# reconciling our priorities

ANNUAL REPORT 2006–2007

environmental commissioner of ontario

## Supplement

## ABBREVIATIONS

**Terms & Titles**

**AAA** American Automobile Association
**AAQC** Ambient Air Quality Criteria
**ALMR** Association of Lighting & Mercury Recyclers
**AFA** Algonquin Forest Authority
**AMO** Association of Municipalities of Ontario
**ANSI** Area of Natural and Scientific Interest
**APFA** Algonquin Park Forestry Agreement
**ARP** Acid Regeneration Plant
**AOU** Area of the Undertaking
**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
**CESD** Commissioner of the Environment and Sustainable Development
**CFIA** Canadian Food Inspection Agency
**CHD** Canadian Hydro Development Inc.
**Class EA** Class Environmental Assessment
**CLC** Citizens Liaison Committee
**CLTIP** Conservation Land Tax Rebate Program
**COA** Canada Ontario Agreement Respecting the Great Lakes Basin Ecosystem
**CMC** Community Monitoring Committee
**CPAWS** Canadian Parks and Wilderness Society
**CPU** Certificate of Property Use
**CWS** Canada-wide Standard
**dB** decibel
**dBA** A-weighted decibel
**DFO** Department of Fisheries & Oceans (federal)
**DO** dissolved oxygen
**EA** Environmental Assessment
**EC** Environment Canada
**ECO** Environmental Commissioner of Ontario
**EDU** Ministry of Education
**EEON** Environmental Education Ontario
**EF** Ecological Footprint
**EFW** Energy From Waste
**ENG** Ministry of Energy
**ENGO** Environmental Non-Governmental Organization
**EPs** Environmental Penalties
**EPR** Environmental Protection Requirements
**ERC** Emission Reduction Credit
**ERT** Environmental Review Tribunal
**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
**NBI** Northern Boreal Initiative
**NEC** Niagara Escarpment Commission
**NEP** Niagara Escarpment Plan
**NMP** Nutrient Management Plan
**NMS** Nutrient Management Strategy
**NOx** Nitrogen Oxides
**NPRI** National Pollutant Release Inventory
**NSSA** New Source Set Aside
**NSWMA** North Simcoe Waste Management Association
**OBA** Ontario Bar Association
**OBS** Ontario Biodiversity Strategy
**OCA** Ontario Court of Appeal
**OEB** Ontario Energy Board
**OEL** Occupational Exposure Limit
**OMAFRA** Ontario Ministry of Agriculture, Food and Rural Affairs
**OHS** Occupational Health and Safety
**OMB** Ontario Municipal Board
**OFA** Ontario Federation of Agriculture
**OFA** Ontario Forestry Association
**OPA** Official Plan Amendment
**OPA** Ontario Power Authority
**ORC** Ontario Realty Corporation
**O. Reg.** Ontario Regulation
**ORM** Oak Ridges Moraine
**ORMCP** Oak Ridges Moraine Conservation Plan
**ORTEE** Ontario Round Table on Environment and Economy
**OSSGA** Ontario Stone, Sand & Gravel Association
**OWES** Ontario Wetlands Evaluation System
**PEC** Portlands Energy Centre
**PET** Polyethylene Terephthalate
**PMP** Park Management Plan
**POI** Point of Impingement
**POO** Provincial Officer's Order

**ESDM** Emission Summary and Dispersion Modeling
**ESDWGs** Education for Sustainable Development Working Groups
**ESL** Environmentally Sensitive Landscapes
**ESWM** Ecologically Sustainable Water Management
**FMP** Forest Management Plan
**FMPM** Forest Management Planning Manual
**FMZ** Fisheries Management Zone(s)
**FOI** Freedom of Information
**FRL** Forest Resource Licence
**FUP** Free Use Policy (MNR)
**GB** Greenbelt
**GGH** Greater Golden Horseshoe
**GHG** Greenhouse Gas
**GLB** Great Lakes Basin
**GLSWRA** Great Lakes Sustainable Water Resources Agreement
**GRCA** Grand River Conservation Authority
**GTA** Greater Toronto Area
**GTTA** Greater Toronto Transportation Authority
**HALT** Haldimand Against Landfill Transfers
**HOV** High Occupancy Vehicle
**IC&I** Industrial, Commercial & Institutional (waste)
**IESO** Independent Electricity System Operator
**IPAT** Industrial Pollution Action Team
**IPSP** Integrated Power System Plan
**LCBO** Liquor Control Board of Ontario
**LDR** Land Disposal Restrictions
**LEED** Leadership in Energy and Environmental Design
**$L_{eq}$** One hour equivalent sound level
**LLFS** Lindsay Landfill Site
**$L_{LM}$** Logarithmic mean impulse sound level
**MAAP** Management of Abandoned Aggregate Properties
**MMAH** Ministry of Municipal Affairs and Housing
**MBS** Management Board Secretariat
**MFTIP** Managed Forest Tax Incentive Program
**PPS** Provincial Policy Statement
**PSW** Provincially Significant Wetland
**PTTW** Permit to Take Water
**PWQO** Provincial Water Quality Objectives
**RCA** Royal Commission on Matters of Health and Safety Arising from the Use of Asbestos in Ontario
**SCB** Sector Compliance Branch (MOE)
**SEV** Statement of Environmental Values
**SFL** Sustainable Forest Licence
**SLAPP** Strategic Lawsuit Against Public Participation
**SMP** Soil Management Plan
**$SO_2$** Sulphur Dioxide
**SOLRIS** Southern Ontario Land Resources Information System
**SPA** Special Policy Area
**STORM** Save the Oak Ridges Moraine
**STP** Sewage Treatment Plant
**SWIS** Solid Waste Information System
**SWMP** Storm Water Management Plans
**SWP** Source Water Protection
**TAC** Transportation Association of Canada
**TDSB** Toronto District School Board
**TOARC** The Ontario Aggregate Resources Corporation
**ToR** Terms of Reference
**TSSA** Technical Standards and Safety Authority
**TTRPOA** Trent Talbot River Property Owners Association
**UCO** United Cooperatives of Ontario
**UNEP** United Nations Environment Programme
**US EPA** United States Environmental Protection Agency
**UTRCA** Upper Thames River Conservation Authority
**WCED** World Commission on Environment and Development
**WPCP** Water Purification Control Plant

**Legislation**

***AFAA*** *Algonquin Forestry Authority Act*
***AMLA*** *Adams Mine Lake Act*
***ANPA*** *Algonquin National Park 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*
***CLA*** *Conservation Land Act*
***ESA*** *Endangered Species Act*
***DADA*** *Dead Animal Disposal Act*
***CWA*** *Clean Water 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*
***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*
***OHSA*** *Occupational Health and Safety Act*
***ORMCA*** *Oak Ridges Moraine Conservation Act*
***OWRA*** *Ontario Water Resources Act*
***PA*** *Planning Act*
***PCLSLAA*** *Planning And Conservation Land Statute Law Amendment Act, 2006*
***PGA*** *Places to Grow Act*
***POA*** *Provincial Offences Act*
***PPA*** *Provincial Parks Act*
***PPCRA*** *Provincial Parks and Conservation Reserves 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 2006/2007 Annual Report. This year's Supplement consists of 11 sections. It addresses the reporting year of April 1, 2006 to March 31, 2007. The following summary provides a short guide to the various sections of the Supplement, and discusses their contents and context within the reporting responsibilities of the Environmental Commissioner of Ontario.

**Section 1 – Unposted 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 that ministry to determine whether the public's participation rights have been respected. For this reporting period, eight unposted decisions were singled out by the ECO and are described in this section.

**Section 2 – Ministries' Use of Information Notices**

Significant differences exist between the requirements ministries must meet for regular proposal notices posted on the Environmental Registry under section 15, 16, or 22 of the *EBR* and information notices created under section 6 of the *EBR*. When regular proposal notices are posted on the Registry, a ministry is required to consider public comment and post a decision notice explaining the effect of the comments on the ministry's decision. The ministry is also obligated to consider its Statement of Environmental Values in its decision-making. 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, eight ministries posted information notices during the 2006/2007 reporting year. The ECO's review found that while some of these postings constituted acceptable and even commendable uses of information notices, sharing important information with the public, others were unacceptable and should have been posted as regular proposal notices for full public consultation.

**Section 3 – Ministries' Use of Exception Notices**

Under the *EBR*, there are limited circumstances in which ministries may proceed with an environmentally significant decision and then inform the public through an "exception notice," instead of following the normal process of posting a proposal notice for prior public notification and consultation. Exception notices may be used in cases of emergency, or when another equivalent public participation process takes place instead. In 2006/2007, 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 2006/2007 reporting year, 2,000 decision notices were posted on the Environmental Registry, most of them for site-specific permits or approvals. Thirty-eight decisions were for policies, three for Acts and 16 for regulations. Whether the ECO conducts a detailed review on a ministry decision depends on the decision's environmental significance and on the public's interest in the decision. Section 4 of this report consists of detailed reviews undertaken by the ECO for 12 selected decisions by four ministries.

**Section 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 also briefly summarized. Section 5 provides a summary and review of applications for review, while section 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 on the decision after it is posted on the Environmental Registry. If leave is granted, the dispute can proceed to a full tribunal hearing or it can result in a settlement that often addresses some or even most of the concerns raised by the applicants. The ECO posts notices on the Registry of these leave to appeal applications, and updates them once the appropriate appeal tribunal have made their decisions. This section provides a summary of the 11 leave to appeal applications under the *EBR* that were filed during the 2006/2007 reporting year.

**Section 8 – *EBR* Court Actions**

Under section 84 of the *EBR,* residents of Ontario have the right to bring a legal action against someone who is violating or is about to violate an environmental Act, regulation or instrument, and is harming, or about to harm, a public resource. In addition, anyone who suffers, or who may suffer, a direct economic loss or personal injury as a result of a public nuisance that caused harm to the environment may bring a legal action under section 103 of the *EBR.* The ECO is responsible for posting notices of court actions on the Registry for information purposes only. While there were no new court actions brought under the *EBR,* this section provides a summary of the two court actions that were ongoing during the 2006/2007 reporting year.

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

**Section 9 – Status of ECO and Public Requests to Prescribe New or Existing Ministries for Laws, Regulations or Processes under the *EBR***

The ECO constantly tracks legal and policy developments at the prescribed ministries and in the Ontario government as a whole, and encourages ministries to update the *EBR* regulations to include new laws and prescribe new government initiatives that are environmentally significant. Section 9 discusses how the ministries go about prescribing new laws, regulations and ministry processes under the *EBR*, and provides two summary tables outlining the status of ECO and ministry efforts to keep the *EBR* in sync with various recent Acts, regulations and ministry processes.

**Section 10 – Flooding Hazards: Prevent and Mitigate, or Compensate and Rehabilitate?**

This special section of the Supplement provides an analysis flooding hazards on lands adjacent to rivers and streams. As evidence mounts that storms are becoming more severe due to climate change, ECO believes that the responsible ministries need to take bold pro-active steps to reduce significant flooding risks with potentially disastrous consequences to life, property and the environment. This section, which is also summarized under "Developing Issues" in the Annual Report, describes the problem, current management and opportunities to reduce the hazards associated with flooding.

**Section 11 – Undecided Proposals**

As required under section 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 sections 15, 16 and 22 of the *EBR*, prescribed ministries are required to post notices of environmentally significant proposals for policies, Acts, regulations and instruments on the Environmental Registry. 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 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 2006/2007 we made inquiries on specific decisions by the Ministry of the Environment, the Ministry of Natural Resources, the Ministry of Northern Development and Mines, and the Ministry of Transportation. Eight decisions on policies, Acts or laws, summarized below, have been identified 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 most of the cases discussed, the ECO continues to disagree with a ministry's failure to post a proposal on the Registry.

## Ministry of the Environment – Regulation

### *EAA* Exemption for the Integrated Power System Plan

*Description:*

- On June 15, 2006, the Ministry of the Environment (MOE) posted an information notice on the Environmental Registry advising the public that the Ontario government had passed a new regulation (O. Reg. 276/06) under the *Environmental Assessment Act* (*EAA*) on June 12, 2006, designating and then exempting the province's Integrated Power System Plan (IPSP) from the requirement to undertake an individual environmental assessment in accordance with Part II of the *EAA*.
- The IPSP is a comprehensive, long-term electricity system plan for the province, which will include recommendations on everything from generation sources to transmission plans to conservation and demand management practices. The ECO believes that the IPSP and the decision to exempt it from the *EAA* is clearly environmentally significant.
- On June 19, 2006, the ECO wrote a letter to the ministry and issued a media release stating that the use of an information notice in this instance was inappropriate. The ECO expressed strong disagreement with the ministry's assertion that full notice on the Registry was not required because the regulation was "administrative in nature".

- In response to the ECO's letter, MOE reposted the information notice on June 20, 2006, including an invitation for public comments.
- On June 26, 2006, an application was submitted under the *EBR* requesting that MOE review O. Reg. 276/06. MOE responded in December 2006 that a review was not warranted. For a summary of this application for review, see page 82 of the Annual Report; for the full review, see page 147 of this Supplement.

*Ministry Rationale:*

- MOE responded to the ECO in a July 2006 letter, stating that the regulation "simply confirms the law." MOE also advised the ECO in this letter that further explanation regarding the ministry's rational for deciding not to the post the exemption regulation would be included as part of the ministry's forthcoming decision on the application for review.

*ECO Comment:*

- Neither MOE's July 2006 letter nor its response to the application for review provided a persuasive rationale for MOE's failure to post a proposal notice on the Environmental Registry. The ECO remains unconvinced that O. Reg. 276/06 is "administrative in nature" or "simply confirms the law."
- An information notice does not have the same requirements as a proposal notice – there is no requirement to seek and consider public comments before making a decision, to consider the ministry's Statement of Environmental Values, or to post a decision notice describing the final course of action.
- In this case, the government received hundred of public comments in response to the information notice, but did not change or revoke the regulation.

For more on this regulation to exempt the IPSP from the requirements of the *EAA*, see the Review of the Posted Information Notice on page 59 of this Supplement, as well as the Review of Application R2006004 on page 147.

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### ***EAA* Exemption for the Seaton Land Exchange**

*Description:*

- On June 15, 2006, MOE posted a notice on its 'EA Projects' website for a declaration order for the Seaton Land Exchange, which had been approved on April 5, 2006. MOE did not post a notice about this declaration order on the Environmental Registry.
- The declaration order relates to a land transfer in which the Ontario Realty Corporation (ORC) exchanged government-owned lands in Seaton for some environmentally sensitive, privately-owned lands on the Oak Ridges Moraine. ORC land transfers are subject to the requirements of the "Class Environmental Assessment Process for ORC Realty Activities" (the Class EA). ORC requested a declaration order from MOE exempting it from one of the Class EA requirements – to obtain the Region of Durham's approval for severing land under the *Planning Act*. MOE granted the declaration order, stating that it would "facilitate severances and transfer, reduce costs and some of the process duplication between the *EAA* and *Planning Act*." The declaration order also had the effect of exempting the decision to sever the land from public consultation and appeal rights under the *Planning Act.*
- The ECO wrote to MOE on July 24, 2006, reminding the ministry that it is required to post proposed declaration orders under the *Environmental Assessment Act* (*EAA*) on the Environmental Registry. The ECO noted that the ministry's own website states: "The request [for a declaration order] is usually posted for a minimum of 30 days on the Environmental Registry prior to the Minister's decision in accordance with the *Environmental Bill of Rights*. The public has an opportunity to comment on the proposed Declaration during the 30-day period."

*Ministry Rationale:*

- MOE responded in a letter in August 2006, explaining that the decision to exempt ORC from the requirement to seek municipal approval for severing the land will not result in significant effects on the environment, and therefore did not need to be posted on the Registry.
- MOE also noted that the other aspects of the land transfer (i.e., the acquisition and the disposition) remained subject to the *EAA* and were open to public comment, and that future development of the lands will be subject to further land use planning.

*ECO Comment:*

- The ECO does not agree with the premise that the declaration order will not result in significant effects on the environment. MOE's failure to post the declaration order on the Environmental Registry is disappointing, especially in light of the fact that the declaration order itself had the effect of removing public consultation rights that would otherwise have been available under the *Planning Act* process. As such, the public was twice deprived of an opportunity to comment. This effect of the declaration order rendered it all the more necessary to post a proposal notice on the Environmental Registry.
- The ECO reminds MOE of its continuing obligation to post proposals for declaration orders on the Environmental Registry.

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## Ministry of the Environment – Policy

### Approval Process for Septage Waste Management Systems

*Description:*

- In July 2006, the ECO became aware of an MOE Fact Sheet from February 2006, entitled "Green Facts: Certificate of Approval – Hauled Sewage Waste Management Systems." The Fact Sheet set out a number of amendments to MOE's waste management policies for hauled sewage (i.e., septage). MOE did not post a notice on the Environmental Registry.
- In the two years prior to the publication of this Fact Sheet, two separate applications for review under the *EBR* had been sent to MOE relating to MOE's approval process for septage waste systems, but MOE denied both requests (see page 182 of the Supplement to the 2005/2006 Annual Report).
- The ECO wrote to MOE in July 2006, pointing out that this Fact Sheet reflected a change to environmentally significant policy, and asking the ministry to explain its 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 a letter in August 2006, stating that MOE's decision to treat in-transit storage of hauled septage as part of a "waste management system", rather than as a "waste disposal site", for purposes of issuing certificates of approval is merely administrative, as well as environmentally insignificant. As such, MOE did not post it on the Registry or consider its SEV.
- MOE also stated that this decision was made, in part, to align the approvals process with recent court decisions that interpreted the definition of waste management system, and that "the Director needs the ability to respond to evolving jurisprudence, such as court or ERT decisions, and to incorporate these into the review and approval process, without having these interpreted to be guideline or policy decisions under the *EBR*."

*ECO Comment:*

- The ECO does not believe that all of the changes set out in the Fact Sheet are administrative. Further, the ECO disagrees with MOE's suggestion that where a ministry is implementing a court or Tribunal decision, the ministry is relieved from the requirement to publish a notice for public comment under the *EBR.*
- In addition, the ECO is disappointed by the fact that MOE twice turned down an opportunity to review its approval process for septage waste systems under the *EBR*, yet it appears that the ministry did undertake a review of its approval process – outside of the *EBR* process and without public consultation – that seems to relate to some of the issues raised in the denied applications.
- The ECO urges MOE to employ a fully transparent and open consultative process whenever reviewing and revising environmentally significant policies.

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## Ministry of Natural Resources – Policy

### Ontario's Landbird Conservation Plan

*Description:*

- In July 2006, the ECO became aware of a joint program between the Ministry of Natural Resources (MNR) and Environment Canada to prepare biological plans for the conservation of landbirds in Ontario. The Ontario Landbird Conservation Plans are to be used to identify priority landbird species, establish measurable objectives for the conservation of landbirds in different regions, and identify the conservation actions needed to achieve these objectives. MNR did not post a notice on the Registry.
- The ECO sent a letter to MNR on July 27, 2006, reminding MNR of its obligations under the *EBR* to post a proposal on the Environmental Registry for public notice and comment.

