Cs of A are amended, all the conditions of the approval are reviewed to protect the health of the public and the environment.

MOE's Decision was Late
The ministry was over a month late in its rejection of the application request, even after having restarted its timeline twice. MOE decided to reset the deadline twice because the applicants submitted two packages of additional information. In effect, MOE took six months to make a decision that under normal *EBR* procedures should take two months. It is true that the late submissions complicated matters, but the applicants asserted that the submissions contained information that ought to have been known to the ministry already, and did not materially change the issue.

MOE's Voluntary Abatement Approach
Although MOE decided not to carry out the requested review, the ministry did in December 2005 sign a voluntary "Letter of Commitment" with the City of Kingston regarding sewage bypassing, and did invite the applicants to a meeting with the City of Kingston to discuss this letter after the fact.

The meeting took place on January 20, 2006, and involved a number of senior staff: four representatives for MOE, including the Regional Director, three representatives for the City of Kingston, including the Deputy Mayor and the CAO, and two representatives for Utilities Kingston, including the President and CEO. At this meeting, MOE staff took the position that voluntary abatement has been demonstrated to work with the city, and therefore there was no need for an Order. The ministry asserted that the Letter of Commitment meets all the major concerns and sets out clear timelines, and confirmed that if the city defaulted on the agreed-upon timelines, the ministry retained its ability to issue Orders. In follow-up correspondence to the ministry, the applicants noted they appreciated the meeting, but remained "fundamentally opposed to the use of voluntary agreements to deal with sewage treatment bypasses from the City of Kingston."

The letter of commitment documents that Utilities Kingston is carrying out a Pollution Control Plan, with the intent to "reduce the volume and frequency of sewage bypass events into Lake Ontario…". The letter also itemizes a number of ongoing sewage infrastructure upgrades, such as pumping station upgrades and two combined sewer overflow tanks, most of which are scheduled for completion by the end of 2006. As well, the letter itemizes four measures that Utilities Kingston has agreed to, in the event of a sewage bypass occurring, specifically:

1) Forthwith, provide notification of all sewage bypass events to the Ministry's Spills Action Centre (SAC), the Medical Officer of Health for Kingston, Frontenac and Lennox & Addington Public Health and the Township of Frontenac Islands.
2) Develop a monitoring plan for all bypass events. The plan will include, but not be limited to, sampling for bacteria, recording flow measurement and duration of the bypass event. Each bypass will be posted on the City's/Utilities Kingston web site, with further information available upon request.
3) Implement the debris/floatables removal program as outlined in the Ministry's September 23, 2005 correspondence to Utilities Kingston.
4) Undertake in conjunction with Kingston, Frontenac and Lennox and Addington Public Health a public outreach or community education program on the proper disposal of hypodermic needles and personal health products. Post the program on the City's/Utilities Kingston web site.

Further Bypasses and Correspondence
In early April 2006, one of the applicants sent the ECO a submission containing a detailed rebuttal to MOE's refusal letter, additional documentation of bypass events in 2005 and 2006 and related records. The applicant also sent photographs of freshly deposited sewage debris that had washed ashore on Wolfe Island on April 1, 2006. The submission was copied to the Minister of the Environment and senior staff at the ministry. To that date, Kingston had already experienced five sewage bypass events in 2006, amounting to an estimated 47 million litres.

ECO Comment

MOE rejected this application on a number of narrow, technical grounds, which the ECO finds very unpersuasive. In the ECO's view, there is evidence that discharges of untreated sewage cause environmental harm. The ECO is also unimpressed by the ministry's reference to consultation opportunities under the Class Environmental Assessment process. Further, the ECO does not agree that the requested review would have duplicated ongoing and past efforts by the ministry.

Strong Evidence of Bypass Events

The ECO observes strong, unrefuted evidence of a long history of sewage bypass events at Kingston (see box); that these events have been ongoing even in 2005 and 2006; and that these events are unlikely to cease in the near future. While ministry staff anticipate that the frequency of bypass events will decline gradually as infrastructure upgrades are undertaken, the ministry nowhere asserts or even suggests that Kingston's bypass events will cease any time in the future. The total volume of Kingston's bypassed sewage is very considerable: at least 50 million litres per year released into downstream open waters, which are used as sources of drinking water. The ministry noted, as part of its rationale for rejecting the application, that the April 2005 incident was unique, since no other incidents of sewage debris washing up in downstream areas had been reported. But the applicants provided photo evidence of a subsequent incident in April 2006.

Acknowledged Risk to Health and Environment

It is clear to the ECO that these ongoing, large discharges of untreated sewage into open waters represent a significant risk of harm to the environment and a threat to human health. The ministry too, has stressed its concern on this point, in letters sent in 2005 to both Utilities Kingston and to the applicants. A letter from MOE's Eastern Region Director to Lake Ontario Waterkeeper in May 2005 stated that "The E. coli levels from these [Kingston bypass] events have historically been above the provincial Water Quality Objectives and continue to be a concern to the ministry." In August 2005, a letter from MOE's Kingston District Supervisor to Kingston Utilities noted: "It is also known that associated with bypass events is debris and floatables that can have an adverse effect on human health and the environment." Indeed, the ministry's entire regulatory and policy infrastructure for municipal wastewater is built on the understanding that waterways must be protected from the release of untreated sewage, as illustrated by the ministry's Procedure F-5-1 (see page 199 of this supplement.)

Inadequate Public Consultation

MOE argued that consultation is provided by the Municipal Class Environmental Assessment process when Cs of A for sewage infrastructure are issued or amended. However, the ECO has highlighted the inadequacy of public consultation under Class EA processes in several past annual reports. Sewage approvals under the Class EA process are excepted from important *EBR* notice, comment and appeal requirements. This means that the public does not see such approvals posted on the Environmental Registry; does not have the right to comment under the *EBR*, and does not have the right to request leave to appeal such instruments.

No Duplication of Efforts

A review of the Cs of A as requested and described by the applicants would not have been a duplication of activities already underway. The applicants requested that the City of Kingston "be legally obliged by its Cs of A to undertake all reasonable measures to avoid, minimize and mitigate the potential adverse effects associated with sewage treatment bypasses." If bound by an enforceable instrument, the city would have experienced a very strong incentive to avoid and minimize bypass events. Since MOE instead chose a voluntary Letter of Commitment, the ministry has not imposed a legal obligation or clear timelines on the city, and has not provided the degree of accountability or transparency requested by the applicants.

For example, the ministry and the city agreed on a voluntary system for warning downstream residents and communities. The applicants have complained that this system is not working, because the notifications are not actually reaching the affected residents. Instead, the faxed notices are being filed away in the records of the agencies receiving them. The applicants had also requested the imposition of a mandatory compensation program for aggrieved residents. The ministry rejected this concept, arguing that s. 99 of the *Environmental Protection Act* already provided a compensation mechanism for those affected by spills. The applicants later countered that the city would be able to defend itself against any s. 99 claims by reference to the Letter of Commitment, and that this letter in effect would deprive the public of access to environmental justice.

Approximate annual volumes of untreated sewage bypassed into local waterways from Kingston sewage treatment facilities:

1999: 150 million litres
2000: 56 million litres
2001: 82 million litres
2002: 61 million litres
2003: 687 million litres
2004: 252 million litres
2005: 126 million litres
2006: 47 million litres (for January through March only)

Several comments will help to put the data in this box into some context: These bypass summaries have not been published by either the ministry or the municipality; the applicants requested the information over a period of months, and were forced to submit requests to the city through freedom of information legislation for summaries covering the years 2002-2004. The stated bypass volumes are only approximate and in fact underestimate the true volumes, because the city did not provide measurements or even estimates of about one third of bypass events, especially post-2001. In order to put these volumes into some perspective, the total bypassed volume for the year 1999 represented about 2.8 average days worth of sewage flow from the city.

Beyond the ministry's narrow technical arguments, this application also deserves a broader evaluation. Two themes were stressed by the applicants: the ministry's obligation to apply legally binding instruments and the obligation to provide public transparency. The ministry's response was a disappointment on both counts.

Legally Binding Instruments
The applicants had stressed that a voluntary abatement approach would be an inappropriate response to the city's bypass record. They argued it would result in confusion, and could not be followed up with either enforcement or administrative penalties. But the ministry's decision summary failed to explain why MOE opted for a voluntary abatement approach.

At a meeting held with the applicants in January 2006, the ministry asserted that voluntary abatement has been demonstrated to work with the city. However, the evidence shows that voluntary abatement has resulted in many years of chronic sewage bypasses in Kingston, continuing with no improvements in either frequency or size, well into 2006. Key upgrades to Kingston's sewage infrastructure have recently been completed, but they were slow in coming. Amid a larger multi-year program to upgrade pumping stations, sewer mains and the Ravensview Sewage Treatment Plant, the construction of combined sewer overflow storage tanks are specifically targeted to control sewage bypasses. Two such tanks were

constructed in 1998-99, and an additional two tanks were completed in 2005-2006, at a total cost of over $14 million.

In past annual reports, the ECO has criticized MOE's evident reluctance to use the full set of available legal tools when dealing with larger municipalities and wastewater issues (e.g., ECO 2002/2003 annual report, page 158). The same criticism is due in this case. The fact that Ontario residents can no longer apply for *EBR* investigations of alleged contraventions of the *Fisheries Act* also supports the argument for legally binding instruments (see the ECO 2001/2002 annual report, pages 58-59). The ECO does not believe that the larger public interest is served when approval, compliance and enforcement processes under the *Environmental Protection Act* and the *Ontario Water Resources Act* are essentially abandoned in favour of soft, unenforceable approaches like letters of commitment. In these cases, the ministry is the sole regulator on behalf of the environment, and the regulator must at times be seen to enforce, especially when compliance requires major multi-year investments. Municipalities facing huge capital costs to upgrade sewage infrastructure also face many other competing priorities, and invisible underground sewage works may not always be the first choice for voters. When MOE does not apply the full range of regulatory tools at its disposal, municipalities and other proponents are apt to feel less pressure. Regulated deadlines melt into softer shifting timelines and firm requirements become mere guidelines. In the long run, the environment suffers.

Transparency

Although the applicants had emphasized their desire for a formal, open consultative process, the ministry's decision summary failed to explain why MOE opted for closed-door discussions with the city. The applicants made clear in June 2005, that they were interested in participating in these discussions, but they were not invited to a meeting on the matter until January 2006, a month after the letter of commitment had been finalized. The ECO does not find it appropriate to exclude the public from such discussions, and also questions why the applicants were required to resort to freedom of information legislation to access several years of sewage bypass records. Sewage bypass records should be open to public scrutiny, in part because they catalogue a quintessentially public problem. Thousands of homes and public land use decisions contribute to the problem; the released sewage pollutes public waterways and the solution requires investments of public funds. The ministry and the city's technical solutions might also have enjoyed more public understanding and support if, at an early stage, interested members of the public had been diligently welcomed and engaged in a legitimate dialogue.

MOE's Obligations

This application is site-specific, but it illustrates a province-wide problem. MOE has overwhelming evidence that sewage bypasses and inadequate sewage treatment remain major, chronic pollution sources for many Ontario waterways. The Ontario legislature has assigned to MOE the obligation of protecting these waterways from exactly these types of impacts. Over the past generation, growing societal concerns about the health of waterways have added numerous useful laws and policies to the ministry's arsenal, to strengthen its capacity to protect public waters. The failure in this instance lies not with the laws or policies, but with their lack of application. At some crucial level, the ministry lacks the resolve to face and fix the problem.

The ministry's reluctance to tackle the issue is underscored by the continued lack of an up-to-date summary of Ontario sewage treatment plant performance and monitoring data. MOE's last comprehensive summary was published in 1993, based on 1991 data. In response to an ECO recommendation in 2003, MOE said it was working on a summary. But in 2006, MOE acknowledged that this work is not likely to begin until 2007 at the earliest. Moreoever, MOE considers the review of plant performance an "internal exercise", and says "there are no plans to share the results of the review with the public" (see the ECO 2005/2006 annual report, page 197).

On the issue of regulating municipal sewage discharges, MOE has failed to show the required leadership. MOE needs to take seriously its obligations as regulator and exercise its full range of legal tools on behalf of the environment. MOE also needs to break the habit of treating sewage discharges as a private matter for negotiation among select partners. The ministry has an obligation to operate in an open and consultative way; to present the public with the facts, and to treat the environment as its primary client.

Postscript
In June 2006, Kingston Utilities began, as promised, to post a log of sewage bypass events on its website, as well as a summary of annual sewage bypass records for the years 2000-2006. Regrettably, the city reported a bypass event on June 27, 2006, when heavy rain forced the bypassing of approximately five million litres of sewage into Lake Ontario, despite the recent infrastructure improvements .

Review of Application R2005004:
Review of MOE's Guideline C-4 – Biomedical Waste
(Review accepted by MOE)

Background/Summary of Issues
In August 2005, two applicants requested a review of Guideline C-4; "the Management of Biomedical Waste in Ontario", administered by the Ministry of the Environment (MOE). The applicants argued that the guideline was over 10 years old, and was unenforceable. They noted that very large quantities of biomedical waste were being discarded into the non-hazardous waste stream; that many unlicensed companies are collecting biomedical waste; and that biomedical waste packaging standards are not being adhered to.

Ministry Response
On December 22, 2005, MOE agreed to carry out a review, and committed to providing the applicants with a copy of the review outcome no later than October 1, 2006.

ECO Comment
The ECO will review the handling of this application for review in the 2006/2007 annual report.

Review of Applications R2005005, R2005006, R2005007, R2005008:
Comprehensive Land Use Planning in the Northern Boreal
(Review Denied by MNR, MNDM, ENG; Response Pending by MOE)

Background/Summary of Issues
In September 2005, Sierra Legal Defence Fund (SLDF) filed an application for review on behalf of the Wildlands League requesting that several ministries consider the need to create a comprehensive land use planning system for northern Ontario. The applicants asserted that a wide array of evidence suggests that landscape level planning is needed in advance of resource development decisions in Ontario's Northern Boreal region. The application for review was sent to the Ministry of the Environment (MOE), the Ministry of Natural Resources (MNR), the Ministry of Northern Development and Mines (MNDM), and the Ministry of Energy (ENG).

Ontario's boreal forests begin just north of the Great Lakes. The boreal forests to the north of the 51st parallel have global significance, identified by the World Resources Institute as remaining frontier forests, relatively unimpaired by development. The United Nations Environment Programme recognizes this region of Ontario as one of the world's remaining significant 'closed canopy' forests. The Northern Boreal comprises approximately one-third of Ontario's land-base at almost 400,000 km^2 – an area equivalent to New Brunswick, Nova Scotia, and Prince Edward Island combined. SLDF and the Wildlands League contend that the current lack of policy with respect to comprehensive land use planning puts this area at risk of irreversible environmental harm. The applicants assert that the Northern Boreal contains:

- one of the last strongholds of species-at-risk, such as woodland caribou and wolverine. These species are wide-ranging, require large habitat areas and have demonstrated sensitivity to human disturbances, such as industrial activity;
- habitat for populations of commercially important furbearer and game species, such as beaver, American marten and, moose, and crucial breeding habitat for countless songbirds and waterfowl;
- wild river and lake systems supporting more than 60 species of fish, including many that sustain subsistence and fly-in fisheries in the region;
- large intact watersheds that are critical to maintaining healthy, clean sources of water for local communities and all citizens of Ontario;
- traditional land use areas, beyond that of reserve land, of at least twenty eight First Nations;
- the full complement of biodiversity existing in the region for approximately the last 8-10,000 years;
- valuable ecosystem services, including filtration, soil, nutrients, store carbon, produce oxygen, control flooding and erosion, support species, mitigate climate change; and
- natural capital that supports an internationally significant wilderness tourism industry.

SLDF and the Wildlands League believe that MNR's on-going Northern Boreal Initiative (NBI) does not address all of the planning issues at hand, as it only covers a small portion of the area in question and it is primarily focused on commercial forestry activities. Further, the applicants contend that the NBI does not address landscape level planning and MNR does not have jurisdiction over all of the possible development projects which include, but are not limited to, roads, coalbed methane exploration, mineral staking and prospecting, hydro generation projects and transmission corridors for electricity. As illustration of some of their concerns, the applicants took issue with the "piece-meal" approval process for the Victor Diamond Mine near Attawapiskat.

The applicants note that planning rules do exist for other areas of Crown land, such the Declaration Order regarding MNR's Class Environmental Assessment Approval for Forest Management on Crown Lands in Ontario. However, this Declaration Order does not extend into the Northern Boreal.

MNR's Northern Boreal Initiative (NBI) was established in 2000 in response to the expressed interest of several First Nations communities in developing commercial forestry opportunities. It was intended to address community-led planning for potential forestry operations in the area approximately 150 kilometers north of the current Declaration Order. In part, NBI was initiated due to the Ontario Forest Accord which was an agreement signed by MNR, the forest industry and a coalition of environmental groups in 1999. One of the commitments of the Forest Accord was to open up these northern lands to commercial forestry as quickly as possible, subject to the full agreement of affected First Nations communities, approval under the *Environmental Assessment Act*, and with the regulation of new protected areas.

SLDF and the Wildlands League believe that a comprehensive land use strategy must include proper engagement of First Nations communities in the Northern Boreal and the public-at-large, environmental assessments of each project, proper land use planning with consideration of the ecosystems in question and the designation of protected areas before resource allocations are made. The applicants assert that such a strategy must take an inter-ministerial approach and comprise the following elements:

- compliance with the Statements of Environmental Values of each ministry;
- ensure the long-term health of ecosystems;
- continued availability of natural resources (planned and managed in an orderly, sustainable and fair way);
- protect natural heritage and natural features;
- employ the precautionary principle;
- respect partnership arrangements;
- properly value resources (including commercial and non-market values);
- improve the knowledge base;
- protect significant features and landscapes;
- rehabilitate degraded ecosystems;
- promote environmentally sustainable development activity which is preceded by sound conservation planning and adequate public input, and gives high priority to environmental protection and minimizes environmental disturbances; and,
- require collaboration with other ministries leading to joint sign-off mechanisms.

The applicants stress that a strategy should address the cumulative impacts of all proposed developments in the Northern Boreal including the impacts of developments already proceeding further south. SLDF and the Wildlands League also argue that landscape-level plans should be complete before any areas are licensed to industry or allocated for development. They believe that land use plans should be required to have large core protected areas, wildlife movement corridors, buffer zones, traditional use areas, protected sacred areas, and areas designated for other uses.

In March 2003, the current Premier, then the Leader of the Official Opposition, promised to "institute meaningful, broad-scale land-use planning for Ontario's Northern Boreal Forest before any new major development, including ensuring full participation by native communities. Land use planning must protect the ecological integrity of this natural treasure and help to provide a sustainable future for native people and northern communities."

Ministry Response

Ministry of the Environment (MOE)

As of May 2006, MOE had not provided a decision to the applicants and the ministry was approximately six months beyond the deadlines prescribed by the *EBR*.

Ministry of Natural Resources (MNR)

MNR denied the application in November 2005, stating that the public interest did not warrant a review for a new comprehensive land use policy in advance of resource allocation decisions being made. The ministry also asserted that the existing environmental assessment approvals and permitting processes are sufficient to address, mitigate, and minimize potential harm to the environment.

The ministry stated that it was responsible for a relatively limited number of approvals with regard to the Victor Diamond Mine. The ministry asserted that these decisions were based on "approved land use planning documents for the region and numerous scientific studies conducted by the MNR and the

disposition applicant DeBeers Canada to ensure environmental effects were considered during project evaluation."

MNR stated the Northern Boreal Initiative directs community-based land use planning. The ministry asserts that NBI allows First Nations to take a leading role in land use planning "with an important objective of fostering sustainable economic opportunities in forestry and conservation." MNR claims that this local-level process also "utilizes a landscape-scale approach to ensure that achievements are measured appropriately and that impacts beyond the planning area are adequately considered."

Despite denying the application, MNR stated that it was working on a policy that addressed the concerns raised by the SLDF and the Wildlands League. The ministry informed the applicants that "in early 2005 MNR began exploring potential approaches for land use planning in Ontario's far north and has initiated discussions with the first nation treaty organizations and tribal councils, as well as several non-governmental organizations. This exercise is continuing and MNR would welcome discussions regarding the land use planning elements proposed in the review application."

Ministry of Northern Development and Mines (MNDM)
MNDM denied the application in November 2005, stating that the public interest did not warrant a review. The ministry also asserted that it was not the lead ministry for the development of such a strategy, but that it would actively participate with MNR in developing and implementing its approaches to land use planning.

With respect to the applicants' concern regarding the Victor Diamond Mine, MNDM stated that it participated in the review of a Comprehensive Study Environmental Assessment under the *Canadian Environment Assessment Act*. The ministry also stated that three environmental assessments processes occurred for activities related to the mine site, as well the signing of an Impacts and Benefits Agreement between the Attawapiskat First Nation and DeBeers.

The ministry stated that "mining is a temporary land use, and mining regulations ensure that a mine site is rehabilitated to natural, recreational or commercial land uses." MNDM asserted that Ontario's *Mining Act*, along with other permitting processes, ensures that mineral exploration and development endeavours to mitigate the short-term effects of mining on the environment; eliminate the long-term effects of mining on the environment; ensure continuing availability of mineral resources for the long-term benefit of the people of Ontario; and, protect natural heritage and biological features of provincial significance.

Ministry of Energy (ENG)
ENG denied the application in November 2005, stating that the public interest did not warrant a review. The ministry did not specifically address the concerns raised by the applicants, but, rather, it described the numerous regulatory processes that must be followed for new energy projects. ENG also stated that "Ontario must confront a massive shortfall between supply and demand for electricity within the next 15 years" and the solution to this shortfall "will require the consideration of major energy projects." The ministry also stated that "possible northern Ontario energy projects include small hydro projects, wind turbines, and a major new electricity transmission line from northern Manitoba to southern Ontario."

Themes and Links
In our 2002/2003 annual report, the ECO provided extensive commentary on the need for comprehensive planning in northern Ontario. The ECO wrote that "landscape level planning should inform community-by-community decision-making" and that "it is imperative that MNR assess the ecological implications of industrial logging in the northern boreal forest." In that report, the ECO also made two formal recommendations related to resource development in northern Ontario:

- The ECO recommends that the Ministry of Natural Resources conduct gap analyses and develop objectives and targets in order to establish a protected areas network for the Northern Boreal Initiative area as a whole.
- The Ministry of Natural Resources should carry out a thorough assessment of forest management approaches that are ecologically suited to the northern boreal forest and make the research results available to the public.

As of the spring of 2006, the ECO notes that the environmental impacts of permitting forestry in the northern boreal forest have not yet been assessed formally, and will require either approval or exemption under the *EAA*.

ECO Comment
The ECO concurs with the applicants that significant changes should be made to the way in which the Ontario government regulates and plans for the Northern Boreal. The existing approval processes typically operate in isolation from one another and they do not take a comprehensive "big picture" approach. This "silo mentality" does not effectively serve Ontarians nor provide adequate assurances of environmental protection in the path of resource development. The Northern Boreal has a unique and varied ecology that merits the same standard of planning – if not higher – than applies to the rest of the province.

Unfortunately, the ECO is unable to substantively comment on this application as the Ministry of the Environment, which has assumed the lead role in this application, has failed to provide a response within the timelines prescribed by the *Environmental Bill of Rights*. While the ECO acknowledges that the issues raised by the applicants are complex, excessive delays frustrate the public interest and undermine the *EBR*. The ECO is also disappointed that MNR denied this application for review, especially in light of the fact that the ministry is developing new approaches to land use planning in Ontario's far north. The ECO commits to fully report on this application in a forthcoming annual report, following the legally required response by MOE.

Review of Application R2005011
Review of Government Policy re: Office Relocation
(Review Denied by MOE)

Background/Summary of Issues
Two Kingston area residents submitted an application for review of government policy regarding environmental considerations in office location selection, arising from a relocation of the offices of the Ministry of Environment's Eastern Region offices in Kingston from the city core to the outskirts. The applicants were concerned with issues around the site selection including loss of transit opportunities for staff, and felt that the relocation to a suburban rather than a downtown location would contribute to "urban sprawl."

The ECO forwarded the application to MOE after consulting with staff in the Environmental Bill of Rights Office at MOE.

As is normally the case for government facilities procurement, the Ontario Realty Corporation (ORC) managed the process of acquiring and leasing a new office for MOE's Eastern Region staff. The ORC is the sole provider of realty services to the Ontario government. As of June 2005, ORC reports to the

Ministry of Public Infrastructure Renewal (MPIR), which is at present not a prescribed ministry under the *EBR*.

In procuring new accommodation for government offices, ORC follows procedures prescribed under its Class Environmental Assessment process. The Class EA sets out different levels of EA study, or "categories" for different types of activities. Category A undertakings are routine activities considered "pre-approved." Administrative office leasing and renewals, such as the subject offices, fall into this category. Other categories of undertaking require a range of activities through categories B to D – the latter being major undertakings subject to individual environmental assessment.

Ministry Response
MOE initially accepted the review within the required time frame set out in the *EBR*. However, in December 2005, more than one month after the application had been forwarded to the MOE by the ECO, MOE staff contacted the ECO seeking consent to return the application to the ECO as provided under s. 64 of the *EBR*. Section 64 allows a minister to request that an application be returned to the ECO when he or she believes that the application raises matters that are better addressed by another ministry. In this case the MOE suggested that the matter should be assigned to the ORC and MPIR.

The Commissioner was disappointed by this request. In mid December 2005, the ECO conveyed our preliminary view to MOE that it was very late in the application handling process for the ECO to treat the application as a non-prescribed matter under s. 62(2) of the *EBR* because the ECO is required to make such a determination within ten days of receiving an application. Despite our concerns the ECO granted consent to MOE, allowing the review to be returned.

The ECO also asked MOE to clarify with its Environmental Assessment and Approvals Branch as to whether the office relocation project was subject to an Environmental Assessment (EA) approval process under the ORC's revised Class EA, 2004. In late December 2005, MOE verified that the project was a Category A project under ORC's Class EA.

In its written documentation forwarded with the returned application, MOE stated that the policy relevant to this application is administered by the Ontario Realty Corporation, and that it therefore did not have the authority to handle the application. The ministry did point out that it had considered environmental variables in the selection of accommodation, including ensuring that the new facility was LEED (Leadership in Energy and Environmental Design) certified. The ministry also attached an extensive set of ORC Leasing Guidelines which clarified the roles, responsibilities and procedures of the ORC and its clients. Review of these guidelines lend support to the ministry's assertion of its lack of authority on the key decision making of concern to the applicant regarding environmental aspects of the office relocation.

In early 2006, the ECO forwarded the application to MPIR and ORC as a non-prescribed matter under their jurisdiction. However, there is no obligation on the part of a ministry or agency to acknowledge a non-prescribed review and communicate further with the ECO or the applicants.

ECO Comment
The response of MOE to this *EBR* application was reasonable. The ministry's role in this process was to request a change in accommodation in the Kingston area. The ORC has the responsibility for responding to this type of request, in consultation with its client ministry, while carrying out its legal obligations under the Class EA. The project, in this case was given a Category A level of handling under the Class EA which provides minimal attention to environmental aspects of the decision on location of the replacement facilities and associated matters of concern to the applicants.

In the future, the ECO urges MOE and other ministries prescribed for reviews to make determinations about non-prescribed matters as early as possible so that the ECO can provide notice to the applicants within 10 days as required by s. 62 of the *EBR*.

The key option that was available to the applicants, and could have provided a forum to raise and potentially address their concerns, would have been to request that the Category A project be "bumped up" to a higher level (such as a Category B or C project) under the ORC Class EA process. It is unclear if the applicants were made aware of this option during consultations on the relocation of the office. The ECO urges MOE, MPIR and ORC to improve its public education efforts so that the public is made aware of their public participation options before controversial decisions such as these are made by the ORC.

Review of Application R2005013
Certificate of Approval Review for K & E Blackwell Rd. Landfill
(Review Undertaken by MOE)

Background/Summary of Issues
Two Ontario residents applied for a Review of the Certificate of Approval for the landfill located on Blackwell Rd. in Sarnia. The applicants state that the site used to be a quarry which was to have been reclaimed and used to establish a golf course. They state that the landfill has been continuously expanded without appropriate approval and that site remediation which has been promised by MOE has not occurred. They also allege that leachate is being discharged to a storm sewer.

Ministry Response
The Ministry of Environment agreed to conduct the requested review of the C of A, focusing on the conditions which relate to the containment of landfill gases and the management of leachate. Although matters pertaining to the title and registration of the landfill property lie outside of the scope of a Part IV *EBR* application for review, the ministry has agreed to follow up on these issues. Other matters raised by the applicants will not be addressed.

ECO Comment
The ECO will review MOE's handling of this application for review in our 2006/2007 annual report.

Review of Application R2005014:
Review of Composting Site Requirements in Regulation 101/94 under the EPA
(Decision pending by MOE)

Background/Summary of Issues
The applicants requested a review of Ontario Regulation 101/94 under the *Environmental Protection Act* (*EPA*). The request for review is predicated on the concern that large commercial composting facilities can be established without any assessment of the potential for environmental impact. They said the regulation allows a leaf and yard waste composting site to be exempt from s. 9, 27, 40 and 41 of the *EPA* as long as it is set back 100 metres from the site boundaries and/or any lake, river, pond, stream, reservoir, spring or well. The applicants said that Reg. 101/94 does not set criteria for the type of terrain, or require any hydrological or groundwater impact assessment or a site plan. The applicants used the Harmony Road Compost operation in Oshawa to demonstrate their concerns. They say it is located adjacent to an

area designated as one of high aquifer vulnerability on the crest of the Oak Ridges Moraine, and provided monitoring data that suggest contamination.

The application was forwarded to MOE on April 6, 2006.

Ministry Response
MOE had not responded at the time of writing, in early June 2006. An MOE response is due by June 6, 2006.

ECO Comment
The ECO will review MOE's handling of this application for review in our 2006/2007 annual report.

Review of Application R2005018:
Review of the Exemption for Road Salt under EPA

Background/Summary of Issues
The applicants requested a review of Regulation 339, RRO 1990 made under the *Environmental Protection Act* which exempts road salt, or any other de-icing substance used for winter road safety, from the provisions of the *Act*. If not for this exemption, road salt could be classified as a contaminant and the Ministry of Transportation, which is responsible for the majority of highways in Ontario, could be subject to regulatory oversight by MOE, including possible prosecutions for causing the discharge of a contaminant into the natural environment when it applies salt to highways in winter time. The applicants feel that this regulatory exemption should be reviewed because of the damage salt does to the natural and built environments as well as to sources of drinking water for humans.

Ministry Response
The ECO did not receive the response to this application from the Ministry of Environment by the close of the reporting year, i.e., March 31, 2006.

ECO Comment
The ECO will review MOE's handling of this application for review in our 2006/2007 annual report.

MINISTRY OF MUNICIPAL AFFAIRS AND HOUSING

Review of Application R2005019:
Review of PPS or New Legislation to Protect Rail Corridors

Background/Summary of Issues
The applicants requested that the Ministry of Municipal Affairs and Housing review a section of its Provincial Policy Statement (PPS) and review the need for new legislation to protect rail corridors in Ontario. Some of the reasons the applicants cited as the need for this review include: that rail corridors are irreplaceable infrastructure assets; and that rail, as a mode of transportation, has a much smaller environmental footprint than certain other modes, for example, the use of trucks to transport freight.

Ministry Response
The ECO did not receive the response to this application from the Ministry of Municipal Affairs and Housing (MAH) by the close of the reporting year, i.e., March 31, 2006.

ECO Comment
The ECO will review MAH's handling of this application in the 2006/2007 reporting year.

MINISTRY OF NATURAL RESOURCES

Review of Application R2003008: *Rehabilitation of Ontario Pits and Quarries* (Review pending by MNR)

Background/Summary of Issues

In November 2003 the ECO received an application arguing that Ontario's pits and quarries are not being adequately rehabilitated by the aggregate industry, and requesting a review of sections of the *Aggregate Resources Act (ARA)*. The applicants represented a citizens' group called Gravel Watch, which also issued a news release alleging that Ontario's gravel pit operators are not complying with rehabilitation regulations, and stating that "less than half of excavated land is actually being rehabilitated." The applicants noted that under the current situation in Ontario, approximately 6,000 hectares per decade are being degraded by aggregate operations, without rehabilitation. The applicants also requested a review of s. 6.1 of the *ARA* relating to an Aggregate Resources Trust. Responsibility for this Trust, the applicants argue, has been inappropriately assigned to a company (The Ontario Aggregate Resources Corporation) wholly owned by the Ontario Stone, Sand and Gravel Association (formerly known as the Aggregate Producers of Ontario), in effect allowing an industry lobbying association to control and spend public money on rehabilitation work, without adequate public accountability. (Also see page 38 of the ECO 2005/2006 annual report).

Ministry Response

MNR confirmed on January 31, 2004, that it would undertake the requested review. Although the ministry indicated in July 2004, that the review was very near completion, MNR continued to deliberate behind closed doors for well over two years, and did not release the outcome of its review until August 2, 2006, as our 2005/2006 annual report was going to press. The ECO will review the outcome of this application in the 2006/2007 annual report.

ECO Comment

The ECO observes that MNR has taken a small step forward through its acknowledgement that improvements are needed in the rehabilitation of aggregate sites. But the ECO remains concerned about the very lengthy delay and the lack of transparency associated not only with this particular review, but more generally with MNR's development of policy related to aggregate resources.

Review of Application R2004014: *Review of the Aggregate Resources Act* (Review Denied by MNR)

Background/Summary of Issues

As a result of a concern that the province is not doing enough to conserve aggregate resources and to ensure aggregate sites are rehabilitated, the Pembina Institute and Ontario Nature (the "applicants") submitted an application for review in January 2005. In particular, they requested a review of the rehabilitation requirements defined in Part VI of the *Aggregate Resources Act* (*ARA*) and of the fee structure defined in O. Reg. 244/97 that they believe does not encourage efficient use of the resource. Since buildings and infrastructure projects require large amounts of aggregates, the applicants also requested a review of development standards and the Building Code regulation, O. Reg. 403/97, passed under the *Building Code Act*. Finally, the applicants requested a review of the need for a new policy – an aggregate resources conservation strategy. To support their application, a copy of the report

"Rebalancing the Load: The need for an aggregates conservation strategy for Ontario" published by the Pembina Institute on January 25, 2005, was attached.

Background
Aggregate resources are regulated by the Ministry of Natural Resources (MNR) under the *ARA*. The *ARA* and its regulations require that pit and quarry operators in southern Ontario and designated areas in northern Ontario obtain site licenses or permits, conduct their operations according to specified rules and rehabilitate excavated areas. Some holders of aggregate licenses and permits are required to pay fees and royalties as defined in O. Reg. 244/97 under the *ARA*. Of the annual license fee of six cents per tonne, four cents is given to the municipality in which the site is located, half-a-cent to the regional municipality, half-a-cent to the Aggregate Resources Trust for Rehabilitation and one cent to the province. In 2004, the Trust collected over 9.8 million dollars in fees and royalties from aggregate producers.

In December 1996, responsibility for the management of rehabilitation funds in the Aggregate Resources Trust and rehabilitation of abandoned pits and quarries was transferred from MNR to The Ontario Aggregate Resources Corporation (TOARC) whose sole shareholder is the Ontario Stone, Sand & Gravel Association (OSSGA) formerly called the Aggregate Producers Association of Ontario (APAO). MNR retained responsibility for setting standards, approving licences and enforcement, and was granted the authority to decide which licence applications could be referred to the Ontario Municipal Board. In 1997, the Ministry of Transportation (MTO) was granted responsibility for issuing and administrating permits for its projects. In 1999, TOARC's responsibilities were expanded to include the gathering and publishing of information related to management of aggregate resources and rehabilitation of disturbed land. In essence, the aggregate industry under TOARC became largely self-regulated and was given control over information about the amount and types of aggregate that were being extracted, auditing of production data and rehabilitation including administration of the fees collected for rehabilitation. According to TOARC, of the approximately 2,700 licensed and 3,300 permitted aggregate operations in 2004, it conducted 165 production audits. With the exception of permits issued by MTO, MNR retained responsibility for enforcement, issuing licences and permits, and setting standards for the siting, design and operation of pits and quarries.

In our 2002/2003 annual report, the ECO reported that between 1992 and 2000 the average number of hectares disturbed by aggregate operations was more than double the number of hectares rehabilitated. Although the rate of rehabilitation has improved in recent years, the number of hectares disturbed each year still exceeds the number rehabilitated which means that the industry has not been able to reduce the estimated 24,000 hectares of disturbed land on licensed sites that have not been rehabilitated. The following figure shows the annual number of hectares that are newly disturbed, how many hectares were rehabilitated at those sites, and how many hectares were rehabilitated at sites abandoned before 1990.

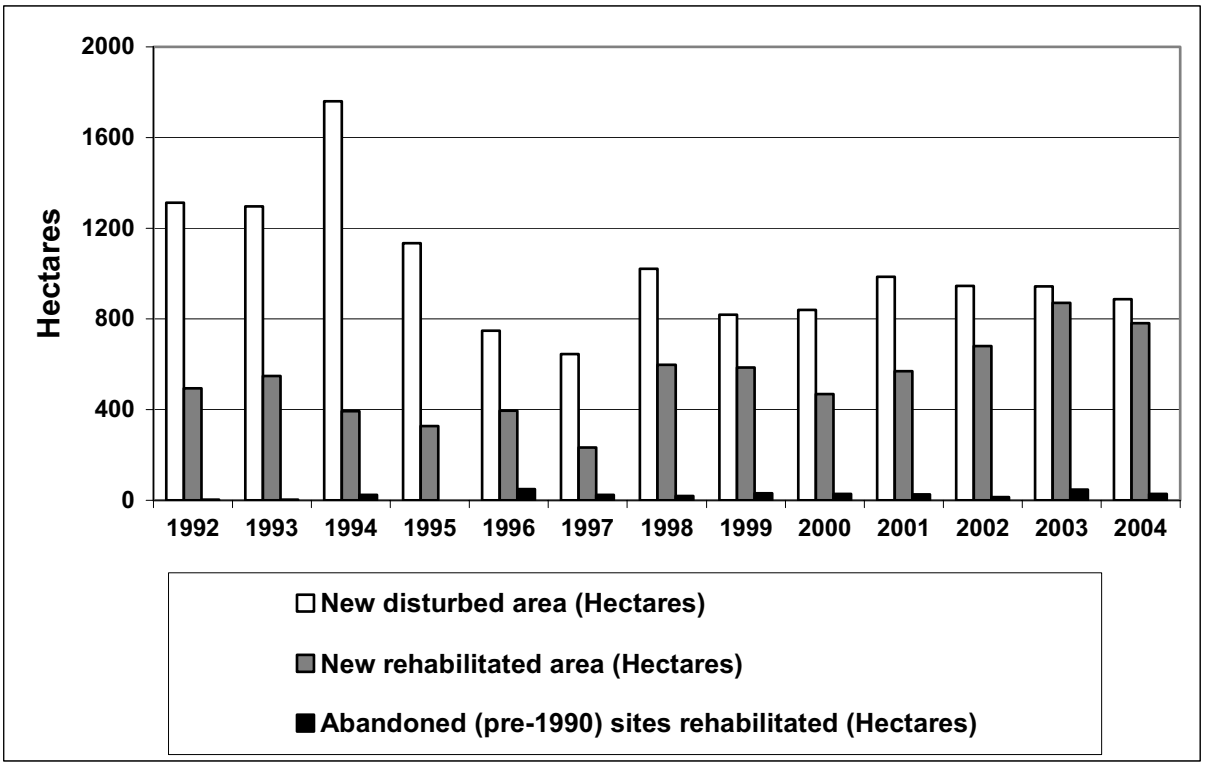


Figure 1: Hectarage of active sites disturbed and rehabilitated, and hectarage of abandoned sites rehabilitated for the years 1992 - 2004.

In response to our 2002/2003 annual report, MNR acknowledged that the aggregate industry needs to increase their rehabilitation efforts to "reassure the public that aggregate extraction is an 'interim land use' and to minimize the potential impacts to the environment." MNR also stated that it would encourage compliance with rehabilitation obligations through education and the issuance of rehabilitation orders. MNR made no commitment to lay charges under the *ARA*. According to MNR's enforcement statistics, no charges for violations related to rehabilitation have been laid during the years 2000 to 2005.

Application for review handling

The ECO forwarded the application to MNR for review of the issues identified in the application related to the *ARA*, and to the Ministry of Municipal Affairs and Housing (MMAH) since it administers the Building Code, O. Reg. 403/97, even though the sections in the Building Code related to development standards and demand for aggregates are not prescribed under the *EBR*. The ECO also forwarded the application to the Ministry of Public Infrastructure and Renewal (MPIR) since it administers the development standards even though MPIR is not a prescribed ministry under the *EBR*. The ECO advised the applicants that neither MMAH nor MPIR are required to respond to their application. The issues raised by the applicants are summarized below.

Aggregate Resources Act Part VI – Rehabilitation

The applicants quoted a statistic reported by TOARC, the organization responsible for ensuring that sites are rehabilitated, that indicated only three per cent of the total disturbed area at licensed sites was rehabilitated in 2002. The applicants noted that there is a legal requirement for producers to rehabilitate areas after they have removed the aggregates and recommended that existing aggregate policies and legislation be updated to strengthen the rehabilitation requirements of the *ARA*. In particular, they

recommended that aggregate operators not be allowed to expand their operations until they had made substantial progress on rehabilitating their disturbed areas. The applicants advised that this requirement is being contemplated under the proposed Greater Golden Horseshoe Greenbelt Plan. (The Greenbelt Plan was approved in 2005 with a requirement that aggregate operations within the area captured by the plan must complete rehabilitation of disturbed lands that are in excess of a maximum allowable disturbed area as determined by MNR.)

Aggregate Facts and Figures[1]

The term "aggregate resources" refers to sand, gravel, clay, earth, shale, stone, limestone, dolostone, sandstone, marble, granite, rock or other material prescribed under the *ARA*.

Over 55 per cent of aggregates are used in the construction of roads, and the remaining 45 per cent in such uses as fill and the manufacture of concrete, asphalt and mortar.

The construction of one kilometre of a new two-lane road uses about 15,500 tonnes of aggregates. An average brick home requires 440 tonnes of aggregates.

Municipalities are responsible for almost 90 per cent of the roads in the province. Public authorities purchase over 50 per cent of all aggregates produced in Ontario.

The demand for aggregates is equivalent to each Ontarian using 12 to 14 tonnes of aggregates annually.

Over 75 per cent of the GTA's aggregates come from the Niagara Escarpment and the Oak Ridges Moraine. Aggregate production in the province totalled about 173 million tonnes in 2004.

There are about 2,800 active pits and quarries on private land, and 3,300 on Crown land. There are about 6,900 abandoned pits and quarries of which about one-third to one-half have been left to rehabilitate naturally.

The applicants also recommended that measures such as a surcharge be adopted to provide the funds needed to address the backlog of unremediated aggregate extraction sites. The industry estimates that 2,700 of the 6,900 abandoned sites are candidates for rehabilitation.

O. Reg. 244/97 – Fee Structure

The applicants contend that provincial policy and low royalties and fees have allowed aggregate operators to minimize transportation expenses, caused environmental harm and hampered efforts to conserve. The applicants noted that for the last 35 years, provincial policy has given access to aggregate resources priority over other land uses and that aggregate producers have been able to locate close to their markets to minimize significant transportation costs. They noted that the revisions to the Provincial Policy Statement (PPS) in 1996 strengthened policies that required aggregate operations to be made available as close to market as possible "without consideration of other land-use planning objectives" and that prohibited development that would hinder access to aggregate resources. Although new aggregate operations are no longer allowed on the Niagara Escarpment and the Oak Ridges Moraine, the applicants noted that the revisions to the PPS proposed in 2004 (which came into effect on March 1, 2005), and the draft Greenbelt Plan (the final version of the Greenbelt Plan was released on February 28, 2005), continue to protect access to aggregate resources. The applicants concluded that government policies have

"ensured a supply of inexpensive aggregate by minimizing transportation costs from extraction sites to markets." The applicants believe that the negative environmental effects of transporting heavy loads of aggregates long distances by road can be reduced through conservation and recycling, and the use of rail and marine transportation.

According to the applicants, aggregate extraction fees have not increased since 1990, which means that they have been effectively decreasing. They noted that the fees are too low to encourage the efficient use of the resource and do not include environmental, social and economic costs. They believe increasing these fees will reduce the demand for aggregates by encouraging "more efficient building and infrastructure design, and increasing demand for alternatives." According to the applicants, the United Kingdom, Sweden and Denmark have imposed environmental taxes, which are as much as 60 times the current charge in Ontario, on the extraction of aggregates with the objective of reducing demand and encouraging the use of alternative materials. The Pembina report states that there is an "emerging 'crisis' regarding aggregate supply in southern Ontario" and that it is "time for Ontario to seriously consider the alternatives to the current unsustainable policy of attempting to guarantee perpetual access to aggregate resources before all other land-use policy objectives."

Building Code, Development Standards (including Highway and Road Design)
The applicants noted that, over the years, MTO has revised standards to require higher quality and greater amounts of aggregates to be used in the construction of highways. As a result, there has been an increased demand on quarries on the Niagara Escarpment and the Carden Plain. The applicants acknowledged that the proposed growth management plan for the greater Horseshoe region, *Places to Grow*, included some options to reduce the demand for aggregates in this area, and that provincial standards for roads and public works have been revised to allow the use of alternative materials. However, the applicants noted that there is no explicit requirement for the province or municipalities to use alternative materials or recycled materials. In addition, although municipalities are encouraging higher population densities which would be expected to decrease the per capita demand for aggregates, there is some evidence to suggest that this decrease is offset by the increase in aggregate use to build the public infrastructure, such as wider streets, to support these densities.

The applicants recommended that the provincial government reduce the demand for aggregates by revising its regulations, policies and guidelines related to residential development and infrastructure, and by establishing targets for the replacement of aggregates with recycled materials.

Aggregate Resources Strategy
The applicants noted that public information on aggregate supply and demand has not been updated since 1992 and that "Ontario needs to develop and implement a comprehensive strategy for the management and conservation of the province's aggregate resources" as previously recommended by the ECO in his 2002/2003 annual report and acknowledged in *Places to Grow*.

Ministry Response
MNR denied the applicants' request for review on the basis that the public interest does not warrant a review of the issues raised in the application.

Aggregate Resources Act Part VI - Rehabilitation
MNR noted that the *ARA* already requires sites to be rehabilitated and that it had agreed to conduct a review of the rehabilitation requirements in the *ARA* in response to another *EBR* application for review – R2003008 – which had noted that less than half of the land disturbed in the past ten years had been rehabilitated. In that application, MNR was requested to review the enforcement of rehabilitation requirements in the *ARA* and to amend the requirements to ensure that rehabilitation is done in an open and accountable manner. MNR indicated that it would inform the applicants about the outcome of the

other application. For additional information on R2003008, refer to the ECO 2005/2006 annual report, pages 38-43.

Aggregate Resources Strategy
MNR did advise the applicants that, in response to a recommendation in the ECO 2002/2003 annual report, it had formed an inter-ministerial committee, the Aggregate Resources Conservation Strategy Committee, with representatives from the ministries of Natural Resources, Environment and Transportation to develop a draft strategy. MNR acknowledged that, as of April 2005, only preliminary discussions had been held. However, due to the additional issues that the applicants raised, MNR would invite the ministries of Municipal Affairs and Housing, Public Infrastructure and Renewal, Northern Development and Mines, and Finance to send representatives to the committee. MNR also noted that the strategy would be developed in an "open and transparent manner" and that it would advise the applicants on how they may participate after the committee has decided on the public participation process.

MNR noted that a "lot of recycling" of aggregates occurs at the job site and that these numbers are not included in recycling statistics. In part, this is related to requirements for construction and demolition waste diversion established by MOE in O. Reg. 103/94 made under the *Environmental Protection Act*. In its response, MNR emphasized that Ontario is a leader in North America in recycling of aggregates citing a 1992 study. MNR believes that this has not changed since recent innovations have resolved some of the technical problems. MNR also advised that it and MTO do not have a mandate to dictate how municipalities build their roads. Although MTO has revised the road construction standards to allow increased use of alternative materials, such as crushed glass and ceramics, Portland cement concrete and some types of slag, municipalities are responsible for nearly 90 per cent of the roads in Ontario and are under no obligation to use recyclable materials in construction or to recycle materials when they resurface roads.

O. Reg. 244/97 – Fee Structure
In its response, MNR acknowledged that there have been no increases in fees in over 14 years and in royalties for aggregates on Crown land for over 30 years. MNR indicated that the Aggregate Resources Conservation Strategy Committee will review the fees as part of its work. Although MNR indicated that the committee may consider approaches used in other jurisdictions to encourage conservation, it disputed the applicants' analysis of the relevance and effectiveness of some of these approaches.

MNR disputed the applicants' view that the Provincial Policy Statement (PPS) gives aggregate operations planning priority over all other land uses and commented that the applicants had not provided any evidence to support their view. MNR cited recent legislation such as the Greenbelt Plan, Niagara Escarpment Plan, the *Oak Ridges Moraine Conservation Act* and changes to the PPS as evidence that access to aggregate resources is not given priority over all other land uses. However, MNR did note that government policy advocates close to market sourcing of aggregates but not to the detriment of all other land uses or the environment. MNR explained that, since government consumes 50 per cent of aggregate production, close to market policies have reduced the costs to the Ontario taxpayer. Furthermore, close to market policies have lessened greenhouse gas emissions and traffic congestion. MNR disputed the view that using other transportation methods, such as rail and marine as suggested in the Pembina report, are a viable alternative to roads. It quoted studies done in 1980 and 1992 that concluded otherwise and contended that the conclusions of these studies are still relevant.

Building Code, Development Standards (including Highway and Road Design)
Neither MPIR nor MMAH provided a response to this application. As noted above, MPIR is not a prescribed ministry and the relevant sections in the Building Code are not prescribed for applications for review under the *EBR*.

Other
In its response, MNR reviewed the objectives of its Aggregates Resources Program stating that the program minimizes the adverse effects of aggregate operations and contributes to ecological sustainability, influences land use planning by protecting aggregate resources and ensuring their availability, promotes conservation and ensures that Ontarians receive a fair return on Crown-owned aggregate resources. MNR noted that no environmental harm would come from denying this application since matters included in this application were already under review, and since the *ARA* and other policy and legislative tools such as the *Ontario Water Resources Act*, *Planning Act* and *Environmental Protection Act* protect the environment. It also noted that the demand for aggregates will continue to grow despite measures to curb demand.

Followup by the applicants
In a letter sent to the Minister of Natural Resources in May 2005, the applicants expressed their disappointment that MNR had rejected their request to conduct a broader review than that requested in 2003 by R2003008. The applicants believe that the province is not acting in a proactive manner and restated their concerns that the PPS gives primacy to aggregate development over other potentially incompatible land use options and that MNR had referred to outdated studies and still lacked current information on aggregate consumption and recycling.

ECO Comment
The ECO has many of the same concerns as the applicants and has brought them to the attention of MNR. However, the ECO agrees that MNR was technically justified in denying this application for review since the matters raised by the applicants are already under review by two other initiatives – an inter-ministerial committee that was formed to prepare an aggregate resources conservation strategy and the review of the application, R2003008. The ECO notes that MNR did agree to invite several additional ministries to join the committee.

However, the ECO is very concerned that MNR relied on the two above-noted initiatives as reasons for denying this application when progress on these initiatives has been slow. The committee, which was formed in 2003 has only held some "preliminary discussions." In addition, it is disturbing to discover that the committee membership did not include representatives from MMAH and MPIR that represent major consumers of aggregates – municipalities which are responsible for close to 90 per cent of the roads in the province and public infrastructure projects such as water and sewer systems. The ECO is also very concerned about the amount of time that MNR is taking to complete its review of R2003008. For additional information about this review, refer to the ECO 2005/2006 annual report, pages 141-145.

The ECO is very disappointed that MNR continues to take the position that aggregate operations are not given priority over other land use considerations since the *ARA* clearly states that it applies "despite any municipal by-law, official plan or development agreement" and that MNR need only "have regard to" any other planning and land use considerations. The ECO is also very concerned that MNR quoted extensively from studies performed in the early 1990s. This reinforces the need for more current information on the state of aggregate resources in the province.

In its response, MNR stated that it expects "the conservation strategy will be developed in an open and transparent manner" but that the committee will decide how the public will participate in the process. The ECO notes that policies developed by all three of the original ministries represented on the committee are subject to the public participation rights defined under the *EBR*. Due to the significance of this strategy, the ECO urges the committee to provide additional public participation opportunities beyond the minimum posting requirements defined under the *EBR*.

Five weeks after MNR responded to the applicants, it posted proposed changes to its Policies and Procedures Manual for the Administration of the *ARA* including changes related to rehabilitation of disturbed sites on the Registry. In addition, MNR posted proposed changes to the *ARA* on the Registry on January 4, 2005. MNR's response should have mentioned its intention to post these proposals in the Registry and invited the applicants to submit comments. For additional information regarding the changes to the manual, which were finalized in April 2006, refer to Registry Number PB05E6006, and the proposed changes to the *ARA*, refer to Registry Number AB05E4001.

Public concerns regarding aggregate operations have escalated over the years and owners/operators are facing increasing pressure from neighbours to mitigate impacts on the environment and on the community. However, MNR has been slow to respond with a stronger management framework and has failed to put forth credible proposals that will ensure the long-term sustainability of aggregate resources in Ontario.

Review of Application R2004015:
Motorized off-road vehicle events on Crown Land under the Free Use Policy
(Review Undertaken by MNR)

Background/Summary of Issues
In March 2005, an application was submitted requesting a review of MNR's policy for off-road motorized vehicle events on Crown land. Such events are governed by MNR's Free Use Policy (PL 3.03.01) under the *Public Lands Act*. (For a summary of the application for review, see page 286 of the 2004/2005 annual report supplement). We also reported that MNR had altered the Free Use Policy requirements for off-road events in 2004 without posting a proposal notice on the Environmental Registry (see pages 7-8 of the 2004/2005 supplement).

Ministry Response
In April 2005, MNR agreed to review the parts of the Free Use Policy that pertain to off-road vehicle events on Crown land. The ministry did not indicate when it expects to complete its review. In late May 2006, in response to a query from the ECO, MNR indicated that its review is nearing completion.

ECO Comment
The ECO awaits the results of MNR's review, and will report on the handling of this application once the review is completed.

Review of Applications R2005005, R2005006, R2005007, R2005008:
Comprehensive Land Use Planning in the Northern Boreal
(Review Denied by MNR, MNDM, ENG; Response Pending by MOE)

Background/Summary of Issues
In September 2005, Sierra Legal Defence Fund (SLDF) filed an application for review on behalf of the Wildlands League requesting that several ministries consider the need to create a comprehensive land use planning system for northern Ontario. The applicants asserted that a wide array of evidence suggests that landscape level planning is needed in advance of resource development decisions in Ontario's Northern Boreal region. The application for review was sent to the Ministry of the Environment (MOE), the Ministry of Natural Resources (MNR), the Ministry of Northern Development and Mines (MNDM), and the Ministry of Energy (ENG).

Ontario's boreal forests begin just north of the Great Lakes. The boreal forests to the north of the 51st parallel have global significance, identified by the World Resources Institute as remaining frontier forests, relatively unimpaired by development. The United Nations Environment Programme recognizes this region of Ontario as one of the world's remaining significant 'closed canopy' forests. The Northern Boreal comprises approximately one-third of Ontario's land-base at almost 400,000 km^2 – an area equivalent to New Brunswick, Nova Scotia and Prince Edward Island combined. SLDF and the Wildlands League contend that the current lack of policy with respect to comprehensive land use planning puts this area at risk of irreversible environmental harm. The applicants assert that the Northern Boreal contains:

- one of the last strongholds of species-at-risk, such as woodland caribou and wolverine. These species are wide-ranging, require large habitat areas and have demonstrated sensitivity to human disturbances, such as industrial activity;
- habitat for populations of commercially important furbearer and game species, such as beaver, American marten and, moose, and crucial breeding habitat for countless songbirds and waterfowl;
- wild river and lake systems supporting more than 60 species of fish, including many that sustain subsistence and fly-in fisheries in the region;
- large intact watersheds that are critical to maintaining healthy, clean sources of water for local communities and all citizens of Ontario;
- traditional land use areas, beyond that of reserve land, of at least twenty eight First Nations;
- the full complement of biodiversity existing in the region for approximately the last 8-10,000 years;
- valuable ecosystem services, including filtration, soil, nutrients, store carbon, produce oxygen, control flooding and erosion, support species, mitigate climate change; and
- natural capital that supports an internationally significant wilderness tourism industry.

SLDF and the Wildlands League believe that MNR's on-going Northern Boreal Initiative (NBI) does not address all of the planning issues at hand, as it only covers a small portion of the area in question and it is primarily focused on commercial forestry activities. Further, the applicants contend that the NBI does not address landscape level planning and MNR does not have jurisdiction over all of the possible development projects which include, but are not limited to, roads, coalbed methane exploration, mineral staking and prospecting, hydro generation projects and transmission corridors for electricity. As illustration of some of their concerns, the applicants took issue with the "piece-meal" approval process for the Victor Diamond Mine near Attawapiskat.

The applicants note that planning rules do exist for other areas of Crown land, such the Declaration Order regarding MNR's Class Environmental Assessment Approval for Forest Management on Crown Lands in Ontario. However, this Declaration Order does not extend into the Northern Boreal.

MNR's Northern Boreal Initiative (NBI) was established in 2000 in response to the expressed interest of several First Nations communities in developing commercial forestry opportunities. It was intended to address community-led planning for potential forestry operations in the area approximately 150 kilometers north of the current Declaration Order. In part, NBI was initiated due to the Ontario Forest Accord which was an agreement signed by MNR, the forest industry and a coalition of environmental groups in 1999. One of the commitments of the Forest Accord was to open up these northern lands to commercial forestry as quickly as possible, subject to the full agreement of affected First Nations communities, approval under the *Environmental Assessment Act*, and with the regulation of new protected areas.

SLDF and the Wildlands League believe that a comprehensive land use strategy must include proper engagement of First Nations communities in the Northern Boreal and the public-at-large, environmental assessments of each project, proper land use planning with consideration of the ecosystems in question and the designation of protected areas before resource allocations are made. The applicants assert that such a strategy must take an inter-ministerial approach and comprise the following elements:

- compliance with the Statements of Environmental Values of each ministry;
- ensure the long-term health of ecosystems;
- continued availability of natural resources (planned and managed in an orderly, sustainable and fair way);
- protect natural heritage and natural features;
- employ the precautionary principle;
- respect partnership arrangements;
- properly value resources (including commercial and non-market values);
- improve the knowledge base;
- protect significant features and landscapes;
- rehabilitate degraded ecosystems;
- promote environmentally sustainable development activity which is preceded by sound conservation planning and adequate public input, and gives high priority to environmental protection and minimizes environmental disturbances; and,
- require collaboration with other ministries leading to joint sign-off mechanisms.

The applicants stress that a strategy should address the cumulative impacts of all proposed developments in the Northern Boreal including the impacts of developments already proceeding further south. SLDF and the Wildlands League also argue that landscape-level plans should be complete before any areas are licensed to industry or allocated for development. They believe that land use plans should be required to have large core protected areas, wildlife movement corridors, buffer zones, traditional use areas, protected sacred areas, and areas designated for other uses.

In March 2003, the current Premier, then the Leader of the Official Opposition, promised to "institute meaningful, broad-scale land-use planning for Ontario's Northern Boreal Forest before any new major development, including ensuring full participation by native communities. Land use planning must protect the ecological integrity of this natural treasure and help to provide a sustainable future for native people and northern communities."

Ministry Response

Ministry of the Environment (MOE)

As of May 2006, MOE had not provided a decision to the applicants and the ministry was approximately six months beyond the deadlines prescribed by the *EBR*.

Ministry of Natural Resources (MNR)
MNR denied the application in November 2005, stating that the public interest did not warrant a review for a new comprehensive land use policy in advance of resource allocation decisions being made. The ministry also asserted that the existing environmental assessment approvals and permitting processes are sufficient to address, mitigate, and minimize potential harm to the environment.

The ministry stated that it was responsible for a relatively limited number of approvals with regard to the Victor Diamond Mine. The ministry asserted that these decisions were based on "approved land use planning documents for the region and numerous scientific studies conducted by the MNR and the disposition applicant DeBeers Canada to ensure environmental effects were considered during project evaluation."

MNR stated the Northern Boreal Initiative directs community-based land use planning. The ministry asserts that NBI allows First Nations to take a leading role in land use planning "with an important objective of fostering sustainable economic opportunities in forestry and conservation." MNR claims that this local-level process also "utilizes a landscape-scale approach to ensure that achievements are measured appropriately and that impacts beyond the planning area are adequately considered."

Despite denying the application, MNR stated that it was working on a policy that addressed the concerns raised by SLDF and the Wildlands League. The ministry informed the applicants that "in early 2005 MNR began exploring potential approaches for land use planning in Ontario's far north and has initiated discussions with the first nation treaty organizations and tribal councils, as well as several non-governmental organizations. This exercise is continuing and MNR would welcome discussions regarding the land use planning elements proposed in the review application."

Ministry of Northern Development and Mines (MNDM)
MNDM denied the application in November 2005, stating that the public interest did not warrant a review. The ministry also asserted that it was not the lead ministry for the development of such a strategy, but that it would actively participate with MNR in developing and implementing its approaches to land use planning.

With respect to the applicants' concern regarding the Victor Diamond Mine, MNDM stated that it participated in the review of a Comprehensive Study Environmental Assessment under the *Canadian Environment Assessment Act*. The ministry also stated that three environmental assessments processes occurred for activities related to the mine site, as well the signing of an Impacts and Benefits Agreement between the Attawapiskat First Nation and DeBeers.

The ministry stated that "mining is a temporary land use, and mining regulations ensure that a mine site is rehabilitated to natural, recreational or commercial land uses." MNDM asserted that Ontario's *Mining Act*, along with other permitting processes, ensures that mineral exploration and development endeavours to mitigate the short-term effects of mining on the environment; eliminate the long-term effects of mining on the environment; ensure continuing availability of mineral resources for the long-term benefit of the people of Ontario; and, protect natural heritage and biological features of provincial significance.