*Ministry Rationale:*

- MNR responded in a letter in September 2006, explaining that the Landbird Conservation Plans are "advisory in nature," and are not policy. Nonetheless, MNR advised the ECO that the ministry would post an information notice to the Registry to better inform Ontarians about this planning initiative.
- As of late April 2007, MNR had not yet posted an information notice.

*ECO Comment:*

- The Landbird Conservation Plans include some environmentally significant policy, such as population and habitat objectives, as well as recommended actions to achieve those objectives. The ECO believes that this planning initiative should be subject to public notice and consultation on the Environmental Registry. The ECO urges MNR, at a minimum, to post an information notice on the Registry as promised in September 2006.

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### Caribou Recovery Strategy

*Description:*

- On July 10, 2006, MNR posted an information notice on the Environmental Registry advising the public of its Draft Recovery Strategy for Forest-dwelling Woodland Caribou in Ontario, and providing a 60-day comment period.
- In September 2006, the ECO sent a letter to MNR, advising the ministry that it should re-post the recovery strategy as a regular proposal notice on the Environmental Registry.

*Ministry Rationale:*

- MNR responded to the ECO in a letter in October 2006, stating that the recovery strategies are "advice to government" by a given recovery team, and not government policies. The ministry also used the rationale that recovery strategies are "science" and, as such, do not require proper public consultation. MNR further stated that it is under no obligation to implement the recommended recovery actions, and therefore, the recovery strategies are not policy.

*ECO Comment:*

- The ECO does not accept MNR's stated rationales for failing to post a regular proposal notice on the Registry for the recovery strategy.
- The *EBR* defines a policy as any "program, plan or objective and includes guidelines or criteria to be used in making decisions." By that definition, recovery strategies are government policies and must be properly posted on the Environmental Registry to ensure government accountability and transparency.
- Further, the other rationales put forward by MNR, such as that the policy is "science-based" or that it contains actions that may not be implemented, are not cause to exempt the ministry from adhering to the *EBR*.
- By posting an information notice, rather than a proposal notice as required by the *EBR*, MNR did not have to legally consider public comments, consider its Statement of Environmental Values, or post a decision notice describing the final course of action.
- The improper posting of recovery strategies is a systemic problem that the ECO has repeatedly requested that MNR resolve. Recovery strategies fit the definition of a policy under the *EBR*, regardless of the composition of a recovery planning team.

For more on the province's caribou recovery strategy, see page 75 of the Annual Report.

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**Natural Heritage Systems**

*Description:*

- On November 7, 2006, MNR posted an information notice on the Environmental Registry announcing the release of an MNR discussion paper entitled A Proposed Modelling and Scenario-based Approach for Identifying Natural Heritage Systems in Southern Ontario, and provided a 45-day comment period.
- The information notice states that this document is the first step in the development of science-based guidelines and tools to assist parties in identifying landscape scale natural heritage systems for southern Ontario. The proposed approach being developed by MNR is intended to provide a strategic framework for stewardship and securement activities, as well as provide technical guidance to inform municipal planning under the Provincial Policy Statement.
- The ECO wrote to MNR in March 2007, reminding MNR of its obligation to properly post the draft policy as a proposal notice on the Environmental Registry as required by the *EBR*.

*Ministry Rationale:*

- MNR responded in April 2007, stating that the proposed process and methodology for identifying natural heritage systems set out in the discussion paper is simply a voluntary tool, which may be used by others to support decision-making. As such, MNR stated that the paper did not require a proposal notice on the Registry.
- MNR also noted that the ministry may, in the future, "incorporate information learned from the application of the modelling process into manuals or guidance documents," and that, should this occur, MNR would consider its obligations under the *EBR*.

*ECO Comment:*

- The ECO disagrees with MNR's conclusion that because a ministry document sets out voluntary guidance, it does not need to be posted as a proposal on the Environmental Registry. The *EBR* defines a policy as any "program, plan or objective and includes guidelines or criteria to be used in making decisions." This definition includes voluntary guidelines, such as the Proposed Modelling and Scenario-based Approach for Identifying Natural Heritage Systems in Southern Ontario, that are to be used to support decision-making.
- The ECO feels that this document is an environmentally significant policy that satisfies the *EBR* definition of a policy, and therefore should be posted to the Environmental Registry for public comment.
- By posting an information notice, rather than a proposal notice as required by the *EBR*, MNR did not have to legally consider public comments, consider its Statement of Environmental Values, or post a decision notice describing the final course of action.
- The ECO urges MNR to discontinue the practice of posting policy documents such as the Natural Heritage Systems Discussion Paper as information notices, and to post all such policy documents as proposal notices on the Environmental Registry for full public comment.

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## Ministry of Northern Development and Mines – Regulation

### Mining Act Regulation

*Description:*

- On May 10, 2006, the Ministry of Northern Development and Mines (MNDM) filed a new regulation (O. Reg. 194/06), made under the *Mining Act*, which amended O. Reg. 240/00 – Mine Development and Closure under Part VII of the Act. The amending regulation was not posted on the Environmental Registry as required by the *EBR*.
- One of the amendments in O. Reg. 194/06 provided a new exception to the definition of "advanced exploration" in O. Reg. 240/00 for certain surface stripping activities. Normally, advanced exploration activities are subject to rehabilitation and closure plan requirements under the *Mining Act*.
- In effect, this amendment allows surface stripping of areas that are greater than 10,000 square metres or 10,000 cubic metres on mining lands, without having to satisfy the requirements under Part VII of the *Mining Act*, provided that: the surface stripping occurs on two or more distinct areas of the property; the surface stripping areas are less than 10,000 square/cubic metres each; and each of the areas are separated by 500 metres. This exception could increase the amount of surface stripping that is allowed on mining lands without the need to comply with the rehabilitation and closure plan requirements of the *Mining Act*.
- The ECO wrote to MNDM in June 2006, pointing out that O. Reg. 194/06 reflects environmentally significant amendments to a regulation, and asked the ministry to explain its decision not to post the regulation on the Environmental Registry. The ECO also asked how the ministry's Statement of Environmental Values was considered and whether other public consultation was undertaken in the development of this regulation.

*Ministry Rationale:*

- MNDM justified its decision not to post O. Reg. 194/06 on the Registry by stating that the amendments are "administrative in nature in that they clarify wording, standards and enhance the efficiency of operations and will have no significant effect on the environment." MNDM explained that the extent of any effects resulting from the amendment to the definition of "advanced exploration" would be local and minimal.

- MNDM also noted that its Mining Act Advisory Committee, which is comprised of a variety of stakeholders representing the mining industry, environmental groups, cottagers' associations and native groups, reviewed and supported the amendments.

*ECO Comment:*

- Mine rehabilitation is a matter of public interest. MNDM's failure to post these changes to O. Reg. 240/00 on the Environmental Registry is unfortunate, particularly in light of the fact that MNDM is already struggling to deal with the more than 5600 abandoned and inactive mine sites and mine hazards in Ontario. This regulation provides a further exception to the mine rehabilitation and closure plan requirements under the *Mining Act*.
- The ECO does not accept MNDM's stated rationales. The amendments were not administrative and even local effects are considered significant under the *EBR*.
- The public should have been offered the opportunity to comment on MNDM's proposed amendments after they had been reviewed by the Mining Act Advisory Committee. The ECO urges MNDM to make better use of the Environmental Registry in the future, and to employ a fully transparent and open consultative process with the general public, rather than limit consultation to a small group of stakeholders.

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## Ministry of Transportation – Policy

### Highway Guides under the Environmental Standards Project

*Description:*

- On July 14, 2006, the Ministry of Transportation (MTO) posted two information notices on the Environmental Registry advising the public of two new documents – the Environmental Reference for Contract Preparation and the Environmental Standards and Practices User Guide – providing a 45-day comment period for both.
- These two documents are part of MTO's Environmental Standards Project, through which the ministry has developed 13 documents over the past few years providing environmental compliance guidance for highway activities. All previous guides developed under this project had been posted on the Registry as regular proposal notices.
- MTO describes both of these documents as informational/reference documents. The Environmental Reference for Contract Preparation provides a reference list of environmental-related contract documentation to assist with the preparation of construction contracts, as well as information to assist with the implementation of environmental mitigation options. The "Environmental Standards and Practices User Guide" is described by MTO as a "road map" to the other MTO documents that provide guidance on environmental assessment and impact mitigation.
- Despite MTO's description of these guides as purely informational, the ECO believes that they meet the definition of policy under the *EBR*. Accordingly, the ECO sent a letter to MTO on August 6, 2006, urging the ministry to post a regular proposal notice on the Environmental Registry at the earliest reasonable time to provide for full public notice and comment as required by the *EBR*.

*Ministry Rationale:*

- MTO responded to the ECO's letter, stating that neither of these documents included "new policy". MTO stated that the two documents were developed to direct users to other documents where the policies could be found, and that they did not themselves establish new direction. MTO further stated that, by themselves, these documents were not environmentally significant.
- MTO also noted that it did not receive any comments on either of the documents despite the invitation to comment included in the information notices.

*ECO Comment:*

- The ECO believes that these two documents are both environmentally significant and satisfy the definition of policy under the *EBR*. The User Guide, for example, provides general guidance on how planners and designers are to avoid or mitigate impacts on wetlands. In addition, the ECO believes that portions of the documents are, in fact, new policy not found elsewhere. As such, these documents should have been posted on the Registry as regular proposal notices.
- Despite the fact that no comments were received in this case, the ECO notes that MTO was still required to post a proper proposal notice as required by the *EBR*, which would have legally required MTO to consider any public comments (had they been received), as well as consider its Statement of Environmental Values and post a decision notice describing the final course of action.

# 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 section 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 proposal notice for public comment (under sections 15, 16 or 22 of the *EBR*). Significant differences exist between regular proposal notices posted on the Registry and information notices. 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's 2000/2001 Annual Report, if a prescribed ministry decides that it is appropriate to seek public comment on a policy, Act or regulation proposal through the Registry, the correct procedure is to post a 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. 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.

During the 2006/2007 reporting year, eight ministries posted 117 information notices in total. Ministries often post updates on information notices throughout a year. For the purposes of tracking trends year-to-year, the ministries posted 70 information notices, according to the ECO practice of not double-counting multiple postings for the same initiative, or the notices MNR posted related to 28 Forest Management Plans.

| Ministry | Number of Information Postings |
|---|---|
| Energy (ENG) | 1 |
| Environment (MOE) | 11 |
| Health and Long-term Care (MOHLTC) | 1 |
| Municipal Affairs and Housing (MAH) | 19 |
| Natural Resources (MNR) | 23 + 28 Forest Management Plans |
| Northern Development and Mines (MNDM) | 12 |
| Public Infrastructure Renewal (MPIR) | 1 |
| Transportation (MTO) | 2 |

*Good Use of Information Notices:*
Several ministries used information notices during this reporting period to inform the public about initiatives which are legally excepted from the requirement to post regular proposal and decision notices. For example MOE posted several notices informing the public about hearings and decisions related to hearings under acts such as the *Consolidated Hearings Act*, which are not prescribed for posting under

the *EBR*. MOE also posted an information notice, requested comments and posted a follow-up for a Director's Order to clean up a sewage lagoon in West Grey County. MOE also made good use of an information notice to bring attention to an opportunity to provide comments to the Canadian Council of Ministers of the Environment on a draft Canada-wide strategy for managing municipal wastewater effluent.

*Inappropriate Use of Information Notices:*
On several occasions ministries also used information notices inappropriately during this reporting period, stating that the initiatives were not "policy decisions" for a variety of reasons. For example, MOE should have used a regular proposal notice for its exemption of the Integrated Power System Plan under the *Environmental Assessment Act.* MNR should have used regular proposal notices with an opportunity to comment for the Caribou Recovery Strategy and Natural Heritage Systems Approach. MTO should have used regular proposal notices for two policies under its Environmental Standards Project, the Environmental Standards and Practices User Guide and Environmental Reference for Contract Preparation. Massive public interest was shown in some of these ministry initiatives, illustrating the need for public consultation before decisions are finalized. For example, the ministries and ECO received hundreds of comments on MNR's Caribou Recovery Strategy and MOE's EA exemption for the IPSP. Because the ECO followed up with the ministries on these notices, they are described in the unposted decisions sections of the Supplement.

MNR also used an information notice to inform the public that it had eliminated the requirement for work permits under the *Lakes and Rivers Improvement Act* for all activities other than dams. MNR said that the change would not significantly affect the environment, and that the activities no longer regulated by MNR would require permit approvals from Conservation Authorities under the *CAA*. MNR provided this information notice to the public four months after the regulation had been passed.

MNR also used an information notice five months after some new policies and procedures related to the erection of buildings on Crown lands in parks and conservation reserves were approved for use. MNR described them as "interim" policies and procedures, to justify not providing an opportunity for comment. The ECO has advised MNR previously that calling a new guideline, policy or direction "interim" does not mean it is not a policy for the purposes of the *EBR*. The *EBR* defines a policy as "a program, plan or objective and includes guidelines or criteria to be used in making decisions about the issuance, amendment or revocation of instruments..." and says that "a policy is implemented when the person or body with authority to implement the proposal does so." The *EBR* requires that the ministry post a proposal notice allowing for a minimum of 30 days for public comment, before implementing a new or revised policy.

*Need for Ministries to Make Decisions Subject to Regular Notice and Comment:*
Ministries post several types of environmentally significant decisions as information notices because they are new initiatives that have not yet been prescribed under the *EBR*. Examples this year include 13 MAH notices for municipalities' official plan amendments and zoning by-laws to implement the *Oak Ridges Moraine Conservation Act* and Plan. These instruments were posted as information notices because MAH has not yet prescribed them under the *EBR*, even though the Act was enacted in 2001 and MAH committed to prescribing them in 2002. Similarly, the MPIR Greater Golden Horseshoe Growth Plan was posted as an information notice because the ministry is not yet prescribed under the *EBR*, even though the ministry was created in 2004. MNR has also continued to post information notices for Water Management Plans (WMPs), under the *Lakes and Rivers Improvement Act.* Technically these decisions did not have to be posted on the Environmental Registry for comment, but only because the ministries have been too slow to legally prescribe them under the *EBR*. The ECO has previously 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 169 of this year's Annual Report).

MNDM posted 11 information notices during this reporting period for amendments to mine closure plans. MNDM did not classify amendments to mine closure plans (if proposed by the licensee) as instruments under the *EBR*. The ECO continues to encourage MNDM (see page 19 of the ECO 2005/2006

Supplement) to consider regulatory or legislative amendments in order to provide opportunities for public participation on closure plan amendments through regular proposal notices on the Registry in the future.

**Summary of all Information Notices Posted During the 2006/2007 Reporting Year**

| Registry Number | Type | Title | Ministry's Rationale for Information Notice | Date Published |
|---|---|---|---|---|
| **Ministry of Energy** | | | | |
| XO06E0001 | ENG regulation | Ontario Regulation 424/04 made under *The Electricity Act, 1998* | Not prescribed | June 21, 2006 |
| **Ministry of the Environment** | | | | |
| XA06E0001 | MOE policy | Procedures for the Use of Risk Assessment Under Part XV.1 of the *Environmental Protection Act* | Not new policy | June 08, 2006 |
| XA06E0006 | MOE regulation | *Environmental Assessment Act* (*EAA*) Designation and Exemption of Integrated Power System Plan (IPSP) | Administrative | June 15, 2006 |
| XA06E0007 | MOE instrument | Preventative Measures Order - The Corporation of the Municipality of West Grey | Not explained in notice | August 23, 2006; updated later |
| XA06E0002 | MOE regulation | A regulatory amendment under the *Consolidated Hearings Act* to allow for a Joint Board hearing that includes an application under the *Aggregate Resources Act* for the Nelson Aggregate Co. Burlington Quarry extension. | Not prescribed | June 27, 2006 |
| XA06E0009 | MOE notice of hearing | Notice of Preliminary Hearing Conference and Written Hearing - A.B.P. Recycling Inc. v. Director, Ministry of the Environment | Not prescribed | September 29, 2006 |
| XA06E0010 | MOE policy | Canadian Council of Ministers of the Environment Consultation on Options for a Canada-wide Strategy for Managing Municipal Wastewater Effluent | Federal/provincial consultation process | December 01, 2006 |
| XA06E0011 | MOE regulation | Deposit Return Program for Beverage Alcohol Containers in Ontario | Cabinet decision | December 01, 2006 |
| XA07E0001 | MOE regulation | Amendments to Ontario Regulation 173 under the *Consolidated Hearings Act*. | Not prescribed | February 16, 2007 |
| XA06E0005 | MOE instrument | Revocation of the 1990 Director's Order issued to Ontario Hydro (now known as Ontario Power Generation) related to emission monitoring and reporting requirements at the Lambton, Nanticoke, Thunder Bay and Atikokan power generation facilities. | Not environmentally significant | December 14, 2006 |
| | | | | |

| Registry Number | Type | Title | Ministry's Rationale for Information Notice | Date Published |
|---|---|---|---|---|
| XA06E0012 | MOE acts | Schedule D of Bill 171, the proposed *Health System Improvements Act, 2006* - Amendments to the *Health Protection and Promotion Act*, the *Ontario Water Resources Act* and the *Safe Drinking Water Act, 2002* | Equivalent public participation | December 14, 2006 |
| 010-0064 | MOE policy | Delegation of Powers and Duties for Voluntary Designation Agreements: Subsection 3.0.1under the *Environmental Assessment Act*, 1997 | Not environmentally significant | March 13, 2007 |
| **Ministry of Health and Long-term Care** | | | | |
| XG07E0001 | MHP policies | Review of the Mandatory Health Programs and Services Guidelines | Not environmentally significant | February 19, 2007 |
| **Ministry of Municipal Affairs and Housing** | | | | |
| Oak Ridges Moraine Official Plan Amendments and Zoning By-laws | | | | |
| XF06E0006 | MAH instrument | City of Oshawa Official Plan Amendment No. 115- Oak Ridges Moraine. | Not yet prescribed | April 25, 2006 |
| XF06E0007 | MAH instrument | Town of Mono's Zoning By-Law Amendment 2006-13 Oak Ridges Moraine | Not yet prescribed | April 25, 2006 |
| XF06E0005 | MAH instrument | City of Oshawa Zoning By-law Amendment - By-law No. 38-2006 - Oak Ridges Moraine | Not yet prescribed | April 26, 2006 |
| XF06E1002 | MAH instrument | Township of Cavan-Millbrook-North Monaghan Zoning By-law Amendment - By-law 2006-18 - Oak Ridges Moraine | Not yet prescribed | April 26, 2006 |
| XF06E1004 | MAH instrument | Township of Alnwick/Haldimand (Former Haldimand) Zoning By-law Amendment - By-law 32-2006 - Oak Ridges Moraine | Not yet prescribed | April 26, 2006 |
| XF06E1005 | MAH instrument | City of Kawartha Lakes Zoning By-law Amendment - By-law 2005-133 - Oak Ridges Moraine | Not yet prescribed | April 26, 2006 |
| XF06E1003 | MAH instrument | Township of Alnwick/Haldimand (Former Alnwick) Zoning By-law Amendment - By-law 31-2006 - Oak Ridges Moraine | Not yet prescribed | April 26, 2006 |
| XF06E1001 | MAH instrument | Township of Cramahe Zoning By-law Amendment - By-law 06-14 - Oak Ridges Moraine | Not yet prescribed | April 26, 2006 |
| XF06E0008 | MAH instrument | City of Pickering Official Plan Amendment No. 15 - Oak Ridges Moraine | Not yet prescribed | May 11, 2006 |
| XF06E0009 | MAH instrument | City of Pickering Zoning By-law Amendment - By-law 6640/06 - Oak Ridges Moraine | Not yet prescribed | May 11, 2006 |