Ministry of Energy (ENG)
ENG denied the application in November 2005, stating that the public interest did not warrant a review. The ministry did not specifically address the concerns raised by the applicants, but, rather, it described the numerous regulatory processes that must be followed for new energy projects. ENG also stated that "Ontario must confront a massive shortfall between supply and demand for electricity within the next 15 years" and the solution to this shortfall "will require the consideration of major energy projects." The ministry also stated that "possible northern Ontario energy projects include small hydro projects, wind turbines, and a major new electricity transmission line from northern Manitoba to southern Ontario."

Themes and Links
In our 2002/2003 annual report, the ECO provided extensive commentary on the need for comprehensive planning in northern Ontario. The ECO wrote that "landscape level planning should inform community-by-community decision-making" and that "it is imperative that MNR assess the ecological implications of industrial logging in the northern boreal forest." In that report, the ECO also made two formal recommendations related to resource development in northern Ontario:

- The ECO recommends that the Ministry of Natural Resources conduct gap analyses and develop objectives and targets in order to establish a protected areas network for the Northern Boreal Initiative area as a whole.
- The Ministry of Natural Resources should carry out a thorough assessment of forest management approaches that are ecologically suited to the northern boreal forest and make the research results available to the public.

As of the spring of 2006, the ECO notes that the environmental impacts of permitting forestry in the northern boreal forest have not yet been assessed formally, and will require either approval or exemption under the *EAA*.

ECO Comment
The ECO concurs with the applicants that significant changes should be made to the way in which the Ontario government regulates and plans for the Northern Boreal. The existing approval processes typically operate in isolation from one another and they do not take a comprehensive "big picture" approach. This "silo mentality" does not effectively serve Ontarians nor provide adequate assurances of environmental protection in the path of resource development. The Northern Boreal has a unique and varied ecology that merits the same standard of planning – if not higher – than applies to the rest of the province.

Unfortunately, the ECO is unable to substantively comment on this application as the Ministry of the Environment, which has assumed the lead role in this application, has failed to provide a response within the timelines prescribed by the *Environmental Bill of Rights*. While the ECO acknowledges that the issues raised by the applicants are complex, excessive delays frustrate the public interest and undermine the *EBR*. The ECO is also disappointed that MNR denied this application for review, especially in light of the fact that the ministry is developing new approaches to land use planning in Ontario's far north. The ECO commits to fully report on this application in a forthcoming annual report, following the legally required response by MOE.

Review of Application R2005012
Review of the Geographic Extent of the Aggregate Resources Act
(Review Denied by MNR)

Background/Summary of Issues
In November 2005, two applicants requested a review of the geographic extent of the application of the *Aggregate Resources Act* (*ARA*) and its regulations. They noted that currently only aggregate operations on Crown land, land under natural water bodies and private land in designated areas (primarily in southern Ontario) are subject to the requirements of the *Act* and its regulations. As a result, "large areas of the province are not protected, regulated or rehabilitated." They requested that the government consider extending the protection provided by the *ARA* and its regulations to all land in the province. The applicants attached a series of informational pamphlets published by the Ontario Stone, Sand & Gravel Association (OSSGA), formerly called the Aggregate Producers Association of Ontario (APAO), and a copy of a report published by the Pembina Institute on January 25, 2005, called "Rebalancing the Load: The Need for an Aggregates Conservation Strategy for Ontario" to their application.

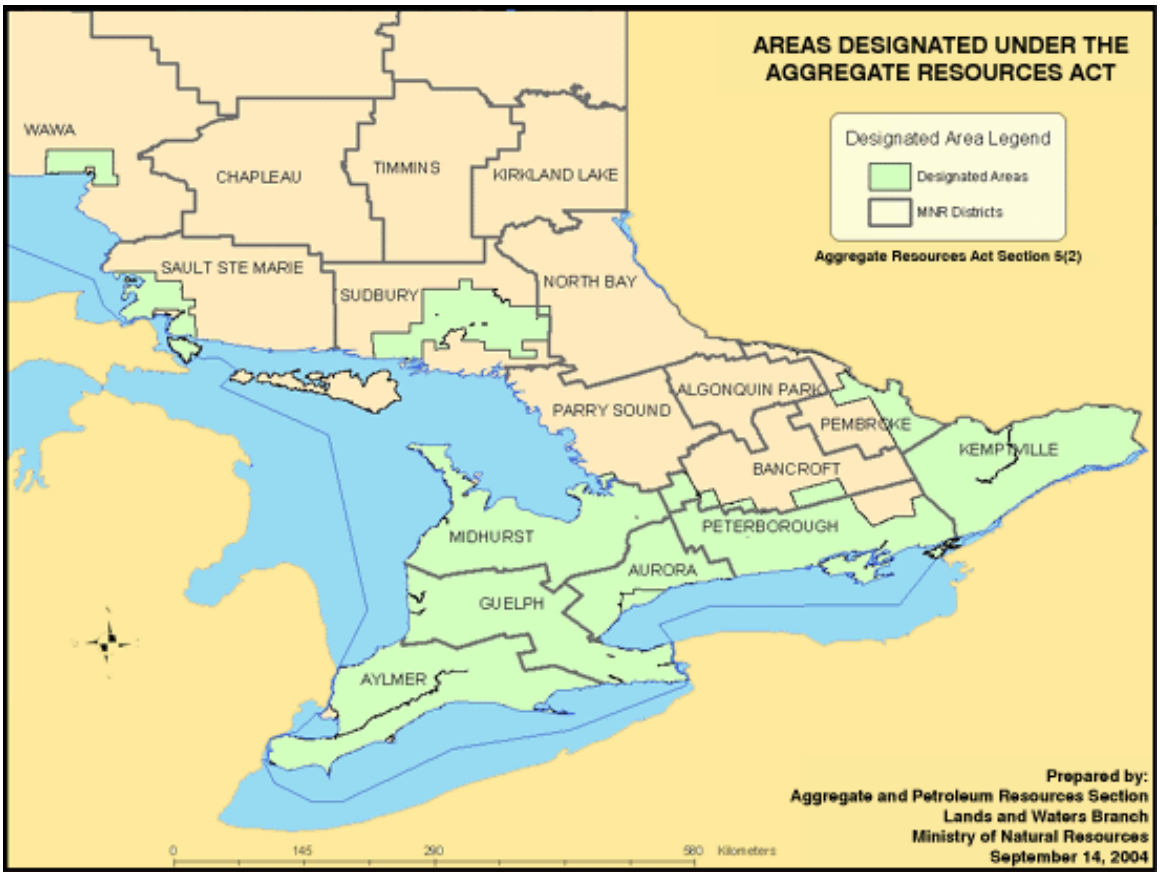
Background
Aggregate resources are regulated by the Ministry of Natural Resources (MNR) under the *ARA*. According to s. 5, the *ARA* and its regulations apply to: (a) all aggregate and topsoil that is the property of the Crown or that is on land the surface rights of which are the property of the Crown; (b) designated private lands; and (c) all land under water. Currently Crown land throughout the province and most private land in southern Ontario are subject to the requirements of the *ARA*. However, most private land in northern Ontario is not designated under the *ARA*. The *ARA* and its regulations require that aggregate operators obtain site licenses or permits, consult with the public, prepare site plans, conduct their operations according to specified rules, prepare compliance reports and rehabilitate their sites. Aggregate operations on most private land in northern Ontario are not required to comply with the *ARA* and its regulations but must be approved by municipalities.

This is not the first time that the ECO has received an application requesting that the geographic extent of the *ARA* be reviewed. In 1998, the ECO received an application for review requesting MNR extend the *ARA* to include Armour Township in the Parry Sound area. The applicants alleged that unregulated aggregate operations were causing environmental harm. Although MNR decided against carrying out the review, it stated that "all significant aggregate resources areas of Ontario should be designated," and that it was phasing in new areas but that it was having difficulty achieving this objective due to costs. (For additional information regarding this application, refer to the ECO 1998 annual report, page 272).

Despite MNR's commitment to phase in all areas with significant aggregate resources, only two relatively small areas have been designated since 1997. O. Reg. 244/97, established under the *ARA*, was amended in 1999 to designate the Village of Hilton Beach. It was also amended in 2004 to designate the Township of Michipicoten and 12 surrounding townships near Wawa in response to concerns about a proposed aggregate operation to be located along the shores of Lake Superior. In March 2005, MNR advised the ECO that its commitment to designate all areas with significant aggregate resources is still in place. (For additional information regarding aggregate operations along the north shore of Lake Superior, refer to the ECO 2004/2005 annual report, pages 89-91, and to the supplement to that report, pages 105-116).

The ECO 2002/2003 annual report raised concerns about the increasing demand for aggregates and the lack of a strategy to conserve this non-renewable resource. In response, MNR established the Aggregate Resources Conservation Strategy committee (composed of staff from three ministries) and asked the committee to develop a conservation strategy for aggregates. As of April 2006, the committee had not published a strategy for public review and MNR has not indicated any timelines for completion of this work. (For additional information, refer to the ECO 2002/2003 annual report, pages 29-35).

Map of the Designated Private Lands under the ***Aggregate Resources Act*** *as of September 14, 2004*



Summary of Issues

According to the applicants, aggregate extraction can affect ground and surface water flows and quantity, change the slope of the land and alter drainage patterns, reduce the capacity of the land to store water, cause erosion and pollute local water supplies, permanently alter natural heritage areas and affect agricultural areas, livestock and wells. They note that the extraction, crushing and transportation of aggregates can release significant amounts of particulate matter into the air along with exhaust pollutants and greenhouse gases. They note that transportation of aggregates via trucks also poses noise and serious safety concerns.

The applicants noted that, according to the OSSGA, the licensing requirements under the *ARA* are an important aspect of site planning, preparation and rehabilitation. For example, they quoted from an OSSGA pamphlet that stated "a detailed and careful hydrogeological study is necessary" when licensing operations that will be extracting aggregates below water, and "pit ponds can affect cold water fisheries resources." Furthermore, the applicants quoted estimates that indicate that less than half of the land disturbed by aggregate extraction in regulated areas has been rehabilitated and in unregulated areas rehabilitation rates are as low as 1-2 per cent.

The applicants believe that the public should be informed about and be able to comment on applications for aggregate licences and permits, and have recourse if operators do not comply with the *ARA* and its regulations. They also believe that, as future aggregate conservation measures are introduced, all parts of the province must be involved and participate.

To provide context for their arguments, the applicants enclosed several informational pamphlets produced by the OSSGA, including "Being a Good Neighbour", "Rehabilitation of Pits and Quarries", "Groundwater in the Aggregate Industry", and "Management of Abandoned Aggregate Properties (MAAP) Program," which are available at http://www.ontarioossga.com. The "Being a Good Neighbour" pamphlet notes that aggregate producers are committed to being good neighbours through communication, education, community involvement, enhancing the appearance of their sites, controlling dust, noise and vibration, and managing their use of water. The "Rehabilitation of Pits and Quarries" pamphlet explains that aggregate extraction is considered to be an interim land use and that after extraction is complete in any area, producers must rehabilitate the area to another use such as agriculture, forestry, recreation or wildlife habitats. The "Groundwater in the Aggregate Industry" pamphlet describes the effects of activities such as aggregate extraction and dust control at above-water and below-water pits and quarries on groundwater flow, quality, quantity and temperature. The "Management of Abandoned Aggregate Properties (MAAP) Program" pamphlet describes how MAAP rehabilitates pits and quarries in areas designated under the *ARA* that were abandoned before 1990 into agricultural lands, natural areas and recreational space. The pamphlet notes that about one-third to one-half of abandoned sites are rehabilitated naturally, i.e., without human involvement, and that others may only require levelling and seeding.

The applicants also submitted a copy of a report by the Pembina Institute that reviewed the history of provincial land use policies related to aggregate operations, discussed the environmental impacts of aggregate operations and raised numerous issues related to the management of aggregate resources. The authors of the report concluded that provincial land use policies have increasingly given aggregate operations priority over other land uses and that Ontario requires an aggregate resources conservation strategy to ensure the sustainability of this non-renewable resource. The authors also made numerous recommendations regarding the content of the proposed strategy. For additional information about this report, refer to the ECO 2005/2006 annual report, pages 141-145 and the supplement, pages 214-221.

The ECO forwarded the application to MNR for review.

Ministry Response

MNR denied the applicants' request for review on the basis that the public interest does not warrant a review of the issues raised in the application. MNR's primary reasons for not undertaking the review were that it had already agreed to conduct a review of the same issues in response to an application that it had received in 2003 from the citizen's group called Gravel Watch, and that it had already established the Aggregates Resources Conservation Strategy committee in response to concerns related to dwindling aggregate supplies raised by the ECO. For additional information on the 2003 application, refer to the ECO 2005/2006 annual report, pages 141-145, and for additional information on the ECO's concerns about aggregate supplies, refer to the ECO 2002/2003 annual report, pages 29-35.

In its response, MNR noted that one of the objectives of its Aggregate Resources Program is "to minimize adverse impacts of aggregate operations on the environment and contribute to ecological sustainability by administering the *ARA*." MNR also noted that the program ensures that aggregate resources are available and protected from incompatible land uses, and promotes conservation. MNR reiterated that, based on current population growth projections and per capita consumption of aggregates, an additional 2 million tonnes of aggregates per year will be required to meet the demand. MNR noted that, when issuing a new aggregate licence, it must consider planning, environmental, economic and social factors before making

its decision. In response to the applicants' concerns regarding the impact of aggregate operations on the environment, MNR listed nine other policies and legislation, such as the *Ontario Water Resources Act*, *Planning Act* and *Environmental Protection Act*, that protect areas unregulated by the *ARA* from environmental harm that may be caused by aggregate operations and noted that the geographic extent of the *ARA* is subject to on-going review as part of normal business practices.

Since MNR had already agreed to review the geographic extent of the *ARA*, it did not believe that conducting another review and its associated costs were necessary. However, MNR did commit to providing the applicants with a copy of the outcome of the other application for review.

In response to MNR's decision, the applicants wrote to the Minister of Natural Resources, and to the Premier noting that MNR's rationale for turning down the request for review never answered the question "why the *Act* and its regulations should not protect all land in Ontario" and why the *ARA* is necessary if, as MNR asserts, other legislation can be relied upon to adequately protect the environment in areas not regulated by the *ARA*. In addition, the applicants noted that continued demand for aggregates is not a reason for not requiring aggregate operations to be licensed or regulated since licensing does not "prevent or restrict the supply of aggregate." Although the applicants agreed with MNR that extending the geographic extent of the *ARA* would entail additional costs, the applicants wondered why aggregate producers should not be required to bear these costs and why unregulated areas did not deserve to be protected.

ECO Comment

The ECO believes that MNR was technically justified in denying this application for review since the matters raised by the applicants are already under review or are being considered by the Aggregate Resources Conservation Strategy committee.

MNR asserted that the ministry had already made a commitment to review the issue of the geographic extent of the application of the *ARA*, triggered by the application submitted by Gravel Watch in 2003. However, the ECO notes that Gravel Watch did not directly request a review of this matter and that MNR had not advised Gravel Watch that the geographic extent of the application of the *ARA* would be included in its review. So it appears that MNR is now carrying out a broader review of the Gravel Watch application than originally intended, and has used that rationale to turn down this subsequent application. The ECO will evaluate the extent to which MNR's review, once completed, also addresses the concerns raised by the applicants. The ministry has promised the applicants a copy of the completed review of the Gravel Watch application. However, the ECO has serious concerns about MNR's handling of the Gravel Watch application and the slow progress by the committee on developing a conservation strategy. These concerns are discussed in the ECO 2005/2006 annual report, pages 141-145.

The ECO notes that MNR's commitment to designate all areas of Ontario with significant aggregate resources under the *ARA* has been in place since 1998. However, MNR has not effectively communicated this commitment to the public nor has it made any significant progress implementing it. In fact, MNR did not advise the applicants of this commitment even though it would have addressed some of the applicants' concerns. Furthermore, the ECO agrees with the applicants that MNR never explained why the *ARA* is needed, if, as MNR asserts, other legislative and policy tools protect the environment in non-regulated areas. Indeed, MNR acknowledges that the *ARA* has the legislative authority to both require rehabilitation and enforce those requirements. None of the other legislative or policy tools listed by MNR include these rehabilitation requirements. As a result, in geographic areas where the *ARA* does not apply, rehabilitation is rare or virtually non-existent. The applicants asserted that in unregulated areas, rehabilitation rates are estimated to be as low as 1-2 per cent, and MNR did not refute this assertion.

At the time of this review, MNR had two proposals on the Registry that may have been of interest to the applicants. One proposal, PB05E6006, outlined proposed changes to MNR's Policies and Procedures Manual for the Administration of the *ARA* including changes related to rehabilitation of disturbed sites. The other proposal, AB05E4001, outlined proposed changes to the *ARA*. MNR's response should have mentioned that these proposals were on the Registry and should have indicated that the public will be invited to comment at some point in the future on a proposed aggregate conservation strategy.

This is the third application for review regarding MNR's aggregate program that the ECO has received since 2003, suggesting that the public has serious concerns with the program that need to be addressed. The ECO shares many of these concerns. As noted by these and other applicants under the *EBR*, Ontario's regulatory and policy framework for aggregates is being applied in a patchwork way across the province. The current Aggregate Resources Program is not ensuring adequate levels of site rehabilitation and is not promoting conservation of aggregate resources. MNR needs to take prompt action to resolve these concerns. For additional information, refer to the ECO 2005/2006 annual report, pages 141-145.

Review of Application R2005016
Review of Ontario's Zoo Licensing Regime
(Review Denied by MNR)

Background/Summary of Issues
In January 2006, applicants submitted an application for review of all Acts, regulations and policies relating to the keeping of wildlife in captivity in Ontario. The applicants asserted that the Ministry of Natural Resources' (MNR) zoo licensing regime is both grossly inadequate and significantly inferior to those of the other provinces. They further asserted that, on account of MNR's inadequate licensing regime, there are more zoos and captive wildlife displays in Ontario than in any other province, and the vast majority of such facilities have substandard conditions.

In support of their position, the applicants included a report prepared by them on the state of Ontario's zoos. The report set out the findings of a zoo audit conducted by an independent zoo expert. The auditor inspected 80 animal exhibits at 16 of Ontario's 45 known zoos. The report concluded that 83 percent of the audited exhibits failed to meet the applicants' criteria for basic welfare, husbandry and housing standards. In the introduction to the report, the zoo auditor expressed his surprise at the substandard conditions of the Ontario zoos he inspected, stating that the level of care, welfare and housing at several of these zoos were "…on a par with some of the worst zoos I have seen in many developing countries."

The applicants set out a number of concerns with respect to Ontario's zoo licensing regime arising from the zoo audit. Generally, the applicants were concerned that MNR's existing standards are inadequate to protect captive wildlife, the environment and the public in Ontario. Secondly, even if these standards were improved, the majority of the wildlife in captivity in Ontario would remain unprotected as Ontario's zoo licensing requirements only apply to prescribed native wildlife. These issues are set out in greater detail below.

Ontario's Zoo Licensing Standards
The Wildlife in Captivity Regulation (O. Reg. 668/98) under the *Fish and Wildlife Conservation Act* (*FWCA*) includes some very basic zoo licensing conditions regarding record keeping and the identification of birds. In addition to these two basic requirements, MNR attaches two more general conditions to the zoo licences with respect to the size of enclosures and the provision of veterinary services. MNR actually developed comprehensive draft "Minimum Standards for Zoos in Ontario" in

July 2001; however, these draft standards have never been implemented. Without these more comprehensive standards in place, the applicants argued that there are a number of major deficiencies in the current zoo licensing regime.

Insufficient Animal Welfare Standards
The applicants alleged that MNR's licensing regime fails to ensure adequate standards for the care and housing of animals held in Ontario zoos. According to the applicants' report, animals in the audited zoos were frequently found to be housed in small, barren, ramshackle cages, lacking shelter, shade or privacy. Many exhibits were far too small and/or completely lacking in appropriate design features, hindering the animals' ability to move about freely and exercise natural behaviours. Accordingly, on inspection, many animals displayed signs of boredom, frustration, psychological disturbance and abnormal behaviour, such as pacing, rocking and bar-biting. In addition, the auditor found dirty cages and dirty water bowls, which could result in disease transmission. The report also noted that most of the audited facilities lacked professionally trained animal care staff.

Insufficient Ssafety and Security Requirements
The applicants alleged that Ontario's zoo licensing regime fails to impose sufficient security requirements to ensure the safe containment of captive wildlife. The applicants' audit found that many exhibits did not have adequate barriers to prevent animal escapes and/or public contact with dangerous animals. They provided numerous examples of recent animal escapes from zoos in Ontario. The applicants asserted that the failure to impose sufficient security standards for zoo enclosures poses significant threats to both public safety and the environment. They noted that potential impacts include escaped exotic zoo animals becoming established in Ontario, competing with native animals in the wild, breeding, disrupting natural ecological relationships and gene pools, spreading diseases, putting native populations at risk of being supplanted by invasive species, and ultimately threatening Ontario's biodiversity.

Insufficient Requirements for Educational and Conservation Benefits
A "zoo" is defined in the Wildlife in Captivity Regulation as a place where native wildlife is "kept in captivity for display to the public and for conservation, educational or scientific purposes." The applicants alleged that MNR fails to ensure that zoos provide such educational or conservation benefits to the public. The applicants reported that the education and conservation messages at many of the audited zoos were non-existent or "questionable at best", and that many of the zoos were actually providing a negative educational experience by displaying the animals in unnatural, behaviourally impoverished environments, resulting in the animals exhibiting abnormal behaviour.

Insufficient Inspections and Enforcement
The applicants also asserted that the results of their zoo audit were evidence that the zoos are not being inspected and/or the licence conditions are not being enforced.

Exclusion of Exotic Species
The applicants expressed concern over the fact that MNR's zoo licensing requirements only apply to a small portion of all animals kept in captivity. Section 40 of the *FWCA* requires anyone who keeps prescribed native wildlife in captivity to obtain a licence from MNR. This requirement applies only to persons keeping species of native wildlife that are listed in either the schedules or regulations under the Act; it does not apply to exotic (i.e., non-native) wildlife or native wildlife that is not prescribed. Accordingly, anyone may keep exotic animals in captivity without requiring a licence from MNR. The applicants claimed that, by excluding exotic animals from the regulatory regime, an estimated two-thirds of all animals kept in Ontario's zoos are not subject to any welfare conditions.

In addition, the applicants claimed that several species that should be considered to be native have not been prescribed in the schedules or regulations under the *FWCA*. The applicants cited the porcupine and the eastern cougar as examples, noting the anomaly that MNR's Species as Risk Unit has listed the eastern cougar as an endangered species in Ontario under the *Endangered Species Act*.

Ministry Response
MNR decided that a review was not warranted. MNR noted that the *FWCA* and its regulations were the result of extensive consultation prior to its enactment in 1999, including several *EBR* proposal notices, and that MNR continues to review the zoo licensing regime on an ongoing basis.

Animal Welfare Requirements
MNR responded that the *FWCA*, its regulations and its relevant policies already address the applicants' concerns regarding the protection and management of prescribed native wildlife held in Ontario zoos. In addition to the four general licensing conditions regarding size of enclosures, veterinary services, record keeping and marking of birds, MNR noted that the ministry modifies or adds to these conditions on a case-by-case basis to ensure that regulated wildlife receives a minimum standard of care. MNR also mentioned that it is working with the zoo industry and other interested parties to assess the need for any changes to the general licence conditions to ensure a minimum standard of care for regulated species.

MNR also commented that animal welfare (of both native and exotic animals) falls under the mandate of the Ministry of Community Safety and Correctional Services (MCSCS). Further, the *Ontario Society for the Protection of Cruelty to Animals Act* (*OSPCAA*), administered by MCSCS, deals with the prevention of cruelty to all animals and empowers the Ontario Society for the Protection of Cruelty to Animals (OSPCA) to enforce laws pertaining to the welfare of animals. In addition, the *Criminal Code of Canada* has provisions relating to cruelty to animals.

Safety and Security Requirements
MNR noted that the *FWCA* prohibits people from releasing wildlife from captivity. The *FWC*A also requires persons who keep wildlife in captivity to ensure that it does not escape, and, in case of escape or release, to recapture or kill such animal. These provisions apply to both native wildlife (s. 46 of the *FWCA*) and exotic wildlife (s. 54 of the *FWCA*). According to MNR, these provisions protect the environment and wildlife populations living in nature from exposure to parasites, diseases, genetic contamination, habitat impacts, predation and the establishment of feral populations that may result from contact with an escaped captive animal.

With respect to licence conditions relating to public safety, however, MNR responded that this was not within its mandate. It noted that, under the *Municipal Act, 2001*, public safety concerns relating to captive wildlife facilities fall within the jurisdiction of the local municipalities and their respective police services.

Education and Conservation Benefits
MNR confirmed that zoos are required to provide at least one of the three defined purposes: a conservation, education or scientific purpose. MNR simply noted that it "will continue to work with the zoo community and other interested parties with expertise in zoos in identifying what a minimum zoo education program must include."

Inspections and Enforcement
MNR stated that it inspects zoos to ensure compliance with licence conditions and has, in fact, refused to re-issue a zoo licence in one case where the zoo licence conditions had not been met.

Exclusion of Exotic Species
MNR simply noted that its mandate is to protect and manage the *native* fish and wildlife resources of Ontario and that the *FWCA* addresses *native* wildlife resources. It remarked that, as previously mentioned, the *OSPCAA* and the *Criminal Code of Canada* deal with general animal welfare and animal cruelty provisions for all animals, including exotic wildlife.

In response to the applicants' assertion that certain native species have not been prescribed, MNR commented that the list of scheduled wildlife under the *FWCA* was the result of extensive consultation with the zoo community, other stakeholders and the public, and that additional native species may be added as necessary.

ECO Comment
Failure to Engage in Transparent Process
MNR has stated numerous times since the enactment of the *FWCA* in January 1999, that it intends to develop operating standards for zoos in Ontario, and that this is to be done in consultation with interested members of the public. In a fact sheet accompanying the enactment of the *FWCA*, MNR announced that it was working with representatives of the zoo community "to develop a minimum set of standards by which [zoo] facilities will operate." Later that year, in March and August 1999, MNR again stated in two separate Registry decision notices that it would be meeting with interested parties to develop animal care standards and operating conditions for captive wildlife facilities, and that there would be an opportunity for the public to provide input in the development of such standards. In July 2001, MNR completed draft "Minimum Standards for Zoos in Ontario." And again, in its response to this application for review, MNR noted that it continues to work with the zoo industry and other interested parties on assessing the need for changes to the general zoo licence conditions, including conditions relating to animal care and education programs.

Given these comments, the ECO is disappointed that MNR failed to take this timely opportunity to review and develop standards in an open and transparent public process. The ECO believes that MNR should at least have provided an explanation as to why, more than seven years after the enactment of the *FWCA* and its regulations, it still has not followed through on its promises to develop regulated standards. MNR's process for the review and development of zoo standards appears to be taking place in a closed forum. The ECO urges MNR to engage in a formal open and transparent review of its licensing conditions, and that it post any such policies or standards on the Environmental Registry for public comment.

Failure to Review Zoo Licensing Regime
The ECO disagrees with MNR's decision that a review is not warranted. A preliminary review of the various provincial zoo licensing regimes suggests that Ontario does indeed lag behind most other provinces in Canada in regulating captive wildlife. Almost all of the other provinces have more comprehensive and stringent standards than Ontario. In fact, every other province, except for British Columbia, regulates both native and exotic wildlife in captivity. A few jurisdictions even set out specific standards by species or groups of species. Most provinces impose far more detailed standards with respect to enclosure size (including height, surface space and volume), design (including materials, landscape features, shelters and equipment), diet, sanitation, veterinary care, and security requirements (such as guardrails, moats, barrier or perimeter fences, locks, and double-gated entrances for dangerous animal exhibits).

There are clearly large regulatory gaps (and overlaps) in Ontario's zoo licensing regime, including the regulation of exotic species, public safety and animal welfare. For example, MNR stated that general animal welfare does not fall within its mandate, but rather, within the mandate of MCSCS. However, MCSCS (through OSPCA) deals with cases of animal cruelty, i.e., the deprivation of food, water, or

shelter, or the violent abuse or neglect of an animal; it does not, as MNR itself acknowledged, set out general standards or licensing requirements to ensure the general well-being of captive animals, i.e., set out standards for stimulation, enrichment and quality of life.

The ECO believes that, for the protection of wildlife, the environment and the public, there must be one key agency responsible for *all* aspects of zoo regulation, and that agency should be MNR. There is strong support for the argument that MNR has the authority and mandate to regulate all aspects of zoo licensing. In 2002, the Ontario Court of Appeal stated: "Concerns regarding animal welfare… fall squarely within the policy and objectives of the *FWCA*." As the *FWCA* is administered by MNR, this provides a strong legal basis for the claim that MNR is responsible for regulating the general welfare and well-being of wildlife in captivity. In fact, MNR seems to have accepted this responsibility to regulate animal well-being by imposing a zoo licence condition regarding the size of enclosures and by including animal welfare provisions in its draft zoo standards.

Similarly, MNR has established precedents in regulating exotic species, despite its assertions that this is not within its mandate. In December 2004, MNR amended O. Reg. 665/98 (Hunting) under the *FWCA* making it illegal to hunt all wildlife in captivity, not just native captive wildlife. In the Registry decision notice, MNR stated that this amendment was to provide "more equitable treatment of native and non-native wildlife" (*EBR* Registry Number RB04E6010). In addition, the *FWCA* includes provisions concerning the release, escape and recapture of both native and non-native captive wildlife. Further support is also provided by a 1992 provincial coroner's inquest, in which the jury recommended that the province create legislation to regulate the licensing of exotic animals.

Finally, the ECO believes that a comprehensive zoo licensing regime must include security standards for the purpose of preventing captive wildlife escapes. The prevention of wildlife escapes to protect animals living in the wild and the environment is clearly within MNR's mandate. Moreover, it should be considered an important goal for MNR, especially given MNR's objective to stop the spread of invasive species. The only security requirement currently imposed under the *FWCA* is that a person who keeps wildlife in captivity "shall ensure that it does not escape." Specific security standards would provide zoo owners with necessary guidance on how to achieve this goal and would enable MNR to better enforce this requirement. It would also provide the additional benefit of addressing many public safety concerns at the same time.

Review of Application R2005017
Designation of the Algonquin Forestry Authority Act under the EBR
(Review Denied by MNR)

Background/Summary of Issues
Algonquin Provincial Park is the only provincial park where commercial logging is still allowed despite decades of protests by environmental groups, such as the Wildlands League, and members of the public. Prior to 1974, more than a dozen companies held licences to cut timber in the Park. However in 1974, those licences were transferred to the Crown agency, the Algonquin Forest Authority (AFA), created under the *Algonquin Forestry Authority Act* (*AFAA*) for the purpose of managing forestry operations in the Park. The *AFAA* provides direction to the *AFA* in matters related to its governance, finances, priorities, principles and forest management obligations. In 2002/2003, the AFA sold forest products worth $25.4 million; in fact, Algonquin Park timber accounted for approximately 40 per cent of the volume harvested from Crown forests in central and eastern Ontario. Logging is allowed in approximately 78 per cent or 534,000 hectares of the Park and over 8,000 kilometres of road (which is farther than

traveling from the east coast of Canada to the west coast) have been built using gravel excavated from within the Park to accommodate the heavy equipment used by the loggers. The remaining 22 per cent of the Park includes areas used for recreation and park facilities, and areas protected due to the presence of significant historical, natural, earth or life science features.

In October 2005, applicants used the *EBR* to request that the Ministries of Natural Resources (MNR) and of the Environment (MOE) conduct a review of the need to prescribe the *AFAA* for the following sections under the *EBR*:

- s. 16 would require proposals for regulations under *AFAA* to be subject to public notice and comment.
- s. 19 would require MNR to classify proposals for instruments issued under the *AFAA*.
- s. 22 would require proposals for classified instruments to be subject to public notice and comment.
- s. 61 would allow the public to request reviews of the need to amend, repeal or revoke the *AFAA*, and associated policies, regulations or instruments.
- s. 74 would allow the public to request investigations into potential contraventions of the *AFAA* and associated regulations and classified instruments.
- s. 105 would provide protection against employer reprisals.

The *AFAA* is one of several statutes that provide overall direction regarding activities undertaken in the Park. Park management operations are regulated under the *Provincial Parks Act* (*PPA*) and forestry operations are required by the *AFAA* to comply with the *Crown Forest Sustainability Act* (*CFSA*). Under the *PPA*, the Algonquin Park Management Plan was first developed in 1974 and its last major review and update occurred in 1999. Under the *CFSA*, the Algonquin Forest Management Plan was developed. Additional direction is provided to MNR by the Declaration Order MNR-71 regarding the Class Environmental Assessment Approval for Forest Management on Crown Lands. Declaration Order MNR-71 includes requirements related to the forest management planning process, road building and public advisory committees. Lastly, the Algonquin Park Forestry Agreement between AFA and MNR provides additional direction regarding the forest management activities of both parties and identifies the wood supply contracts that AFA is required to fulfil.

Forestry in Algonquin Provincial Park from 1893 to 1974

Algonquin Provincial Park – the oldest park in Ontario – was created in 1893 "as a public park and forest reservation, fish and game preserve, health resort and pleasure ground" by the *Algonquin National Park Act* (*ANPA*). Logging was allowed to continue after the Park was created but settlement, in particular, agriculture, was not. Tree cutting, agriculture and fire in southern Ontario had resulted in the widespread removal of trees and had contributed to increasing incidents of drought, erosion and the spread of sand dunes by the late 1870s. As Ontario's population grew in the late 1800s, there was increased pressure to cut and burn the vast forests in the area that was to become Algonquin Park to support agriculture. The *ANPA* ended that possibility. It also limited timber cutting to pine – the only commercially valuable wood at the time and an important source of future revenue for the Park. However, in response to protests from loggers, *ANPA* was amended in 1900 to allow loggers to also cut spruce, hemlock, birch, cedar, black ash, and tamarack.

Over the next few decades, some indiscriminate logging activities that affected the scenic and recreational values of the Park spurred park management to develop a shoreline protection policy in the1930s to give primacy to scenic values over timber rights. The policy required loggers to leave a 300-foot strip of trees along lakes and roads and 150-foot strip along rivers and portages so that recreational users had scenic views. However, by the 1960s, the mechanization of logging required operators to build a durable road network in the Park and allowed timber to be removed year-round creating new opportunities for conflict with recreational users. In 1974, after more than a decade of public pressure, MNR limited logging

activities to specific areas (called the Recreation-Utilization zone) in the Park, created the AFA and transferred the timber licences to the AFA. In return, MNR agreed to supply, through the AFA, the companies with timber based on what the Park's forest could provide sustainably.

Provincial Park Management
In 1954, the *PPA* replaced the *Parks Act* of 1913 and established Ontario Parks, a department within MNR, to administer the park system. Since 1967, parks have been classified into one of six classes and have been required to prepare management plans, if requested, according to the objectives and permissible activities defined for their classification. Algonquin Park was classified as a natural environment park, which means that it has "outstanding recreational landscapes with representative natural features and historical resources to provide high quality recreational and educational experiences." Along with the classification system, a zoning system was also introduced in recognition that areas within a park may have different objectives and permissible activities. For instance, although commercial forest operations are generally prohibited in natural environment parks, such operations are permitted in the Recreation-Utilization zone but not in the other zones of Algonquin Park . Low-intensity recreational activities, such as canoe-tripping, are also allowed in the Recreation-Utilization zone. The *PPA* requires that parks be managed for the "healthful enjoyment and education" of the public and "be maintained for the benefit of future generations." The *PPA* does not require parks to be managed to preserve or restore ecological integrity.

The public has the full range of *EBR* rights with respect to the *PPA*, its regulations and proposals for environmentally significant policies under the *PPA* including the right to file applications for investigation and for review. The public is also notified of and invited to participate in park planning activities through the Registry.

Forestry on Crown Lands – Crown Forest Sustainability Act and Declaration Order MNR-71
Forestry operations on Crown land are administered by the Forests Division of MNR and regulated under the *CFSA*. The *CFSA* was established to protect the long-term health of Crown forests and requires that forest management plans be prepared in accordance with the Forest Management Planning Manual (FMPM). The FMPM outlines a five-stage planning process that includes multiple opportunities for public participation and public notice and comment through the Registry. Forest management plans must:

- Provide for the sustainability of Crown forests; and
- Have regard to the plant life, animal life, water, soil, air and social and economic values, including recreational values and heritage values of Crown forests.

Although the *CFSA* has a general provision that exempts Crown forests in provincial parks from its requirements, the *AFAA* requires forestry operations conducted in Algonquin Park by the AFA comply with the *CFSA*.

The public has the full range of *EBR* rights with respect to the *CFSA,* its regulations and proposals for environmentally significant policies including the right to file applications for investigation and for review. The public does not have the right to public notice and comment under s. 22 of the *EBR* for the type of forestry licence issued to the AFA – the Forest Resource Licence.

The Declaration Order MNR-71 gives direction to MNR on numerous matters related to forest management including the planning process, monitoring of operations, annual reporting and public consultation. Since the Declaration Order is considered to be a regulation under the *EBR*, the public has the full range of *EBR* rights with respect to the Declaration Order. (For additional information regarding this Declaration Order and the ECO's review, refer to the ECO 2003/2004 annual report, pages 94-99.)

Forestry in Algonquin Provincial Park from 1974 to 2005
As of May 2006, AFA holds a Forest Resource Licence issued by MNR under s. 27 of the *CFSA* and is required to conduct forest operations including self-inspections according to the terms defined in the Algonquin Park Forestry Agreement. AFA's responsibilities include timber cutting, forest management, silviculture, pest management and maintenance of public access roads. It also has responsibility for monitoring compliance with its Forest Management Plan and all applicable legislation, manuals and guidelines. Inspections are conducted by the AFA and also by staff of Ontario Parks. In 2004/2005, AFA conducted 318 forest operations compliance self-inspections.

The Agreement requires MNR to provide five-year licences to the AFA for a 20-year period that started in 1997. The Agreement also requires AFA to supply specified volumes of lumber to specified companies during the five-year period. The Park's Superintendent is designated as the MNR District Manager for the purposes of the *CFSA* and is responsible for ensuring that forestry operations in the Park are conducted in accordance with the *CFSA*. In 2004/2005, Ontario Parks' staff conducted 77 forestry operations compliance inspections.

Algonquin Forestry Authority Act
The *AFAA*, which has been amended three times, contains 18 sections:

- s. 1, 2 – defines terms used in the *Act*, assigns MNR responsibility for the administration of the *Act* and makes the *CFSA* applicable to Algonquin Park.
- s. 3 – creates the Crown corporation without share capital, the AFA.
- s. 4, 5, 6, 7, 8, 10 – outlines rules applicable to the Board of Directors and employees of the AFA related to staffing, benefits, powers and liability.
- s. 9(1)(a) – designates the AFA as the agency responsible for harvesting timber and producing logs in Algonquin Provincial Park and for sorting, selling, supplying and delivering the logs according to the requirements defined in the *CFSA*.
- s. 9(1)(b) – requires the AFA to "perform, undertake and carry out such forestry, land management and other programs and projects" as may be requested by the Minister, MNR.
- s. 9(4) – authorizes the Minister, MNR, to set objectives for the AFA, i.e., production and operational objectives regulating the flow of logs, social objectives that maintain or improve employment levels in the forest industry, and financial, commercial and economic objectives ensuring reasonable prices for logs and rate of return on the capital invested in the AFA.
- s. 11(1) – requires that MNR ensure that the Algonquin Park Management Plan balances the public interest in maintaining and improving the quality of the park for the purpose of recreation and in providing a flow of logs from the Park.
- s. 11(2) – requires that the Algonquin Park Management Plan comply with the requirements defined for forest management plans in the *CFSA*. In July 2006, MNR advised the ECO that "timber supply commitments…are only undertaken when the land use planning direction permits this activity (e.g., permitted in the park management plan).
- s. 11(3) – requires the AFA to act in accordance with the intent and spirit of the Algonquin Park Management Plan and with regard for the aesthetics, ecology and all other qualities of the environment.
- s. 12, 13, 14, 15, 16 – authorizes MNR to make grants and loans to the AFA and establishes rules related to the management of these monies.
- s. 17, 18 – requires the AFA to submit an annual report that includes a description of its operation and a copy of its audited financial statement to the Legislative Assembly.

There are no regulations under the *AFAA*. The specific terms and conditions regarding forest and harvest operations in the Park are defined in the Algonquin Park Forestry Agreement, which, according to MNR, is similar to a Sustainable Forestry Licence issued under s. 26 of the *CFSA*. Additional requirements are defined in the Forest Resource Licence issued under s. 27 of the *CFSA*. Instruments issued under sections 26 and 27 of the *CFSA* are not prescribed under the *EBR*. Although the *AFAA* has no offence clauses, the *CFSA* and other environmental legislation are enforceable in the Park.

EBR Rights related to AFAA and Crown Agencies
When the *EBR* was implemented, MNR decided against designating the *AFAA* for any of the public participation rights under the *EBR*. Therefore the public has only the right to be notified of and to comment on proposals to amend, revoke or repeal the *AFAA* that, if implemented, could have a "significant effect on the environment." Under s. 14 of the *EBR*, MNR is required to consider the following factors in determining the environmental significance of a proposal:

- The extent and nature of the measure that might be required to mitigate or prevent any harm to the environment that could result from a decision whether or not to implement the proposal.
- The geographic extent, whether local, regional or provincial, of any harm to the environment that could result from a decision whether or not to implement the proposal.
- The nature of the private and public interests, including governmental interests, involved in the decision whether or not to implement the proposal.
- Any other matter that the minister considers relevant.

Proposals that are "predominantly financial or administrative in nature" are exempt from the requirements of the *EBR*. Since the *EBR* was implemented, the *AFAA* has had one significant amendment, which was not posted on the Registry. In 2002, the *AFAA* was amended to require the Algonquin Park Management Plan to comply with the *CFSA* and to require the AFA to conduct its activities in compliance with the Algonquin Park Management Plan.

Crown agencies are generally not required to prepare Statements of Environmental Values or to post environmentally significant proposals on the Registry. However, Crown agencies are required to apply for approvals for instruments that are designated under the *EBR*, such as permits to take water and certificates of approval, in order to conduct their activities and the ministries responsible for issuing the approvals are required to post these proposals for public notice and comment on the Registry unless they relate to undertakings under the *EAA*. Crown agencies can also be investigated by the relevant ministries for alleged violations of applicable Acts, regulations and approvals. For instance, the AFA has been found to be in non-compliance with relevant agreements and legislation by Ontario Parks and has paid penalties and been issued warning letters.

Summary of Issues
The applicants noted that the *AFAA* grants the AFA the authority to "permit and regulate commercial forestry operations in Algonquin Provincial Park." Since forestry operations have significant effects on the environment, the applicants argue that the *AFAA* is an environmentally significant Act and should be prescribed under the *EBR*. The applicants also reasoned that the Statements of Environmental Values of the Ministries of Natural Resources and the Environment indicate that their decisions must be consistent with an ecosystem approach and protection of significant natural heritage features and landscapes. Finally, the applicants noted that the *AFAA* does not require a "periodic review of the impact of logging on the ecosystem integrity within the Park" and that other statutes regulating forestry, such as the *CFSA*, have been prescribed under the *EBR*. In support of their request, the applicants attached a copy of the Forest Management Plan Summary for Algonquin Park.

Application Handling
In early November 2005, the ECO followed past precedent and forwarded the application to MOE for review since it is responsible for administering O. Reg. 73/94 under the *EBR* – the regulation that would need amending if the *AFAA* were prescribed under the *EBR*. The ECO also sent a copy of the application to MNR for its information. MOE advised the applicants a few days later that it had received the application. In early December, MOE advised the ECO that it would be forwarding the application to MNR since MNR was in a better position to assess if the *AFAA* met the criteria for designation under the *EBR* and since MNR would be the most affected if the *AFAA* were designated. In mid-January 2006, MNR accepted the application and in late January the ECO formally forwarded the application to MNR for review.

Ministry Response
In late March 2006, MNR denied the applicants' request for review. MNR contended that the *AFAA* is predominantly administrative in nature and other statutes that apply to the Park and forestry operations in the Park, i.e., the *CFSA*, *PPA* and *Environmental Assessment Act* (*EAA*), are environmentally significant and are already prescribed. MNR reasoned that these Acts and related regulations, policies and guides already address "the public interest in sustainable forest management activities" in the Park.

MNR noted that its SEV identifies several desired outcomes including economic development of natural resources, orderly planning and management of natural resources, and the protection of significant natural heritage features and landscapes. MNR advised that it is required by its SEV and the *PPA*, *CFSA* and the *EAA* to balance "protection and consumption objectives associated with the management of protected areas and Crown forest lands." MNR believes that this is achieved through the existing park and forest management planning processes, and added that the Algonquin Park Forest Management Plan, developed under the *CFSA*, must comply with the Algonquin Park Management Plan, developed under the *PPA*, and together they protect the significant features and landscapes in the Park.

MNR concluded that there would be no or negligible harm to the environment if it doesn't undertake the review. Any potential for harm is already addressed by other legislation that is already prescribed and requires public participation. The AFA must conduct its operations consistent with the *PPA* and relevant policies and the Algonquin Park Management Plan, *CFSA* and relevant policies and manuals, Class Environmental Assessment for Provincial Parks and Conservation Reserves and the Declaration Order MNR-71 regarding the Class Environmental Assessment Approval for Forest Management on Crown Lands in Ontario, the ministry wrote.

MNR advised that the AFA holds a Forest Resource Licence issued under the *CFSA* that requires it to prepare a forest management plan, and to conduct environmental inventories and other activities according to approved forest manuals. The AFA must also submit compliance reports and prepare a forest compliance plan. Since the AFA has received ISO 14001 certification and is working towards its Canadian Standards Association forest certification, systems are in place or will be in place that provide additional environmental oversight on forest management activities in the park. Lastly, MNR reasoned that there has been a "long and distinguished history" of scientific and forest research in the Park that has been incorporated into park and forest management planning processes and that ensure the Park and its forests are effectively managed.

MNR also denied the review on the basis that forest management activities in Algonquin Park are subject to periodic review and public consultation through park and forest management planning processes. MNR noted that the *PPA* is prescribed under the *EBR*, and that the Algonquin Park Management Plan, the *PPA* and the Provincial Parks Planning and Management Policies (which include the zoning policy that allows logging) were all developed with multiple opportunities for public participation. Similarly, the *CFSA* and relevant policies and manuals are subject to the requirements of the *EBR*. Proposals for forest

management plans require extensive public consultation with opportunities provided during each of the five planning stages. The Registry is used to notify the public of these opportunities. Furthermore, a Local Citizen's Committee has been established and assists with the development of the forest management plan. Lastly, MNR notes that all forest management guidelines are reviewed every five years as required by the Declaration Order. MNR advised the applicants that they could propose an amendment to an area-specific land use policy through the Crown Land Use Policy Atlas and associated planning processes.

MNR also denied the review on the basis that the governance structures of the AFA are reviewed on a regular basis by MNR and that the AFA must table an annual report to the Legislature each year. MNR noted that the ministry reviews the Algonquin Park Forestry Agreement every five years. In addition, the AFA is subject to an Independent Forest Audit every five years during which time the public has an opportunity to raise issues. The next audit will review the period 2002 - 2007.

MNR concluded by stating that sustainable forest management is a requirement of the Recreation-Utilization zone in Algonquin Park.

ECO Comment

The legislative framework that governs forestry operations in Algonquin Park is a series of inter-connected components that includes the *PPA* and *CFSA* and related policies and manuals, the *EAA*, the *AFAA*, AFA's Forest Resource Licence, the Algonquin Park Forestry Agreement, contracts with the local forestry companies and the Crown Land Use Atlas. The *AFAA* is the piece of the framework that designates the AFA as the agency responsible for harvesting timber in Algonquin Park. As noted by MNR, the environmental significance of logging policies on Crown land have been recognized and decisions regarding these policies are subject to the requirements of the *EBR*. However, MNR has not recognized the environmental significance of the Act that implements logging policies in Algonquin Park, nor has it prescribed the Act under the *EBR*. The ECO disagrees with MNR's decision that the *AFAA* is "predominantly administrative" since the act requires that the AFA comply with the *CFSA* and the Algonquin Provincial Park plan, both of which have environmental significance. As a result, the ECO believes that the *AFAA* should be prescribed for the full rights under the *EBR*.

The ECO agrees with MNR that the statutes and many of the policies that provide overall direction to the AFA are periodically reviewed and are prescribed under the *EBR*. However, more specific direction is provided in AFA's Forest Resource Licence and the Algonquin Park Forestry Agreement, both of which are exempted under the *EBR*. As a result, the public does not have the right to be notified of or to comment on proposals for either of these instruments, and does not have the right to submit applications for review or investigation.

The ECO believes that the Forest Resource Licence issued to AFA and the Algonquin Park Forestry Agreement are unique instruments that should be given special consideration under the *EBR*. They are the only forestry-related approvals that apply in a provincial park. Furthermore, the public and the local communities have expressed a keen interest both for and against logging in the Park for many decades. In keeping with the spirit and the purpose of the *EBR*, the ECO believes that both of these instruments are environmentally significant and should be designated for public notice and comment under the *EBR*, and be subject to applications for review and investigation.

Although MNR failed to respond to the applicants' concern that the *AFAA* does not require a "periodic review of the impact of logging on the ecosystem integrity with the Park," the ministry has recognized that the ecological integrity of provincial parks is an issue deserving attention. In June 2006, the Ontario Legislature passed into law the *Provincial Parks and Conservation Reserves Act.* This new law requires parks to be managed in a manner that maintains ecological integrity as a first priority and requires that an assessment of the " threats to ecological integrity" be done every five years.

Handling of Application
The handling of this application highlights a challenge to the implementation of the *EBR* that resulted in a delay in providing the applicants with a response. Under s. 62 of the *EBR*, the ECO is required to forward applications for review to the ministry that the ECO considers to be the most appropriate to review the matters raised in the application, which is normally the ministry responsible for the administration of the subject Act or regulation that would need amending. In this particular case, the ECO forwarded the application to MOE since it administers the regulation that designates Acts under the *EBR*, O. Reg. 73/94.

A prior review of a request to prescribe the *Fish & Wildlife Conservation Act* for applications for review under the *EBR* was handled in this way in 2003 (for additional information, refer to the ECO 2003/2004 annual report, page 134).

MOE initially accepted the review but, in early December 2005, insisted that MNR conduct the review. The ECO agrees with MOE that it is not always in the best position to review an existing Act administered by another *EBR* ministry for designation under the *EBR*. The ECO notes that, when the *EBR* was first being implemented, reviews for designation of Acts under O. Reg. 93/94 were conducted by the ministry that was responsible for the administration of the subject Acts. In this particular case, MNR would have been responsible for reviewing the *AFAA* for designation when the *EBR* was implemented and eventually agreed (three months after the application was accepted by MOE) to consider the review in response to the 2005 request. To ensure a more timely response to the applicants in the future, MOE and MNR have advised the ECO that they will develop a protocol for addressing these types of applications in a timely manner.

Debate Needed
Algonquin Park represents some of the best and most beautiful natural heritage in Ontario. Park and forest management plans have kept logging activities out of the sight and hearing of most recreational visitors but not necessarily the more adventurous visitors. However, the zones where logging is banned are merely "islands" within the Recreation-Utilization zone. Furthermore, logging roads that provide access into the heart of the Park are a corridor for invasive alien species and increase the risk to sensitive Park features such as the interior trout lakes and the endangered wood turtle. Despite the threat that logging poses to achieving ecological integrity, MNR plans to continue to allow commercial forestry operations in Algonquin Park. However, the ministry is considering a public review of the management of the Park and is seeking advice on how to "lighten" logging's footprint. The ECO urges MNR to proceed with a comprehensive public review of its policy to allow logging in the Park and to consider how the proposed park management objective of ecological integrity would be achieved if the ministry continues with this policy.

MINISTRY OF NORTHERN DEVELOPMENT AND MINES

Review of Applications R2005005, R2005006, R2005007, R2005008: *Comprehensive Land Use Planning in the Northern Boreal* (Review Denied by MNR, MNDM, ENG; Response Pending by MOE)

Background/Summary of Issues

In September 2005, Sierra Legal Defence Fund (SLDF) filed an application for review on behalf of the Wildlands League requesting that several ministries consider the need to create a comprehensive land use planning system for northern Ontario. The applicants asserted that a wide array of evidence suggests that landscape level planning is needed in advance of resource development decisions in Ontario's Northern Boreal region. The application for review was sent to the Ministry of the Environment (MOE), the Ministry of Natural Resources (MNR), the Ministry of Northern Development and Mines (MNDM), and the Ministry of Energy (ENG).

Ontario's boreal forests begin just north of the Great Lakes. The boreal forests to the north of the 51st parallel have global significance, identified by the World Resources Institute as remaining frontier forests, relatively unimpaired by development. The United Nations Environment Programme recognizes this region of Ontario as one of the world's remaining significant 'closed canopy' forests. The Northern Boreal comprises approximately one-third of Ontario's land-base at almost 400,000 km^2 – an area equivalent to New Brunswick, Nova Scotia and Prince Edward Island combined. SLDF and the Wildlands League contend that the current lack of policy with respect to comprehensive land use planning puts this area at risk of irreversible environmental harm. The applicants assert that the Northern Boreal contains:

- one of the last strongholds of species-at-risk, such as woodland caribou and wolverine. These species are wide-ranging, require large habitat areas and have demonstrated sensitivity to human disturbances, such as industrial activity;
- habitat for populations of commercially important furbearer and game species, such as beaver, American marten and, moose, and crucial breeding habitat for countless songbirds and waterfowl;
- wild river and lake systems supporting more than 60 species of fish, including many that sustain subsistence and fly-in fisheries in the region;
- large intact watersheds that are critical to maintaining healthy, clean sources of water for local communities and all citizens of Ontario;
- traditional land use areas, beyond that of reserve land, of at least twenty eight First Nations;
- the full complement of biodiversity existing in the region for approximately the last 8-10,000 years;
- valuable ecosystem services, including filtration, soil, nutrients, store carbon, produce oxygen, control flooding and erosion, support species, mitigate climate change; and
- natural capital that supports an internationally significant wilderness tourism industry.

SLDF and the Wildlands League believe that MNR's on-going Northern Boreal Initiative (NBI) does not address all of the planning issues at hand, as it only covers a small portion of the area in question and it is primarily focused on commercial forestry activities. Further, the applicants contend that the NBI does not address landscape level planning and MNR does not have jurisdiction over all of the possible development projects which include, but are not limited to, roads, coalbed methane exploration, mineral staking and prospecting, hydro generation projects and transmission corridors for electricity. As illustration of some of their concerns, the applicants took issue with the "piece-meal" approval process for the Victor Diamond Mine near Attawapiskat.

The applicants note that planning rules do exist for other areas of Crown land, such the Declaration Order regarding MNR's Class Environmental Assessment Approval for Forest Management on Crown Lands in Ontario. However, this Declaration Order does not extend into the Northern Boreal.

MNR's Northern Boreal Initiative (NBI) was established in 2000 in response to the expressed interest of several First Nations communities in developing commercial forestry opportunities. It was intended to address community-led planning for potential forestry operations in the area approximately 150 kilometers north of the current Declaration Order. In part, NBI was initiated due to the Ontario Forest Accord which was an agreement signed by MNR, the forest industry and a coalition of environmental groups in 1999. One of the commitments of the Forest Accord was to open up these northern lands to commercial forestry as quickly as possible, subject to the full agreement of affected First Nations communities, approval under the *Environmental Assessment Act*, and with the regulation of new protected areas.

SLDF and the Wildlands League believe that a comprehensive land use strategy must include proper engagement of First Nations communities in the Northern Boreal and the public-at-large, environmental assessments of each project, proper land use planning with consideration of the ecosystems in question and the designation of protected areas before resource allocations are made. The applicants assert that such a strategy must take an inter-ministerial approach and comprise the following elements:

- compliance with the Statements of Environmental Values of each ministry;
- ensure the long-term health of ecosystems;
- continued availability of natural resources (planned and managed in an orderly, sustainable and fair way);
- protect natural heritage and natural features;
- employ the precautionary principle;
- respect partnership arrangements;
- properly value resources (including commercial and non-market values);
- improve the knowledge base;
- protect significant features and landscapes;
- rehabilitate degraded ecosystems;
- promote environmentally sustainable development activity which is preceded by sound conservation planning and adequate public input, and gives high priority to environmental protection and minimizes environmental disturbances; and,
- require collaboration with other ministries leading to joint sign-off mechanisms.

The applicants stress that a strategy should address the cumulative impacts of all proposed developments in the Northern Boreal including the impacts of developments already proceeding further south. SLDF and the Wildlands League also argue that landscape-level plans should be complete before any areas are licensed to industry or allocated for development. They believe that land use plans should be required to have large core protected areas, wildlife movement corridors, buffer zones, traditional use areas, protected sacred areas, and areas designated for other uses.

In March 2003, the current Premier, then the Leader of the Official Opposition, promised to "institute meaningful, broad-scale land-use planning for Ontario's Northern Boreal Forest before any new major development, including ensuring full participation by native communities. Land use planning must protect the ecological integrity of this natural treasure and help to provide a sustainable future for native people and northern communities."

Ministry Response

Ministry of the Environment (MOE)

As of May 2006, MOE had not provided a decision to the applicants and the ministry was approximately six months beyond the deadlines prescribed by the *EBR*.

Ministry of Natural Resources (MNR)

MNR denied the application in November 2005, stating that the public interest did not warrant a review for a new comprehensive land use policy in advance of resource allocation decisions being made. The ministry also asserted that the existing environmental assessment approvals and permitting processes are sufficient to address, mitigate, and minimize potential harm to the environment.

The ministry stated that it was responsible for a relatively limited number of approvals with regard to the Victor Diamond Mine. The ministry asserted that these decisions were based on "approved land use planning documents for the region and numerous scientific studies conducted by the MNR and the disposition applicant DeBeers Canada to ensure environmental effects were considered during project evaluation."

MNR stated the Northern Boreal Initiative directs community-based land use planning. The ministry asserts that NBI allows First Nations to take a leading role in land use planning "with an important objective of fostering sustainable economic opportunities in forestry and conservation." MNR claims that this local-level process also "utilizes a landscape-scale approach to ensure that achievements are measured appropriately and that impacts beyond the planning area are adequately considered."

Despite denying the application, MNR stated that it was working on a policy that addressed the concerns raised by SLDF and the Wildlands League. The ministry informed the applicants that "in early 2005 MNR began exploring potential approaches for land use planning in Ontario's far north and has initiated discussions with the first nation treaty organizations and tribal councils, as well as several non-governmental organizations. This exercise is continuing and MNR would welcome discussions regarding the land use planning elements proposed in the review application."

Ministry of Northern Development and Mines (MNDM)

MNDM denied the application in November 2005, stating that the public interest did not warrant a review. The ministry also asserted that it was not the lead ministry for the development of such a strategy, but that it would actively participate with MNR in developing and implementing its approaches to land use planning.

With respect to the applicants' concern regarding the Victor Diamond Mine, MNDM stated that it participated in the review of a Comprehensive Study Environmental Assessment under the *Canadian Environment Assessment Act*. The ministry also stated that three environmental assessments processes occurred for activities related to the mine site, as well the signing of an Impacts and Benefits Agreement between the Attawapiskat First Nation and DeBeers.

The ministry stated that "mining is a temporary land use, and mining regulations ensure that a mine site is rehabilitated to natural, recreational or commercial land uses." MNDM asserted that Ontario's *Mining Act*, along with other permitting processes, ensures that mineral exploration and development endeavours to mitigate the short-term effects of mining on the environment; eliminate the long-term effects of mining on the environment; ensure continuing availability of mineral resources for the long-term benefit of the people of Ontario; and, protect natural heritage and biological features of provincial significance.

Ministry of Energy (ENG)
ENG denied the application in November 2005, stating that the public interest did not warrant a review. The ministry did not specifically address the concerns raised by the applicants, but, rather, it described the numerous regulatory processes that must be followed for new energy projects. ENG also stated that "Ontario must confront a massive shortfall between supply and demand for electricity within the next 15 years" and the solution to this shortfall "will require the consideration of major energy projects." The ministry also stated that "possible northern Ontario energy projects include small hydro projects, wind turbines, and a major new electricity transmission line from northern Manitoba to southern Ontario."

Themes and Links
In our 2002/2003 annual report, the ECO provided extensive commentary on the need for comprehensive planning in northern Ontario. The ECO wrote that "landscape level planning should inform community-by-community decision-making" and that "it is imperative that MNR assess the ecological implications of industrial logging in the northern boreal forest." In that report, the ECO also made two formal recommendations related to resource development in northern Ontario:

- The ECO recommends that the Ministry of Natural Resources conduct gap analyses and develop objectives and targets in order to establish a protected areas network for the Northern Boreal Initiative area as a whole.
- The Ministry of Natural Resources should carry out a thorough assessment of forest management approaches that are ecologically suited to the northern boreal forest and make the research results available to the public.

As of the spring of 2006, the ECO notes that the environmental impacts of permitting forestry in the northern boreal forest have not yet been assessed formally, and will require either approval or exemption under the *EAA*.

ECO Comment
The ECO concurs with the applicants that significant changes should be made to the way in which the Ontario government regulates and plans for the Northern Boreal. The existing approval processes typically operate in isolation from one another and they do not take a comprehensive "big picture" approach. This "silo mentality" does not effectively serve Ontarians nor provide adequate assurances of environmental protection in the path of resource development. The Northern Boreal has a unique and varied ecology that merits the same standard of planning – if not higher – than applies to the rest of the province.

Unfortunately, the ECO is unable to substantively comment on this application as the Ministry of the Environment, which has assumed the lead role in this application, has failed to provide a response within the timelines prescribed by the *Environmental Bill of Rights*. While the ECO acknowledges that the issues raised by the applicants are complex, excessive delays frustrate the public interest and undermine the *EBR*. The ECO is also disappointed that MNR denied this application for review, especially in light of the fact that the ministry is developing new approaches to land use planning in Ontario's far north. The ECO commits to fully report on this application in a forthcoming annual report, following the legally required response by MOE.

SECTION 6

ECO REVIEWS OF APPLICATIONS FOR INVESTIGATION

SECTION 6: ECO REVIEWS OF APPLICATIONS FOR INVESTIGATION

MINISTRY OF ENVIRONMENT

Review of Application I2005001
Alleged EPA, s. 14 Contravention, re: Petroleum Hydrocarbon Emissions
(Investigation Denied by MOE)

Background/Summary of Issues
In May 2005, two residents submitted an application alleging that Petro-Canada (the "company"), a major oil refiner and distributor, was responsible for petroleum hydrocarbon contamination of the property at 267 Government Road in Dryden, Ontario. In their application, the applicants, alleged a contravention of s. 14 of the *Environmental Protection Act*: "Despite any other provision of this *Act* or the regulations, no person shall discharge a contaminant or cause or permit the discharge of a contaminant into the natural environment that causes or is likely to cause an adverse effect."