| Registry Number | Type | Title | Ministry's Rationale for Information Notice | Date Published |
|---|---|---|---|---|
| XF06E0012 | MAH instrument | Township of King Zoning By-law No. 2005-23 - Oak Ridges Moraine | Not yet prescribed | August 09, 2006 |
| XF06E1007 | MAH instrument | Municipality of Trent Hills Zoning By-law No. 2006-18 - Oak Ridges Moraine | Not yet prescribed | October 24, 2006 |
| XF06E0013 | MAH instrument | Town of Caledon Zoning By-law Amendment - By-law 2003-183 - Oak Ridges Moraine | Not yet prescribed | October 24, 2006 |
| **Unprescribed MAH Regulations** | | | | |
| XF06E3001 | MAH regulation | Ontario Regulation 200/06 under the *Planning Act* | Not prescribed | June 19, 2006 |
| XF06E0011 | MAH regulation | Ontario Regulation 353/06, amending Ontario Regulation 473/73, made under the *Ontario Planning and Development Act, 1994* | Not prescribed | July 11, 2006 |
| XF06E0014 | MAH regulation | Revocation of Ontario Regulation 20/74 | Not prescribed | December 08, 2006 |
| XF07E0001 | MAH regulation | Ontario Regulation 14/07 under the *Planning Act* | Not prescribed | February 20, 2007 |
| **Other MAH Notices** | | | | |
| XF06E0010 | MAH regulation | Ontario Regulation 369/06 requires a hearing officer to give notice of a hearing to prescribed persons and public bodies in the prescribed manner, pursuant to clause 13(1)(b) and subsection 18(6) of the *Oak Ridges Moraine Conservation Act, 2001* | Not yet prescribed | August 22, 2006 |
| XF05E0022 | MAH policy | Intergovernmental Action Plan for Simcoe, Barrie and Orillia | Not policy | October 24, 2006 |
| **Ministry of Natural Resources** | | | | |
| XB04E6008 | MNR policy | 2006 Bear Wise Program for Reducing Human-Bear Conflicts | Not new policy | April 03, 2006 |
| XB06E6010 | MNR policy | Double-crested Cormorant Research and Monitoring Program in Lake Huron (North Channel and Georgian Bay) | Not new policy | May 15, 2006 |
| XB06E6013 | MNR policy | 2006 Double-crested Cormorant Management at Presqu'ile Provincial Park | Not new policy | May 15, 2006 |
| XB06E6016 | MNR policy | Draft Recovery Strategy for Forest-dwelling Woodland Caribou in Ontario | Not ministry policy | July 10, 2006 |
| XB04E6007 | MNR policy | General Notice of Rabies Research and Control Operations for 2006 | Not new policy | July 18, 2006 |
| XB06E6017 | MNR regulation | Amendment to Ontario Regulation 454/96 made under the *Lakes and Rivers Improvement Act* (LRIA) | Not environmentally significant | August 02, 2006 |

| Registry Number | Type | Title | Ministry's Rationale for Information Notice | Date Published |
|---|---|---|---|---|
| XB06E6007 | MNR policy | Posting of draft Recovery Strategies on the federal Species at Risk Act Registry | Federal consultation process | August 14, 2006 |
| XB06E7018 | MNR policy | Review of the Independent Forest Audit Process: Opportunities for Public Input | Not environmentally significant policy | August 16, 2006 |
| XB06E7019 | MNR regulation | Change to the interest charged on overdue Crown charges under the *Crown Forest Sustainability Act* - Amendment to Ontario Regulation 167/95, section 6 | Financial exception | September 05, 2006 |
| XB06E6023 | MNR policy | Crown Land Roads Manual - Update and Revision to former Access Roads Manual (Ministry of Natural Resources 1992) | Early notice; expect policy proposal in future | October 30, 2006 |
| XB06E2022 | MNR policy | Northern Boreal Initiative: *Environmental Assessment Act* Coverage for Forest Management on the Whitefeather Forest - MNR Submission in Support of a Declaration Order Request | Early notice; expect MOE regulation proposal in future | November 01, 2006 |
| XB06E2025 | MNR policy | Discussion Paper - A Proposed Modelling and Scenario-based Approach for Identifying Natural Heritage Systems in Southern Ontario | Not policy | November 07, 2006 |
| XB07E7003 | MNR policy | 2007 Prescribed Burns | Not new policy | February 14, 2007 |
| 010-0006 | MNR policy | Review of the Proposed Insect Pest Management Program - Jack Pine Budworm, Northwestern Ontario: Stage Two – Insect Pest Management Program Inspection | Consultation carried out under other process | December 11, 2006; March 13, 2007 |
| 010-0096 | MNR policy | Incidental Buildings on Public Land (Interim) – Approval of Policy and Procedure PL 3.05.01 (Public Lands Act) and PM 10.03 (Provincial Parks and Conservation Reserves) | "Interim policy" | March 14, 2007 |
| 010-0113 | MNR policy | The Ministry of Natural Resources announces it will be updating the provincial wild turkey management plan | Early notice; expect policy proposal in future | March 26, 2007 |
| **MNR Forest Management Plans** | | | | |
| XB06E2010 | MNR instrument | Major Amendment to the Gordon Cosens Forest Management Plan for the period April 1, 2005 to March 31, 2025 - Public Information Centre and 30-Day Review | Not prescribed | April 20, 2006 |
| XB06E2011 | MNR instrument | Forest Management Plan for the Nighthawk Forest for the 10-year period April 1, 2008 to March 31, 2018 - Invitation to Participate | Not prescribed | May 05, 2006 |
| | | | | |

| Registry Number | Type | Title | Ministry's Rationale for Information Notice | Date Published |
|---|---|---|---|---|
| XB04E2002 | MNR instrument | Forest Management Plan for the Pineland Forest for the 20-year period of June, 2006 to March 31, 2026 - Public Inspection of Approved Plan | Not prescribed | May 08, 2006 |
| XB06E2012 | MNR instrument | Forest Management Plan (FMP) for the Cochrane-Moose River Forest Management Unit, for the 10-year period April 1, 2008 to March 31, 2018 - Invitation to Participate | Not prescribed | May 12, 2006 |
| XB06E2015 | MNR instrument | Major Amendment to the Lac Seul Forest Management Plan for the period April 1, 2006 to March 31, 2026 - Public Information Centre and 30-Day Review | Not prescribed | May 30, 2006 |
| XB05E2001 | MNR instrument | Forest Management Plan for the Big Pic Forest for the period April 1, 2007 to March 31, 2017 - Public Inspection of Approved Plan | Not prescribed | September 29, 2006 |
| XB05E1003 | MNR instrument | Forest Management Plan for the Caribou Forest for the 10-year period April 1, 2008 to March 31, 2018 - Review of Proposed Operations | Not prescribed | October 02, 2006 |
| XB05E1002 | MNR instrument | Forest Management Plan (FMP) for the Lakehead Forest for the 10-year period April 1, 2007 to March 31, 2017 - Public Inspection of the Approved Plan | Not prescribed | October 03, 2006 |
| XB06E2021 | MNR instrument | Forest Management Plan for the Magpie Forest for the 10-year period April 1, 2009 to March 31, 2019 – Invitation to Participate | Not prescribed | October 18, 2006 |
| XB06E2020 | MNR instrument | Forest Management Plan for the English River Forest for the 10-year period April 1, 2009 to March 31, 2019 - Invitation to Participate | Not prescribed | October 25, 2006 |
| XB06E2026 | MNR instrument | Forest Management Plan for the Trout Lake Forest for the 10-year period April 1, 2009 to March 31, 2019 - Invitation to Participate | Not prescribed | November 02, 2006 |
| XB06E2002 | MNR instrument | Forest Management Plan - Contingency Plan for the Caribou Forest for the period April 1, 2007 to March 31, 2008 - Public Inspection of Approved Plan | Not prescribed | November 21, 2006 |
| XB05E1001 | MNR instrument | Forest Management Plan (FMP) for the Crossroute Forest for the 10-year period April 1, 2007 to March 31, 2017- Public Inspection of Approved Plan | Not prescribed | November 27, 2006 |
| XB06E2005 | MNR instrument | Forest Management Plan for the Ogoki Forest for the 10-year period April 1, 2008 to March 31, 2018 - Review of Proposed Long-Term Management Direction | Not prescribed | December 11, 2006 |

| Registry Number | Type | Title | Ministry's Rationale for Information Notice | Date Published |
|---|---|---|---|---|
| XB06E2029 | MNR instrument | Forest Management Plan (FMP) for the Dog River Matawin Forest for the 10-year period April 1, 2009 to March 31, 2019 - Invitation to Participate | Not prescribed | December 27, 2006 |
| XB07E2028 | MNR instrument | Forest Management Plan for the French/Severn Forest for the 10-year period April 1, 2009 to March 31, 2019 - Invitation to Participate | Not prescribed | January 12, 2007 |
| XB05E2811 | MNR instrument | Forest Management Plan for the Wabigoon Forest for the 10-year period April 1, 2008 to March 31, 2018 - Review of Proposed Operations | Not prescribed | January 24, 2007 |
| XB05E2809 | MNR instrument | Forest Management Plan for the Red Lake Forest for the 10-year period April 1, 2008 to March 31, 2018 - Review of Proposed Operations | Not prescribed | February 01, 2007 |
| XB07E2002 | MNR instrument | Forest Management Plan for the Whiskey Jack Forest for the 10-year period April 1, 2009 to March 31, 2019 - Invitation to Participate | Not prescribed | February 01, 2007 |
| XB05E2805 | MNR instrument | Forest Management Plan - Contingency Plan for the Romeo Malette Forest for the period April 1, 2007 to March 31, 2009 Public Inspection of Approved Plan | Not prescribed | February 07, 2007 |
| XB05E2810 | MNR instrument | Forest Management Plan (FMP) for the Hearst Forest for the 10-year period April 1, 2007 to March 31, 2017 - Public Inspection of Approved Plan | Not prescribed | February 08, 2007 |
| XB07E2001 | MNR instrument | Forest Management Plan for the Nipissing Forest for the 10-year period April 1, 2009 to March 31, 2019 - Invitation to Participate | Not prescribed | February 08, 2007 |
| XB06E2009 | MNR instrument | Forest Management Plan for the White River Forest for the period April 1, 2008 to March 31, 2018 - Review of Proposed Long-Term Management Direction | Not prescribed | February 16, 2007 |
| XB07E2005 | MNR instrument | Forest Management Plan for the Romeo Malette Forest for the 10-year period April 1, 2009 to March 31, 2019 - Invitation to Participate | Not prescribed | February 21, 2007 |
| XB07E2006 | MNR instrument | Major Amendment to the Smooth Rock Falls Forest Management Plan (FMP) for the period April 1, 2005 to March 31, 2025 - Public Information Centre and 30-Day Review | Not prescribed | February 23, 2007 |
| | | | | |

| Registry Number | Type | Title | Ministry's Rationale for Information Notice | Date Published |
|---|---|---|---|---|
| 010-0008 | MNR instrument | Forest Management Plan for the Temagami Crown Management Unit (CMU) for the 10 year period April 1, 2009 to March 31, 2019 – Invitation to Participate | Not prescribed | March 12, 2007 |
| 010-0001 | MNR instrument | Forest Management Plan (FMP) for the Lakehead Forest for the 10-year period April 1, 2007 to March 31, 2017 – Public Inspection of the Approved Plan | Not prescribed | March 12, 2007 |
| 010-0065 | MNR instrument | Major Amendment to the Smooth Rock Falls Forest Management Plan for the period April 1, 2005 to March 31, 2025 – Invitation to Participate and 30-Day Comment Period | Not prescribed | March 13, 2007 |
| **MNR Water Management Plans** | | | | |
| XB03E3002 | MNR instrument | Water Management Plan for the Muskoka River - Public Inspection of Approved Plan | Not prescribed | May 08, 2006 |
| XB03E2007 | MNR instrument | Water Management Plan for the Mattagami River System - Public Inspection of Approved Plan | Not prescribed | August 09, 2006 |
| XB03E2008 | MNR instrument | Water Management Plan for the Abitibi River System - Public Inspection of Approved Plan | Not prescribed | September 12, 2006 |
| XB05E2802 | MNR instrument | Water Management Plan for the Montreal River - Public Inspection of Approved Plan | Not prescribed | February 14, 2007 |
| **MNR Aquaculture Licences** | | | | |
| XB05E2010 | MNR instrument | Meeker's Aquaculture, *FWCA* section 47 (1) - Issuance of an Aquaculture licence for cage culture of rainbow trout at existing operational site | Section 32 exception - *EAA* | February 14, 2007 |
| XB05E2011 | MNR instrument | Cold Water Fisheries Inc., *FWCA* section 47 (1) - Issuance of an Aquaculture licence for cage culture of rainbow trout at existing operational sites | Section 32 exception - *EAA* | February 14, 2007 |
| XB05E3402 | MNR instrument | North Wind Fisheries Limited, *FWCA* section 47 (1) - Issuance of an Aquaculture licence for cage culture of rainbow trout at existing operational site | Section 32 exception - *EAA* | February 14, 2007 |
| **Ministry of Northern Development and Mines** | | | | |
| XD07E1031 | MNDM policy | Toward Developing an Aboriginal Consultation Approach for Mineral Sector Activities - A Discussion Paper | Information Notice | February 23, 2007 |

| Registry Number | Type | Title | Ministry's Rationale for Information Notice | Date Published |
|---|---|---|---|---|
| **Amendments to Mine Closure Plans** | | | | |
| XD06E1009 | MNDM instrument | Amendment to the Red Lake Mine Closure Plan | Not prescribed | April 25, 2006 |
| XD06E1008 | MNDM instrument | Amendment to the Aquarius Project Closure Plan | Not prescribed | April 25, 2006 |
| XD06E1012 | MNDM instrument | Amendment to the Northern Empire Mill Closure Plan | Not prescribed | July 06, 2006 |
| XD06E1015 | MNDM instrument | Addendum to Holloway Mine Closure Plan "Closure Cost Update" | Not prescribed | August 03, 2006 |
| XD06E1014 | MNDM instrument | Addendum to Holloway Mine Shaft #3 Closure Plan "Closure Cost Update" | Not prescribed | August 03, 2006 |
| XD06E1019 | MNDM instrument | Amendment to the Podolsky Project Advanced Exploration Closure Plan | Not prescribed | September 26, 2006 |
| XD06E1020 | MNDM instrument | Amendment to the Sand River - Leitch - East Leitch Advanced Exploration Project | Not prescribed | October 02, 2006 |
| XD06E1024 | MNDM instrument | Amendment to the Nortoba-Tyson Molybdenite Advanced Exploration Project | Not prescribed | January 12, 2007 |
| XD06E1022 | MNDM instrument | Amendment to the Sand River - Leitch - East Leitch Advanced Exploration Project | Not prescribed | January 12, 2007 |
| XD07E1029 | MNDM instrument | Pamour Mine Closure Plan Amendment - Appendix K | Not prescribed | February 12, 2007 |
| XD07E1030 | MNDM instrument | Dome Mine No. 6 Tailings Area Closure Plan Amendment | Not prescribed | February 13, 2007 |
| **Ministry of Public Infrastructure Renewal** | | | | |
| XR06E0003 | PIR Policy | Places To Grow: Better Choices. Brighter Future. The Growth Plan for the Greater Golden Horseshoe, 2006. | Ministry not yet prescribed | June 16, 2006 |
| **Ministry of Transportation** | | | | |
| XE06E4561 | MTO policy | Environmental Standards and Practices User Guide | Not explained | July 14, 2006 |
| XE06E4562 | MTO policy | Environmental Reference for Contract Preparation | Not explained | July 14, 2006 |

# SECTION 3

## USE OF EXCEPTION NOTICES

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### 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 section 29 of the *EBR* when the delay in waiting for public comment would result in danger to public health or safety, harm or serious risk to the environment, or injury or damage to property (the "emergency" exception). Second, ministries can post an environmentally significant proposal as an exception notice under section 30 of the *EBR* when the proposal will be or has already been considered in another public participation process that is substantially equivalent to the requirements of the *EBR* (the "equivalent public participation" exception).

The ministries posted 24 exception notices during this reporting year, and most of them were acceptable uses of the sections 29 and 30 exceptions allowed by the *EBR*. The ECO is pleased that the ministries reduced their reliance on the emergency exception during this reporting year, posting only two this year compared to 11 in 2005/2006. There were, however, a few equivalent public participation notices that the ECO believes should have been posted as regular proposal notices to allow the public an opportunity for comment.

MNR relied on the "equivalent public participation" exception to post notice of regulations for each of the province's 38 conservation authorities under the *Conservation Authorities Act* to regulate "Development, Interference with Wetlands and Alterations to Shorelines and Watercourses." These regulations should have been posted as regular notices for public comment, as the earlier consultation on the generic regulation was not site-specific. The public should have had an opportunity to comment on the delineation of wetlands and waterways set out in maps in the regulation for each conservation authority.

MOE posted an exception notice informing the public that it was putting a hold on all approvals for small space heaters burning used oil, which included a link to a related proposal notice for a regulation banning the burning of used oil in space heaters. The ministry provided no rationale for the use of an exception notice. MOE may have intended the notice to be posted as an "information notice," which would have been more appropriate.

MOE relied on an emergency exception to notify the public about a regulation which exempted fuel suppliers from the fuel quality requirements for ethanol in gasoline in order to increase provincial gasoline supplies during the period of fuel shortages in the winter of 2007. This was an acceptable use of an emergency exception.