Further, the applicants alleged that there has been poor follow up by MOE on Provincial Officers Orders written to direct actions to mitigate the contamination problem. Specifically, they pointed to the numerous Provincial Officer Orders (most of which were included in the application) that MOE had issued since 2002 about the contamination at the affected property and alleged that action was not taken in time to comply with any of these Orders by their due date. According to the applicants, some of the Orders were not complied with at all. The applicants alleged that policing and enforcement on the part of the ministry is at best, questionable, since the contamination situation has been allowed to continue since it was first discovered in late 2001.

The effect of MOE's failure to take action against the company was characterized by the applicants in the following manner "[t]his failure to enforce compliance of your orders has created an unsafe environment for one of the applicants and his family." The applicants further alleged that this failure has caused growing financial problems for the family. Finally, the applicants indicated that MOE's reluctance to enforce these Orders could be related to a statement made by MOE in one of its pieces of correspondence to the affected applicant: "that it [the contamination] is being dealt with at a higher level." This presumably was meant to refer to discussions between MOE and Petro-Canada.

Ministry Response
MOE determined that an investigation was not warranted because the on-site and off-site contamination of the property on 267 Government Road is already subject to ongoing investigation and abatement actions by the ministry. MOE went on to state that Petro-Canada continues to comply with ministry Orders to address hydrocarbon contamination issues.

Detailed Ministry Response:
Site History of 267 Government Road
MOE explained that gasoline vapour was discovered in the basement of a home located at 267 Government Road in Dryden, Ontario on November 2, 2001. The source of the vapour could not be ascertained at that time as this home is located close to a number of properties which either contain or formerly housed operating petroleum bulk plants and/or gas stations. Provincial Officer Orders were issued in December 2001 to those surrounding properties including Imperial Oil Limited, 172965 Canada Limited, Keewatin Patricia District School Board, Husky Energy Inc., and Petro-Canada, to assess the source of the contamination. A review of the hydrogeological reports submitted as required by these

orders, was conducted by MOE's Technical Support Section in Northern Region. The review identified that a liquid petroleum hydrocarbon source on the properties at Husky Energy Inc. and Petro-Canada had entered the groundwater regime, migrated off-site and contaminated neighbouring lands. As a result of these findings, individual Director's Orders were issued on February 4, 2003 to Petro-Canada and Husky Oil Limited. These orders required both parties to submit remediation plans that would delineate and monitor the extent of the liquid phase hydrocarbon contamination and address its removal from each of their properties. Through numerous reviews of reports and correspondence conducted by MOE's Technical Support, Northern Region, it was determined that the Petro-Canada site at 274 Government Road was the most likely source of the contamination. As of 2005, Husky Oil Limited is only required to submit a monitoring report to the ministry each calendar year.

MOE's Account of Orders Written
As noted above, the ministry determined that the most likely source of the contamination of the Dryden residence at 267 Government Road was Petro-Canada and that soil and groundwater contamination was present on properties surrounding the residence. MOE said that, since 2001, the ministry has been working and continues to work with the resident, the local fire department, Petro-Canada and the Northwestern Health Unit to resolve the hydrocarbon contamination issue in Dryden. Between 2001 and May 2005, nine Provincial Officer Orders and/or Director's Orders were issued to Petro-Canada related to the affected property.

All nine of these Orders issued to Petro-Canada included a requirement to provide clean air in the residence at 267 Government Road. This included an installation of a ventilation system and gas alert monitors. These orders were issued to temporarily eliminate hydrocarbon fumes until the source of contamination can be removed. MOE asserted that all Provincial Officer Orders and/or Director's Orders issued to date relating to vapours and the ventilation system have been complied with by Petro-Canada.

Five of the nine Provincial Officer Orders and/or Director's Orders issued to Petro-Canada required them to submit to the ministry an action plan to delineate the extent of contamination at the property on 267 Government Road. The action plan was submitted on August 10, 2004, approved by the ministry August 17, 2004, and revised and approved on December 15, 2004, for implementation. MOE reported that agents of Petro-Canada were not allowed full access to the affected property, by the owner of the property, to enable them to delineate the contamination. Consequently, the ministry revoked all Orders that required delineation of the hydrocarbon contamination at the affected property. On June 13, 2005, a new Provincial Officer Order was issued to Petro-Canada requiring them to prepare and submit an action plan with timelines to address all on-site and off-site petroleum contamination that originates from the Petro-Canada property nearby at 274 Government Road.

MOE also noted that the ministry has encouraged agreement and cooperation between the resident and Petro-Canada, including matters of access. The ministry continues to work with Petro-Canada and the resident to move towards environmental compliance. All of the requirements of the Provincial Officers' Orders and/or Director's Orders related to 267 Government Road issued to Petro-Canada, where the resident allowed access, have been met. These Orders were issued to prevent an adverse effect or eliminate the likelihood of an adverse effect resulting from the discharge of a contaminant into the natural environment from or on the property. In addition, Petro-Canada is currently conducting monitoring of groundwater and vapours annually as required by the Director's Order issued on February 4, 2003, until the site is restored.

It should also be noted that, early in the process (2002), MOE suggested in a letter to the affected resident that legal action was an option: "Lastly, the affected property owner may also choose to seek damages in civil court from the responsible party or parties."

ECO Comment
The fact that nine Provincial Officer or Director's Orders needed to be issued over several years in order for remedial action to proceed on a matter as significant as hydrocarbon contamination of a residence is troubling. In this case, fumes could be smelled and measured in the basement of the affected applicant — an obviously serious health and safety matter. Furthermore, most of the work flowing from MOE's Orders to date has involved monitoring and ventilation of the residence, as opposed to site cleanup.

The ECO notes a large discrepancy between the applicants' and MOE's accounts about how effective the Orders have been at eliciting action. Contrary to the view of the applicant, MOE reported that the alleged contravener complied with all of the Provincial Officer Orders and Directors Orders issued against the alleged contravener relating to ventilation of fumes (other Orders, for the delineation of contamination, were revoked: MOE stated that the company's agents have been denied access to the affected property to carry out this function). The applicants feel the alleged contravener should have been charged for failure to comply with some of these Orders. As of spring 2006, MOE reports that the company is preparing to commence whatever cleanup it can conduct on lands surrounding but not including the affected residence.

This case is a reminder that regulatory, operating and technical measures to prevent spills are much preferred to measures to remediate after hydrocarbon contamination has occurred. Such soil and groundwater cleanups are often slow, complicated and sometimes only marginally effective. To this end, the ECO believes that the amendments to the *EPA* contained in Bill 133 passed in June 2005, may help prevent similar problems in the future (See page 101 for Bill 133 review). Furthermore, it seems obvious that the land use planning process that sited residences and the petroleum tank farm so close together had a large part to play in allowing these events to occur.

MOE's decision to deny an investigation under the *EBR* is sound: According to s. 77(3) of the *EBR*, a minister is not required to duplicate an ongoing or completed investigation. MOE is ensuring that Petro-Canada continues some degree of monitoring and subsurface investigation which is intended to lead to remediation. Accordingly, the ministry could have provided timelines, key milestones or process end points to give greater assurance to the affected applicant. In the course of an *EBR* investigation, the ministry would normally inform applicants of anticipated completion dates and provide notice of the outcome of an investigation. For this reason, and the fact that this particular contamination situation has been occurring since at least 2002, the ECO would expect greater progress and more certainty. Staff at MOE told the ECO in May 2006, that soil and groundwater remediation (i.e., not just monitoring) should begin in the summer of 2006 – nearly five years since the contamination was first detected. The ECO will continue to monitor progress in this remediation project in the future.

Review of Application I2005002
Alleged EPA Contraventions re: Noise from Institutional HVAC units
(Investigation Denied by MOE)

Background/Summary of Issues
In June 2005, two Ontario residents submitted an application for investigation alleging an adjacent laboratory and research centre was causing noise levels that contravene the *Environmental Protection Act (EPA)*. The applicants live in a house close to the London Biotechnology Commercialization Centre ("the Centre") which is located within the University of Western Ontario's Research Park. Since 2004, the applicants and neighbours have been concerned about noise from several chiller and cooling units installed on the roof of the Centre. The Centre has been operating this equipment under a certificate of approval (C of A) issued by the Ministry of the Environment (MOE) in November 2002. The applicants

alleged that sound was being emitted in contravention of various sections of the *EPA* and that some of the equipment owned by the Centre was not covered by the C of A, contravening s. 9 of the *EPA*.

The applicants claimed that the sound levels from the Centre have been comparable to the continuous operation of a neighbour's power lawn mower heard through the house walls. They state that the noise curtails use of outdoor living areas. The applicants and several neighbours residing on the same street have lodged complaints with MOE and have raised the possibility of a legal suit for damages claiming discomfort, sleep disturbances and health effects which they have experienced for at least 2 years.

In September 2004, nine months prior to the *EBR* application, one of the applicants wrote to MOE, complaining that the Centre had added new cooling equipment during the summer of 2004, and that this had increased the emitted noise. The applicant examined the existing (2002) C of A and formed the opinion that the new equipment put the Centre out of compliance with its C of A. Subsequent investigation by MOE confirmed the applicant's observations, and in October 2004, the MOE District Officer issued a Provincial Officer's Order ("the Order") to the Centre to apply for an amended C of A by the end of November 2004. The Order also required the Centre to appoint a consultant to carry out a noise study of the area. The Centre submitted a report on the noise study and application for an amended C of A in March 2005. In this application, the Centre specified both the additional equipment installed since 2002, and further equipment that would be installed. In all a total of one chiller unit and six cooling units would be mounted on the roof of the Centre.

An application for an amended C of A was posted on the Registry for a 30-day public comment period in March 2005. In response to the instrument proposal, the applicants submitted comments and noise data collected by them for consideration by MOE in its review of the application.

The applicants corresponded with MOE's district Office and MOE's Environmental Assessment and Approvals Branch (EAAB) representatives on numerous occasions during April and May of 2005, expressing concerns with discrepancies on the new C of A application. EAAB's applications processor visited the site in June 2005 and found that equipment specified on the C of A application had not been installed yet and that some installed equipment was not listed on the application. These discrepancies would make the noise studies previously carried out and reported in March 2005 irrelevant and misleading. At this point, MOE indicated that it was turning the file over to the Investigations and Enforcement Branch (IEB) for further investigation.

It was at this time (June 2005) that the applicants submitted their *EBR* application, apparently frustrated at discrepancies between the two Cs of A, and believing that the Centre's noise study assessments would be therefore misleading. Since the Centre was planning to install additional equipment, the applicants believed that the already unacceptable noise levels would potentially increase even further in the near future.

Provincial and Municipal Rules

The *EPA* provides for the protection and conservation of the natural environment and under s. 14, the discharge of a contaminant that causes, or is likely to cause an adverse effect is prohibited. "Contaminant" is defined to include sound, and "adverse effect" is defined to include loss of enjoyment of normal property use. Under s. 9 of the *EPA*, emitters must not operate equipment to which the Act applies and for which a certificate of approval has not been issued. The unit of sound measurement is the decibel (dB), and it is used to describe ratios between sound intensities. The decibel scale of sound is not linear but logarithmic, so increases in dB along the dB scale are more significant than is obvious. Sound level meters are calibrated to measure dBA, where "A" represents a factor that reflects how the human ear would interpret the sound being measured.

Although there are no regulations under the *EPA* to support the inclusion of sound as a contaminant discharge, MOE has produced and applies two sets of guidelines relating to noise limits; one of these applies to stationary sound sources in rural and urban areas. The other set provides criteria for the assessment of noise which can be applied in land use planning situations. These two sets of guidelines replaced an earlier Model Municipal Noise Control By-Law published by MOE in 1978 and intended to provide guidance to municipalities in development of noise control by-laws. London has a noise by-law, but it does not specifically address existing continuous sources of noise from mechanical installations, and in fact, only addresses a limited number of noise sources.

MOE has no policies or guidelines to assist with strategies for mitigation of existing noise affecting land uses. The guidelines on noise limits are therefore generally used to define "acceptable" noise levels in situations such as those raised by the applicants. The criteria indicate that a limit of 55 dBA should be met for outdoor living areas of residential land use during the daytime period of 7:00 a.m. to 11:00 p.m. MOE says that it does not consider that there is a potential for "adverse impact" as mentioned in the *EPA* until noise assessment shows more than a five dBA increase above the 55 dBA limit.

Ministry Response
In August 2005, MOE Operations Division responded to the applicants. The letter indicated that because the ministry was conducting investigations and taking action related to previous complaints from the applicants that were raised prior to their *EBR* application, it would not be conducting a separate *EBR* investigation. The ministry did, however, provide a comprehensive summary of the status of ongoing investigations and findings by ministry staff.

In its response, MOE recognized:

- that the Centre was in fact producing excessive noise levels;
- that the Centre was operating without proper *EPA* approvals;
- wood barriers erected as a temporary measure were inadequate;
- further investigation by the Investigations and Enforcement Branch would be required; and
- an independent acoustic noise assessment would be required.

As a result of its investigations, MOE decided that the application for an amended C of A would be put on hold until further assessment and abatement plans were completed.

The Centre was granted an amended certificate of approval in November 2005. MOE stated that comments and concerns identified by the applicants and their neighbours, as well as technical concerns raised by MOE staff were all addressed in the amended C of A. As a condition of the C of A, sound absorbing structures and exhaust silencers have been installed around the Centre's equipment, and an independent acoustical audit was required to be carried out as a post-abatement compliance audit. The audit was provided to MOE in March 2006, and as of June 1, 2006 is still being reviewed by MOE acoustical engineering staff.

ECO Comment
Noise discharges to the environment are a fact of life, particularly in urban settings. Land use planning is key to reducing the impact of noise on residential areas. Once noise issues arise, MOE has only general guidelines for abatement, despite the fact that the *EPA* defines sound as a contaminant. The existing guidelines are generally for application in future land use planning work, and not very helpful in mitigation of noise from existing stationary noise sources. The ECO has expressed its concern about this deficiency in previous annual reports (see, e.g., the ECO 2003/2004 annual report supplement, pages 322 - 326), given that local land use planning methods are sometimes deficient at providing adequate buffers

for sound, and that the *EPA*'s inclusion of sound as a contaminant creates an expectation by the public for ministry guidance and enforcement.

MOE's handling of this application was reasonable, given that the applicants' concerns had already been brought to MOE's attention and a separate non-*EBR* investigation undertaken. MOE staff have maintained a reasonably close liaison with the applicants as they have worked to resolve the noise problems associated with the Centre's noise emitting equipment. Although MOE's management of this issue was generally commendable, the time frame over which the issue has been ongoing is of some concern, given the apparent impact of excessive noise on the neighbourhood's residents for nearly two years.

The applicants were diligent in their pursuit of the information needed to document discrepancies between the listed equipment on the 2002 certificate of approval and what the Centre had actually installed. In its response to the applicants, MOE acknowledged these discrepancies and took appropriate action for the most part. It is of some concern that no auditing process occurred, through which the deviations from the 2002 C of A would have been identified and addressed. Given the acknowledged excessive sound levels from the site, and the fact that the Centre was not in compliance with its C of A and the *EPA*, MOE could have more strenuously pursued the implementation of mitigating measures, possibly including the reduction in the operation of the roof mounted equipment by the Centre until such time as silencers and other devices were in place.

Review of Application I2005003
Alleged EPA Contravention by PSC Industrial Services Canada Inc.
(Investigation Denied by MOE)

Background/Summary of Issues
In June 2005, the applicants submitted an application alleging that PSC Industrial Services Canada Inc. (PSC), the operator of the Taro East Quarry landfill site (Taro LFS) in Stoney Creek, violated its Certificate of Approval for a Waste Disposal Site (C of A) by accepting domestic waste from the former Rennie Street landfill site (Rennie LFS) in east Hamilton. The applicants advised that condition 26 of Taro LFS's C of A restricts the types of waste received at the site to solid, non-hazardous commercial, institutional and industrial waste including petroleum-contaminated soils and that condition 27 prohibits the deposit of putrescible and domestic waste at the site. The applicants alleged that by accepting domestic waste from the former Rennie LFS, PSC (now owned by Newalta) is in contravention of its C of A. In addition, the applicants alleged that PSC violated s. 40 of the *Environmental Protection Act* (*EPA*) that prohibits the deposit of waste and s. 41 that prohibits the use of a facility "except in accordance with the terms and conditions" of its C of A. In support of their allegations, the applicants provided excerpts of communications in which concerns about the nature of the waste were discussed; and copies of the Taro LFS C of A and the Rennie St. Landfill Excavation Waste Classification and Segregation Plan.

Background
The Rennie LFS is an old dumpsite that operated from the 1950s to the early 1960s. No records were kept about the types of waste that were accepted at the site. Since a section of the Rennie LFS needed to be excavated to allow for the construction of the Red Hill Valley Expressway, site contamination investigations were conducted between 2000 and 2003. (For additional information on the Red Hill Valley Expressway, see the ECO 2003/2004 annual report, pages 141-145.) These investigations suggested that household, industrial, commercial and institutional waste had been accepted at the site. The

Rennie St. Landfill Excavation Waste Classification and Segregation Plan (the "Plan") dated August 2004 indicated that five types of waste were anticipated to be found in the excavated waste:

1) Granular fill and soil including clean fill, road sweepings, crushed concrete and recycled asphalt;
2) Refuse "composed mostly of decaying domestic garbage" that may be odorous;
3) Special waste such as containers of tars, sludges and oil;
4) Other solids such as wood, pieces of concrete and metal; and
5) Leachate that may be odorous.

The Plan indicated that excavated waste would be segregated on-site according to type, and sampled according to the specified frequency (i.e., one sample for every x truckloads of waste) and tested for the specified parameters (e.g., metals and chlorinated pesticides.)

In December 2004, the excavator hired by the City of Hamilton advised the Rennie LFS Community Liaison Committee (CLC) that only the upper granular layer of clean fill would be deposited at the Taro LFS and that the refuse would be shipped to a site approved to accept domestic waste. However, in May 2005, the excavator advised the Rennie LFS CLC that material from the refuse layer consisting of brown compost had also been deposited at the Taro LFS. The excavator noted that the material was tested before it was shipped to the Taro LFS to confirm that it complied with the Taro LFS C of A and that no garbage bags had been found. The Rennie LFS CLC was also advised that some odorous materials had been found during excavation, but that the odour was not detectable a short distance away.

In response to the public's concerns in May 2005, that waste from the refuse layer was being accepted at the Taro LFS, MOE explained that it characterizes waste based on the nature of the waste that is actually excavated not on whether or not it comes from a particular layer of a landfill site or on statements found in previous reports. According to MOE, the excavated waste was non-hazardous and did not exhibit characteristics that would suggest that it was domestic in nature or putrescible (e.g., food wastes) as previously anticipated. MOE advised that its inspector is on-site at the Taro LFS most business days and randomly inspects incoming loads to determine if the load contains household items. The inspector can also conduct a more thorough examination of a load. In response to emails from a member of the Rennie LFS CLC requesting information about the number of loads that are inspected and the criteria that are being used, and an allegation that less than 10 per cent are being inspected, MOE advised that a "significant percentage" of the loads arriving at the Taro LFS are being examined, but refused to be more specific.

Summary of Issues

The applicants were concerned that domestic waste may have been deposited at the Taro LFS – a violation of its C of A and of the *EPA* – and that it will create odour problems for the surrounding residential areas and affect the ability of nearby residents to use and enjoy their properties. In addition, they wondered if MOE deliberately prohibited the deposit of domestic waste at the Taro LFS due to concerns that methane gas and leachate would be generated. The applicants did not know if the Taro LFS had the proper systems in place to handle methane gas.

The applicants also alleged that on May 24, 2005, a constant stream of trucks deposited waste from the Rennie LFS at the Taro LFS in the absence of an MOE inspector and with no apparent testing of the waste.

In June 2005, after the application had been forwarded to MOE, the applicants forwarded a page from a report on the Rennie LFS excavation activities that indicated a small quantity of radioactive concrete had

been found. The report indicated that the level of radioactivity was within safety limits and that an appropriate waste disposal site would be found for the radioactive waste.

Ministry Response
MOE denied the application for investigation on the basis that its inspection program, landfill records and recent on-site sampling did not indicate that prohibited wastes were accepted at the Taro LFS. MOE advised that it had consulted with its Environmental Assessment and Approvals Branch and staff in its Hamilton District Office including the inspector assigned to the Taro LFS, and that it had reviewed the Taro LFS records.

MOE noted that the waste materials excavated from the Rennie LFS "are consistent with industrial waste" accepted at Taro LFS and that, based on its observations, the composition of the waste materials is estimated to be "95 per cent soil materials with the balance being rubber by-products and wood wastes with no significant organic or putrescible materials." MOE noted that it conducts frequent site inspections and that earlier concerns by the community that domestic waste was accepted at the Taro LFS had been addressed in May 2005. According to MOE, the excavated materials were being assessed based on their current characteristics not on presumed characteristics at the time of original deposit in the Rennie LFS. MOE acknowledged that conflicting statements made in the past by various parties and a preliminary assessment that suggested that there was a significant refuse layer at the Rennie LFS provided grounds for the applicants' concerns.

MOE advised the applicants that the C of A for the Taro LFS includes "provisions for a leachate collection system, groundwater, surface water, air, landfill gas and leachate monitoring and contingency plans to address potential leachate or landfill gas impacts." MOE has also provided a full-time ministry inspector who is on-site three to four days a week and who is responsible for conducting inspections and monitoring and sampling activities to verify compliance with the Taro LFS C of A.

For the above reasons, MOE concluded that the C of A for the Taro LFS had not been violated.

ECO Comment
The ministry's response to deny this application for investigation was reasonable. MOE staff has been actively involved in the sampling and testing of waste at both the Rennie and the Taro LFSs. MOE has also participated in some CLC meetings and responded to emails from concerned residents regarding the same issues raised in this application. However, the applicants had reasonable grounds to suspect that domestic waste was being excavated from the Rennie LFS and accepted at the Taro LFS. The Rennie LFS operated when there were few rules regarding the design and operation of a dumpsite and when records of the types of waste accepted at the site were either not kept or not retained. It was reasonable to suspect that the Rennie LFS accepted domestic waste, as did many other dumpsites at the time. However, neither the applicants nor MOE reported finding explicit evidence of domestic waste or identifiable household materials. Although some odorous materials were excavated at the Rennie LFS, it is not clear from the information provided by MOE or the applicants if it was decomposing domestic waste or even if its source was ever determined. The ECO believes that MOE should have provided information regarding the sampling and testing program for the incoming wastes at the Taro LFS. Information such as frequency of sampling and a list of the parameters being analysed may have allayed some of the concerns raised by the applicants.

The ECO agrees with MOE's position that it should rely on current analyses of waste composition rather than historical records to determine if a particular waste should be accepted at a landfill site. However, this approach can be confusing since Cs of A for landfill sites include conditions that describe acceptable wastes in terms of their source, e.g., domestic, industrial, commercial, etc., and in terms of their characteristics, e.g., hazardous, flammable, putrescible, etc. Typically the source and characteristics of

waste that is recently generated are known and documented and landfill site operators and inspectors can determine if both conditions are met. However, records documenting the source of waste deposited at the Rennie St. LFS were unavailable, and the exact types of waste deposited there were unclear. MOE was able to determine that the characteristics of the waste excavated from the Rennie LFS were acceptable under one of the conditions in the Taro LFS C of A, but the ECO believes that MOE relied on the absence of proof that the source of the excavated waste was domestic to conclude that the waste came from an acceptable source and therefore met the other condition. The ECO wonders if the Taro LFS C of A should have been amended to clarify that, in the instance of the waste excavated from the Rennie LFS, the waste would be assessed solely on its current characteristics.

Review of Application I2005004:
Alleged Contravention of the OWRA, re: Leaking Underground Storage Tank
(Investigation Denied by MOE)

Background/Summary of Issues
The applicants asked the Ministry of the Environment to investigate an abandoned fuel depot in Arkona, Lambton County, alleging that fuel leaking from underground tanks is contaminating both surface and groundwater in violation of s. 30(1) of the *Ontario Water Resources Act* (*OWRA*).

The applicants believe that a gas station and bulk fuel depot was in operation from 1944 to 1994, when it was abandoned. The applicants fear that leaking fuels are endangering town water wells and agricultural operations as well as a nearby creek. The applicants recommended that the tanks be removed. They stated that local federal, provincial and municipal politicians have written to the ministry about the problem but that no action had been taken to date. They remarked that both the federal and provincial governments had made financial commitments to clean up contaminated sites. A 1994 report by XCG Environmental Services Inc. was cited as evidence in support of the allegations.

According to the MOE, the 1994 XCG report was prepared for the owner, United Cooperatives of Ontario (UCO). The report identified five buried steel tanks on-site with small quantities of product remaining in each tank, and evidence of a petroleum hydrocarbon plume present on the property and extending easterly towards the highway. UCO declared bankruptcy in 1995 and the bankruptcy trustees provided notice they had no interest in the property in 1996. The bankruptcy trustees are no longer in business.

Ministry Response
The ministry determined that an investigation was not warranted. The ministry said that there is no evidence of a violation, and due to the bankruptcy situation, a responsible party cannot be identified and investigated for a possible contravention of the *OWRA*. MOE determined there have been no off-site impacts on water quality because no concerns have been identified by the operator of the municipal water well system located approximately two kilometers from the abandoned fuel depot site. The ministry said that "although there has been no indication of off-site migration, the ministry recognizes that the potential for off-site migration exists, based on the plume that was identified on the property in the consultant's 1994 Phase 1 & 2 Environmental Audit Report for the site." MOE said that, since a responsible owner of the property cannot be identified, the ministry will continue to address concerns with the potential for contaminant migration from the site. The ministry committed to conducting a geophysical survey of the area in November 2005.

ECO Comment
The ECO accepts MOE's decision not to carry out an *EBR* investigation, but would like to see the ministry use available tools to get the site cleaned up. It is commendable that MOE committed to addressing concerns with the potential for contaminant migration from the site, including conducting a geophysical survey. It is unfortunate however, that the ministry did not commit to share the results of its survey with the applicants, or to describe what actions the ministry would take in its "ongoing abatement" role.

MOE subsequently advised the ECO that it did carry out the geophysical survey in November 2005 as promised, but did not share the results with the applicant. The geophysical survey was carried out to determine if there were any buried fuel tanks on the property in addition to the known tanks, but no survey was done to determine whether the plume has migrated off-site. The geophysical survey identified three "anomalies," or areas with high magnetic readings, and recommended that they be investigated further to determine their cause, but as of February 2006, MOE was not planning any further investigations.

MOE staff advised the ECO that the ministry wants to see the site cleaned up and will continue to seek a responsible party. MOE encouraged the municipality to participate in the Brownfields Financial Tax Incentive Program by selling the property in a tax sale, but the municipality declined. In past reviews of new brownfields regulations, the ECO has expressed concern that the regulations do not adequately address liability risk for municipalities and others who may take control of contaminated sites.

The Ministry of the Environment has jurisdiction over the investigation, clean-up and restoration of the natural environment in Ontario. The ministry will assume responsibility for cleaning up contaminated sites when no responsible party can be found, as in this case. The provincial Environmental Clean-up Fund is available for MOE clean-up and hydrogeological studies of areas where serious contamination is known or expected. New guidelines were released for the fund in May 2005, which state that funds will be directed mainly towards the implementation of remedial measures where there is a real or potential risk of harm to public health and safety or the environment. Examples of projects eligible for funding include drinking water wells contaminated with hydrocarbons and a plume of contaminated groundwater entering a creek. Abandoned underground fuel storage tanks are the focus of about half of the projects being funded by the Environmental Clean-up Fund. The appropriate management practice in this situation is to remove the leaking tanks, and if a responsible party could be identified, they would be required to pay for the clean-up. In this case, it is MOE's responsibility to either order a clean-up or carry it out itself using the Environmental Clean-up Fund.

The Provincial Auditor has raised concerns about the ministry's handling of contaminated sites and the Environmental Clean-up Fund. In its 2002 report the Auditor said that MOE still had not taken steps to identify abandoned underground fuel storage tanks. In its 2004 Annual Report the Auditor highlighted the risk of groundwater contamination and the high costs of the ministry's current reactive efforts and recommended that, among other things, the ministry identify groundwater pollution sources on a timely basis so that remedial action can be taken before serious contamination begins. Taking action as MOE currently does only when serious contamination has been proven off-site may prove to be a costly and inefficient way to address this systemic issue. The proposed *Clean Water Act* includes new methods of assessing risks to groundwater and drinking water and may improve the way MOE responds to this type of situation in the future.

Review of Application I2005005
Alleged Contraventions under the EPA and EAA: Permission to Erect Wind Turbines
(Investigation Denied by MOE)

Background/Summary of Issues
In December 2005, the ECO received an application raising concerns about a large wind farm project being constructed along the north shore of Lake Erie. The wind farm consists of 66 turbines with a total generation capacity of 99 megawatts of electricity – enough power to serve over 25,000 homes. The Government of Ontario awarded the wind farm developer a 20-year electricity supply contract in November 2004 as part of the province's strategy to meet its renewable energy goals. The province has made a commitment to ensure that five per cent of all electricity sold in Ontario is produced using renewable energy by 2007, and 10 per cent by 2010.

The wind farm straddles three municipalities and required the approval of each municipality to amend its official plan and rezone lands to permit the erection and operation of the wind turbines. The applicants alleged that its municipality's decision to rezone lands from agricultural to commercial use to permit the erection of the wind turbines contravened s. 3 of the *Environmental Protection Act* (*EPA*) and s. 5.1 and 6.3 of the *Environmental Assessment Act* (*EAA*). (The applicants also alleged a contravention of the *Endangered Species Act* – see pages 261-262 of this supplement.)

Alleged Contravention of the Environmental Protection Act
Section 3 of the *EPA* sets out the purpose of the *Act* "to provide for the protection and conservation of the natural environment." The applicants alleged that the municipality failed to protect the environment by allowing wind turbines to be sited in the area of the Long Point Basin. The applicants argued that this area is an important and endangered ecosystem that the municipality has an obligation to protect. They asserted that both migratory and resident birds depend on this habitat, and that depriving a migrating species of its staging grounds where it builds up fat reserves could render it unable to reproduce when it reaches its nesting territory. The applicants also claimed that the wind turbines were sited in the pathway of a major migratory corridor for thousands of migrating birds.

Alleged Contravention of the Environmental Assessment Act
Sections 5.1 and 6.3 of the *EAA* set out public consultation obligations for proponents of projects that are subject to the environmental assessment (EA) requirements under the *EAA*. The applicants alleged that the municipality failed to meet its obligations for public consultation under the *EAA*.

However, most of the EA requirements under the *EAA* do not apply to the wind farm project. Section 4(4) of O. Reg. 116/01, the Electricity Projects Regulation under the *EAA*, exempts wind farm projects that have a generation capacity of over two megawatts from the EA requirements set out in Part II of the *EAA* and, instead, requires project proponents to conduct a similar, but less onerous, Environmental Screening Process (ESP). As with the regular EA process, the ESP imposes requirements for public notification and consultation.