**All Exception Notices Posted During 2006/2007 Reporting Year**

| Registry Number | Ministry | Title | Type | Date Published |
|---|---|---|---|---|
| RB00E2002 | MNR Regulation | Establishing 16 provincial parks, additions to 13 existing provincial parks and the re-classification and re-configuration of an existing provincial park identified in the "Ontario's Living Legacy Land Use Strategy": amending regulations made under the *Provincial Parks Act* and the *Fish and Wildlife Conservation Act* | Equivalent Public Participation Exception | June 28, 2006 |
| RB00E3001 | MNR Regulation | Establishing seven conservation reserves: amendment to Ontario Regulation 805/94 (Conservation Reserve) made under the *Public Lands Act* | Equivalent Public Participation Exception | June 28, 2006 |
| RB00E3002 | MNR Regulation | Establishing five provincial parks and additions to two existing provincial parks: amending regulations made under the *Provincial Parks Act* and the *Fish and Wildlife Conservation Act* | Equivalent Public Participation Exception | June 28, 2006 |
| RB00E1001 | MNR Regulation | Establishing 26 conservation reserves and an addition to an existing conservation reserve: amendment to Ontario Regulation 805/94 (Conservation Reserve) made under the *Public Lands Act* | Equivalent Public Participation Exception | June 28, 2006 |
| RB00E3003 | MNR Regulation | Establishing 16 conservation reserves: amendment to Ontario Regulation 805/94 (Conservation Reserve) made under the *Public Lands Act* | Equivalent Public Participation Exception | June 28, 2006 |
| RB00E2001 | MNR Regulation | Establishing 76 conservation reserves: amendment to Ontario Regulation 805/94 (Conservation Reserve) made under the *Public Lands Act* | Equivalent Public Participation Exception | June 28, 2006 |
| RB01E2001 | MNR Regulation | Establishing eight new provincial parks and new additions to three existing provincial parks: amending regulations made under the *Provincial Parks Act* and the *Fish and Wildlife Conservation Act* | Equivalent Public Participation Exception | June 28, 2006 |
| RB01E3007 | MNR Regulation | Establishing one new conservation reserve: amendment to Ontario Regulation 805/94 (Conservation Reserve) made under the *Public Lands Act*. | Equivalent Public Participation Exception | June 28, 2006 |
| RB02E2002 | MNR Regulation | Establishing four new provincial parks and five additions to existing provincial parks: amending regulations made under the *Provincial Parks Act* and the *Fish and Wildlife Conservation Act* | Equivalent Public Participation Exception | June 28, 2006 |
| RB02E2004 | MNR Regulation | Establishing one new provincial park and one addition to an existing provincial park: amending regulations made under the *Provincial Parks Act* and the *Fish and Wildlife Conservation Act* | Equivalent Public Participation Exception | June 28, 2006 |

| Registry Number | Ministry | Title | Type | Date Published |
|---|---|---|---|---|
| RB02E1006 | MNR Regulation | Establishing one conservation reserve: amendment to Ontario Regulation 805/94 (Conservation Reserve) made under the *Public Lands Act*. | Equivalent Public Participation Exception | June 28, 2006 |
| RB03E2003 | MNR Regulation | Establishing five new provincial parks and additions to two existing provincial parks: amending regulations made under the *Provincial Parks Act* and the *Fish and Wildlife Conservation Act* | Equivalent Public Participation Exception | June 28, 2006 |
| RB03E2001 | MNR Regulation | Establishing eight new conservation reserves: amendment to Ontario Regulation 805/94 (Conservation Reserve) made under the *Public Lands Act*. | Equivalent Public Participation Exception | June 28, 2006 |
| RB03E2002 | MNR Regulation | Establishing two new provincial parks and two additions to existing provincial parks: amending regulations made under the *Provincial Parks Act* and the *Fish and Wildlife Conservation Act.* | Equivalent Public Participation Exception | June 28, 2006 |
| RB03E1001 | MNR Regulation | Establishing one provincial park: amending regulations made under the *Provincial Parks Act* and the *Fish and Wildlife Conservation Act.* | Equivalent Public Participation Exception | June 28, 2006 |
| RB03E1002 | MNR Regulation | Establishing two conservation reserves: amendment to Ontario Regulation 805/94 (Conservation Reserve) made under the *Public Lands Act*. | Equivalent Public Participation Exception | June 28, 2006 |
| RB04E2002 | MNR Regulation | Establishing a new provincial park: amending regulations made under the *Provincial Parks Act* and the *Fish and Wildlife Conservation Act*. | Equivalent Public Participation Exception | June 28, 2006 |
| RB9E6012 | MNR Regulation | Establishing eight provincial parks and additions to five existing provincial parks: amending regulations made under the *Provincial Parks Act* and the *Fish and Wildlife Conservation Act.* | Equivalent Public Participation | June 28, 2006 |
| RB06E6004 | MNR Regulation | Notice of recent approval of local regulations for each of the province's 38 Conservation Authorities under section 28(1) and section 28(8) of the *Conservation Authorities Act*, RSO 1990 - to address "Development, Interference with Wetlands and Alterations to Shorelines and Watercourses." | Equivalent Public Participation Exception | July 12, 2006 |
| RB06E6009 | MNR Regulation | Revisions to Part 7 of Ontario Regulation 663/98 with regards to where Sunday gun hunting may occur south of the French and Mattawa Rivers | Equivalent Public Participation Exception | August 25, 2006 |
| RB06E7010 | MNR Regulation | Establishing five additions to Woodland Caribou Provincial Park as identified in the "Ontario's Living Legacy Land Use Strategy" and "Whitefeather Forest and Adjacent Areas Land Use Strategy"; amending regulations made under the *Provincial Parks Act* and the *Fish and Wildlife Conservation Act.* | Equivalent Public Participation Exception | September 05, 2006 |

| Registry Number | Ministry | Title | Type | Date Published |
|---|---|---|---|---|
| **RB06E6012** | MNR Regulation | Designation of new areas in southern, central and northern Ontario under the *Aggregate Resources Act* (*ARA*), and the establishment of fee increases under the *ARA*; Ontario Regulation 499/06 amending Ontario Regulation 244/97 under the *ARA.* | Emergency Exception | October 31, 2006 |
| **PA8E0008** | MOE Policy | Approval of Small Used Oil Space Heaters on Hold. | Not explained | January 11, 2007 |
| **010-0003** | MOE Regulation | Regulation to exempt fuel suppliers from the fuel quality requirements of Ontario Regulation 535/05 – Ethanol in Gasoline, to increase provincial gasoline supplies during a period of widespread fuel shortages across the province. | Emergency Exception | March 11, 2007 |

# SECTION 4

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

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

**Review of Posted Decision:**

**Bill 51 – Planning And Conservation Land Statute Law Amendment Act, 2006**

**Decision Information:**

Registry Number: AF05E0001
Proposal Posted: December 13, 2005
Decision Posted: June 8, 2007
Comment Period: 75 days
Number of Comments: Unknown
Came into Force: Part on October 19, 2006 on receiving Royal Assent; Remainder on January 1, 2007 by proclamation

**Description**

In October 2006, the Ontario government passed the *Planning and Conservation Land Statute Law Amendment Act* (*PCLSLAA*), which amended the *Planning Act*, the *Conservation Land Act*, and a number of other pieces of legislation. A number of these amendments came into force on receiving Royal Assent on October 19, 2006, and the rest were proclaimed on January 1, 2007.

The *PCLSLAA* makes a number of amendments to the *Planning Act* in order to modify different aspects of the land use planning process, provide new tools to assist with implementation of provincial policies and promote provincial planning goals such as sustainable development, intensification and brownfield redevelopment. The *PCLSLAA* also amends provisions of the *Conservation Land Act* relating to conservation easements and covenants.

The purposes of the amendments in the *PCLSLAA* were outlined in a Ministry of Municipal Affairs and Housing (MMAH) backgrounder that accompanied the introduction of Bill 51 in the Ontario legislature. The *PCLSLAA* is intended to:

- Provide municipalities with the tools and flexibility to address their needs, including protection of employment lands, sustainable development (e.g., environmentally-friendly design) intensification and brownfield revitalization;
- Allow for greater information, participation, consultation and decision-making to take place early on in the process, giving local residents and community leaders more opportunity to play their crucial part in planning our communities;
- Create a more transparent and accessible land-use planning process; and
- Make the Ontario Municipal Board more effective, transparent and user-friendly.

More specific purposes were articulated in the Registry proposal notice and include:

- Providing new planning rules and tools to strengthen implementation of provincial policies and municipal priorities;
- Providing new planning rules and expanded/enhanced planning tools to facilitate intensification/brownfield redevelopment, sustainable development, and community /design features;
- Providing for an optional local appeal body that, if established by a municipality, would hear appeals of decisions on minor variances and consents;
- Providing new rules for information, materials and parties at OMB hearings; and
- Providing other technical amendments to the *Planning Act* that would improve administrative planning processes, and clarify existing provisions in the *Planning Act* and related regulations.

*Background:*
The legislative amendments in the *PCLSLAA* represent one element in the Ontario government's broad package of land use planning reforms launched following the election of the new government in October 2003 as noted in the ECO's 2004/2005 Annual Report.

A number of the amendments are intended to address specific concerns about the Ontario Municipal Board (OMB) that had been expressed to the government, including the following: that the OMB had the power to substitute its opinions for the decisions of elected municipal councils; that appeals before the OMB forced municipalities to spend scarce resources to defend decisions that had been subject to the land use planning process; that the OMB process was inaccessible to members of the public and the interests of ordinary citizens were not given equal weight to those of developers; and that municipalities were not able to respond within tight deadlines in development applications, leading to a greater number of appeals before the OMB.

A major study of OMB planning decisions by John Chipman reviewed hundreds of decisions made during specific periods. Chipman concluded that the OMB had frequently overturned land use planning decisions made by municipalities and imposed its own policies, generally to the benefit of private interests, and also that provincial planning policies had been applied within the context of the OMB's own standards. Another large study, conducted for Ontario Nature, of cases with significant natural heritage issues decided by the OMB found that parties defending natural heritage had a 30 per cent success rate in winning appeals before the OMB, as opposed to development interests which had a 70 per cent success rate. The study suggested that this striking difference in results might be due to a variety of factors, including: weak outreach by the OMB to support and guide potential appellants; an imbalance in the resources available to defenders of natural heritage as compared to development interests; different levels of understanding of natural heritage in OMB adjudicators; and lack of clarity in the Provincial Policy Statement with respect to natural heritage.

In June 2004, MMAH released a discussion paper on the OMB as part of a broader consultation seeking public input on planning reform in Ontario. The focus of the OMB consultation at that time included the following issues: the mandate of the OMB, ranging from very complex projects to backyard additions; the OMB's accountability to change the decisions of elected municipal councils; qualifications and length of tenure of OMB members in relation to public perception of Board independence; and the ability of the public to participate in hearings before the OMB.

Many of the amendments made by the *PCLSLAA* do not apply in relation to the City of Toronto, but comparable provisions are put in place for Toronto in the *City of Toronto Act*. The new *City of Toronto Act* was enacted after the Ontario government launched a joint review of the legislation along with the City of Toronto in 2004, to "ensure the city has the tools it needs to remain strong and prosperous long into the future."

*Planning Act Amendments:*
The *PCLSLAA* makes extensive amendments to the *Planning Act*, and many of them are very significant. The most substantive amendments will be highlighted here.

Provincial Interest
The *PCLSLAA* adds a new matter of provincial interest to the *Planning Act*. In addition to the other matters of provincial interest listed, decision-makers under the *Planning Act* must have regard to "the promotion of development that is designed to be sustainable, to support public transit and to be oriented to pedestrians."

Other amendments clarify the degree of discretion and independence that decision-makers under the *Planning Act* have in relation to municipal decisions and provincial policies. When making a planning decision under the Act, the decision-maker, whether an approval authority or the OMB, must have regard to any decision that is made by a municipal council or another approval authority relating to the same matter, as well as to any supporting information and material that the municipal council or approval authority considered in making the decision. This provision is somewhat unusual given that precedent

typically does not bind administrative tribunals. Decision-makers on planning matters must be consistent with provincial policy statements in effect at the time of the decision, and must conform with, or not conflict with, the provincial plans in effect on that date, such as the Niagara Escarpment Plan, the Oak Ridges Moraine Conservation Plan and the Greenbelt Plan. This is a major change in Ontario and should promote more consistent decision-making in the next decade.

Pre-Consultation, Public Consultation and Access to Information

Several amendments provide the public greater access to the land use planning process, including information related to that process. A new provision in the Act requires that any information that is required to be provided to a municipality or approval authority under the *Planning Act* be made available to the public.

In the course of preparing an official plan, the municipal council must meet additional consultation requirements. In addition to consulting the approval authority on the preparation of the plan, the council must now provide the approval authority with an opportunity to review supporting information and material, even if the plan is exempt from approval. The council is also required to consult prescribed public bodies on the preparation of the plan and give them an opportunity to review supporting information and material. At least one public meeting needs to be held, as was the case prior to these amendments.

In addition, if it is determined that an official plan needs to be revised, or if an official plan, a three-year zoning by-law update is undertaken or a zoning by-law is being amended in relation to a development permit system, the municipal council must ensure that at least one open house is held to give the public an opportunity to review and ask questions about the information and material available. In such circumstances, an open house will be required even where an official plan sets out alternative measures for informing and obtaining the views of the public in respect of official plan or zoning by-law amendments that may be proposed.

Municipal councils are required to make information available to the public about who is entitled to appeal all or part of an official plan, or zoning by-law amendment, to the OMB.

Where there is an application to a municipal council, planning board or approval authority to amend its official plan, zoning by-law or site plan control, or to approve a plan of subdivision approval, the council, planning board or authority must permit the applicants to consult with it before submitting their application, and may by by-law require the applicants to consult.

Local Appeal Bodies

The *PCLSLAA* provides that municipal councils who meet prescribed conditions may establish and appoint a local appeal body to hear appeals of certain local land use planning matters. The local appeal body may hear appeals of decisions of the Committee of Adjustment and decisions on consents, and will have all of the powers and duties of the OMB in relation to these appeals unless is before the OMB or related to other appeals to the OMB. An appeal on a question of law from a local appeal body decision may be made to the Divisional Court, if leave is granted.

Ontario Municipal Board

*Limited Right of Appeal:*

Prior to amendment by the *PCLSLAA*, any person or public body had a right of appeal to the OMB regarding all or part of an official plan. The *PCLSLAA* limits this right of appeal to the following: a person or public body who made oral submissions at a public meeting or written submissions to the council before the plan was adopted; the Minister; the appropriate approval authority; and, where a request has been made to amend the plan, the person or public body that made the request. Likewise, the *PCLSLAA* has removed the broad right of any person or public body to appeal a zoning by-law, providing instead that only the following may appeal to the OMB: the applicant; a person or public body who made oral submissions at a public meeting or written submissions to the council before the by-law was passed; and the Minister. In addition, no appeal will be allowed at all of official plan policies adopted or by-laws

passed to permit the erecting, locating or use of two residential units in a detached, semi-detached or row house in a residential area.

The *PCLSLAA* permits only the following individuals or groups to appeal decisions on subdivision plan approvals: the applicant; a person or public body who made oral submissions at a public meeting or written submissions to the approval authority before the decision was made; the Minister; the municipality or planning board area where the land is located; or, if the land is not located in a municipality or planning board area, any person or public body.

Prior to the Bill 51 amendments, applicants and public bodies possessed a right to appeal in relation to various conditions of subdivision approval. The list of those permitted to appeal in these circumstances now specifies the following: the applicant; a public body that made oral submissions at a public meeting or written submissions to the approval authority before the decision was made; the Minister; the municipality or planning board area where the land is located; or, if the land is not located in a municipality or planning board area, any person or public body.

The *PCLSLAA* limits those who may appeal to the OMB in relation to a decision on a request for an official plan amendment (OPA) to: the person or public body that requested the amendment; the Minister of Municipal Affairs; and the appropriate approval authority. In relation to an application for a zoning by-law amendment, only the applicant or the Minister may appeal to the OMB. There is now no appeal allowed at all of an OPA request that: proposes to amend or revoke official plan policies adopted to permit the erecting, locating or use of two residential units in a detached, semi-detached or row house in a residential area. In addition, there is no appeal related to an application for an OPA or zoning by-law amendment proposing to remove any land from areas of employment if the official plan contains policies dealing with the removal of land from areas of employment.

*Limits to Added Parties:*
The *PCLSLAA* also introduces explicit restrictions as to whom may be added as parties in the appeal of an official plan or a zoning by-law, limiting them to: the Minister; the appropriate approval authority; and a person or public body who made oral submissions at a public meeting or written submissions to the council before the plan was adopted, or a person or public body who may be added because there are reasonable grounds to do so in the OMB's opinion.

The *PCLSLAA* also limits parties who may be added in appeals of decisions on subdivision plan approvals to: a person or public body who made oral submissions at a public meeting or written submissions to the approval authority, or made a written request to be notified of changes to the conditions, before the decision was made, or a person or public body added by the OMB on the basis of reasonable grounds; the Minister; the appropriate approval authority; the municipality or planning board area where the land is located; or, if the land is not located in a municipality or planning board area, any person or public body.

*New Evidence at Hearing:*
Where new information and material is presented at an OMB hearing that was not provided when the municipal council was making an official plan or zoning by-law decision under appeal, or when an approval authority was deciding on a subdivision plan approval, the OMB has discretion, either on its own initiative or on a motion by the municipality, approval authority or another party, to consider whether the new information and material could have materially affected the council's decision. If the OMB determines that this is the case, the information and material must not be admitted into evidence until the OMB has notified the municipal council or approval authority of the opportunity to reconsider its decision in light of the information and material and make a written recommendation to the OMB. The OMB must have regard to the recommendation from the council or authority if received within the prescribed time period, but also has the discretion to do so if it is received after that time period.

*New Grounds for Dismissal:*
In addition to the grounds upon which the OMB already has discretion to dismiss an appeal without holding a hearing, the *PCLSLAA* adds new grounds for dismissal where an appellant has persistently and

without reasonable grounds commenced proceedings before the OMB that constitute an abuse of process. New grounds for dismissal are also available in relation to official plans, zoning by-laws and subdivision plan approvals where, in the OMB's opinion, the application to which the appeal relates is substantially different from the application that was before council or the approval authority at the time of its decision. These powers of dismissal apply despite the procedural fairness provisions of the *Statutory Powers Procedure Act*.

*Powers Limited to Matters before the OMB:*
The *PCLSLAA* clarifies that the OMB's power to approve, modify and approve or refuse to modify all or part of an official plan does not include the power to approve or modify any part of the plan that is in effect and was not dealt with in the municipal council decision to which the notice of appeal relates.

*Complete Application:*
A council, planning board, or approval authority may require that an applicant requesting an OPA, zoning by-law amendment, subdivision approval or consent provide any other information or material considered necessary, if the official plan provides for this.

Once an applicant requests an OPA, zoning by-law amendment or subdivision approval, the council, planning board, or approval authority is required to notify them as to whether or not the application is complete. Applicants who are advised that their application is not complete have 30 days by which to make a motion to have the OMB determine whether the information and material have in fact been provided or whether a requirement for additional information is reasonable. An applicant who does not receive notice as to whether the application is complete or not within 30 days, may make a motion at any time to have the OMB determine whether the information and material have in fact been provided or whether a requirement for additional information is reasonable. In the case of an application for consent, the applicant, the council or the Minister may make a motion for directions to have the OMB determine whether the information and material have in fact been provided or whether a requirement for additional information is reasonable. The OMB's determination on this is not subject to appeal or review.

*Matters Subject to Site Plan Control Approval:*
Respecting site plan controls, the *PCLSLAA* permits a landowner or municipality to make a motion to the OMB to determine a dispute about whether a specific matter is subject to site plan control approval by the municipality. The OMB's determination on this is not subject to appeal or review.

*Minister's Order and Matters of Provincial Interest:*
If the OMB is requested to hold a hearing on a Minister's order in relation to zoning or subdivision control, and the Minister is of the opinion that a matter of provincial interest is, or is likely to be, adversely affected if the order is amended or revoked, the Minister may give written notice to the OMB. In these circumstances, the OMB's decision on the matter will not be final and binding until the provincial Cabinet confirms the decision. The Cabinet also has discretion to vary or rescind the OMB's decision, and to direct the Minister to amend or revoke the order.

*Consolidated Hearings Act:*
The *PCLSLAA* prohibits the referral of an undertaking to a joint board under the *Consolidated Hearings Act* if it involves an application for an OPA, a zoning by-law amendment, a subdivision plan approval or a consent unless a decision has been made on the application or the time period before which an appeal can be made has run out.

Official Plan Contents and Review
The *PCLSLAA* provides for the making of regulations to specify other matters that must be included in official plans.

Prior to the *PCLSLAA* amendments, the *Planning Act* required that a municipal council hold a special meeting, open to the public, at least once every five years to determine the need for a revision of the plan, having regard to provincial policy statements. The *PCLSLAA* strengthens and clarifies the requirements related to the five-year review of an official plan. Every five years after the plan or any part of it comes

into effect, the municipal council must revise the official plan to ensure that it conforms, or does not conflict, with provincial plans, has regard to matters of provincial interest under the *Planning Act*, and is consistent with provincial policy statements. Also, if the plan contains policies dealing with areas of employment, such as designation of areas of employment in the official plan and policies about the removal of land from areas of employment, the council must ensure that those policies are confirmed or amended. Within three years of a revised official plan coming into effect, the council is required to amend all zoning by-laws in effect in the municipality to conform with the plan.

Municipal Tools for Sustainable Communities

The *PCLSLAA* expands the scope of community improvement plans to include improvement of energy efficiency. Municipal grants and loans to support implementation of a community improvement plan may be made to pay for costs related to environmental site assessment, environmental remediation and provision of energy efficient uses.

The *PCLSLAA* clarifies that the municipal authority to pass zoning by-laws regulating the construction of buildings or structures includes and, despite the decision of any court, is deemed always to have included the authority to regulate the minimum area of a parcel of land the minimum and maximum density and height of development in the municipality or areas defined in the by-law.

The *PCLSLAA* also provides that if an official plan contains policies relating to zoning with conditions, the municipal council may pass a by-law permitting a use of land or erection, location or use of buildings or structures, and imposing prescribed conditions on the use, erection or location. When such a condition is imposed: the municipality may require a landowner subject to the by-law to enter an agreement with the municipality relating to the condition; the agreement may be registered against the land to which it applies; and the municipality may enforce the agreement against the owner and subsequent owners of the land. The Committee of Adjustment does not have the authority to allow a minor variance from such a condition.

The *PCLSLAA* does provide the Committee of Adjustment with the discretion to require a landowner to enter into one or more agreements with the municipality dealing with terms and conditions imposed by the committee. Such an agreement may be registered against the land to which it applies and the municipality may enforce the agreement against the owner and subsequent owners of the land.

The *Planning Act* previously prohibited development in a site plan control area unless the municipal council or OMB, if the matter was referred to it, had approved drawings or plans addressing specified matters. The *PCLSLAA* provides that the additional matters be deemed addressed if set out in the municipality's official plan and zoning by-laws, including: the sustainable design of buildings; and sustainable design elements such as trees, shrubs, hedges, plantings or other ground cover, permeable paving materials, street furniture, curb ramps, waste and recycling containers and bicycle parking facilities.

The *PCLSLAA* adds two new criteria that must be considered when an approval authority is assessing a draft plan of subdivision: the extent to which the plan's design optimizes the available supply, means of supplying, efficient use and conservation of energy; and the interrelationship between the design of the proposed plan of subdivision and site plan control matters relating to any development on the land, where the land is located within a designated site plan control. The *PCLSLAA* also expands the list of conditions that an approval authority may impose on a subdivision approval to include designated pedestrian pathways, bicycle pathways and public transit rights of way. As noted on pages 17 and 108 of the ECO's 2006/2007 Annual Report, this should have important implications for promoting positive alternatives for transportation in southern Ontario communities.

Exemption for Energy Projects

The *PCLSLAA* provides that an undertaking or class of undertakings relating to energy is not subject to the *Planning Act* if it has been approved or exempted under the *Environmental Assessment Act*. The Cabinet may make regulations prescribing undertakings or classes of undertakings that relate to energy.

*Conservation Land Act Amendments:*
The *PCLSLAA* expands the purposes for which conservation easements and covenants may be established under the *Conservation Land Act*. Prior to these amendments, a landowner was permitted to grant an easement to or enter into a covenant with a conservation body for the following purposes: the conservation, maintenance, restoration or enhancement of the land or the wildlife on the land; the conservation, preservation or protection of the land for agricultural purposes; or for access to such lands.

Under the *PCLSLAA*, a landowner may grant an easement to or enter into a covenant with one or more conservation bodies for:

a) the conservation, maintenance, restoration or enhancement of the land or the wildlife on the land;
b) the protection of water quality and quantity, including protection of drinking water sources;
c) watershed protection and management;
d) the conservation, preservation or protection of the land for agricultural purposes;
e) the purposes prescribed in regulations made under this Act; or
f) access to the above-listed lands.

The *PCLSLAA* also provides that a conservation body that is conveying land may reserve an easement for one of these purposes.

The *PCLSLAA* clarifies that if a conservation body that is a party to an easement registered against the land becomes the owner of the land in question, the easement will be suspended but will not merge, and if the conservation body later conveys the land, the easement will come into effect again.

A number of other minor amendments to facilitate conservation easements and covenants are also made to the *Planning Act*, the *Conveyancing and Law of Property Act*, the *Greenbelt Act, 2005*, and the *Land Titles Act*.

**Implications of the Decision**

The *PCLSLAA* should have a number of important impacts on the land use planning process in Ontario. Provincial plans and policies will have a greater influence on all land use planning decisions because these decisions will have to be consistent with provincial policy statements in effect on the date the decision is made, and will have to conform, or not conflict, with the provincial plans in effect on that date. This is a significant change since, prior to this, decision-makers only needed to follow rules in effect at the time of the application.

There are several ways in which the amendments to the *Planning Act* will allow for greater public engagement at the front end of the planning process, including: public access to information required to be provided to a municipality or approval authority in complete applications required under the *Planning Act*; additional public consultation requirements related to official plan preparation; and mandatory open houses related to official plan revisions and development permit systems. These reforms should result in a more transparent process.

At the same time, a number of the changes made by the *PCLSLAA* have the potential to limit public involvement in land use planning appeals to the OMB. For example, the *PCLSLAA* now limits the right of appeal to those members of the public who made oral submissions at a public meeting or written submissions to the council before a plan was adopted. The *PCLSLAA* also limits those who may appeal to the OMB in relation to a decision on a request for an official plan amendment (OPA) to: the person or public body that requested the amendment; the Minister; and the appropriate approval authority. There are now also restrictions on adding parties in official plan appeals, generally limiting them to those who made oral or written submissions before the plan was adopted, although the OMB may add a party where there are reasonable grounds to do so.

The *PCLSLAA* should also give municipalities a number of tools to help promote environmentally sustainable development and design. When the Minister introduced the bill, he drew attention to some of these tools:

> municipalities would have new authority to set conditions for how new subdivisions are designed in ways that maximize energy efficiency and include transit- and pedestrian-friendly design elements along streets and highways…[and] give municipalities more powers to shape the look and feel of their communities through new authority to consider external design details when they approve site plans.

In particular, municipalities may be able to: expand the scope of community improvement plans to include improvement of energy efficiency; use municipal grants and loans to pay for costs related to environmental site assessment, environmental remediation and provision of energy efficient uses; require developers to address sustainable design of buildings and other sustainable design elements in communities; and consider the extent to which the design of a draft plan of subdivision optimizes the available supply, means of supplying, efficient use and conservation of energy.

Reforms in the *PCLSLAA* should assist with land use planning in Northern Ontario particularly due to increased opportunities for official plan re-visioning and reform, and provisions allowing municipalities a greater role in promoting sustainable development and design.

The *PCLSLAA* will have a major impact on some future energy projects because it allows the Ontario government to make regulations exempting new energy projects from the *Planning Act* if they are approved or exempted under the *Environmental Assessment Act (EAA)*. The EA process may not address site-specific zoning issues, such as setback requirements, construction, traffic and overall official plan requirements. Municipalities may not have enough of an opportunity to identify appropriate locations for energy undertakings from a land use planning perspective, and some land use conflicts may become more frequent or remain unaddressed.

The strengthening of conservation easement provisions in the *Conservation Land Act* is likely to support the provincial government's efforts to protect agricultural and other natural lands planning, particularly in the Greenbelt Plan area. A recent review of academic literature on the use of conservation easements in the United States and Canada has shown that agricultural conservation easements have been effective in containing urban growth and helping to create a larger and more permanent agricultural land base.

**Public Participation & *EBR* Process**

Bill 51 was introduced in the Ontario Legislature on December 12, 2005 and a proposal for the draft Act was placed on the Registry the next day, providing the public with a comment period of 75 days. MMAH had conducted prior public consultation on possible reforms to the Ontario Municipal Board during the summer of 2004.

The description of Bill 51 in the proposal notice clearly summarized the main details of the proposed legislation.

Since MMAH had not posted a Registry decision notice by the time this review was completed in March 2007, the ECO is uncertain as to exactly how many comments were submitted, what content those comments contained, or how they were considered by the Ministry. However, an excellent indication of the perspectives of various stakeholders is available in the record of submissions given before the Standing Committee on General Government during legislative committee hearings on Bill 51.

Overall, there was strong support for the proposed amendments from municipalities, along with recommendations to further strengthen municipal powers. There was also a fair degree of support from environmental non-government organizations (ENGOs) and other citizens' groups, although specific issues were raised. In contrast, developers and homebuilders' associations generally expressed

concerns that the legislative changes would result in added costs, delays and uncertainty in the planning process.

Stakeholders involved in development opposed the amendment requiring that planning decisions be consistent with provincial policy statements in effect, and conform or not conflict with provincial plans in effect, at the time of the decision. They recommended that the province ensure that applications be assessed against the plans and policies in force on the date of the application, rather than the date of decision.

Concerns were expressed about new provisions relating to requirements to hold open houses. Municipal associations suggested that open house meetings only be required for new official plans and official plan updates, comprehensive bylaws and their three-year updates, and major amendments to any plan, or that it be left to municipalities to decide when an open house is appropriate for a particular type of application. The development community recommended that public open houses only be held in relation to applications for official plan amendments.

Municipal stakeholders generally supported the amendment allowing for local appeal bodies. It was further recommended that the establishment of local appeal bodies be permitted on an inter-municipal basis for smaller municipalities. One municipality suggested that the mandate of local appeal bodies could be expanded to include appeals of site plans, plans of subdivision, zoning matters where the application conforms to an approved official plan, and other planning matters of a purely local nature. However, development stakeholders did not support the proposal to establish local appeal bodies if the OMB would not have the authority to hear appeals of their decisions.

A number of stakeholders expressed concerns about amendments limiting the right of appeal to the OMB and the adding of parties to a hearing. An ENGO stakeholder noted that these provisions could be unnecessarily restrictive for community-based and public interest interveners due to their limited resources. Another stakeholder suggested that by excluding any person who is not a public body and did not make an oral or written submission before the council made its decision, the proposed amendments would limit public participation in the appeal process and favour participation by applicants and public bodies. A representative of the development community also argued against favouring public bodies, recommending that public bodies that have not participated in the planning approvals process be prohibited from appealing council decisions or being added as parties to a hearing. A number of ENGO stakeholders also encouraged the government to develop a framework to provide intervener funding to support community participation in the planning process.

A significant number of stakeholders commented on the proposed amendment to restrict the evidence presented at OMB hearings to the information that was provided to the municipal council. The Association of Municipalities of Ontario (AMO) was concerned that councils might receive overly detailed presentations and be required to produce detailed minutes from public meetings. One municipality noted that it would be difficult and costly for part-time councilors on small rural councils to consider all information in full detail. AMO proposed the addition of a provision that would allow the introduction of limited new information to the OMB so long as it did not represent a material change that should have been presented to the council prior to it making its decision.

Development stakeholders objected to the prohibition on new evidence at the OMB, arguing that council meetings do not take the form of hearings in the way that OMB proceedings do, and that there would not be an opportunity to present a detailed argument at council given the general limit of five minutes on deputations. Instead, they recommended eliminating the proposal that no new evidence be presented to the OMB and maintaining full *de novo* hearings. An environmental organization also opposed the restriction of new evidence at OMB hearings because it would negatively impact on the ability of the public to participate meaningfully in appeals at the OMB. The organization noted that the goal of ensuring that all relevant information is submitted to councils before they make a decision, would be achieved through the complete application provision and the requirement that the OMB have regard to council decisions.

Some municipal bodies felt that the requirement that the OMB have regard to a municipal decision was insufficient to achieve the objective of returning the OMB to its original role of an appellate body, and needed to be strengthened. One stakeholder suggested that "have regard to" be replaced with stronger language giving greater deference to decisions of municipal councils, or that the proposed legislation be amended to clarify that the standard of review by the OMB of the council decision should be one of reasonableness.

Representatives of the development community expressed concerns about the new complete application requirement, recommending instead that there be a prescribed pre-consultation process put in place with minimum information standards and appropriate response times. One stakeholder advocated the establishment of a consensus-based process in which applicants and municipal planning staff would decide together what information and studies would be required to support the application. An ENGO representative noted that all information in a complete application should be made available to the public at the time that the application is considered complete.

AMO noted that employment lands in rural and northern communities are often different in character from southern Ontario, given that many employment centres include resorts and recreational uses, and recommended that the definition of employment lands be amended to reflect this diversity. In addition, development stakeholders also recommended that employment land definitions and policies be consistent and integrated with other provincial policies and legislation, including the provincial policy statements, plans under the *Places to Grow Act* and brownfield policies.

The development community raised strong concerns about sustainable design requirements for buildings and community features and argued for a balanced approach in defining "sustainable development" both in terms of economic and environmental sustainability, given competitive building costs determine lease rates, influencing the viability of projects. Building associations recommended that proposed changes to section 41 of the *Planning Act* dealing with site planning control and urban design be revised to limit municipal powers to control architecture and design.

Many commenters addressed the proposed exemption from the *Planning Act* for energy projects approved or exempted under the *Environmental Assessment Act*. A number of stakeholders, including the Canadian Wind Energy Association, the Association of Power Producers of Ontario and the Ontario Waterpower Association, supported this amendment due to a need to eliminate duplication and overlap currently existing between the EA and planning processes.

At the same time, many municipal and ENGO stakeholders strongly opposed the proposal for this exemption on the grounds that energy undertakings should not be exempted from the land use planning process even if they have been through an EA. The City of Toronto emphasized that energy undertakings require an evaluation under a municipality's site plan control and zoning processes, in addition to an EA. The City of Mississauga contended that municipalities should have the ability to identify appropriate locations for energy undertakings in accordance with good planning principles. The Canadian Environmental Law Association noted that exemption from the *Planning Act* would mean that important site-specific zoning issues, including setback requirements, construction, traffic and overall official plan requirements, would not be considered for energy projects because EA process does not address such issues.

A number of concerns were also raised regarding proposed amendments to the *Conservation Land Act*. Stakeholders supported establishing a registry under the *Conservation Land Act*, but suggested there was a need for a consolidated registry that would apply to conservation easements put in place by agreements under other legislation such as the *Ontario Heritage Act* and the *Agricultural Research Institute of Ontario Act*. The Ontario Land Trust Association urged amendments to the *Assessment Act* requiring property assessors to take account of the impact of a conservation easement on a property's value for assessment purposes. Another conservation stakeholder recommended that the list of purposes for which conservation easements and covenants may be established be further expanded to include walking trails, recreation and areas of aesthetic or scenic interest.

Finally, a number of stakeholders pointed out the generous use of regulation-making authority in the *PCLSLAA* and the fact that substantive matters had been left to the regulations. These stakeholders suggested that these regulation-making provisions be replaced with substantive provisions in the legislation wherever possible.

In response to comments received, the legislative committee made many housekeeping amendments and a number of substantive amendments to the *PCLSLAA*. Some of these substantive amendments are outlined below.

The *PCLSLAA* was amended to allow the OMB not only to determine whether an application is complete according to a municipality's requirements, but also whether it considered those requirements to be reasonable. The decision of the OMB on this issue is not subject to appeal or review.

The committee also amended the *PCLSLAA* to remove the limitation on private parties presenting evidence to the OMB that was not before the municipal council. Instead, the OMB will receive more discretion to determine whether or not evidence that was not before the municipal council at the time of application for the official plan amendment ought to be admissible on appeal to the OMB. If the OMB determines that the information could have materially affected the council's decision, that information will not be admitted into evidence at the hearing and the OMB will give the municipality notice that it may reconsider its decision and make a recommendation to the OMB. The committee amendments mean that the OMB will now be required to "have regard for" the council's recommendation, as opposed to the first reading language in the *PCLSLAA* that required the OMB to "consider" it.

Another committee amendment allows the OMB to dismiss an appeal of an application if it is substantially different from the application considered by council. The committee also amended the *PCLSLAA* to require open houses only before statutory public meetings for certain applications, as opposed to all applications.

**SEV Consideration**

At the date of writing, no documentation on consideration of MMAH's SEV had been received by the ECO.

**Other Information**

In connection with the passage of the *PCLSLAA,* a number of regulations have been made under the new regulation-making authorities in the *Planning Act*:

- Official Plans and Plan Amendments, O. Reg. 543/06
- Plans of Subdivision, O. Reg. 544/06
- Zoning By-laws, Holding By-laws and Interim Control By-laws, O. Reg. 545/06
- Requests to Amend or Revoke Minister's Zoning Orders, O. Reg. 546/06
- Consent Applications, O. Reg. 547/06
- Transitional Provisions under section 70.5 of the Act – Continuation and Disposition of Matters and Proceedings, O. Reg. 548/06
- Prescribed Time Period – Subsections 17(44.4), 34(24.4) and 51 (52.4) of the Act, O. Reg. 549/06
- Prescribed Matters – Upper-Tier Community Improvement Plans, O. Reg. 550/06
- Local Appeal Bodies, O. Reg. 551/06

The *PCLSLAA* is one piece in a wide-ranging package of related planning reforms that include: the Provincial Policy Statement, 2005; the *Greenbelt Act, 2005* and Greenbelt Plan; the *Places to Grow Act, 2005*; the Growth Plan for the Greater Golden Horseshoe; amendments to the *Planning Act* in Bill 26, the *Strong Communities Act*; the new *City of Toronto Act, 2006*; and the *Clean Water Act, 2006*. Many of

these initiatives have been reviewed in previous ECO Annual Reports, and some are discussed in the 2006/2007 Annual Report.

**ECO Comment**

Overall, the ECO commends the Ministry of Municipal Affairs and Housing for implementing the reforms contained in the *PCLSLAA*. In the ECO's 2005/2006 Annual Report, the Commissioner reviewed the state of provincial planning in relation to adaptation to a changing climate. Municipalities may be able to use some of the new provisions put in place by the *PCLSLAA* to adopt strategies for adapting to the effects of climate change and reducing future emissions by their residents, institutions and business operations.

The *Planning Act* now requires municipalities to have regard to the promotion of development that is designed to be sustainable, to support public transit and to be oriented to pedestrians. However, more must be done to ensure better integration of a range of community, social and economic services and activities that are accessible to pedestrians including local retail, employment and educational opportunities and services, financial services, recreational activities (such as playgrounds and community centres) and other services. People won't walk if there aren't more walkable destinations in their communities. This type of change in planning and designing Ontario communities is essential if Ontarians are to move toward sustainability and we are to achieve the health benefits associated with walkable communities.