Pursuant to the ESP requirements, the proponent (i.e., the wind farm developer) took the following steps:

- Published a "Notice of Study Commencement" for the ESP in February 2004;
- Held "Public Information Centres" in February and November 2004 to provide information to the public about the project, outline the ESP, and address public concerns and issues;
- Mailed "Notices of Public Information Centres" to known interested parties for both of the Public Information Centres, as well as published the notices in a number of local newspapers;
- Completed an Environmental Screening Report (ESR) in April 2005;

- Published a "Notice of Completion of the Environmental Screening Report" and provided the public with 30 days to review and comment on it; and
- Submitted a "Statement of Completion" to MOE in May 2005.

In addition to the ESP, the municipality engaged in a separate public consultation process in accordance with the *Planning Act* in respect of its decision to amend its Official Plan and zoning bylaw. The applicants claimed that municipal residents were not adequately notified of any public meetings, nor adequately notified of the details of the wind farm project until after the project decisions had been made. As such, the applicants alleged that the municipality deprived residents of a fair opportunity to make submissions to municipal council about the wind farm project.

The applicants also alleged that, in making its zoning decision to allow the erection of wind turbines, the municipality relied on an incomplete Environmental Screening Report (ESR). Under the ESP, proponents are required to complete an ESR that includes: a list of agencies contacted or consulted, a description of the public consultation programs and events undertaken, a summary of public and agency concerns or issues, and a description of how these concerns were resolved or addressed. The applicants alleged that the ESR failed to include both a description of the public consultation program and the results of such consultations.

Ministry Response

In its response, MOE stated that none of the allegations raised by the applicants were valid and therefore no contraventions could have occurred. Accordingly, MOE concluded that an investigation was not warranted.

MOE concluded that the municipality did not contravene s. 5.1 and 6.3 of the *EAA*. MOE noted that the EA requirements under the *EAA* did not apply to the wind farm project by virtue of the exemption provided in the Electricity Projects Regulation. Secondly, the consultation requirements under both the *EAA* and the ESP only apply to a "proponent" of a project. As the municipality was not a proponent of the wind farm project, it had no obligation to consult with interested persons under the ESP. MOE also noted that an EA is not required for a municipality to pass or amend an Official Plan or bylaw.

Although the applicants only alleged a contravention of the *EAA* by the municipality, MOE nonetheless considered the proponent's (i.e., the wind farm developer's) compliance with O. Reg. 116/01. MOE found that the proponent fully complied with all of the requirements under the ESP, including the public consultation and ESR requirements. The proponent's ESR included a detailed description of the public consultation program, the issues raised and its responses.

In addition, MOE found no evidence to show that the actions of the municipality contravened the *EPA*. MOE noted that its staff had reviewed the proponent's documentation of the wind farm project's environmental impacts during the ESP, as required by the Electricity Projects Regulation. Moreover, MOE staff had completed a separate technical review of the project to assess noise impacts from the wind turbines prior to issuing a Certificate of Approval (air) for noise emissions pursuant to s. 9 of the *EPA*. MOE also noted that the municipality's actions in approving the rezoning were in accordance with the provisions of both the *Canadian Environmental Assessment Act* and the *Planning Act.*

MOE remarked that there had been several opportunities to provide input into the municipality's decision earlier in the process, but that the applicants had failed to take advantage of them. MOE explained that the ESP includes public consultation opportunities and that, under the ESP, a person can request that a project be elevated to a full EA subject to Part II of the *EAA*. However, MOE did not receive any elevation requests for this project. MOE further noted that a municipality's zoning approvals are subject to the *Planning Act*, which also requires public notification and provides an opportunity for citizen input.

MOE advised the applicants that the appropriate method to appeal a municipality's decision to pass a bylaw amendment is an appeal to the Ontario Municipal Board pursuant to the *Planning Act*.

ECO Comment
The ECO believes that the ministry's decision was reasonable. The ECO notes that although MOE's response was two weeks late, MOE provided a thorough explanation of its decision and addressed issues that were not directly raised by the applicants. MOE also provided information on how the applicants could have become involved in the process, as well as advising the applicants of their right to appeal the municipality's decision to the Ontario Municipal Board.

MOE could not review the municipality's approval process for Official Plan and zoning amendments or its public notice and consultation process. These municipal activities are subject to the *Planning Act,* which is administered by the Ministry of Municipal Affairs and Housing (MMAH). Unfortunately, neither MMAH nor the *Planning Act* is prescribed for the purposes of the *EBR*'s application for investigation process.

MOE's conclusion that there was no contravention of the *EPA* in this case was reasonable. However, the ECO notes that, while renewable energy development is an important and laudable goal, the Ontario government must try to ensure that new renewable energy projects are sited and constructed in an environmentally sensitive way, preferably away from vulnerable ecosystems. Given the province's goal to increase renewable energy production and the expectation that wind power generation will continue to grow in Ontario, these land use planning issues are likely to arise more frequently. This is not the first application about wind turbines that the ECO has received (see the supplement of the 2004/2005 annual report at page 307), and the siting of these facilities is likely to be a continuing source of controversy.

In addition, the Provincial Policy Statement (PPS), which sets out the province's policy direction for planning decisions and which took effect in March 2005, encourages the development of renewable energy systems in settlement areas, rural areas and prime agricultural areas. The PPS also sets out the province's goal to step back and allow municipalities to make environmentally sustainable land use decisions. As municipalities are provided with more decision-making power, MOE will be required to continue playing an important role in reviewing ESPs and issuing Certificates of Approval to ensure that these renewable energy projects are sited in an environmentally appropriate manner. MMAH staff have stated that they have flagged the siting of wind turbines as an issue that may need further provincial guidance.

Review of Application I2005007
Alleged EPA Contravention by an Auto Dealer, re: CFC top-up
(Investigation Denied by MOE)

Background/Summary of Issues
In late 2005, two applicants applied for an investigation of an automobile dealership. The applicants stated that the air conditioning unit ("A/C unit") in a vehicle that they had purchased from this auto dealer had been filled with refrigerant in June 2005. In August of that same year, the owners of the vehicle had its A/C unit tested at another garage because of poor cooling performance. That technician informed the vehicle owners that the A/C unit was faulty and that it should not have been recharged with coolant at the dealership where the car was purchased. The applicants wrote that, it was at that point in time, they became aware that the dealer's action in June may have contravened s. 14 "Prohibition, contamination causing adverse effect" of the *Environmental Protection Act (EPA)*. The applicants noted that, based on handwriting on the original bill of sale, the dealer likely had knowledge that the A/C unit was not

functioning properly. The handwritten note was: "could be a leak / Put gas for A/C – works / No Warranty on A/C". Based on this, the applicants alleged the dealer had committed an "illegal refuelling of leaky air-conditioning unit" with refrigerant that subsequently leaked and this they felt was a violation of the *Environmental Protection Act*, s. 14.

The specific basis for the technician characterizing the refilling of the A/C unit as improper or illegal is Ontario's Refrigerants regulation, O. Reg. 189/94, a regulation made under the *EPA*. O. Reg. 189/94 governs the use, testing and servicing of refrigeration equipment, and has a general prohibition against the discharge of refrigerant, as well as more specific prohibitions such as "8. (2) No person shall refill refrigeration equipment with a refrigerant if,… (b) the equipment appears damaged in a manner that may have had the effect of permitting the discharge of the refrigerant into the natural environment." The refrigerants of greatest environmental concern are called chlorofluorocarbons or CFCs. CFC-based equipment is gradually being replaced worldwide with equipment using refrigerants which are much less harmful to the earth's ozone layer.

Ministry Response

The ministry denied this application. MOE said it conducted an assessment of the evidence provided by the applicants, information found in ministry files, input from staff and a review of the relevant policy, legislation and regulations governing ozone depleting substances in Ontario. The ministry reported that its search of its files brought up no reports or records involving the alleged contravener.

MOE's Air Policy Branch provided the opinion that the purpose of O.Reg. 189/94 is to govern the use, testing and servicing of refrigeration equipment and to detail processes and procedures related to the documentation of such activities. The regulation deems that a discharge in excess of 100 kilograms (kgs) into the natural environment is significant, requiring that it be reported to MOE, and requiring the ministry's further involvement. Staff of MOE estimated that a motor vehicle typically contains less than one kilogram of refrigerant. MOE went on to write:

> *"Although the alleged contravener suspected that there "could be a leak" in the A/C equipment, there is no evidence (e.g., statements from the applicant) indicating that the equipment was in fact tested to confirm or deny a leak at the time of sale and, there is no evidence stating that the applicant was actually informed or knew that the alleged contravener refilled the A/C equipment."*

In summary, MOE staff concluded that there was no clear evidence of harm to the natural environment from this emission and concluded that an investigation under the *EBR* would not be conducted. Further, there was no indication that MOE considers the cumulative effects of these small discharges and the need to deter future similar small discharges.

R. v. Don Henry Heating **(September 23, 1998, Ontario Provincial Offenses Court).** The defendant pleaded guilty to one count of discharging a refrigerant and one count of not being properly certified to work with refrigerants. Henry was hired to repair the condenser on an air conditioning unit. He removed the condenser without first evacuating and collecting the Freon inside, which was CFC-based; instead he discharged the Freon to the atmosphere. Fine: $500 per count, totalling $1,000.

R. v. Prescod **(November 9, 1998, Ontario Provincial Offences Court).** The defendant pleaded guilty to one count of discharging a refrigerant and one count of servicing refrigeration equipment without being certified. Prescod operated a motor vehicle service station and wrecking yard. The refrigerant escaped while he repaired a van's air conditioning system which he was not licenced to do.

Source: Ontario Environmental Protection Act Annotated, Dianne Saxe

ECO Comment

The principal reasons MOE denied this application were that the leak was small and therefore would not likely cause harm to the environment and that the applicants somehow failed to provide

adequate proof of the infraction. On the first point, it should be noted that MOE has pursued enforcement of small discharges of CFCs on several past occasions (see also Text Box). On the second point, MOE wrote that "there is no evidence (e.g., statements from the applicant) indicating that the equipment was in fact tested to confirm or deny a leak at the time of sale and, there is no evidence stating that the applicant was actually informed or knew that the alleged contravener refilled the A/C equipment." A member of the public purchasing a vehicle is unlikely to be familiar with the intricacies of A/C equipment testing procedures and the provisions of refrigerant regulations. The ECO feels MOE is placing too great a burden of proof on the applicants in this instance. The applicants have made a reasonable case that improper refrigerant handling and/or A/C equipment repair may have occurred.

MOE also did nothing to explain what, if any, enforcement provisions exist under the *EPA* and Ontario's Refrigerant Regulation O. Reg. 189/94. In its response to the applicants, MOE may have in fact led the applicants to believe that O. Reg. 189/94 has no provisions for enforcement, MOE wrote: "the purpose of Ontario Regulation 189/94 is to govern the use, testing and servicing of refrigeration equipment and, detail process and procedures related to the documentation of such activities." This gives the public the false impression that some regulations are little more than good advice or best practice documents.

Despite its inaction on this application, MOE indicated that it intends to visit the alleged contravener in the year ahead. In a note attached to the decision summary which the ECO received, MOE wrote that it intends to add this dealership to its roster of "proactive" inspections for 2006/07. The applicants may or may not have been made aware of this. In either case, the applicants were probably left wondering on what basis MOE makes it decisions about enforcing key pieces of environmental legislation in Ontario.

In defence of MOE's approach on this application for investigation, it is understandable that it would be resource-intensive for the Ministry to be pursuing every small discharge (however, even small discharges are a point of concern as one atom of chlorine (CFC-11 has two) can destroy up to 100,000 molecules of ozone in the stratospheric ozone layer before it forms a stable compound and diffuses out of the atmosphere). Further, the nature of refrigerant leaks makes them difficult to pursue – the gas is colourless and disperses readily, the amount discharged is often small, and little if any residue is likely to be found. Because of this, there may not be much physical evidence to collect, unlike with soil or water contamination where there may be a medium to test in order to verify that a discharge occurred. However, a regulation such as this does require some level of enforcement by MOE, to signal to operators that there is a real risk of penalty if time or cost-saving short-cuts are used. Eye-witness reports, review of written records, and tips can greatly assist regulators to pursue enforcement of refrigerant mishandling or discharges. Effectively, the applicants provided this type of information to MOE which should have constituted a valid starting point for an investigation.

Aside from an enforcement approach, the ECO believes there are remaining ways in which MOE could be demonstrating action on the regulation of ozone depleting substances. This application highlights an important, but under-attended, area of MOE's air quality program: the phase-out of ozone depleting substances. Many people believe that the phase-out of ozone depleting substances was effectively complete shortly after the ratification of the Montreal Protocol in the late 1980s. Yet, a lot of work remains to be done in the years ahead to achieve the ultimate goal of repairing the stratospheric ozone layer which shields the earth's ecosystems from harmful ultra-violet radiation (see the ECO annual report 2001/2002 for greater detail).

An MOE proposal (RA03E0007) for a CFC phase-out regulation has languished on the Environmental Registry since March 2003. If adopted, the regulation would lead to a complete phase-out of the use of CFC-based refrigerants in Ontario. The commercial applications still using CFC-based refrigerant include mobile refrigeration, commercial refrigeration and certain types of air conditioning and chillers. In autumn 2005, the ECO met with representatives of the industries that would be affected by this

regulation. These representatives stated that they were in support of MOE proceeding with this initiative. The ECO and the industry association have since written to MOE encouraging the ministry to adopt this regulation. As of the close of 2005/2006 reporting year, this initiative regrettably remains a proposal.

The ECO believes it is time for MOE to help close the gap in the earth's stratospheric ozone layer by shoring up its enforcement efforts when provided with a very reasonable opportunity from members of the public. Also, MOE should close the gap in the national regulatory framework on the phase-out of CFC-based ozone depleting substances. Most other provinces and territories in Canada have already taken action equivalent to that of Ontario's proposed CFC phase-out regulation.

Review of Application I2005008:
Alleged OWRA Contravention by a Pit Operation
(Decision Due from MOE May 8, 2006)

Background/Summary of Issues
The applicants site several instances of contravention of the *OWRA.*

Ministry Response
MOE's response is pending as of the end of the 2005/2006 fiscal year. ECO will review the handling of this application in the 2006/2007 annual report.

MINISTRY OF NATURAL RESOURCES

Review of Application I2005006:
Alleged Contravention under the ESA: Permission to Erect Wind Turbines
(Investigation Denied by MNR)

Background/Summary of Issues
In December 2005, the ECO received an application raising concerns about a large wind farm project being constructed along the north shore of Lake Erie. The wind farm consists of 66 turbines with a total generation capacity of 99 megawatts of electricity – enough power to serve over 25,000 homes. The Government of Ontario had awarded the wind farm developer a 20-year electricity supply contract in November 2004 as part of the province's strategy to meet its renewable energy goals. The province has made a commitment to ensure that five per cent of all electricity sold in Ontario is produced using renewable energy by 2007, and 10 per cent by 2010.

The wind farm straddles three municipalities and required the approval of each municipality to amend its official plan and rezone lands to permit the erection and operation of the wind turbines. The applicants alleged that its municipality's decision to rezone lands from agricultural to commercial use to permit the erection of the wind turbines contravened s. 5 of the *Endangered Species Act* (*ESA*). (The applicants also alleged contraventions of the *Environmental Protection Act* and the *Environmental Assessment Act* – see pages 255-257 of this supplement.)

Section 5 of the *ESA* prohibits people from willfully injuring or interfering with any species of fauna or flora that is threatened with extinction or its habitat. The applicants alleged that the wind turbine is interfering with fauna and flora and, as such, the municipality should not have permitted the erection of the wind turbines. The applicants specifically noted that the approved location for one of the wind turbines was near an active nesting site for bald eagles, which are an endangered species in Ontario.

The developer of the wind farm had retained an ornithologist (bird expert) to complete an avian observation study of migration patterns and nesting locations in the area. According to the developer, this study found no adverse effects on the local bird population.

Ministry Response
MNR determined that s. 5 of the *ESA* was not contravened by the municipality. It further determined that s. 5 of the *ESA* was not contravened by the wind farm developer, the construction company, the landowners, or anyone else involved in the project.

MNR noted that its staff had conducted a site visit and had found no evidence that the municipality or anyone else willfully interfered with or attempted to interfere with endangered species of flora or fauna. MNR concluded that the allegations do not warrant an investigation.

ECO Comment
The ECO believes that MNR's response was reasonable. The ministry responded to the concerns raised by the applicants by conducting site visits to monitor the status of the bald eagles. Based on the site visits, MNR was satisfied that there was no contravention of the *ESA*. According to local news publications, the bald eagles did in fact abandon their nest when construction of the wind turbine began, but relocated just several hundred meters away, where they appeared to be doing well.

Renewable energy projects like wind turbines and solar installations can be among the most benign energy installations constructed. Nevertheless, caution must be taken when any objects or installations are constructed near the habitat of endangered species. In the case of this wind farm, MNR was involved during the early stages of siting and returned to visit the site once the turbines were in place and allegations of habitat destruction had been made. MNR found none, yet citizens remain concerned about the potential for interference with habitat.

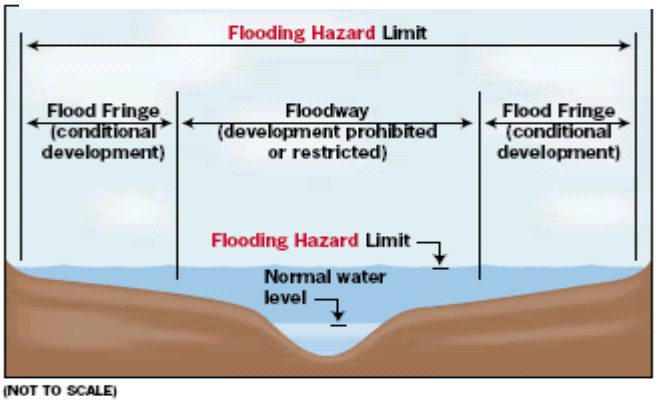
An MNR proposal notice on the Registry (AB06E6001, May 9, 2006) is relevant to those concerned with protection of habitat and endangered species. The notice announces MNR's plan to undertake "a review and update of the province's species at risk legislation to provide for broader protection and recovery of species at risk and their habitats." In nearly every annual report since 1999/2000, the ECO has encouraged MNR to initiate public debate to assess options for species and habitat protection and to develop a more effective legislative, regulatory and policy framework to protect species at risk in Ontario. (These issues were most recently set out in the ECO's supplement to the 2004/2005 annual report on pages 280-285.) The ECO is very pleased to see this Registry notice and looks forward to reporting on MNR's new direction on species at risk in our 2006/2007 annual report.

Given the province's goal to increase renewable energy production in the province and the expectation that wind power generation will continue to grow in Ontario, the issue of introducing wind turbines near the habitat of endangered species is likely to arise again. The ECO hopes that MNR will continue to be vigilant and provide greater guidance on the siting of these facilities in the future.

Review of Application I2004008
Alleged Conservation Authorities Act Contravention by the Upper Thames River Conservation Authority
(Investigation Denied by MNR)

Background/Summary of Issues
In February 2004, two applicants filed an application for investigation alleging that the Upper Thames River Conservation Authority (UTRCA) contravened s. 20(1) of the *Conservation Authorities Act* (*CAA*), and s. 4 and 5(1)(2)(3) of Regulation 170, R.R.O. 1990, when it issued permits to Rival Developments Inc. ("Rival") related to a development project. Rival planned to purchase a vacant property for the purpose of building residential dwellings at 1 Beaufort Street, which is located in the floodplain of the Thames River in the City of London, Ontario (the "City"). The applicants supported their application with three volumes of documentation that included copies of technical reports, photographs of activities at the site, correspondence between the municipality, UTRCA, Rival and one of the applicants, the Ontario Municipal Board's (OMB) decision to approve the project and the Ontario Superior Court of Justice's decision on a judicial review related to the project.

Figure 1: Two-zone floodplain management



Source: MNR. Understanding Natural Hazards. 2001.

The property, which had been used for a variety of cultural and industrial purposes such as a tannery, had been vacant since 1983 when the last building, a mill, burned

down. Since then, the property has consisted of a wooded area and a meadow that local residents and children from a neighbouring school have used for recreational and educational purposes with the consent of the landowner. Rival planned to purchase the property if it obtained the required planning approvals. The proposed project would require changing the zoning designation of the property from "Open Space" to "Low Density Residential", removing the mill's foundation, re-grading the site to allow gravity flow sanitary services, and building a maximum of 27 residential units. UTRCA advised Rival and the City that the subject property was located within a floodplain and may be subject to erosion. UTRCA noted that, if development was allowed, basements would need to be flood proofed and dry access to the buildings would need to be provided for vehicles during flood events.

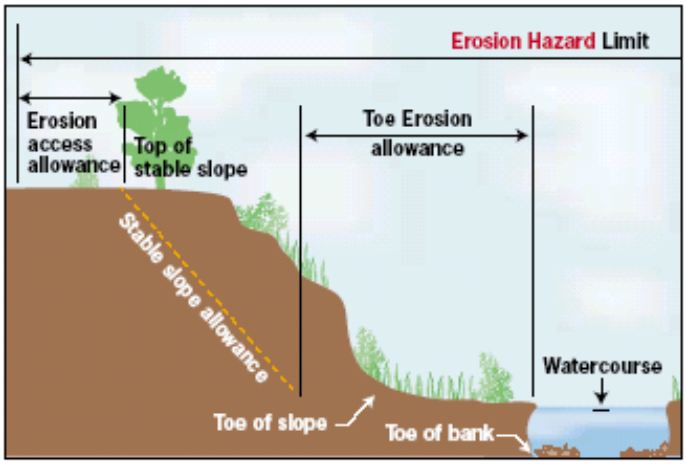
Floodplain and Erosion Policies

The Provincial Policy Statement (PPS) provides policy direction to municipalities and conservation authorities on matters related to land use planning and development. Under the PPS, development is to be directed away from areas that are subject to natural hazards such as flooding and erosion and that pose "unacceptable risk to public health or safety or of property damage."

The floodplain of the Thames River is the area next to the river that would be flooded if a storm the size of Hurricane Hazel was to occur. The delineation of the floodplain is called the Regulatory Flood Line and represents the limits of the flooding hazard. Under the PPS, municipalities can manage flood plains using the one-zone concept, which prohibits any development within the floodplain, or the two-zone concept, which allows some types of development, such as residential buildings, if certain conditions are met. The two-zone concept divides the floodplain into two areas – the floodway which is the area where flood depth and/or velocity pose a potential threat to public heath and safety and/or property, and the flood fringe which is the area between the Regulatory Flood Line and the floodway as shown on Figure 1. The City's Official Plan includes floodplain policies using the two-zone concept and allows development in the flood fringe if buildings are flood proofed and dry access to buildings is provided for vehicles and pedestrians.

The City's Official Plan also includes policies related to development in areas susceptible to erosion to protect the public and property from damage due to erosion and slope instability. The Ministry of Natural Resources (MNR) describes several approaches to determining the susceptible areas. One approach to delineating the area at risk of erosion is to use the 100-year erosion rate, i.e., the area that would be eroded over 100 years at the average annual rate of erosion, and to add in a setback for a 3:1 horizontal to vertical slope and a further setback of six metres. However, conservation authorities can decide to allow slopes steeper or gentler than 3:1 and greater or lesser than a 6-metre setback. Figure 2 shows how this approach is applied to a slope.

Figure 2: Erosion management



Source: MNR. Understanding Natural Hazards. 2001.

In order to determine the sections of 1 Beaufort Street that can be developed, i.e., the sections of the property that lie within the flood fringe and beyond the erosion hazard, the City applied its floodplain and erosion policies with the assistance of the UTRCA.

The Rival Development Project
Based on initial flooding and erosion studies commissioned by Rival and agreed to by the UTRCA, it was determined that part of the property was located on the flood fringe and that this area could be safely developed. In May 2001, Rival requested the City to change the zoning designation for the property from "Open Space" to "Low Density Residential" and provided an initial site plan. In August 2001, the UTRCA advised Rival that it would be required to submit additional information related to flood proofing and the erosion limit when it submitted its detailed site plan for approval, and that Rival would need to obtain a Fill, Construction and Alteration to Waterways permit under Regulation 170, R.R.O. 1990.

However, in July 2002, the City rejected Rival's request to change the zoning designation stating that it wished to maintain the existing "Open Space" designation and that the request was premature since additional information was needed to demonstrate that the proposed development would not negatively impact the river corridor. In its decision, the City identified several matters that needed further information related to the potential impacts of tree removal, fill and grading, and justification of the development limit. In the meantime, since the City had not made a decision within 90 days on Rival's zoning request, Rival had filed an appeal with the Ontario Municipal Board (OMB). Experts in various fields testified in support of the proposed site plan on behalf of Rival, and in opposition on behalf of the City and one of the *EBR* applicants. The UTRCA testified under subpoena in support of the proposed site plan. In March 2003, the OMB issued an order to the City to approve the request to change the zoning designation and noted that the outstanding information requirements had been satisfied at the hearing. The OMB based its decision partly on the understanding that Rival would convey lands required to maintain a 30-metre buffer to the City and that these lands would retain the designation of "Open Space" and continue to be accessible by the public.

Since the zoning designation approved by the OMB allowed for higher density housing, Rival revised the proposed site plan. After the UTRCA received the revised site plan, it advised the City that it required more information from Rival on slope stability, flood proofing, fill requirements for the parking area, tree preservation and erosion control. In response, a consultant for Rival advised that, since slopes would be no greater than 4:1, no further slope stability studies were required since slopes flatter than 3:1 are considered to be stable. The consultant also advised that engineered fill would only be placed on the flood fringe and would not affect slope stability. Based on this and other information provided by Rival and on the condition that no vegetation be removed, the UTRCA provided a partial approval of surplus fill being generated at another site to be placed on the property.

In August 2003, the City approved Rival's revised site plan for 27 townhouses with a 30-metre buffer against the recommendation of its Planning Committee. The plan required all trees to be removed from the development area; and fill, up to two metres deep, to be placed on the site to aid in flood proofing, dry access and to allow for gravity flow sanitary sewers; and slopes to be 3:1 or 4:1. Rival would be required to conduct an archaeological study of the site prior to removal of the mill foundations and to prepare a Record of Site Condition to determine if any of the soil on the site is contaminated.

After the City approved the revised site plan, one of the applicants sought an order from the Ontario Superior Court of Justice to quash the City's approval and the UTRCA's partial approval for fill placement. The Court heard testimony that, after the OMB decision, Rival revised its site plan to take advantage of the additional density permitted by the zoning change, and that more of the property would be covered by buildings and pavement and would be graded. It heard evidence that the 30-metre buffer was in question which contradicted the City's statement that Rival would respect this OMB requirement.

In December 2004, the Court denied the request for an order to quash on the understanding that the City would not issue a building permit unless Rival provided a 30-metre buffer. In its decision, the Court stated "if the minimal environmental protections underpinning the Board decision are not respected, the very integrity of this project building on hazardous lands may be compromised."

Conservation Authority Act and Regulation 170, R.R.O. 1990
Under s. 20(1) of the *CAA*, a conservation authority is required to undertake programs "designed to further the conservation, restoration, development and management of natural resources." Under Regulation 170, R.R.O. 1990, s. 4 grants a conservation authority the authority to issue permits allowing the construction of buildings or placement of fill if it does not affect the control of flooding or pollution or the conservation of land; and s. 5 lists the documentation that must be provided as part of an application for various permits. For instance, an application for a fill permit must include copies of plans that show where the fill will be placed, its depth and the final grade of the land.

Summary of Issues
The applicants alleged that the UTRCA made decisions and issued permits "without collecting enough information to reasonably conclude that the project can be carried out without undue impact on the riparian corridor or risk to public safety." For instance, they noted that the additional information, including information related to slope stability, erosion control, fill and tree preservation, provided to the UTRCA by Rival's consultants in June 2003 consisted of "blanket assurances" which were not supported by evidence or further work on the part of the consultants. Based on this additional information, the UTRCA advised the City that the natural hazards concerns had been addressed and the City approved the revised site plan in August 2003. According to the applicants, although the site plan was revised, changes in grade, housing density and setbacks from the river were not properly reconsidered, and there had been no investigation into off-site hazards.

When work began in January 2005 on the archaeological study of the mill and removal of its foundations, the applicants became concerned since the mill once housed a tannery. The applicants believed that the soil in the area might be contaminated and noted that appropriate precautions were not in place to ensure the safety of the workers and appropriate handling of the soil and potentially toxic runoff. The applicants alleged that excavation activities took place without sufficient information, in particular, without a Record of Site Condition being done which would have confirmed the presence or absence of contaminated soils. Furthermore the UTRCA failed to respond to concerns they raised in January 2005 about the excavation and potentially contaminated runoff. (The ECO notes that a Record of Site Condition was filed April 5, 2005, with MOE.)

The applicants also alleged that the UTRCA did not follow or enforce "the requirements of applicable legal instruments." According to the applicants, the UTRCA allowed Rival to store fill on the property even though the UTRCA was still waiting for information, had not received the documentation required under s. 5 of Regulation 170, R.R.O. 1990, and had not made a decision regarding the application for a permit to fill. On February 27, 2004, the UTRCA issued a Notice of Violation to Rival stating that it was violating Regulation 170 and that it must cease all filling activities until it submitted site plans and a new application for a permit. The applicants considered UTRCA's actions to be nothing more than a "mild slap on the wrist" since there were "no repercussions, no demands for mitigation, and no steps taken to prevent a recurrence."

In November 2004, the UTRCA issued a permit to allow limited clearing "for archaeological investigations only." According to the applicants, Rival proceeded to clear the entire site, and excavated and refilled the mill area. When they notified the UTRCA of Rival's tree clearing activities, the applicants

were advised that the UTRCA had no jurisdiction over tree removal, which the applicants disputed stating that trees aid in erosion control, which is within UTRCA's authority. The applicants were also concerned

about soil being excavated without a Record of Site Condition – a requirement of the development agreement. According to the applicants, the UTRCA ignored the other activities even though the proper permit had not yet been issued.

Lastly, the applicants alleged that the UTRCA issued the permits even though Rival's plans failed to meet UTRCA's "minimum standards for flood proofing, slope stability, and containment." For example, the applicants alleged that the UTRCA approved a grading plan that violated safety requirements such as buildings located too close to the edge of the area approved for development, slopes steeper than agreed and use of fill obtained from other construction sites instead of engineered fill. The applicants noted that the OMB decision was premised on Rival maintaining a 30-metre buffer but that the UTRCA agreed to a revised site plan that provided a buffer that was less than 20 metres in some areas.

The applicants believe that the UTRCA has waived informational requirements, overlooked the improper and illegal conduct of Rival, accepted unproven assertions from Rival's experts and ignored expert opinions provided by the applicants Since information about the property and the development project is incomplete and out-of-date, the applicants concluded that it is not possible to assess the threats to the environment, life, property and public and provincial interests. The applicants believe that an investigation into the actions of the UTRCA is required to restore the public's confidence and to ensure that this project does not set a precedent for future development in the floodplain.

Ministry Response

In April 2005, MNR advised the applicants that there had been no contravention and that no investigation was necessary. MNR noted that it had "considerable knowledge" of this particular project, reviewed the documentation provided by the applicants, consulted with the UTRCA, reviewed UTRCA's compliance with its legislative and regulatory requirements and had conducted a site visit. MNR noted that it had previously received an application for review related to the same sections of the *CAA* and Regulation 170, R.R.O. 1990, and which had cited the actions of the UTRCA on this development project as the evidence that demonstrated the need for changes to the *Act* and the Regulation. For additional information regarding the application for review (R2003011) and the ECO's findings, refer to the supplement to the ECO 2004/2005 annual report, pages 269-271.

ECO Comment

MNR's response on this application is disappointing. The response did not include sufficient detail about its rationale for the decision other than to say that it had considerable knowledge of the subject. Under s. 77 of the *EBR*, ministries are required to investigate an alleged contravention unless they consider the application to be frivolous or vexatious, or if the alleged contravention is not serious or not likely to cause harm to the environment, or if an investigation has already been completed or is ongoing. It would have been helpful if MNR had indicated when it became involved, the nature of its involvement and when it visited the site.

The ECO notes that the applicants have compiled a considerable amount of documentation on this project and have photographed the site both before development activities began and after. One of the applicants has also testified against the project at the OMB and Ontario's Superior Court of Justice, and obtained opposing expert opinion with no apparent success. Unfortunately, decisions about projects, such as this one, that rely on projections of the severity of future storms, stability of slopes, the erosive rate of the river and decisions about the adequacy of documentation will differ from expert to expert.

In 1999, the ECO received an application for investigation for another alleged violation of the *CAA* that was also denied by MNR stating that only conservation authorities have the authority to enforce fill regulations under the *CAA*. The ECO noted that this was problematic since it means that MNR is unable to investigate an alleged violation even though the *CAA* is prescribed for applications for investigations. Furthermore, MNR has never responded to the ECO's request that MNR consider rectifying the situation, possibly by delegating the minister's responsibilities for applications for investigation under the *CAA* to conservation authorities. The ECO urges MNR to resolve this situation so that the public's right to request an investigation into an alleged violation of the *CAA* under the *EBR* is meaningful. (For additional information regarding the 1999 application for investigation, refer to pages S7-24 of the supplement to the ECO 1999/2000 annual report.)

Review of Application I2005009:
Alleged Contravention of the Aggregate Resources Act by a Pit Operation
(Decision Due from MNR May 12, 2006)

Background/Summary of Issues
The applicants site several instances of contravention of the *Aggregate Resources Act* by operators of a pit located near Arnprior, Ontario.

Ministry Response
MNR's response is pending as of the end of the 2005/2006 fiscal year. ECO will review the handling of this application in the 2006/2007 annual report.

SECTION 7

EBR LEAVE TO APPEAL APPLICATIONS

SECTION 7: *EBR* LEAVE TO APPEAL APPLICATIONS

EBR LEAVE TO APPEAL APPLICATIONS
April 1, 2005 to March 31, 2006, Status as of June 15, 2006

Parties and Date of Leave Application	Description of Grounds for Leave to Appeal	Decision on Leave Application and Decision Date	Status/Final Outcome
Registry # IA01E1063 **Applicants:** Trent Talbot River Property Owners Association (TTRPOA); Marchand Lamarre and Jodi McIntosh; and Sandra Southwell **Ministry:** MOE **Proponent:** Stan McCarthy **Date Application received by ECO:** November 8, 2002 **Instrument:** Permit to Take Water (PTTW), s. 34, *OWRA*	The applicants sought leave to appeal the decision to issue a PTTW to dewater a proposed quarry. The grounds for seeking leave included the following: the PTTW application contains conflicting estimates of the quarry's influence on the groundwater; the model submitted to the Director to estimate drawdown is based on four inaccuracies that underestimate the drawdown radius; and there was no consideration of the potential impact on significant surface water features such as the impact on springs, wetlands, or the Trent Canal.	The ERT granted the leave to appeal application of TTRPOA, Marchand Lamarre and Jodi McIntosh on the grounds that: the opinion of the Director "that the taking of water from the quarry would result in a drawdown of the water table in an area limited to the immediate surroundings of the site" is too conservative an interpretation of the data and modeling; the proposed quarry is located in a recharge area; and the vulnerability of local drilled wells to sulphurous and salty water emphasizes that there is potential for impacts on water quality as well as quantity. The ERT denied the leave to appeal application of Sandra Southwell based on insufficient evidence and because issuance of a PTTW is unrelated to the issuance of a Certificate of Approval for waste water discharge **Date of Leave Decision:** January 8, 2003	This hearing was held concurrently with the related sewage works C of A hearing (see Registry # IA03E0893 below). In December 2005, the ERT issued its ruling. The panel allowed the appeals in part, by adding some additional conditions to the PTTW. Much of the ERT's decision focused on the question of potential impacts to existing water supply wells. The Tribunal found that the Lamarre/McIntosh well water supply would be affected, and called for terms and conditions in the PTTW to ensure that these residents be provided with adequate water supply for all current and future uses. In response to the TTRPOA concerns about water supply impacts to other domestic wells, the Tribunal judged that most of the area's wells would not be significantly affected. It found that a

Parties and Date of Leave Application	Description of Grounds for Leave to Appeal	Decision on Leave Application and Decision Date	Status/Final Outcome
			few other wells might experience a significant impact, but that the monitoring and remedial actions required under the PTTW should be sufficient to address such problems. Technical experts at this hearing disagreed on fractured limestone hydrogeology, sufficiency of available groundwater data, and the geographic extent of potential impacts from quarry dewatering. The Tribunal judged this question in favour of the proponents, and retained a one-kilometre radius within which the quarry operator would be responsible if well water supplies were affected; the appellants had argued for a larger radius of potential impact. Conditions added to the PTTW include: water level monitoring in observation wells and in nearby private wells, commencing six months before the start of quarry dewatering; semi-annual technical reports to the MOE; and establishment of a "Citizens' Liaison Committee," composed in part of local residents, to provide advice but holding no legal power. The permit holder is also required to post all water monitoring data and reports on a public website.

Parties and Date of Leave Application	Description of Grounds for Leave to Appeal	Decision on Leave Application and Decision Date	Status/Final Outcome
			Regarding water quality impacts of the PTTW, the ERT did not find evidence that the PTTW would have a significant impact on water quality of nearby domestic wells. The Tribunal decision noted that this review extended only to the PTTW and the C of A, and other concerns such as potential road deterioration, traffic hazards, noise, dust and vibrations from the proposed quarry, were outside the ERT's jurisdiction. The Tribunal stated in its decision that the PTTW and C of A for this quarry carry far more environmental protection provisions than are found in the instruments for other quarries. In early 2006, counsel for the TTRPOA applied to the ERT for a re-hearing of some of the issues decided in the November 2005 decision. The TTRPOA alleged a number of serious irregularities in the ERT hearings procedure which resulted in the exclusion of crucial evidence related to the hydrogeology of the site. In May 2006, the ERT denied this request and issued an amended approval. Counsel for the TTRPOA then applied to the ERT for a re-hearing on the re-issued

Parties and Date of Leave Application	Description of Grounds for Leave to Appeal	Decision on Leave Application and Decision Date	Status/Final Outcome
			May 2006 PTTW.
Registry # IA02E1174 **Applicants:** Jessie Davidson; Mr. & Mrs. Garry Brewster; Mr. & Mrs. Russell Smith; Mr. & Mrs. Frank Weiner; and Mr. & Mrs. Fred Zinn **Ministry:** MOE **Proponent:** Aquafarms Date Application received by ECO: **May 9, 2003** **Instrument:** PTTW, s. 34, *OWRA*	The applicants sought leave to appeal the decision to issue a PTTW to a commercial water bottler. The grounds for seeking leave included the following: the hydro-geological study was not required to include the cumulative effects on the water table of two large water taking plants situated in the same small watershed less than one mile apart; nor was the study required to establish the source of the water extracted from Aquafarms' wells; MOE has received complaints from at least 14 property owners within a few kilometres of Aquafarms stating that their wells have dried up; and one applicant's farm which is on the same wetland as the Aquafarms' wells lost the spring which fed a natural brook trout producing pond in the previous autumn.	The ERT granted this leave to appeal application on the grounds that: each of the applicants had an interest in the decision to issue the PTTW; and it was unreasonable to grant a PTTW when no sub-watershed groundwater study had been done and many wells and springs in the local areas have gone dry. The ERT was of the opinion that there was a real chance that the environment could sustain significant harm if a PTTW was granted. **Date of Leave Decision:** February 12, 2004	On June 25, 2004, MOE filed notice of an application for judicial review of the ERT's decision to grant leave to appeal the PTTW on the basis that the ERT erred in law or exceeded its jurisdiction by misstating the test for leave to appeal in s. 41 of the *EBR*, and erring in its application of the leave test by: failing to appreciate the conjunctive nature of the test; failing to apply the appropriate evidentiary onus and burden of proof; making patently unreasonable factual findings; and granting leave on every individual ground without providing analysis or reasons. The application for judicial review is in progress. On October 4, 2004, the ERT received notice of the withdrawal of the Davidson, Weiner and Zinn appeals after these parties reached a settlement with MOE. All these appellants signed on to Minutes of Settlement reached through a mediation process facilitated by an ERT hearing officer prior to the hearing. On March 1, 2005, the ERT received notice of the withdrawal of the Smith appeal.

Parties and Date of Leave Application	**Description of Grounds for Leave to Appeal**	**Decision on Leave Application and Decision Date**	**Status/Final Outcome**
			The only remaining appellants were Garry and Jennifer Brewster. The ERT dismissed their appeal on the following grounds: - The appellants provided only hearsay evidence and speculation that the amount of water taking was having an adverse effect on area wells. The Tribunal found that the amount of water taking under the PTTW is appropriate and sustainable, and the depletion of the water table in 2002 was likely attributable to the drought that year. - The impact and cumulative impact of the water taking on other users and the ecosystem was adequately considered and, based on the evidence, no adverse impacts would result from the PTTW, and requiring a sub-watershed study would not provide any additional information that would challenge the Director's decision. - MOE regulations and policy with respect to the issuance of permits to take water, including the precautionary principle, were properly applied.

Parties and Date of Leave Application	**Description of Grounds for Leave to Appeal**	**Decision on Leave Application and Decision Date**	**Status/Final Outcome**
Registry # IA03E0893 **Applicants:** Marchand Lamarre and Jodi McIntosh; and Trent Talbot River Property Owners Association **Ministry:** MOE **Proponent:** Thomas S. McCarthy & Barbara Ann McCarthy Date Application received by ECO: **December 2, 2003** **Instrument:** C of A, s. 53, *OWRA*	The applicants sought leave to appeal the decision to issue a C of A for sewage works for quarry de-watering. The grounds for seeking leave included the following: a prior C of A issued and subsequently revoked for this quarry included a condition to deal with the risk that normal operation of the quarry may result in discharges causing long-term contamination of the property, but the current C of A does not include this condition; there are several potential sources of contamination including fuels, lubricants and solvents that could be spilled, and dust control chemicals; and the minimum information requirements set out in the MOE's "Guide for Applying for Approval of Industrial Sewage Works" were not provided to the MOE Director.	The ERT granted this leave to appeal application in regard to the issue of quantity and quality of the water entering the quarry on the grounds that it was unreasonable and premature for the Director to issue a C of A for sewage works without a valid PTTW in place because it is impossible to know certain facts concerning the de-watering regime for the quarry, such as the volume of water involved. This raised the possibility that an approval for a sewage works could result in significant harm to the environment. The ERT expressed concern that the multiple proceedings related to this quarry application might result in fractured hearings concerning the PTTW and the sewage works C of A. The ERT suggested that in the future any hearings should be heard concurrently. **Date of Leave Decision:** January 29, 2004	The ERT hearing was held concurrently with the related PTTW hearing (see Registry # IA01E1063 above). On March 12, 2004, MOE filed notice of an application for judicial review of the ERT's decision to grant leave to appeal the sewage works C of A on the basis that the ERT: failed to apply or incorrectly applied the leave test under the *EBR*; erred in law in finding that no valid PTTW was in place; erred in fact and made a patently unreasonable decision in finding that no one had any way of knowing whether certain facts were correct with the PTTW in place when there was ample evidence on which to consider the sewage works C of A; and gave vague reasons for its decision and did not provide sufficient notice to MOE or other parties to allow them to participate in the hearing in a meaningful way. As of June 2006, the judicial review application is still before the courts. In December 2005, the ERT finally issued its ruling. The panel allowed the appeals in part, by amending one minor condition on the C of A for sewage. With respect to most of the C of A

Parties and Date of Leave Application	Description of Grounds for Leave to Appeal	Decision on Leave Application and Decision Date	Status/Final Outcome
			provisions for discharge of quarry water, the Tribunal did not find that discharged water would have potential adverse effects on aquatic life. Because of the observed presence of minnows in the discharge stream, it found that testimony regarding potential lethal impacts of discharge water on other aquatic organisms (rainbow trout and the common water flea, *Daphnia magna*) was not credible. In the Tribunal's view, there was almost no potential for discharged quarry water to affect water quality in downstream waterways, and the conditions of the amended C of A would be sufficient to monitor and remediate any such impacts. The Tribunal found no evidence that water quality issues in the area's existing domestic wells were due to nearby quarrying activities. In early 2006, counsel for the TTRPOA applied to the ERT for a re-hearing of some of the issues decided in the November 2005 decision. The TTRPOA alleged a number of serious irregularities in the ERT hearings procedure which resulted in the exclusion of crucial evidence related to the hydrogeology of the site. In May

Parties and Date of Leave Application	Description of Grounds for Leave to Appeal	Decision on Leave Application and Decision Date	Status/Final Outcome
			2006, the ERT denied this request.
Registry # IA04E0887 **Applicants:** Haldimand Against Landfill Transfers (HALT) and Six Nations of the Grand River **Ministry:** MOE **Proponent:** Haldimand-Norfolk Sanitary Landfill Inc. Date Application received by ECO: **March 1, 2005** **Instrument:** C of A, s. 27, *OWRA*	The applicant sought leave to appeal the decision to issue a C of A for a waste disposal site increasing the maximum daily fill rate from 10 tonnes of waste per day (domestic waste) to 500 tonnes of waste per day (9.07 tonnes per day domestic waste and 490.93 tonnes per day industrial, commercial and institutional waste). The grounds for seeking leave included the following: the proponent has provided no evidence to demonstrate that it has the experience or capability of operating a landfill that can receive up to 500 tonnes of waste per day, or of decommissioning a landfill site containing a significant quantity of hazardous and liquid industrial waste; the proponent has failed to comply with conditions in the past; and the site is fundamentally unsuitable for use as a landfill.	The ERT granted the leave to appeal applications on the grounds that: given the undisputed increase in truck traffic that will result from the increased fill rate, no reasonable person would leave the issue of the suitability of the access road to an open-ended post-approval condition; the C of A does not have a completion date for the study or a requirement that any upgrade to the road, if required, be done prior to acceptance of waste at the site; the Director's failure to consult with the Six Nations based on its assertion of aboriginal rights breaches the s. 41 leave test in the *EBR*; and the Director's decision could result in significant harm to the environment. **Date of Leave Decision:** June 21, 2005	Appeal pending
Registry # IA04E0715	The applicant sought leave to	The Environmental Review Tribunal granted	Appeal pending

Parties and Date of Leave Application	Description of Grounds for Leave to Appeal	Decision on Leave Application and Decision Date	Status/Final Outcome
Applicants: The Corporation of the County of Grey, the Town of the Blue Mountains and the Corporation of the Municipality of Grey Highlands ("the applicants") **Ministry:** MOE **Proponent:** Gibraltar Springs **Date Application received by ECO:** October 4, 2005 **Instrument:** Permit to Take Water (PTTW), s. 34, *OWRA*	appeal the decision of the Director to renew and amend a Permit to Take Water (PTTW) under s. 34 of the *OWRA* for Gibraltar Springs, also known as 1519311 Ontario Limited, for a water bottling facility in the Town of the Blue Mountains. The proponent applied for the renewal of an existing PTTW for three wells, each with a maximum daily taking of 491,040 litres/day, up to 260 days taking per year. The permit renewal maintains the previous permit's combined daily taking limit of 700,000 litres/day, and expands the monitoring program for potential aquifer and river impacts. The grounds for leave to appeal included: 1. the MOE Director applied the old Water Taking and Transfer Regulation (O. Reg. 285/99 under the *OWRA*); however, because the decision amended the existing permit and imposed new conditions, the Director should have applied the revised regulation, O. Reg. 387/04, since this regulation applies to decisions that "amend or impose conditions on a	the applicants leave to appeal the decision regarding this PTTW. Leave to appeal was granted on the entirety of the decision, with the exception of the bulk water transfer issue; the ministry and the proponent (Gibraltar Springs) satisfactorily addressed the bulk water issue in evidence presented to the Tribunal. Leave to appeal was granted on the grounds that: - The quantity of water approved is greater than the quantity actually being used, and reserving water in a current PTTW for future use appears to be contrary to ministry policy. - The applicants make legitimate arguments about potential significant environmental impacts of allowing such a large volume of water to be taken. The argument of potential harm is strengthened both because the water taking is in a sensitive area, and because of a lack of information on the site, its surroundings, and the past and potential future impacts of the water taking facility on the environment. The Tribunal did not analyze in detail the applicants' additional arguments, and instead noted that these arguments can be addressed at the appeal stage. The applicants' follow-up notice requiring an appeal hearing must set out which portions of the PTTW are being challenged and on what grounds.	

Parties and Date of Leave Application	Description of Grounds for Leave to Appeal	Decision on Leave Application and Decision Date	Status/Final Outcome
	permit to take water, whether the permit is issued before, on or after January 1, 2005." 2. The Director has not ensured that the regulatory prohibition on inter-basin transfers of bulk water is respected. 3. The PTTW approves water takings up to 700,000 litres/day, contrary to the guidance in O. Reg. 387/04 on ensuring water conservation. 4. The PTTW contains no expiry date, despite guidance stipulating that the maximum permit duration should be 10 years. 5. The Director made this decision without the hydrogeological information necessary to meet regulatory requirements to consider "potential impact" to "the water balance and sustainable aquifer yield." 6. Regulations and policies require consideration of surface water impacts, and the proposed approval could result in significant harm to headwaters for the Pretty River	The Tribunal granted Gibraltar's request that the automatic stay on the water taking be lifted, so that Gibraltar can continue to operate. The stay was lifted on an interim basis until the appeal is concluded. The ERT also allowed 30 days for a motion to be brought forward setting conditions on the lifting of the stay but no motion was brought forward within 30 days. Thus the stay remains lifted, without conditions. This ERT decision included a detailed discussion of the two-part test for leave to appeal, under s. 41 of the Environmental Bill of Rights. The Tribunal notes that in order to be granted leave for third-party appeal, the applicants must demonstrate that (a) it appears that there is good reason to believe that no reasonable person could have made the decision, having regard to relevant law and policies, and (b) it appears that the decision could result in significant harm to the environment. While the proponent and the Ministry of the Environment argued in this case that each ground for appeal must meet both the "reasonable person" test and the "significant harm to the environment" test in order to be accepted, the Tribunal found that it is the overall decision which is being put to this two-part test for leave to appeal, and that the appellants can raise separate grounds to meet the two parts of the test in s. 41.	

Parties and Date of Leave Application	Description of Grounds for Leave to Appeal	Decision on Leave Application and Decision Date	Status/Final Outcome
	within a provincial Area of Natural and Scientific Interest (ANSI). 7. This water taking meets the MOE's 2005 PTTW Manual definition of a "Category 3" water taking, and therefore requires a hydrogeological study.	**Date of Leave decision:** Dec. 30, 2005	
Registry # IA05E0080 **Applicants:** Wayne & Joanne Simpson Additional Leave to Appeal Applicants: Brenda Johnson - Environment Hamilton **Ministry:** MOE **Proponent:** BIOX Canada Limited Date Application received by ECO: **Oct. 7, 2005** **Instrument:** C of A, s.	The proponent sought a Comprehensive Certificate of Approval (Air) which is a single Certificate of Approval that replaces the existing Certificate (s) of Approval (Air) and includes the addition of new or historically unapproved sources for all emissions from its new biodiesel plant. The applicants sought leave to appeal on the following grounds: 1. The C of A lacks any conditions requiring the proponent to undertake stack testing to determine actual emissions of pollutants, including acrolein and tetrahydrofuran, from the BIOX facility. The applicants note that both of these substances are odourous and pose risks to human	The ERT granted the applicants leave to appeal the C of A. Leave was granted on the grounds that the C of A lacks any conditions requiring BIOX to undertake stack testing to determine the actual emissions of pollutants, including tetrahydrofuran and acrolein, from the facility. The C of A relies on air emissions modelling provided by BIOX, rather than requiring testing of actual emissions. The ERT observed that stack testing requirements in the C of A would be consistent with MOE's commitment to the precautionary principle, as set out in that ministry's Statement of Environmental Values under the *EBR*. Given that BIOX has acknowledged the need for follow-up air emission monitoring, there is reason to believe that no reasonable person could have issued a C of A without a condition requiring such stack testing. In the absence of testing for actual emissions, the potential exists for significant harm to the environment	Appeal Pending. In July 2006, the ECO learned that the parties have had settlement discussions and a proposal to settle the dispute is under consideration.

Parties and Date of Leave Application	Description of Grounds for Leave to Appeal	Decision on Leave Application and Decision Date	Status/Final Outcome
9, *EPA*	health. 2. The C of A lacks any reference to pollution or odour control equipment and associated operation and maintenance requirements. 3. The C of A does not include any reference to the safe storage and handling of the registerable residual waste that will be generated by BIOX.	The ERT refused leave to appeal on the other grounds raised by the applicants. **Date of leave decision:** Nov. 9, 2005	
Registry # IA05E0116 **Applicants:** Safety Kleen **Ministry:** MOE **Proponent:** Dunn Paving Date Application received by ECO: **Feb. 24, 2006** **Instrument:** C of A, s. 27, *EPA*	The applicant sought leave to appeal the Director's decision to issue the provisional Certificate of Approval (C of A) No. 1461-6H4HPB for a waste disposal site. The applicant also appealed the associated decision by the Director to approve the amendment to C of A (Air) No. 9364-6EGNQS (see Registry number IA05E0468). Combined, these approvals allow for the use of waste-derived fuel, in the amount of up to eight tonnes per day, to fuel Dunn Paving's hot mix asphalt plant boiler. The applicant sought leave to appeal on the following grounds: 1. The waste-derived fuel (WDF) is	The Environmental Review Tribunal (ERT) denied the applicant leave to appeal related to the amended Certificate of Approval (C of A) sought by Dunn Paving Inc. The ERT noted that the Applicant, Safety-Kleen Canada Inc., failed to present convincing evidence that the decision of the Director was unreasonable and could cause significant environmental harm. The Tribunal found that the Dunn Paving proposal for a provisional C of A (waste disposal site) was exempted from a mandatory hearing under section 30(1) of the *EPA* by section 28.4 of Regulation 347 (General Waste Management). Section 28.4 states that a waste-derived fuel site is exempt from s.30(1) if not more than ten tonnes of waste-derived fuel is utilized at the site on any day. The Tribunal also ruled that the variation in conditions between the Cs of A	Appeal denied

Parties and Date of Leave Application	Description of Grounds for Leave to Appeal	Decision on Leave Application and Decision Date	Status/Final Outcome
	being brought in from off-site and, therefore, the facility does not satisfy the definition of a waste-derived fuel site as set out in Regulation 347, RRO 1990 made under the *EPA*. The site is therefore subject to a mandatory hearing under s. 30(1) of the *EPA* because it is a waste disposal site involving liquid industrial waste. Therefore, the decisions to issue the related C of A (Air) and C of A (Waste Disposal Site) were unreasonable given that the proper mandatory hearing was not required by the Director. 2. The conditions imposed by the Director in both the air and waste disposal site Cs of A are considerably less stringent than the conditions imposed in Cs of A governing facilities involved in the management of used oil, making each of the Directors' decisions to approve these Cs of A unreasonable. 3. The C of A (Air) and C of A (Waste Disposal Site) are both unreasonable as a whole and will lead to significant harm to the environment. The approval to	issued to Dunn and to the applicant, Safety-Kleen, is not in itself sufficient to conclude that there is reason to believe that no reasonable person could have made the Director's decisions within the meaning of section 41 of the *EBR*. The Tribunal also concluded that the applicant has not established that it appears the Directors' decisions could result in significant harm to the environment. **Date of leave decision:** May 4, 2006	

Parties and Date of Leave Application	Description of Grounds for Leave to Appeal	Decision on Leave Application and Decision Date	Status/Final Outcome
	receive and combust WDF will result in significant harm due to increases in emissions of toxic substances including greenhouse gases, common pollutants such as SOx and CO2, toxic metals, and heavy polycyclic aromatic hydrocarbons. Furthermore, use of this material as waste fuel will lead to reductions in available quantities of used crankcase and lubricating oil for re-refining (re-use) and recycling.		

SECTION 8

EBR COURT ACTIONS

SECTION 8: *EBR* COURT ACTIONS

EBR COURT ACTIONS
April 1, 2005 to March 31, 2006

Parties and Date of Claim	Description of Grounds for Claim	Status/Final Outcome
Registry #CQ8E0001 **Plaintiffs:** Karl Braeker, Victoria Braeker, Paul Braeker and Percy James **Defendants:** Her Majesty the Queen in Right of Ontario, 999720 Ontario Limited, and Max Heinz Karge **Date Statement of Claim Issued:** July 27, 1998 **Type of Action:** Harm to a public resource action, s. 84, *EBR* **Court Location:** Superior Court of Justice, Grey County (West Region)	The plaintiffs live next to property owned by the defendant Karge, located in Egremont Township in the County of Grey. The plaintiffs claim that the property is the site of an illegal waste dump and that substances emanating from the site are contaminating or will imminently contaminate the subsoil, groundwater, and surface water in the surrounding vicinity, including the plaintiffs' wellwater. They claim that the defendants are responsible for this contamination. The damages sought by the plaintiffs include: an injunction preventing the use of the property for any use other than rural uses; an environmental restoration plan to prevent, diminish or eliminate harm to a public resource caused by contaminants emanating from the waste dump and to restore the site to its prior condition; and damages in excess of one million dollars.	Action pending. Notice was approved by the court and placed on the Registry on December 23, 1999. As of July 2006, this matter is still going through various pre-trial procedures and has not been listed for trial at this point.
Registry #CQ01E0001 **Plaintiff:** Wilfred Robert Pearson	The plaintiff in this class proceeding maintains that the defendant has and does emit and discharge hazardous contaminants into the natural	The certification motion was heard in June 2002. In a judgment dated July 15, 2002, the Ontario Superior Court of Justice dismissed

Parties and Date of Claim	Description of Grounds for Claim	Status/Final Outcome
Defendants: Inco Limited, The Corporation of the City of Port Colborne, The Regional Municipality of Niagara, The District School Board of Niagara, and The Niagara Catholic District School Board **Date Statement of Claim Issued:** 2001/03/26 **Type of Action:** Public nuisance action, s. 103, *EBR* **Court Location:** Superior Court of Justice, Welland	environment, including the air, water and soil of Port Colborne. The contaminants include oxidic, sulphidic and soluble inorganic nickel compounds, copper, cobalt, chlorine, arsenic and lead. The plaintiff claims that the defendant is liable for the activities at the refinery and the ongoing release of contaminants into the environment and onto the lands of the class members, based on the following causes of action: negligence; nuisance; public nuisance under s. 103 of the *EBR*; trespass; discharging contaminants with adverse effects under s. 14 of the *EPA*; and the doctrine of strict liability in *Rylands and Fletcher*. The plaintiff claims punitive and exemplary damages in the amount of $150 million, and compensatory damages in the amount of $600 million.	the plaintiff's certification motion on the following grounds: the plaintiff failed to disclose a reasonable cause of action against the Region, the City or the Crown; there was no identifiable class; and a class proceeding is not the preferable procedure for resolving the issues found to be common among the class members. In September 2002, the Superior Court of Justice held the plaintiff liable for costs on the certification motion. The plaintiff and class members appealed this decision to the Divisional Court. In February 2004, the Divisional Court upheld the lower court's decision that it was not appropriate to certify this as a class action. In March 2004, MOE and the other parties agreed to an undisclosed settlement with the plaintiff, leaving Inco as the only defendant in the lawsuit. On May 30, 2005, the Ontario Court of Appeal heard Pearson's appeal of the certification issue. The ECO intervened in this appeal on the issue of liability for costs. In November 2005, the OCA overturned the two lower court rulings that refused to certify a class of property owners. In doing so, the OCA has determined that when environmental class litigants properly frame

Parties and Date of Claim	**Description of Grounds for Claim**	**Status/Final Outcome**
		their claims, they can be certified, notwithstanding the earlier failures that have occurred, including the 2001 decision of the Supreme Court of Canada in *Hollick v. Toronto (Municipality)*. On the issue as to whether the plaintiffs could form an identifiable class, the OCA noted that the plaintiff had dropped the health claims related to nickel exposure. Thus, the lawsuit was based solely on reduced property values that resulted from the government announcement of the nickel contamination. Both lower courts had been concerned with the broad nature of the original class definition. Since the common issues before the OCA were narrower than in the courts below and the available evidence supported the allegation of reduced property values for everyone in the proposed geographical area, the OCA accepted that there was an identifiable class and supported certification. The other main issue in the appeal was whether a class action was the "preferable procedure" for addressing the various claims. Under the *Class Proceedings Act*, the courts are required to consider whether on balance, a class action is the most fair, efficient and manageable method of advancing the class members' claims and whether the class action would be preferable to other reasonably available means of resolving the claims. The

Parties and Date of Claim	**Description of Grounds for Claim**	**Status/Final Outcome**
		December 2004 OCA in *Cloud v. The Attorney General of Canada* was cited as an indication that the OCA is now taking a more liberal approach to certification of class proceedings than it had taken in the past. The *Pearson* decision should provide new hope to environmental class litigants who had seen a number of high profile class actions defeated at the certification stage. On June 29, 2006, the SCC rejected Inco's application for leave to appeal, which means that the *Pearson* case can now proceed to trial. The ECO will report on the progress of this case in a future report.

SECTION 9

STATUS OF ECO REQUEST AND REQUESTS TO PRESCRIBE TO NEW OR EXISTING MINISTRIES FOR LAWS, REGULATIONS OR PROCESSES UNDER THE *EBR*

SECTION 9: STATUS OF ECO REQUESTS TO PRESCRIBE NEW OR EXISTING MINISTRIES FOR LAWS, REGULATIONS OR PROCESSES UNDER THE EBR

One of the challenges facing the Environmental Commissioner of Ontario (ECO) and the Ontario government is keeping the *EBR* in sync with new laws and government initiatives. The ECO strives to ensure that the *EBR* remains up-to-date and relevant to Ontario residents who want to participate in environmental decision-making. The Commissioner and his staff constantly track legal and policy developments at the prescribed ministries and in the Ontario government as a whole, and encourage ministries to update the *EBR* regulations to include new laws and prescribe new government initiatives that are environmentally significant.

When the Ontario government passes and then proclaims a major new environmental law, the ECO reviews the law to determine whether it would be logical for the Ontario government to prescribe it for the purposes of the *EBR* and to ensure that Ontario residents are extended rights to participate in environmentally significant decision-making on proposed regulations and instruments issued under the new law. For example, certain new laws have sweeping implications for environmental planning, and there is strong public interest in participation in their implementation. Before the public can begin to participate in decisions to issue new regulations or instruments or request investigations and reviews, a new stand-alone law such as the *Kawartha Highlands Signature Site Parks Act, 2003* has to be added to the lists of laws prescribed for the *EBR* as set out in O. Reg. 73/94, the General Regulation under the *EBR*.