The ECO agrees with those who argued that the loss of broad appeal rights for local residents under the *PCLSLAA* is significant and unfortunate. Public interest group and local resident appeals in relation to natural heritage and development issues have resulted in many important past OMB decisions that have protected natural heritage and limited development on agricultural land. Although in some cases, leave to appeal rights under the *EBR* may be available to interested individuals and groups, these will apply in a very narrow range of cases and, overall, there will be a reduction in appeal rights. Thus, it will be important for MMAH and municipalities to educate residents and interested groups on the importance of early participation in the deliberations of municipal councils so that they can safeguard their appeal rights. The ECO intends to monitor implementation of these new provisions.

The ECO also has concerns about the regulation-making provision that could exempt some energy projects from the *Planning Act* if they have been approved or exempted under the *EAA*. The ECO echoes concerns expressed by municipalities and ENGOs relating to the need for energy undertakings to be evaluated according to land use planning principles. Some public concerns and conflicts related to the siting of wind turbine sites could be addressed if MMAH and the Ministry of Natural Resources were to plan appropriate exclusion zones for wind power development.

The *PCLSLAA* also expands the purposes for which conservation easements and covenants may be established under the *CLA*. The expanded purposes of these easements are an important advance and the ECO applauds these efforts to encourage landowners to restore or enhance land, conserve watershed areas and promote the protection of wildlife habitat.

While the OMB will continue to have a vital role in land use planning decisions, a number of its powers are curtailed and returned to the municipalities. The ECO applauds these changes because they should increase accountability and transparency in municipal decision-making and promote sustainability. The ECO intends to monitor how this change, and other amendments contained in Bill 51, is implemented and report in future Annual Reports.

**ENG's Integrated Power System Plan – Supply Mix**

**Decision Information:**

| | |
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| Registry Number: PO05E0001 | Comment Period: 76 days |
| Proposal Posted: December 14, 2005 | Number of Comments: 2,016 |
| Decision Posted: June 30, 2006 | Decision Implemented: June 13, 2006 |

**Description**

The Integrated Power System Plan (IPSP or the "Plan") is the most significant electricity system initiative in Ontario in over a decade. If and when fully implemented it could result in the construction, refurbishment and replacement of many electricity generating and transmission facilities in Ontario. The estimated capital investment required to implement the generation and conservation portfolio of the Plan is $70 billion according to the Ontario Power Authority (the OPA). The OPA is the agency charged with formulating the Plan and was established in 2005 by the *Electricity Restructuring Act* (Bill 100); for a review, see page 103 of the ECO 2004/2005 Annual Report. One of its key roles is to ensure adequate, reliable and secure electricity supply and resources in Ontario.

The OPA was first directed in May 2005 by the Minister of Energy (ENG) to formulate advice on the supply mix of Ontario's electricity generating system. It did so, and in December 2005 submitted to the Minister of Energy a "Supply Mix Advice Report" for the Ministry's consideration. The report contained advice to ensure Ontario has sufficient generating capacity for the next two decades, with specific targets for the years 2015, 2020 and 2025. The Ministry of Energy considered the advice over the six-month period leading up to June 2006 and received a large number of comments from the public on OPA's advice. Then, on June 13, 2006, ENG announced the Province's preferred approach to meeting Ontario's electricity needs and unveiled it to the public. ENG's Supply Mix decision was quite similar to the OPA's Supply Mix advice and became the subject of a June 2006 directive to the OPA to prepare the IPSP. Key elements of ENG's Supply Mix directive to the OPA included goals objectives for:

- reducing overall electricity demand;
- increasing the generating capacity from renewable forms of energy;
- replacing and rebuilding nuclear generation, but placing a limit on overall capacity;
- using natural gas generation at peak times and for high efficiency applications;
- fixing a date for the phase-out of coal-fired generation;
- strengthening the transmission system;

(A more complete description of the elements of the IPSP directive appears in the text box below.)

Additional items announced along with ENG's June 2006 directive included:

- directing Ontario Power Generation (OPG) to begin a federal approvals process, including an environmental assessment, for new nuclear units at an existing facility;
- directing OPG to begin a feasibility study on refurbishing its existing nuclear facilities that will include a review of the economic, technological and environmental aspects of refurbishment. As part of this initiative, OPG will begin an environmental assessment on the refurbishment of the four existing units at its Pickering B nuclear generating station;
- expanding the transmission capacity from Bruce County and surrounding area to facilitate the transmission of electricity from several new wind farms and the Bruce nuclear facility to Ontario homes and businesses.

*Associated Regulatory Amendments:*
The day before ENG announced its supply mix decision, important regulatory amendments were made. O. Reg. 424/04 (Integrated Power System Plan) under the *Electricity Act, 1998* sets out the rules by

which the Ontario Power Authority would develop the IPSP. Cabinet amended this regulation when it passed O. Reg. 277/06 on June 12, 2006, and added the text in the box below.

**Key Elements of the Integrated Power System Plan Directive from ENG to the OPA**

- The goal for total peak demand reduction from conservation by 2025 is 6,300 megawatts (MW). The plan should define programs and actions which aim to reduce projected peak demand by 1,350 MW by 2010, and by an additional 3,600 MW by 2025. The reductions of 1,350 MW and 3,600 MW are to be in addition to the 1,350 MW reduction set by the government as a target for achievement by 2007. The plan should assume conservation includes continued use by the government of demand management mechanisms such as energy efficiency standards under the *Energy Efficiency Act* and the Building Code, and should include load reduction from initiatives such as: geothermal heating and cooling; solar heating; fuel switching; small scale (10 MW or less) customer-based electricity generation, including small scale natural gas fired co-generation and tri-generation, and including generation encouraged by the recently finalized net metering regulation.
- The OPA should increase Ontario's use of renewable energy such as hydroelectric, wind, solar, and biomass for electricity generation. The plan should assist the government in meeting its target for 2010 of increasing the installed capacity of new renewable energy sources by 2,700 MW from the 2003 base, and increase the total capacity of renewable energy sources used in Ontario to 15,700 MW by 2025.
- The OPA should plan for nuclear capacity to meet base-load electricity requirements but limit the installed in-service capacity of nuclear power over the life of the plan to 14,000 MW.
- The OPA should maintain the ability to use natural gas capacity at peak times and pursue applications that allow high efficiency and high value use of the fuel.
- The OPA should plan for coal-fired generation in Ontario to be replaced by cleaner sources in the earliest practical time frame that ensures adequate generating capacity and electricity system reliability in Ontario.
- The OPA should work closely with the IESO [Independent Electricity System Operator] to propose a schedule for the replacement of coal-fired generation, taking into account feasible in-service dates for replacement generation and necessary transmission infrastructure.
- The OPA should strengthen the transmission system to:
  - Enable the achievement of the supply mix goals set out in this directive;
  - Facilitate the development and use of renewable energy resources such as wind power, hydroelectric power and biomass in parts of the province where the most significant development opportunities exist;
  - Promote system efficiency and congestion reduction and facilitate the integration of new supply, all in a manner consistent with the need to cost effectively maintain system reliability.
- The OPA's plan should comply with Ontario Regulation 424/04 as revised from time to time.

Also on June 12, 2006, Cabinet made a regulation, O. Reg. 276/06 under the *EAA* (Designation and Exemption of Integrated Power System Plan) which had the effect of exempting the overall Plan from the *EAA*. The Minister of Environment reasoned that the direction provided to the OPA was broad government policy and not a specific project or projects and therefore not subject to the *EAA*. Furthermore, O. Reg. 276/06 has the effect of exempting future iterations of the IPSP from the *EAA*. This regulation was the subject of a great deal of controversy when ENG announced its IPSP directive (see Other Information / Public Participation as well as "Review of Posted Notice: *Environmental Assessment Act* (EAA) Designation and Exemption of Integrated Power System Plan (IPSP)" in this Supplement). The net effect of these amendments is that the overall Plan will not undergo an individual environmental assessment under the *EAA*, nor will most projects. Instead most projects under the Plan will undergo a proponent-driven environmental screening under O. Reg. 116/01. Only those projects which are designated under O. Reg. 116/01 as requiring an individual EA will require one.

**Implications of the Decision**

The immediate environmental implications of this decision are complex and must be viewed in terms of more recent Ontario government policy announcements on keeping coal-fired plants open until 2014.

Over the longer term, its implications could be very significant. In August 2007, the OPA brought the IPSP before the Ontario Energy Board for review and to seek approval for the Plan. This review process could require approximately 18 months. Until this step is completed, little of the IPSP will be manifested in real terms.

However, when the Plan is approved by the OEB (presuming it is), and implemented by many parties, it will have major economic and environmental implications. Because the Plan is expected to commit the province to major new electricity infrastructure projects, consumers of electricity will be financially obligated to support the projects through rates charged for electricity. The total capital cost of the generation and conservation components is estimated to be $70 billion.

**Excerpt from Amended O. Reg. 424/04**

8. (1) Ensure that for each electricity project recommended in the plan that meets the criteria set out in subsection (2), the plan contains a sound rationale including,

i. an analysis of the impact on the environment of the electricity project, and

ii. an analysis of the impact on the environment of a reasonable range of alternatives to the electricity project.

(2) For the purposes of paragraph 8 of subsection (1), the following are the criteria:

1. An environmental assessment of the electricity project under Part II of the *Environmental Assessment Act* must be required.

2. The electricity project, based on the recommended date for completion of the project in the plan, will in the opinion of the OPA require that an application for approval for an undertaking be made under the *Environmental Assessment Act* within five years after the approval of the plan by the Board.

The environmental implications will be wide-ranging. On the one hand, the efforts to obtain more electricity from small-scale renewable energy sources and to increase conservation efforts are likely to be environmentally beneficial. Some forms of renewable generation like wind and small hydro can result in virtually no emissions of contaminants and very little ecological disruption in their operation. On the other hand, a major investment in new and refurbished nuclear reactors has reignited the debate over issues such as the handling and long term storage of hazardous waste. The financial commitment to building new and refurbishing existing nuclear reactors is likely to constrain the investment in more benign options such as conservation and renewable energy. Also, the lack of a timeline in ENG's June 2006 directive to the OPA for the closure of Ontario's coal fired generating stations was problematic.

As well, it should be noted that the public was allowed to comment on the OPA's Supply Mix Advice to ENG, but there was not a formal *EBR* proposal for comment on the directive of June 13, 2006, from ENG to the OPA about how Ontario's electricity system should be configured.

**Public Participation & *EBR* Process**

The consultation process for OPA's supply mix proposal was the subject of a great deal of controversy. The ministry posted the proposal for 76 days over late 2005 and early 2006. Initially the proposal was posted for only 45 days, but at the request of the ECO and many members of the public, ENG decided to extend the comment period. In addition, the minister announced in late February 2006 that ENG would hold public meetings across the province so the public could obtain more information about the proposal and submit comments in person.

A key debate coming through in the comments on the IPSP was whether Ontario should choose a "hard" or "soft" energy path – hard being large centralized installations of traditional generating technologies like fossil fuel and nuclear. In contrast, the soft path focuses on smaller more benign forms of generation like wind, solar and small hydro and conservation and more reliance on distributed generation. The supporters of the hard path felt that the IPSP's nuclear component made good sense and some suggested as well that the coal plants could be or should be kept open with the addition of emission control technology. Supporters of the soft path unanimously disliked the hard nuclear path and pleaded that the investment be spent instead on the development of renewable technologies like solar, high efficiency co-generation applications, and for conservation programs. Supporters of nuclear power were often skeptical that wind and other renewables could be reliable, while supporters of renewable energy

often claimed that nuclear was costly and frequently unreliable. Many of the commenters were passionate in their support for their respective preferred energy path.

A few commenters suggested pursuing technologies or methods that were not specifically discussed in the Supply Mix Advice such as using nuclear energy to generate hydrogen and using wind power to store water for hydroelectricity generation. Other comments were more technical in nature.

Several commenters noted the inconvenience of, or in their view, the ineffectiveness of the consultations held by the ENG in the winter of 2006.

The list of commenters included many individual residents and many familiar stakeholder and non-governmental organizations such as the Ontario Chamber of Commerce, Enbridge Gas, Direct Energy, the Power Workers Union, Association of Municipalities of Ontario, the Suzuki Foundation, the Pembina Institute, and the Ontario Clean Air Alliance (whose members submitted 1,656 form letters).

Of the 2,016 comments ENG received, more than 90 per cent of commenters expressed concern or disappointment with the OPA's Supply Mix Advice, primarily because of its nuclear component. Even if the form letters were taken out of the count, and only each original, unique submission (of which there were approximately 240) were counted, opposition to nuclear power ran at about three to one.

**SEV**

ENG filed a statement of consideration of its SEV in the fall of 2006 after the ECO made a request to the ministry that it do so. It was clear that the document was written after the decision was made. The ECO feels that ENG's approach to its SEV consideration was completely inappropriate. The drafters of the *EBR* legislation envisaged ministry staff considering the SEVs at the proposal stage and before a decision is made, not afterward.

ENG found that its decision was consistent with the three principle elements of its SEV: Resource Conservation, Environmental Protection, and Ecosystem Protection. On Resource Conservation, ENG wrote that "the directive to the OPA sets targets to reduce projected peak demand by 6,300 MW and double the amount of energy from renewables by 2025." For Environmental Protection, ENG cited the eventual closure of the coal-fired plants and the use of nuclear power to avert greenhouse gas emissions from fossil-fuel combustion. For Ecosystem Protection, ENG wrote the "directive will not result in any negative ecosystem impacts." The ECO disagrees.

**Other Information**

On June 13, 2006, the Ministry of Environment posted an information notice (XA06E0006) entitled "Environmental Assessment Act (EAA) Designation and Exemption of Integrated Power System Plan (IPSP)" about a recently made regulation, which according to MOE had:

> *"the effect of designating the IPSP subject to the EAA, and then exempting it from the requirement to undertake an individual environmental assessment in accordance with Part II of the EAA and activities of the Crown related to the IPSP. Given that the IPSP is not an undertaking that is subject to the EAA a designation is required in order to exempt it. The regulation confirms and reflects the legislative framework under the Electricity Act, 1998, with respect to the OPA and the IPSP, and confirms the government's long standing position that government policy planning as reflected in the Directive is not an undertaking that is subject to the EAA. In this respect, the regulation is administrative in nature. The projects which result from the IPSP will be subject to all applicable environmental assessment processes."*

On June 19, 2006, the ECO publicly criticized MOE for this approach (the use of an information notice instead of a proper proposal notice) which had the effect of denying the public its right to comment on the

environmentally significant decision that MOE had just made on the IPSP. In a media release, the ECO said:

> *"First, the government made the announcement to proceed with their Integrated Power System Plan for generating electricity, which includes plans to rely on nuclear power,…Then they passed a regulation that bypassed the* Environmental Assessment Act *– so that the plans for nuclear facilities are exempted from having to undergo a provincial environmental assessment…it's the third decision that is most important [to the ECO:] The government made the decision to bypass Ontario's* Environmental Bill of Rights. *They escaped the process whereby the people of Ontario should have been able to review and comment on the regulation to exempt the nuclear plans from an environmental assessment."*

**ECO Comment**

The Integrated Power System Plan is the most significant proposed electricity system restructuring plan in Ontario in more than a decade. If and when fully implemented it could result in the construction, refurbishment and replacement of many electricity generating facilities and will require major capital investment.

In May 2005, the Minister of Energy gave the OPA a directive to come up with supply mix advice that included (at the time) the elimination of coal-fired plants by 2007. Then in June 2005, ENG announced that the coal plant closure date would be extended to 2009. Then after the OPA's advice had been received by ENG, the minister announced that the coal plant closure date was uncertain. But the OPA had been developing its supply mix advice under the understanding and that the coal plants were to close and that their generating capacity would need replacement, in part with new supply. This could mean that the supply mix formulated now over-emphasizes supply (since the coal plants will remain operational for some time into the future). If this is true – that the Plan overemphasizes supply – then this would have a detrimental effect on conservation, energy efficiency and demand management. There will be little need to conserve if supply is abundant. The same conundrum emerged in the early 1990s, partly due to a serious recession that dampened demand and made demand management unattractive to the then-Ontario government.

The ECO concurs with many of the stakeholders who expressed disappointment over the nature of the consultations by ENG and MOE and how the decision to issue the June 2006 directive was made. ENG's directive to the OPA represents one of the most significant capital investment plans in Ontario's history. As well, the Plan will put into action many undertakings which will have environmental implications for generations to come. In numerous Annual Reports, the ECO has emphasized the importance of ministries carrying out effective public consultation on energy related targets and initiatives. The ECO reiterates this point and acknowledges that ENG and the OPA did carry out consultations on the Supply Mix Advice. However, the ECO believes that such a major, capital-intensive electricity plan also deserves thorough scrutiny by environmental experts. Instead, the Plan will be reviewed by the Ontario Energy Board which has traditionally focussed its reviews on issues like rates, costs and fairness, but not ecological or environmental impacts. ENG has advised the ECO that the review process will be open and transparent, including public hearings at which environmental experts may apply for intervener status. This decision will have profound effects on the nature of Ontario's electricity system and corresponding environmental impacts for decades into the future.

**The *Clean Water Act***

**Decision Information:**

Registry Number: AA05E0001
Proposal Posted: December 5, 2005
Decision Posted: July 3, 2007
Comment Period: 60 days
Number of Comments: 90
Comes into Force: On a date to be proclaimed (Received Royal Assent on October 19, 2006)

**Description**

In October 2006, the Ontario government passed the *Clean Water Act, 2006* (*CWA*) to protect existing and future sources of drinking water. The *CWA* stems from Justice O'Connor's Report of the Walkerton Inquiry (Part II), released in May 2002, about the tainted water tragedy that occurred in 2000. In 2002 and 2003, the Ontario government implemented a number of the recommendations set out in the Walkerton Report to address the treatment and distribution of drinking water by enacting the *Safe Drinking Water Act*. The *CWA* now supports the implementation of a further 22 of Justice O'Connor's recommendations by establishing legislation that is designed to protect drinking water at its source.

The *CWA* states that the purpose of the legislation is "to protect existing and future sources of drinking water." The Act aims to achieve this goal by requiring each community to protect its own drinking water supplies by identifying potential threats to its drinking water sources, and by taking action to reduce or eliminate those identified risks.

*Creating a System of Local, Watershed-based Planning Regions:*
As recommended by Justice O'Connor, the *CWA* establishes that source protection planning in the province is to be conducted locally on a watershed basis. The *CWA* creates "source protection areas" – which generally parallel the conservation authority boundaries, although they may be altered by the government – and "source protection regions" – which are an amalgamation of two or more source protection areas located within a common watershed region. O. Reg. 284/07 made under the *CWA* establishes 11 source protection regions with eight source protection areas remaining outside the regions.