In some cases, a new law such as the *Brownfields Statute Law Amendment Act, 2001 (BSLLAA)* amended existing environmental laws that are already prescribed. In these cases, the ECO may request that a ministry determine if any new environmentally significant instruments are created under the amended law and associated regulations, and if the ministry should consider amending O. Reg. 681/94, the Instrument Classification Regulation made under the *EBR*.

If the new law is considered to be environmentally significant, the ECO then contacts the Deputy Minister of the ministry responsible and requests that the Act or certain parts of it be prescribed under the *EBR*. If the ministry agrees, it must then seek appropriate internal and central agency approvals and work with MOE, which is responsible for administering the *EBR* and its regulations, to ensure that appropriate amendments are made and that the proposed changes are posted on the Registry for public comment. Usually this process takes between one and two years. In some cases, the process can take much longer. For example, *Oak Ridges Moraine Conservation Act, 2001* is not yet prescribed under the *EBR* even though the ECO raised this issue with the Ministry of Municipal Affairs and Housing (MAH) in late 2001 and MAH posted proposals for regulations related to prescribing the *ORMCA* under the *EBR* in 2003. (For further discussion, see the update on this issue in the review of the Transportation Planning requirements in the ORM in the ECO 2005/2006 annual report, pages 81-85.)

To illustrate the current status of various recent Acts and regulations, the ECO has prepared a summary in Table 1. This table is merely an indication of the scope of the challenges faced, and is not intended to provide a comprehensive review. As indicated in Table 1, there have been serious delays in making certain laws subject to the *EBR*. The ECO is concerned about these lengthy delays because this means that the public is deprived of rights to participate in environmentally significant decisions, file leave to appeal applications and request *EBR* investigations and reviews. Moreover, the ECO is not legally

empowered to subject ministry decision-making under these non-prescribed Acts to the same degree of scrutiny as would normally occur for decisions made under prescribed Acts.

In the 2005/2006 reporting period, the ECO observed progress in expanding *EBR* coverage over brownfields and nutrient management issues. In June 2005, MOE posted a proposal on the Environmental Registry to amend O. Reg. 681/94 (Classification of Proposals for Instruments) in order to classify Certificates of Property Use (CPUs) under the *EBR*. In October 2005, the decision notice was posted and the regulatory changes were passed making CPUs prescribed instruments under the *EBR*. (For further discussion, see the update on Brownfields in the ECO 2005/2006 annual report, pages 57-58.) In early 2006, more than four years after the ECO's initial request, the Ministry of Agriculture and Food (OMAF) and MOE finalized their proposal to prescribe certain parts of the *Nutrient Management Act* (*NMA*) under the *EBR*. (For further discussion, see the review of O. Reg.511/05 made under the *NMA* in the ECO 2005/2006 annual report, pages 111-116.) The ECO commends MOE and OMAFRA for these positive initiatives.

Table 2 contains an update on the status of applications for review made by the public to make certain ministries subject to the *EBR* or to expand the number of *EBR* processes that apply to a prescribed ministry. Despite the delays catalogued in Table 2, there have been some positive trends in the past two years: ministries appear to be more receptive to requests for review submitted by members of the public under the *EBR* to prescribe Acts and ministries. The ECO applauds this new receptivity.

Table 1 - Status of ECO Requests to Prescribe New Laws, Regulations and Instruments under the *EBR* as of June 2006

Act, Regulation or Instrument (Ministry)	ECO request to prescribe	Status as of June 2006 and ECO Comment
Food Safety and Quality Act, 2001 (OMAFRA)	The ECO wrote to OMAF in late 2001 requesting that it prescribe the *FSQA* for the full range of rights including regulation proposal notices and applications for review and investigation under the *EBR*.	OMAF informed the ECO in June 2002, that it did not consider the *Food Safety and Quality Act* to have a significant impact on the environment, as the primary purpose of the *Act* is to provide for the safety and quality of food and the agricultural and aquatic commodities that become food. OMAF also stated that regulations regarding deadstock disposal would be split between the *Food Safety and Quality Act* and the *NMA* and that such regulations would be posted on the Registry. In July 2004, OMAF posted a new regulatory framework for deadstock, including repeal of the *Dead Animal Disposal Act (DADA)* and Regulation 263, RRO 1990 under the *DADA*.

Greenbelt Act, 2005 (MAH)	The ECO wrote to MAH in April 2005 requesting that it prescribe the *Greenbelt Act* under the *EBR* for regulation and instrument proposal notices and applications for reviews.	In April 2005, MAH informed the ECO it will begin to work on the amendments required to prescribe the *Greenbelt Act* under the *EBR*. In March 2006, MAH reported that it is committed to prescribing the *Greenbelt Act, 2005* under the *EBR*, and "is taking the necessary steps to achieve this." However, no timeline was provided regarding when the Act is likely to be prescribed. A summary was provided of MAH initiatives already underway to ensure the implementation of the Greenbelt Plan. For further detail, see Ministry Progress in the ECO 2005/2006 annual report at pages 192-193.
Kawartha Highlands Signature Site Parks Act, 2003 (MNR)	ECO wrote to MNR in April 2005 requesting that it prescribe the *KHSSPA* under the *EBR* for review and investigation applications.	MNR advised the ECO by letter dated May 25, 2005 that MNR agrees that the *KHSSPA* should be prescribed under the *EBR*. MNR will work with MOE to do so once the *KHSSPA* is proclaimed in full and the parks boundaries are regulated. In March 2006, MNR further advised that the park boundaries are now regulated under the *Provincial Parks Act* and a request will be made to the MOE to prescribe the *KHSSPA* under the *EBR* once it is proclaimed.
Lakes and Rivers Improvement Act (LRIA), Water Management Plans (WMPs) issued under s. 23.1 (MNR)	The *Reliable Energy and Consumer Protection Act* (AB02E6001) received Royal Assent in June 2002 and created s. 23.1 of the *LRIA*, which replaced s. 23 of the Act. In our 2002/2003 annual report, the ECO encouraged MNR to amend O. Reg. 681/94 to include WMPs issued under s. 23.1 as prescribed instruments.	Section 23 of the *LRIA* remains as a prescribed instrument under the *EBR* but it appears to be of little or no force and effect. MNR posted information notices for 20 WMPs during the reporting period. These notices should have been subject to public notice and comment under the *EBR*. In March 2006, MNR advised the ECO that it is not proceeding with the classification of WMPs as instruments under the *EBR* because its Water Management Planning Guidelines for Waterpower "establishes a

		comprehensive approach to public engagement." MNR also noted that the majority of WMPs are complete or close to completion.
Nutrient Management Act (OMAF and MOE) Note: In late 2003, MOE assumed jurisdiction for enforcement of several aspects of the *NMA*.	The ECO wrote to OMAF in late 2001 and again in 2002 and 2003 requesting that it prescribe the *NMA* under the *EBR* for regulation and instrument proposal notices and applications for review and investigation. Unless Nutrient Management Strategies (NMSs) and Nutrient Management Plans (NMPs) are designated as instruments, the public and municipalities will not be notified on the Registry of local nutrient management activities, and residents will be unable to request an investigation under the *EBR* into possible non-compliance and request reviews of specific NMSs and NMPs.	In January 2006, the ECO was pleased to learn that the *NMA* and its regulations were prescribed for notice and comment and for applications for review. However, the *NMA* and its regulations were not designated for applications for investigation and NMSs and NMPs were not designated as instruments. The ECO continues to urge MOE and OMAFRA to prescribe the *NMA* for applications for investigation and to designate NMSs and NMPs for large livestock operations as instruments.
Oak Ridges Moraine Conservation Act, 2001 (MAH)	The ECO wrote to MAH in December 2001 requesting that it prescribe the *ORMCA* under the *EBR* for regulations and instrument proposal notices and applications for reviews. In early 2003 MAH staff briefed ECO staff on its plan to use information notices for official plan amendments (OPAs) related to *ORMCA* implementation rather than regular instruments.	MAH informed the ECO in March 2006 that with the approval of the *Greenbelt Act, 2005* and Plan, which includes the *ORMCA* area, it continues to work on the amendments to O. Reg. 73/94 that are required to prescribe the *ORMCA* under the *EBR*. MAH posted information notices for 26 OPAs and 12 zoning orders related to the *ORMCA* during the reporting period. These notices should have been subject to public notice and comment under the *EBR*.
Safe Drinking Water Act, 2002 (MOE)	In January 2003, the ECO wrote to MOE requesting that it prescribe the *SDWA* for regulation proposal notices and for applications for review under the *EBR*. ECO staff also discussed this issue	MOE prescribed the *SDWA* for regulations and reviews in the summer of 2003. The ECO agrees with MOE that *SDWA* should not be prescribed for *EBR* investigations. MOE also insists that it is not

	at numerous meetings between the ECO and the Environmental Bill of Rights Office of the MOE in 2003 and 2004. MOE contends that the *SDWA* should not be prescribed for *EBR* investigations because the *SDWA* has separate investigation provisions, as recommended by the Walkerton Inquiry. In 2005, MOE finalized a separate regulation on *SDWA* investigations that it first proposed in June 2003.	appropriate to prescribe *SDWA* instruments under the *EBR* because most *SDWA* approvals are exempted under the Municipal Class Environment Assessment on Roads and Water and Sewer Projects. This means that Ontario residents cannot file *EBR* applications for review related to *SDWA* instruments. This is an unfortunate result, and the ECO urges MOE to reconsider this limitation, which seems contrary to the spirit of the Walkerton Inquiry report.
Sustainable Water and Sewage System Act, 2002 (MOE)	In January 2003, the ECO wrote to MOE requesting that it prescribe the *SWSSA* for regulation proposal notices and for applications for review and investigation under the *EBR*.	MOE prescribed the *SWSSA* for regulations and reviews in the summer of 2003. (see O. Reg. 104/03) However, this Act has yet to be proclaimed because MOE has not yet developed any regulations under it.
Waste Diversion Act, 2002 (MOE)	In July 2002, ECO wrote to MOE requesting that it prescribe the *WDA* for regulation proposal notices and for applications for review and investigation under the *EBR*. In May 2003, MOE staff briefed ECO staff on its position on prescribing the *WDA* and indicated that MOE did not believe that the *WDA* should be prescribed for investigations because the contravention section of the *WDA* is intended to support the collection of funds to support waste diversion activities by Waste Diversion Ontario.	In 2003, MOE amended O. Reg. 73/94 to require the ministry to post notices for proposed *WDA* regulations but Ontario residents are not permitted to file applications for review related to the *WDA*. (see O. Reg. 104/03) In 2004, Ontario residents filed two applications for review related to prescribing materials for recycling under the *WDA*, and both reviews were rejected. The ECO believes that MOE should reconsider whether it would be worthwhile prescribing the *WDA* for *EBR* reviews.

Table 2 - Status of Public and ECO Requests to Prescribe New Ministries, Agencies and *EBR* Processes as of June 2006

Ministry or Process	ECO or Ontario resident request to prescribe	Status as of June 2006 and ECO Comment
Making the Ministry of Transportation Subject to the Application for Review Process (MTO and MOE)	In June 2003, two applicants requested that the Ministry of Transportation (MTO) be made subject to Part IV of the *EBR* which, if granted, would permit residents of Ontario to request reviews of MTO's policies and prescribed Acts, regulations, and instruments (permits, licences etc.) and to ask MTO to review the need for new Acts, regulations and policies. To date, MTO's participation has been limited to creating a SEV and posting proposals for new environmentally significant Acts and policies on the Registry for public comment. The applicants feel that the *EBR*'s application for review procedure should apply to MTO and its activities because of the environmental impacts of highway development and use, and the need for MTO to consider and/or promote modes of travel other than highway-based, including alternatives such as rail.	In September 2005, the Ministry of the Environment recommended prescribing the Ministry of Transportation for the purposes of applications for review under the EBR. For the full comment on this application for review, please see pages 166-167 of this supplement. MOE advises the ECO that a Registry proposal notice related to this will be posted in the late spring of 2006.
Making the Ministry of Education Subject to the EBR (EDU and MOE)	This application requested that the MOE review O. Reg. 73/94, the General Regulation under the *EBR*, to determine whether the Ministry of Education should be added as a prescribed ministry under the *EBR*. In July 2004, MOE advised the ECO that it was reviewing the request and would require 6 months to complete its review. A similar request was made to MOE in late 1999 and it was reviewed in the ECO 2000/2001 annual report.	In September 2005 the Ministry of the Environment completed its review and recommended prescribing the Ministry of Education for the purposes of consideration of a Statement of Environmental Values that the ministry would create under the *EBR*. For the full ECO comment on the MOE's handling of this review, please see pages 168-176 of this supplement and pages 123-128 of the ECO 2005/2006 annual report. In November 2005, MOE posted a

		proposal notice for a regulation to amend O. Reg. 73/94. As of June 2006, MOE had not posted a decision notice on the proposal.
Making the Ministry of Public Infrastructure Renewal Subject to the EBR (MPIR and MOE)	The Ministry of Public Infrastructure Renewal (MPIR) was established by the Ontario government in November 2003 with a mandate to support upgrades to roads, transit systems and other public infrastructure and promote sound urban and rural development. To support this vision, in the spring of 2005 the Ontario government enacted a major piece of MPIR legislation titled the *Places to Grow Act* (*PGA*). In early 2004, ECO wrote to MPIR requesting that the ministry be prescribed for SEV consideration, Registry notice and comment, regulation proposal notices and for applications for review under the *EBR* and that the *Places to Grow Act* be prescribed for regulation proposal notices and for applications for review under the *EBR*.	The ECO met MPIR staff in early 2006. As of May 2006, work on these matters was ongoing at MPIR. The lack of progress in prescribing MPIR under the *EBR* is a significant disappointment because MPIR continues to work on growth management plans for most areas of southern Ontario.
Making the Ontario Heritage Trust Subject to the EBR (MNR, MCL and MOE)	The *Ontario Heritage Act* (*OHA*) is the legislative framework for heritage conservation in Ontario. In 2005, the *OHA* was amended to formally recognizes the natural environment conservation function of the Ontario Heritage Trust (formerly the Ontario Heritage Foundation). The Ontario Heritage Trust (OHT), an agency of the Ministry of Culture (MCL), is the province's lead heritage agency and dedicated to identifying, preserving, and promoting Ontario's heritage for the benefit of present and future generations. One of its programs focuses on natural heritage and	In April 2006, MCL responded and suggested that staff of the OHT and MNR meet with the ECO to provide an update on OHT's work and to discuss what actions should be taken. MCL did not expressly commit to making the OHT subject to the *EBR*. As of late May 2006, the meeting had not been held. For further detail on the amendments to the *OHA* and the OHT, see the ECO 2005/2006 annual report, pages 54-58. For further information on the ECO's request that MCL post a notice

	the OHT holds in trust a portfolio of more than 130 natural heritage properties, including over 90 properties that are part of the Bruce Trail. Protected land includes the habitats of endangered species, rare Carolinian forests, wetlands, sensitive features of the Oak Ridges Moraine, nature reserves on the Canadian Shield and properties on the Niagara Escarpment. In March 2006, the ECO wrote to MCL requesting that the OHT be prescribed for environmentally significant decisions. This would include SEV consideration and Registry notice and comment for proposal notices for Acts and policies. Such an approach would ensure that future changes to the Natural Spaces Land Acquisition and Stewardship Program (NSLASP) now administered by the OHT would be posted on the Registry for comment. Changes made to the NSLASP in late 2005 were not posted as a regular proposal notice on the Registry. The ECO also requested that MCL post a regular Registry notice about the NSLASP on behalf of the OHT.	about the changes to the NSLASP, see page 1 of this supplement.

SECTION 10

OVERVIEW OF WASTE DIVERSION IN ONTARIO

SECTION 10: OVERVIEW OF WASTE DIVERSION IN ONTARIO

Waste diversion is often considered within the context of the 3Rs – reduction in the amount of waste produced, reuse of products and recycling of waste materials into new products. For many Ontarians, waste diversion is synonymous with the Blue Box program. However, backyard composting, leaf and yard waste collection, Environment Days and other programs that divert waste from landfill sites are also waste diversion activities. Energy-from-waste facilities, such as Algonquin Power in Brampton, incineration and landfills are classified as waste disposal. The provincial goal of diverting 60 per cent of waste from disposal by the end of 2008 only applies to the municipal, the industrial, commercial and institutional (IC&I), and the construction and demolition (C&D) sectors. The goal does not apply wastes produced by the mining and forestry sectors. For additional information about this goal, refer to the ECO 2005/2006 annual report, pages 26-33.

Waste Composition

Waste composition, i.e., the type and amount of waste, can vary significantly between sectors and even within sectors. The term "municipal waste" has come to mean "residential waste", i.e., waste from single-family and multi-unit dwellings, since many municipalities pick up little or no IC&I and C&D waste. The IC&I sector includes restaurants, retail outlets, hotels, schools, manufacturers, office buildings and most large multi-unit dwellings, e.g., condominiums and apartment buildings. Table 1 lists the major waste types by sector and their percentages (based on tonnage data) of the specified sector's waste stream.

Table 1: Per cent Composition of Municipal, IC&I and C&D Waste.

Waste Type	Municipal	IC&I	Construction	Demolition
Paper	24	23	5	2
Food	25	11 (organic)	-	-
Leaf and Yard	13	-	-	-
Glass	5	5	4	-
Ferrous	2	11 (metal)	8	5
Aluminum	1	-	-	-
Plastic	4	3	3	1
Other	26	26	20	20
Wood	-	21	31	52
Concrete	-	-	7	3
Gypsum board	-	-	9	3
Rock, soil, fines	-	-	13	14

There are also significant differences in waste composition within the IC&I sector. For instance, retail outlets produce large amounts of paper waste; in contrast, restaurants produce large amounts of organic waste.

Waste Management Powers

Waste management programs in Ontario are the result of a complex array of federal, provincial and municipal powers, and private initiatives. The federal government has the power to enact legislation, develop programs related to the flow of waste across national and/or provincial borders and to impose taxes to encourage recycling. However, since the provinces have most of the regulatory powers related to waste, the federal government sometimes works with the provincial and territorial governments on initiatives. For example, in the 1990s, they developed and implemented the National Packaging Protocol

that led to a 50 per cent reduction in the weight of packaging waste that the industrial, commercial and residential sectors diverted from disposal in 1996 compared to 1988. The goal was achieved by reducing the amount of packaging generated, and reusing and recycling of packaging. Most of the reduction was the result of initiatives in the industrial sector rather than in the residential sector.

Ontario has three major pieces of legislation that apply to waste management. Under the *Environmental Protection Act* (*EPA*), owners/operators must obtain certificates of approval from the province to build and operate waste disposal sites and waste transfer facilities, and to haul wastes. Regulations under the *EPA*, known as the 3Rs regulations, require most municipalities and the largest establishments in the IC&I and C&D sectors to have waste diversion programs. Under the *Environmental Assessment Act*, large waste management projects require an environmental assessment. Under the *Waste Diversion Act* (*WDA*), MOE can request Waste Diversion Ontario, a non-government organization created by MOE, to oversee the preparation and implementation of waste diversion programs for wastes designated under the *Act*. As of July 2006, Waste Diversion Ontario has implemented the Blue Box Program Plan (BBPP) and is overseeing the development of a program for electrical and electronic equipment. Other federal and provincial environmental legislation including the *Fisheries Act* and the *Ontario Water Resources Act* may also apply to approvals for specific operations.

Over the years, the Ontario government has passed regulations that have enabled municipalities to make and implement decisions related to waste management. Today, municipalities can pass by-laws related to waste management; ban specified wastes from landfill sites; design and implement waste management programs; and locate and operate waste diversion and disposal facilities as long they comply with provincial and federal legislation.

Municipal Waste Management

Municipal waste collection, diversion and disposal activities may be done by either the municipality or private contractors or a combination of the two approaches.

Sidebar: City of Toronto Multi-unit Dwellings Recycling Program

The City of Toronto has approximately 510,000 single family dwellings which diverted about 49 per cent of their wastes and 490,000 multi-unit dwellings which diverted about 12 per cent of their wastes in 2004 for an overall diversion rate of 36 per cent. In order to fulfil its goal of diverting 60 per cent of waste from landfill by 2006, the City recognized that it must improve the diversion rate in multi-unit dwellings and introduced a by-law that requires owners, property managers and superintendents of multi-unit dwellings with eight or more units to separate Blue Box wastes from their garbage as of January 1, 2006. The City has set diversion targets for each multi-unit dwelling based on the number of units in the dwelling and the amount of waste that would be produced if it diverted recyclables at the same rate as a single-family dwelling. If the waste diversion target is not met, the City plans to apply a levy on the amount of waste that exceeds the target after a phase-in period. Dwellings that meet or exceed their targets will continue to receive free recycling services.

Two of the most important pieces of provincial legislation for municipalities are the 3Rs regulation, O. Reg. 101/94, and the *Waste Diversion Act* (*WDA*.)

O. Reg. 101/94 – Recycling and Composting of Municipal Waste

This regulation requires municipalities:

- In Southern Ontario with a population of at least 5,000 and in Northern Ontario with a population of at least 15,000 to provide a Blue Box Program for both single-family and multi-unit dwellings as of January 1995 and July 1996 respectively;
- With a population of at least 5,000 to provide backyard composters; and

- With a population of at least 50,000 to provide leaf and yard (i.e., organics) waste collection services.

O. Reg. 101/94 also defined which wastes, e.g., paper, glass and aluminum, must be included in the Blue Box Program and which wastes, e.g., aluminum foil, are optional.

Although not required under O. Reg. 101/94, several municipalities have added food wastes to their organics programs. In the City of Toronto, households participating in its expanded organics program diverted 200 kg of organic wastes per household per year, which has increased the overall diversion rate for single family dwellings to 49 per cent in 2004.

Under the *WDA*, the Blue Box Program was rejuvenated in 2003 when funding issues were addressed with the implementation of the BBPP. When the Blue Box Program was first implemented during the 1980s and 1990s, funding support was provided by the province and industry. However, by the late 1990s, funding became the responsibility of the municipality and, as the costs for the program escalated, municipalities began to cut back on their programs and Blue Box diversion rates stagnated at about 27 per cent. In 2003, industry began to pay 50 per cent of the net cost of the program under the BBPP and about 53 per cent of generated Blue Box wastes were being diverted from landfill sites and marketed. Further initiatives to improve Blue Box diversion rates have been identified.

Sidebar: Yellow Bag Program for Commercial Units
Commercial units in Toronto and Ottawa that are serviced by municipal garbage collection are provided with free recycling of organics and Blue Box materials if they use purchased yellow bags for their residual garbage. Participation in the Yellow Bag Program is optional.

A waste diversion program is also being prepared for electrical and electronic equipment under the *WDA*. The program will include mechanisms to cover the cost of implementing and operating the program. Currently many municipalities accept electrical and electronic equipment from residents and cover their costs with property taxes.

IC&I and C&D Waste Management
Waste diversion efforts by the IC&I and C&D sectors are either the result of activities undertaken to comply with the 3Rs regulations or are voluntary. Only the largest establishments in these sectors are required to comply with the 3Rs regulations.

O. Reg. 102/94 – Waste Audits and Waste Reduction Work Plans
This regulation requires large retail outlets, construction and demolition projects, office buildings schools, restaurants, hotels and motels, hospitals and manufacturers that meet the size criteria to undertake annual waste audits and develop waste reduction work plans. Waste audits include strategies to reduce, reuse and recycle waste and set out who will implement each part of the plan, when each part will be implemented, and the expected results.

O. Reg. 103/94 – Industrial, Commercial and Institutional Source Separation Programs
This regulation applies to IC&I establishments that are located in municipalities captured under O. Reg. 101/94 and that meet the size criteria in O. Reg. 102/94. The regulation also applies to manufacturers and C&D projects that meet the size criteria regardless of where they are located. It also applies to multi-unit dwellings of six units or more. This regulation requires establishments to implement on-site source-separation programs for specified wastes. For instance, brick, concrete, wood, drywall and steel must be separated from other wastes on construction and demolition projects. Other sectors are required to separate old corrugated cardboard, food and beverage containers, fine paper and newsprint from other

wastes in their source-separation program. Information about an establishment's source-separation program must be provided to all users and reasonable efforts must be made to ensure that the separated waste is reused or recycled. According to MOE, only about 10 per cent of manufacturers are required to comply with this regulation.

O. Reg. 104/94 – Packaging Audits and Packaging Reduction Work Plans
This regulation requires manufacturers and importers or packagers of packaged food, beverage, paper or chemical products that meet the size criteria to undertake packaging audits and prepare work plans every two years. The audits and work plans are intended as tools for evaluating the opportunities for 3Rs activity, including actions that will help ensure a reduction in the amount of packaging used; an increase in reused or recycled content; an increase in reusability and recyclability of packaging; and a reduction in the overall environmental impact of the packaging that becomes waste.

Waste Diversion Statistics
MOE's discussion paper released in 2004 notes that the municipal, and the IC&I and C&D sectors produced about 9.4 million tonnes of waste in 2002, of which about 2.8 million tonnes were recycled, and most of the remaining 7.2 million tonnes were placed in landfills in Ontario or the United States with only a small amount being incinerated.

Based on waste disposal statistics provided by the State of Michigan, the Ontario Waste Management Association has calculated that Ontario shipped 3.5 million tonnes of municipal and IC&I waste to the United States (mostly to Michigan) in 2004. One-third of that waste was generated by Toronto, and the remaining two-thirds by Peel, York, Durham, Hamilton, Halton, Kitchener, Brantford, London, Barrie, Peterborough and Sudbury.

Table 2 lists prices that municipalities may have been able to obtain for various Blue Box wastes. However, the prices that municipalities actually received depends on the terms defined in their contracts with purchasers. The only exception is mixed glass. Municipalities paid "purchasers" to take the glass. The table also lists the estimated diversion rate, i.e., the tonnage of Blue Box waste marketed divided by the estimated tonnage of Blue Box waste generated, for each of the Blue Box wastes.

Table 2: Spot Prices and Diversion Rates for Selected Blue Box Wastes.

Blue Box Waste	2005 Yearly Average CSR Spot Price ($/Tonne Baled)	2003 Estimated Blue Box Waste Diversion Rate (2005 data not available) (Per Cent)	2003 Tonnage Marketed (Tonnes/year)
Aluminum cans	1,757	41	9,832
Steel cans	115	53	30,447
Glass (clear)	36	58	69,976
Glass (mixed)	(31)	61	44,273
PET bottles	515	50	18,120
Newsprint	103	75	301,000
Boxboard	55	42	54,712

According to Waste Diversion Ontario, the organization that oversees the BBPP, the average household diverted 174 kilograms of Blue Box materials from landfill sites in 2003. However, Table 2 illustrates that substantial amounts of Blue Box materials are not being diverted through the Blue Box Program. Instead, they are being trucked to landfill sites or are being diverted through other means, e.g., aluminum cans are sometimes collected and sold by charities as a means to raise funds.

3Rs Regulation Enforcement

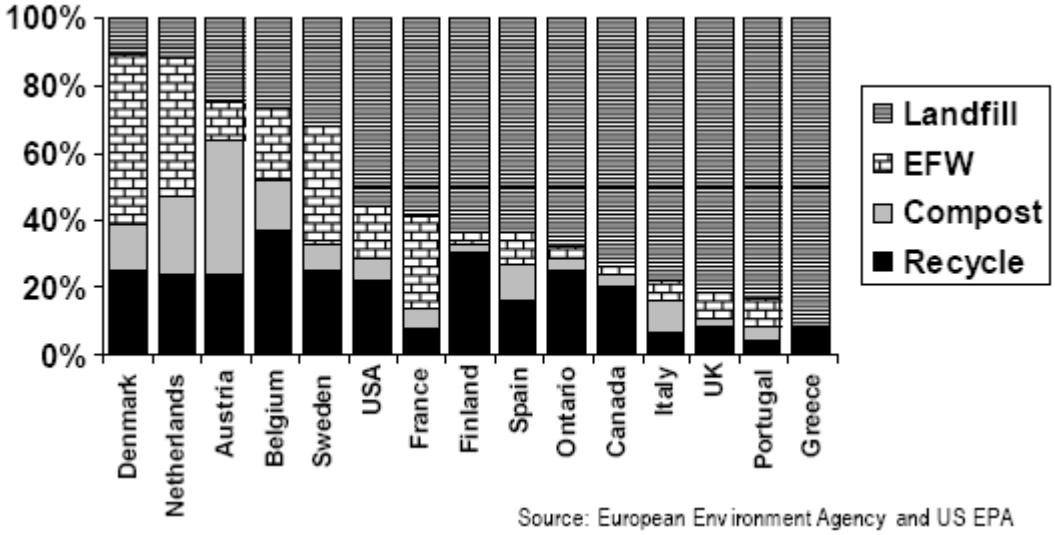
In August 2001, MOE conducted 102 inspections of multi-unit dwellings in Belleville, Kingston, Ottawa, Peterborough, Toronto and York-Durham for compliance with O. Reg. 103/94. It issued 77 Provincial Officer Orders and 53 *Provincial Offences Act* (*POA*) tickets/court summonses/notices. *POA* tickets/summonses/notices carry a maximum fine of $500.

In 2004/2005, MOE inspected 30 facilities including construction and demolition sites, major retail stores and shopping malls, a school board and several hospitals in the City of Toronto for compliance to O. Reg. 102/94 and O. Reg. 103/94. In general, MOE found that some facilities in the IC&I sector had a good understanding of the regulations and a good implementation program; whereas, other facilities had little or no knowledge of the regulations. MOE also found that the IC&I had a better understanding of the regulations and better implementation than the C&D sector. MOE advised the ECO that it inspected additional facilities in 2005/2006.

How Does Ontario Compare?

MOE's discussion paper included the following figure that shows that Ontario's recycling rate compares favourably with most European countries and the U.S.

Figure 1: International Waste Management Statistics



The figure also shows that Ontario relies far less than most of these countries on composting and energy-from-waste technologies for waste management.

Next steps

In June 2004, MOE released a "Discussion Paper" – Ontario's 60 per cent Waste Diversion Goal, which described various options for achieving the goal of diverting 60 per cent of waste from disposal by the end of 2008. The Discussion Paper describes the five factors that MOE considers to be key and numerous

actions that could be taken to achieving its goal. For additional information on the Discussion Paper and the ECO's comments, refer to the 2005/2006 annual report, pages 26-33.)

In July 2006, MOE posted a notice (RA06E0008) on the Registry that proposed amendments to the *EPA* that would eliminate the requirement for some ministry approvals to use organic wastes to produce ethanol and biodiesel or as fuel. MOE also proposed that pilot and demonstration sites for new and emerging waste management technologies, including energy-from-waste technologies, be exempt under the *EAA* and that hearings related to these projects be discretionary instead of mandatory. It also proposed numerous other amendments that would reduce the regulatory requirements related to the development and implementation of waste diversion systems and management of recyclable materials.

SECTION 11

UNDECIDED PROPOSALS

SECTION 11: UNDECIDED PROPOSALS

As required by s. 58 of the *EBR*, the ECO is required is produce a list of all proposal notices posted on the Environmental Registry between April 1, 2005 and March 31, 2006 that were not decided by March 31, 2006. Prescribed ministries posted 9 Acts, 51 regulations, 152 policies, and 2,486 instruments. A detailed list is available from the ECO by special request.

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