The *CWA* establishes a source protection authority ("SP Authority") responsible for each source protection area. In most cases, the SP Authority will be the local conservation authority. The local SP Authority (or where a source protection region has been established, the designated lead SP Authority for that region), will then establish a multi-stakeholder committee, called a "source protection committee" ("SP Committee"), which will lead the planning work for its region. Each SP Committee will be made up of local stakeholders, representing a range of interests, including municipal, agricultural, industrial and commercial sector members, environmental non-government organizations and property owners.

*The Source Protection Planning Process:*
The key focus of the *CWA* is the production of science-based technical assessment reports of the watersheds, and the subsequent development and implementation of source protection plans. The SP Committees will be required to work together with the municipalities, conservation authorities and provincial agencies, as well as consult with the public throughout the planning process.

Each SP Committee is responsible for preparing an assessment report that:

- Identifies the watersheds located within its source protection region;
- Characterizes the water in each watershed;
- Identifies the "vulnerable areas" within the watershed – i.e., the significant groundwater recharge areas, the highly vulnerable aquifers, the surface water intake protection zones and the wellhead protection areas;

- Identifies the "drinking water threats" in each vulnerable area – i.e., the human activities or conditions that adversely affect, or have the potential to adversely affect, the quantity or quality of any water that is, or may be, used as a source of drinking water; and
- Determines where within the vulnerable areas the "drinking water threats" constitute "significant drinking water threats" – i.e., those threats that may pose a *significant* risk to any of the drinking water systems (existing or planned) that have been identified in the source protection planning process.

The draft assessment report must be submitted (along with any comments from the municipalities, the public, and the SP Authority) to the Director at the Ministry of the Environment (MOE) for approval.

Once the assessment report has been approved by MOE, the SP Committee is then responsible for preparing a source protection plan to address the threats identified in the assessment report. The source protection plan must include:

- A "significant threat policy" that is intended to ensure that significant drinking water threats cease to be significant threats and that no future threats become significant.
- Monitoring policies that are designed to monitor the effectiveness of the source protection plan at eliminating significant drinking water threats and preventing drinking water threats located in vulnerable areas from becoming significant.
- If directed by MOE, a "designated Great Lakes policy," which is a policy designed to achieve provincially-developed Great Lakes drinking water targets.

To address significant drinking water threats, Part IV of the *CWA* authorizes source protection plans to designate certain activities as either "prohibited" or "regulated" (i.e., requiring a "risk management plan" to be developed) in areas where those activities would be a significant threat. However, the list of activities that may be designated as prohibited or regulated must be prescribed by regulation under the *CWA*. As of June 1, 2007, no such regulations have been developed. The source protection plan may also identify "restricted land uses" on designated lands, for which a person may not obtain a building permit or apply for a prescribed approval under the *Planning Act* without first obtaining a "notice" confirming that the proposed development complies with certain requirements.

The proposed source protection plan must then be submitted to the Minister of the Environment for approval. In addition to considering all comments from the municipalities, the public and the SP Authority, the minister may chose to order a hearing on the proposed source protection plan (or a part of it), to assist him or her in making a decision.

*Municipalities are Responsible for Implementing the Source Protection Plans:*
Once the source protection plans and policies have been developed and approved, the *CWA* puts the municipalities in charge of implementing and enforcing them. The Act does, however, allow municipalities to delegate its enforcement responsibilities under Part IV of the Act to other specified public bodies, such as the public health unit, SP Authority or province, if that body agrees to do so.

Each municipality (or its designate) is responsible for appointing a "risk management official" (RMO) and "risk management inspectors" who will administer the implementation and enforcement provisions of Part IV of the *CWA*. The RMO is responsible for ensuring that risk management plans are developed for all designated "regulated activities" located within the designated areas in the source protection plan. The RMO will accept a risk management plan only if the RMO or a "qualified person" (as will be prescribed by regulation) is satisfied that the activity will not be a significant drinking water threat if the person complies with the risk management plan.

The RMO is also responsible for reviewing all proposals for development that are related to "restricted land uses". If the RMO determines that the proposal is not a "prohibited" or "regulated" activity or that a "risk management plan" has been developed, the RMO will issue a "notice." This requirement allows the RMO to ensure that new development proposals comply with Part IV of the *CWA* before development begins.

The *CWA* allows any person to submit a "risk assessment" – a document that assesses the risks of a particular activity in a specified location – to the RMO. If the RMO, based on either his or her own opinion in reviewing the "risk assessment" or that of a "qualified person", accepts the risk assessment's conclusions that the activity is not a significant drinking water threat at the specified location, the activity may be engaged in despite any of the prohibited, regulated or restricted use provisions in the *CWA* that may otherwise apply.

The *CWA* also gives municipalities new responsibilities and powers to enforce the rules under the *CWA*. If a person is engaging in a prohibited or regulated activity in contravention of the Act, or is failing to implement the provisions of a risk management plan, a risk management inspector may issue an order requiring the person to comply with the Act or risk management plan, or cease the activity. If a person fails to carry out work required by an order, the Act provides the RMO with the authority to cause the work to be done at the person's expense. The *CWA* also includes offence provisions, which allow a RMO to prosecute persons who have contravened the prohibited or regulated activity provisions of the Act, or have failed to comply with an order.

*Interim Protection from Significant Threats:*
In enacting the *CWA*, the province recognized that the planning process – involving setting up SP Committees and preparing terms of references, assessment reports and source protection plans – will take years to complete. MOE anticipates that source protection plans will not be submitted to the ministry for approval until 2010 to 2012. Yet, activities or land uses identified as significant threats will need to be addressed in the interim. Therefore, the *CWA* includes some interim measures (such as requiring interim progress reports and some interim risk management plans) that apply to the period after the assessment report has been approved, but before the source protection plan has taken effect.

**Implications of the Decision**

*Source Protection Planning is a Local Responsibility:*
One of the central principles of the *CWA* is that source protection planning is to be done locally. Beyond the province's role in providing the legislative and regulatory framework for the source water protection process, the *CWA* places the majority of responsibility – and the associated costs – for protecting drinking water sources on the local communities. The local SP Committees are charged with assigning each of the various tasks for which it is responsible – including watershed analysis, risk analysis, planning, policy development, consulting, monitoring, etc. – to the appropriate local bodies. The majority of these tasks are expected to be delegated to the municipalities and conservation authorities. In addition, the municipalities are assigned a major role under the *CWA* for the implementation and enforcement of the source protection plans.

*Source Protection Planning and Implementation will be Expensive:*
The extensive source protection planning process – which includes watershed characterization reports, water budgets, issues evaluation, threats inventories, and vulnerability assessments, just to name some of the steps – is expected to be very costly. The province has committed approximately $120 million in funding from 2004 to 2008 to enable municipalities and conservation authorities to conduct technical studies and build the capacity necessary for the development of the assessment reports and source protection plans. However, no cost analysis for the source protection planning process has been published, so it is not known whether this funding will be sufficient.

In addition, this funding does not extend to the substantial costs to municipalities (or their delegates) of implementing the source protection measures. Municipal responsibilities include reviewing risk management plans and risk assessments, inspection and enforcement activities, participating in appeals to the Environmental Review Tribunal, amending official plans and zoning by-laws, and potentially addressing any identified significant municipal threats to drinking water, such as sewage treatment facilities. While there is some cost recovery for a few of these activities under the *CWA*, and some of these responsibilities can be delegated to another body, the municipalities will remain liable for much of the costs.

The *CWA* will also result in some compliance costs for some businesses and private landowners affected by the source protection plans (such as farmers located in vulnerable areas), including the costs of preparing risk management plans or implementing risk prevention measures.

In response to widespread stakeholder concerns about the issue of costs, the proposed *CWA* was amended before third reading to include a new "Ontario Drinking Water Stewardship Program" to provide financial assistance to both persons affected by the *CWA* and to those administering programs related to the source protection plans. Initially $7 million will be available for 2007/2008 under this drinking water stewardship program – $5 million for early adopters who take action to reduce threats to drinking water, and $2 million for education and outreach activities.

It is worth noting, however, that while the cost of planning and implementing the source protection plans is expensive, the cost of such prevention planning is arguably less than the costs associated with a drinking water tragedy such as that which occurred in Walkerton. This cost comparison was discussed in the Report of the Walkerton Inquiry (Part II) and in the ECO's Supplement to its 2002/2003 Annual Report on page 102.

*Source Protection Measures do not Protect all Drinking Water Sources:*
The drinking water protection provided under the *CWA* is generally limited to drinking water systems within a source protection area. The Act does not cover all drinking water sources in the province. Most of the northern portion of the province, which includes many First Nations communities, does not fall within any source protection area. The *CWA* allows, but does not require, the Minister of the Environment to include watersheds outside of conservation authority boundaries in the source protection planning process. O. Reg. 284/07 adds two additional source protection areas to cover some of the watersheds located outside of the conservation authority boundaries.

In addition, even within a source protection area, not all sources of drinking water are protected by the *CWA*. While the *CWA* mandates the protection of all municipal residential drinking water systems, private drinking water wells are not, for the most part, protected under the *CWA*. However, the *CWA* does provide municipal councils as well as the Minister of the Environment with the power to designate certain non-municipal drinking water systems for protection under the *CWA*. As a large portion of the residents of central and northern Ontario rely on drinking water from private wells, the extent to which this power is invoked will have important implications for the drinking water quality of a significant portion of the provincial population. Fortunately, MOE is currently looking at making changes to its well regulation – Regulation 903, R.R.O. 1990.

*Source Protection Prevails over other Concerns:*
The *CWA* provides strong and clear direction that source protection requirements prevail over other planning concerns. In recent years, the government has taken some initial steps to incorporate environmental protection with land use planning – such as the requirement in the 2005 Provincial Policy Statement (PPS) that municipal planning take source water protection into account. Without source protection legislation, however, these provisions were largely ineffective. The *CWA* now more fully and clearly integrates source water protection into the land use planning process.

Under the *CWA*, municipalities, local boards and SP Authorities are required to implement any obligations imposed on them by a "significant threat policy" or a "designated Great Lakes policy" included in a source protection plan. Municipal land-use plans and decisions under the *Planning Act*, as well as certain instruments prescribed by regulation (such as certificates of approval), are required to conform with the significant threat and designated Great Lakes policies under the source protection plan, and to "have regard to" the other policies of the source protection plan. Indeed, existing official plans, zoning by-laws and prescribed instruments must be amended to conform with the significant threat and designated Great Lakes policies.

In the case of a conflict between an official plan or zoning by-law and a significant threat or designated Great Lakes policy, the *CWA* provides that the policies of the source protection plan prevail. If there is a

conflict between a provision of the 2005 PPS or a provincial plan (such as the Greenbelt Plan or Oak Ridges Moraine Conservation Plan) and a provision of significant threat or designated Great Lakes policy, whichever provision provides the greater source water protection will prevail. If there is a conflict between the *CWA* and a provision of any other Act or regulation, the *CWA* provides that the provision that provides the greatest protection to a drinking water source prevails. In addition, in case of a conflict between the *CWA* and the *Nutrient Management Act, 2002*, or a regulation or an instrument under that Act, the *CWA* prevails.

*Application to Existing Activities and Uses:*
While the *CWA* does provide greater clarity and coordination with land use planning, the Act still presents some planning challenges. A particular challenge will be in the application of the source protection provisions to pre-existing uses of land. The "prohibited activities" provision in the *CWA* may be applied to pre-existing activities, although persons who are already engaged in a prohibited activity when the source protection plan takes effect have 180 days or until the date set out in the source protection plan to comply – whichever is longer. The *CWA* also provides that the "regulated activities" provision, although generally only applicable to new activities, may be applied to pre-existing activities if either the source protection plan or the RMO decide that a risk management plan should be required.

This concept of applying new provisions to pre-existing uses is a new concept in municipal law that may present conflict in the implementation stage of the source protection plans. Generally, new planning laws only apply to new activities, protecting pre-existing activities as legal non-conforming uses.

*Historical Contamination:*
The source protection framework focuses on managing threats from new or current activities and land uses. There is little in the framework to address the potential damage to watersheds and aquifers from historic contamination. The *CWA* provides that a source protection plan may, but is not required to, include policies intended to ensure that conditions from *past* activities cease to be a significant threat. The Act also provides that, if a condition resulting from a past activity poses a significant threat and the issuance of a prescribed instrument could address the threat, the Minister of the Environment may request that the responsible authority investigate the matter. However, this provision is only useful where there is still a person somehow related to the property or an activity that could be issued an instrument.

*Protecting the Great Lakes:*
With nearly three-quarters of all Ontarians living within the Great Lakes Basin, the Great Lakes are a source of drinking water for a majority of the province's population. The *CWA* allows, but does not require, the Minister of the Environment to establish an advisory committee on the Great Lakes, and to set targets for protecting the Great Lakes as drinking water sources. The minister may also require that certain SP Committees develop policies designed to meet these targets. Despite the obvious importance of protecting the Great Lakes as a source of drinking water, these provisions of the *CWA* are merely discretionary.

*Rights to Appeal:*
The *CWA* provides limited rights to appeal to the Environmental Review Tribunal. The Act allows a person to appeal: a decision by a RMO to establish or to refuse to establish or amend a RMP; a decision by a RMO to refuse to issue a notice; or, an enforcement order issued by an inspector. There are no appeal rights of the SP Committee's assessment report or source protection plan, or in particular, of the identification of "vulnerable areas" and "significant threats" in the assessment report or the designation of prohibited or regulated activities in the source protection plan. As such, people, whose activities and/or property values are affected by such decisions in the assessment report and source protection plan, have no right to legally challenge the science on which the decisions are based.

In addition, unlike other environmental statutes, but similar to the *EBR* leave to appeal applications, there is no statutory right of appeal from the Tribunal's decision.

*Qualified Persons:*
The RMO may instead of making a determination him or herself, rely on the opinion of a qualified person to certify a risk management plan or to accept a risk assessment. This provision enables municipalities (or their delegates) to transfer responsibility – and liability – from a public body to a private consultant. A regulation is to be established that will define who can be a qualified person and in which circumstances it can be used.

**Public Participation & *EBR* Process**

In December 2005, the proposed *Clean Water Act* (then Bill 43) was introduced in the Ontario Legislature for first reading. MOE posted a thorough notice on the Environmental Registry, including a summary of Bill 43, a detailed compendium, and a summary of matters to be addressed in regulations under the proposed Act. MOE provided a 60-day comment period.

Second reading of the bill began in April 2006, and in May 2006, Bill 43 proceeded to the Standing Committee on Social Policy. In August 2006, public hearings were held in five cities across Ontario. Bill 43 went through substantial revision following these consultations, before it was introduced in the Legislature for third reading.

In addition, during the two years before the government introduced Bill 43, the government undertook extensive consultation of the proposed framework, including: establishing two multi-stakeholder expert committees; posting the reports developed by these committees on the Registry; holding seven sectoral roundtables with a range of stakeholders to solicit feedback on the reports; posting draft text for source protection planning legislation on the Registry for 60-days; releasing and posting a White Paper to describe the planning components of source protection legislation on the Registry; and holding eight regional consultation sessions on the White Paper.

*Summary of Comments:*
MOE received 90 comments on the proposed *CWA* during the comment period. Although MOE had not posted a decision notice on the Registry as of June 2007, MOE did provide a copy of all of the comments to the ECO. All commenters stated that they support source water protection; however, not all of the commenters supported the proposed legislation. Numerous agricultural groups and individuals, as well as some industry associations, expressed strong opposition to the proposed *CWA*, arguing that it was too restrictive, cumbersome and costly. In contrast, many conservation authorities, environmental groups, property owner associations and many municipalities expressed strong support for the proposed legislation, but nonetheless expressed concern that the legislation did not go far enough in some areas to protect source water.

*Funding:*
The main comment, from both supporters and detractors of the proposed legislation, related to the need for provincial funding for the implementation of the source protection plans. Many municipalities were concerned about the downloading of costs onto the municipal tax base. These municipalities asserted that the provincial government should completely fund the new municipal responsibilities created under the *CWA*. Similarly, many public health associations expressed concern that the *CWA* will have significant funding and staffing implications for public health units, as municipalities may delegate their authority to a board of health.

Many commenters, from environmental groups to conservation authorities to industry groups, commented that the financial burden on municipalities and conservation authorities may be substantial, and that a clear provincial commitment to ongoing funding is necessary to ensure the successful implementation of the source protection plans. Several commenters noted that, although there are some opportunities for cost recovery, this will certainly not cover all of the costs incurred by the municipalities and conservation authorities. Many commenters felt that a provincial commitment to provide funding for the implementation of the *CWA* should be incorporated directly into the Act. A few commenters suggested that the source protection funding should be generated from water-taking charges.

A number of property owners and associations expressed strong concerns regarding the costs to private landowners to implement measures required under the source protection plans. These commenters recommended that the province develop a stewardship fund to assist impacted property owners.

*Restriction of Private Property Uses without Compensation:*
A number of agricultural groups and individuals commented that they did not support the proposed legislation. These commenters expressed strong concern that the legislation will prohibit or restrict normal farm practices without compensation. They argued that private landowners should not have to bear the costs of protecting a public good – i.e., water. These commenters felt that public funding from the province should be available to compensate farmers who are required to give up certain practices on their land. Moreover, these commenters argued that landowners should not be required to incur any costs related to the implementation of the source protection plans, such as paying permit fees.

*Process is Overly Restrictive and Costly:*
Several industry groups and municipalities expressed concern that the source protection planning process under the *CWA* is overly complex, cumbersome, time-consuming and costly. One industry commenter asserted that this process will hinder business in the province. Several of the industry groups stated that existing regulatory and approvals process already exists in many cases and may be more suitable in managing risks to drinking water. Commenters stated, for example, the approvals processes under the *Aggregate Resources Act*, *Environmental Protection Act,* and *Conservation Authorities Act* are all sufficiently rigorous. Two industry groups suggested that sectors that are already well regulated and meeting provincial requirements (such as the electricity and aggregate sectors) should be exempt from the duplicative source protection planning process under the *CWA*.

One municipality expressed concern that the source protection plans under the *CWA* should not restrict activities in areas designated as growth areas in the Growth Plan. A few industry groups also expressed concern that the conflict provisions in the *CWA*, which state that the source protection plans prevail, could unduly restrict landowners' use of their land. One commenter suggested that the wording in the conflict provision that states that the provision that provides the "greatest" protection prevails should be changed to "adequate" protection.

*Consultation and Involvement in Source Protection Planning:*
A significant number of commenters, from across all stakeholder groups, commented on the need for additional consultation requirements to be included in the legislation. Many of the commenters recommended that the *CWA* include mandatory consultation requirements for all steps in the planning process, including requirements that the terms of reference, assessment report and source protection plan be published for public review and comment before approval. In response to these comments, the *CWA* was amended to include a requirement for notice on the Environmental Registry and an opportunity for comment at each stage. A few agricultural groups also commented that public hearings should be mandatory for all source protection plans, rather than being at the discretion of the minister.

A number of municipalities commented that they should have a greater ability to comment and participate in the decision making in the source protection planning process. One municipality commented that municipal council endorsement of the source protection plans should be required. The government also received numerous comments from all stakeholder groups expressing concern that they would be adequately represented on the SP Committees.

*Appeals:*
Many commenters, including municipalities, agricultural groups and industry groups, commented on the need for greater rights of appeal. Several industry commenters stated that the *CWA* should be amended to include a right of appeal for any landowner that is affected by an assessment report or a source protection plan. One municipal commenter stated that the inclusion of a right to appeal of the assessment report would provide municipalities with an opportunity to state its case early in the process. Further, several of the agricultural industry commenters suggested that the decisions should be appealed to the Normal Farm Practices Protection Board (a tribunal established under the *Farming and Food Production Protection Act, 1998*) rather than the Environmental Review Tribunal.

*Local Planning Approach:*
Many industry commenters, as well as a few municipal commenters, did not support the local approach set out in the legislation, which placed municipalities in charge of administrating and enforcing the plans. These commenters felt that the planning and protection of drinking water is a provincial responsibility, and that the provincial government should maintain responsibility. Several of these commenters expressed concern that the delegation of responsibility for the administration of the *CWA* to the SP Committees may result in inconsistent approaches across the province. These commenters recommended that, to ensure consistent treatment across the province, the province should prepare a standardized 'terms of reference' for all areas, should require consistent information for all plans, and should assign responsibility for enforcement to a single body, such as the Ministry of the Environment.

*Need for Greater Protection for Source Water:*
Whereas some commenters felt the *CWA* was too burdensome, many of the commenters felt that the *CWA* did not go far enough in several areas to protect source water. For example, a number of environmental groups commented that the purpose statement of the *CWA* should be amended to explicitly refer to the "precautionary principle", and that the precautionary principle should be included as a component of all source protection plans.

Many environmental and public health groups also expressed concern that the framework of the *CWA* focuses primarily on point source releases – which are already well regulated under other Acts – and fails to sufficiently focus on the non-point source, cumulative impacts to source water. Several public health associations commented, for example, that storm water management issues, which may have a significant cumulative impact on source water, should be considered and reflected in the source protection plans.

A large number of property owners associations commented that, to address the threat to drinking water posed by the *Mining Act*, the *CWA* should be amended to explicitly state that the *CWA* prevails over the *Mining Act*. These commenters felt that this would address landowner concerns regarding 'Surface Rights Only' lands that, under the *Mining Act*, may be used, assessed and excavated, without authority from the landowner, municipality or conservation authority, in a manner that may cause damage to ground and surface water.

In addition, many groups commented that the *CWA* should provide greater protection to source water by prohibiting the issuance of any new policy instruments that would result in a significant risk during the interim period (i.e., before the source protection plans are in effect), and requiring the responsible bodies to take interim actions on significant risks. A few commenters also recommended that the source protection plans should include requirements that significant threats from past activities be reduced as well.

*Source Protection should be Mandated for Entire Province:*
A large number of environmental groups, property owners associations and professional associations, commented that source protection should be mandated for the entire province. These commenters stated that the *CWA* should be amended to require the Minister of the Environment to establish source protection areas for every watershed in Ontario. Several of these commenters recommended that the Ministry of Natural Resources should lead the development of source protection plans for the areas with no conservation authority.

*Source Protection should Include Private Drinking Water Sources:*
Many of the provincial conservation authorities, environmental groups and property owners associations expressed concern about the limited focus of the legislation on municipal drinking water systems. These commenters felt that the *CWA* should include mandatory protection of non-municipal drinking water sources (i.e., private wells), arguing that rural residents of Ontario should have the same level of protection for their drinking water. Alternatively, a few groups suggested that private drinking water systems should be able to be nominated by petition. Several conservation authorities suggested that the

proposed legislation be amended to include mandatory public outreach, education, incentives and stewardship that apply to both public and private systems.

*Great Lakes:*
Many environmental groups, property owners associations, and professional associations expressed concern regarding the adequacy of the Great Lakes provisions in the proposed legislation. These groups commented that the legislation should provide stronger protection for Great Lakes through better integration with the existing Great Lakes requirements. These commenters felt that the Great Lakes provisions in the *CWA* should be mandatory rather than at the discretion of the Minister.

*Consideration of Comments:*
As of June 2007 – over eight months after the Act was passed – MOE still had not posted a decision notice on the Environmental Registry. As such, the ECO was unable to determine exactly how the ministry considered all of the comments. However, based on the changes from the original Bill 43, it is clear that the government considered the comments and made some amendments accordingly. A decision notice was posted on July 3, 2007, when the Act came into force.

**SEV**

As of June 2007, the ECO had not yet received MOE's comments regarding how its SEV was considered within the context of these decisions.

**Other Information**

Regulations and guidance materials to support the *CWA* are being developed in phases. In April 2007, MOE posted a proposal notice on the Environmental Registry for the first phase of regulations under the *CWA*, which includes the following:

1) Source Protection Areas and Regions – this draft regulation sets out the names, boundaries and SP Authorities of each of the source protection areas and source protection regions to be established for the purposes of the *CWA*. This regulation proposes to establish two new source protection areas that are outside any conservation authority area.

2) Source Protection Committees – This regulation (and the associated guidelines) propose provisions for the establishment and operation of SP Committees including size, composition and rules of procedure. Each SP Committee would be comprised of watershed representatives: one-third municipal members, one-third agricultural, industrial or commercial sector members, and one-third other members. Some SP Committees would also have one seat for First Nations.

3) Terms of Reference – This draft regulation sets out requirements for the SP Committees to include in the terms of reference, including: identify major tasks to be undertaken in the source protection planning process; assign roles and responsibilities; and provide an estimate of costs for the completion of the assessment report and source protection plan.

4) Time Limits – This draft regulation sets out the time limits for submission of the terms of reference, assessment report and source protection plan.

5) Miscellaneous regulation – A draft miscellaneous regulation that:
   - Defines "planned drinking water system"
   - Precludes certain types of drinking-water systems (i.e., any non-municipal drinking water system that serves only one private residence, unless the system is located within a designated area of settlement, or the supply well/intake is located within a cluster of six or more wells/intakes) from inclusion in a terms of reference by municipal council resolution or by the Minister.
   - Sets out the protocol for notifying MOE of an imminent drinking water health hazard

- Prescribes the Great Lakes – St. Lawrence River Basin Sustainable Water Resources Agreement as an agreement to which the *CWA* applies
- Exempts municipal drinking-water systems, wells or surface water intakes that will be permanently discontinued from inclusion in an assessment report.

These regulations were passed on July 3, 2007, and may be reviewed by the ECO in a future report.

**ECO Comment**

The *CWA* is a major step in Ontario's overall efforts to protect drinking water in the province. Protecting water from contamination at the source is a sensible approach to water management, which not only protects public health from drinking water contamination, but may also help protect the ecological integrity of aquatic ecosystems.

However, in a few areas, the *CWA* falls short of achieving its stated goal to protect drinking water sources in Ontario. The *CWA* does not mandate that action be taken in all watersheds with municipal supplies across the province, but rather leaves it to the discretion of the Minister of the Environment to determine which watersheds outside the jurisdiction of the conservation authorities will be afforded the protections provided in the *CWA*. In addition, the government has made a policy choice that source protection planning will only be required for municipal drinking water systems (with some limited exceptions), notwithstanding the fact that a considerable portion of the provincial population relies on private wells as a drinking water source.

Other important protections in the *CWA* are left to the discretion of the minister, ministry staff or the SP Committees. For example, despite the importance of the Great Lakes as a drinking water source for almost three-quarters of all Ontarians living within the Great Lakes Basin, the *CWA* merely permits, rather than requires, the minister to establish mandatory targets for protecting the Great Lakes as a drinking water source. The ECO believes that the *CWA* should provide stronger, mandatory integration with other Great Lakes requirements.

The potential effectiveness of many of the source protection measures is difficult to assess at this time, because important details, such as which activities may be prohibited or regulated, have yet to be prescribed by regulations. The breadth of activities that will be included in the regulations will have a major impact on the effectiveness of the source protection measures. For example, a potential benefit of the *CWA* is its ability to address cumulative impacts to drinking water sources from smaller and/or non-point source pollution sources – such as storm water systems and septic systems – that collectively pose a significant threat to drinking water. Most other environmental statutes, such as the *Environmental Protection Act* and the *Ontario Water Resources Act*, only regulate point sources from individual facilities.

The *CWA* poses significant challenges to the local bodies in the province – primarily the conservation authorities and municipalities – who are charged with the responsibility, and costs, of planning, implementing and enforcing the source protection plans. Without sufficient long-term funding, the ECO is concerned that the municipalities will not be able to adequately implement the source protection plans and successfully protect drinking water sources. The *Sustainable Water and Sewage Systems Act, 2002*, which would provide assistance by requiring cost recovery for drinking water services for municipalities, is still not in force five years after being passed. The ECO continues to encourage the government to move forward with this piece of legislation.

In addition to costs, the *CWA* poses other challenges for municipalities, such as addressing historical contamination that may pose a threat to drinking water, as well as applying prohibitions or restrictions to pre-existing uses.

Conversely, the *CWA* also provides municipalities with much-needed new powers. Many municipalities have been frustrated in the past by a lack of tools or authority to address threats to their own communities' drinking water sources. The *CWA* now gives municipalities the necessary authority to take action against such threats. The Act also provides municipalities with the added impetus to proceed with

measures that they already had the authority to do, but simply have not done. For example, a large number of municipalities have not yet developed or implemented sewer-use by-laws to address industrial contaminant threats to drinking water sources. Importantly, the *CWA* also provides some clarity and certainty for municipal planning, providing clear direction that source water protection prevails over other planning concerns.

The government's policy decision to take a local approach to source protection is reasonable. However, it does not absolve the provincial government of responsibility to provide strong, ongoing technical, regulatory and financial support for source protection. The province should still play an important role in regulating specific, widespread threats to drinking water that apply across the province – such as abandoned wells and septic system failures.

In addition, MOE will have added responsibilities under the *CWA* in reviewing and amending prescribed instruments (such as certificates of approval and permits to take water) to ensure that they comply with the source protection plans and policies. This additional burden to MOE, which already lacks the necessary capacity, will be a challenge. Indeed, the level of provincial funding and other resources provided to all public bodies responsible for administering the *CWA* will be a significant factor in the success of this Act.

Finally, the ECO urges MOE to prescribe the *CWA* under the *EBR* as quickly as possible to ensure that all new regulations under the *CWA* will be subject to the notice and comment requirements under the *EBR*, and to provide the public with the rights to apply for reviews, investigations and leave to appeal in relation to the *CWA*. The ECO also urges MOE to include the source protection plans under the *CWA* as prescribed instruments under the *EBR*, which must be posted on the Registry for notice and comment.

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**Proposal to Revise the Canadian Drinking Water Guideline/Ontario Drinking Water Standard for Trichloroethylene**

**Decision Information:**

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| Registry Number: PA03E0005 | Comment Period: 45 days |
| Proposal Posted: December 19, 2003 | Number of Comments: 0 |
| Decision Posted: June 8, 2006 | Came into Force: June 24, 2006 |

**Description**

In June 2006, MOE finalized a decision to tighten the Ontario Drinking Water Standard for trichloroethylene from 0.05mg/L to 0.005mg/L. Originally used as an anaesthetic, trichloroethylene (TCE) has been more commonly known for its use as a solvent, particularly a dry-cleaning solvent. TCE's use in dry-cleaning, however, has been phased out and today it is most commonly used as a degreasing solvent. Aside from the cleaning of metal parts (accounting for 80 – 95 per cent of TCE consumption), over the years TCE has been found in a variety of consumer products including typewriter correction fluids, paint removers and strippers, adhesives, stain removers, rug-cleaning fluids, shoe polish, drain cleaners, pesticides and has also been used to decaffeinate coffee and as a refrigerant. TCE has been widely chosen for industrial uses due to its non-flammable, non-corrosive and recyclable nature and because of its combination of low price and high performance.

Some water supplies in Ontario and elsewhere have been contaminated with TCE and resulted in closure of drinking water wells. Trichloroethylene is not a naturally occurring substance, therefore introduction of TCE into drinking water supplies has been solely as a result of its improper handling and disposal. TCE use has been declining in Canada since the 1970s. TCE use for metal degreasing continues, but TCE has not been manufactured in Canada since 1985. Only two manufacturers of TCE remain in North America. The National Pollutant Release Inventory shows TCE releases in Ontario of 624 kg in 1999, which fell slightly to 538 kg in 2005.

A chlorinated hydrocarbon once used as an anaesthetic and analgesic, the negative health effects of TCE are now well documented. TCE is highly volatile. Therefore, when considering guidelines for TCE in drinking water it is important to note that not only ingestion but also inhalation - from bathing as well as drinking water - must be considered when setting standards.

TCE depresses the central nervous system; it has also been shown to cause liver and kidney toxicity (leading to renal failure). The carcinogenicity of TCE in humans continues to be an area of debate. A multi-year study, drawing on a substantial amount of new literature was published in 2006 by the U.S. National Academy of Sciences. "Assessing the Human Health Risks of Trichloroethylene" shows a strengthening in the evidence of health risks from TCE since 2001. Epidemiological studies on cancer and TCE exposure suggest that TCE exposure increases individual risk of kidney cancer, renal cell carcinoma, and non-Hodgkins lymphoma. Links made between maternal exposure to TCE-contaminated drinking water during pregnancy and childhood leukemia are more controversial. The general public were alerted to the potential health impacts posed by TCE in the 1990s, by the book (by Jonathan Harr) "A Civil Action," and the motion picture of the same name.

The regulation of TCE in drinking water has been a long-standing concern for citizens of the Province of Ontario. This decision, tightening the existing drinking water standard for TCE from 0.05 mg/L to 0.005mg/L has a long history. The standard of .05 mg/L was originally published in 1987. In 1993, TCE was declared to be toxic under the *Canadian Environmental Protection Act (CEPA)* putting it on Health Canada's review list.

The process for setting drinking water standards has two main steps. In the first step, Health Canada convenes the Federal-Provincial-Territorial Subcommittee (FPTS) on Drinking Water to consider the toxicological and epidemiological evidence of the hazard, in this case TCE. Following review and formulation of a proposed standard, a public consultation process occurs. Then the guideline receives final approval from the Federal-Provincial-Territorial Committee on Environmental and Occupational Health. The second main step in the process is the province's consideration of the provincial adoption of the guideline. In Ontario, drinking water hazards that undergo the FPTS process become part of the Ontario Drinking Water Standards.

There is a long history of members of the public using the *EBR* process to advocate that a more stringent TCE guideline be developed. In 1995, four applications for review were filed in succession seeking to tighten the TCE drinking water guideline in the Province. MOE denied each application for review stating that TCE was currently under review by the FPTS. In denying the applications MOE explained that a decision from the FPTS was expected in 1996. They told the applicants the FPTS decision would be followed by an *EBR* proposal should the province choose to adopt the revised standard as an Ontario Drinking Water Quality Guideline or Objective.

In 2000, four years after MOE's expected decision on TCE, residents of Beckwith Township, a rural municipality in Eastern Ontario, discovered that many of their wells were contaminated with TCE. Another application for review of the TCE drinking water standard was filed. The Medical Office of Health for the Grenville, Lanark and Leeds District Health Unit asked that MOE install carbon filters in all affected homes to treat drinking water to 0.005mg/L. The applicants asked that the Ontario Drinking Water Standard also be tightened to 0.005mg/L. The filters were installed, but MOE did not respond to the request to change the standard. Tightening of the standard as a precautionary, interim measure, would have necessitated limited exposure while bathing. The MOE denied the application stating that the TCE standard was still under consideration by the FPTS. As a result, MOE determined that the adoption of an interim standard was not warranted at that time.

Since several federal departments, including Environment Canada and Health Canada are involved in the FPTS process, the residents of Beckwith Township decided to also file an environmental petition with the federal Commissioner of the Environment and Sustainable Development (CESD). As a result of the petition and the audit carried out by the CESD, the federal Minister of Health in 2001 committed that the TCE guideline development would be a priority.

It was not until 2006 and the posting of this policy on the Registry that a revision of the TCE standard was finally put into effect in Ontario.

**Implications of the Decision**

This decision means that Ontarians will now have the same standard of protection regarding TCE in drinking water as has been in place in the U.S. for decades. A proposal for a revised protocol for drinking water testing methods has also been posted on the Environmental Registry since the TCE decision was posted. Once finalized, the protocol will provide updated guidance for testing all drinking water parameters.

**Public Participation & *EBR* Process**

The draft TCE guideline was posted for review on the Environmental Registry between December 2003 and April 2004. The FPT Committee held a concurrent comment period. The drinking water standard for TCE was posted on the Environmental Registry with a comment period of 108 days. No public comments were received. It was not until May 2005, that the FTP committee gave final approval for the TCE guideline. The decision was not posted on the Environmental Registry until June 2006.

**SEV**

In the SEV briefing note MOE explained its use of the precautionary principle in decision making to protect human health and the environment. This is problematic given the experience of people living in Beckwith Township who asked that precautionary steps be taken in the province to minimize TCE exposure by tightening the guideline in their 2000 application for review. Instead, MOE waited six years before declaring a tightened guideline.

**Other Information**

Justice O'Connor explored the FPTS process for development of drinking water standards in the Part Two Report of the Walkerton Inquiry (2002). A number of recommendations were made to the Committee to improve its guideline setting process. These recommendations were:

*Recommendation 21*
"I recommend that the federal-provincial process for proposing drinking water quality guidelines be refined to provide for greater transparency and public participation."

*Recommendation 22*
"I suggest that the Federal-Provincial Subcommittee on Drinking Water focus on drinking water quality guidelines. I encourage Health Canada to commit the required scientific support to the federal-provincial process for proposing drinking water guidelines."

*Recommendation 24*
"The provincial government should continue to be the government responsible for setting legally binding water quality standards."

*Recommendation 25*
"In setting drinking water quality standards for Ontario, the Minister of the Environment should be advised by an Advisory Council on Standards."

*Recommendation 26*
"The Advisory Council on Standards should have the authority to recommend that the provincial government adopt standards for contaminants that are not on the current federal-provincial agenda."

The CESD found that the provision of safe, TCE-free water supply is the responsibility of the Ontario government. The Commissioner of the Environment and Sustainable Development did go on to discuss the role of Health Canada and the FPTS: "Health Canada should clearly articulate its responsibility for protecting human health in the basin from potential contaminants in drinking water. As part of this it should undertake in conjunction with the Federal-Provincial-Territorial Subcommittee on Drinking Water if possible, a review of the status of drinking water quality, including its adherence to the guidelines for drinking water quality, the public's access to information on drinking water quality; and the need for nationally enforceable drinking water standards."

**ECO Comment**

The delay in the formulation and implementation of the guideline has potentially exposed some Ontarians to unsafe levels of TCE.

The history of the development of a TCE Guideline for Canadian Drinking Water Quality/Ontario Drinking Water Standard has been troubling. The ECO recognizes the difficulty posed by the technical assessments that must be undertaken in guideline review, as well as the challenges posed by multiparty negotiation. However, a period of a decade and a half to decide on a drinking water guideline for a substance that faces more stringent guidelines in other jurisdictions must be considered excessive. New scientific studies on the health impacts of TCE in the U.S. have already prompted the United States Environmental Protection Agency to undertake a review of their standard, which is the same as Ontario's newly adopted standard.

The Province could have tightened the standard while continuing to review and negotiate a new national guideline with the FPTS. Instead of practicing precaution and tightening the standard, MOE left the standard at a level that has been the subject of multiple applications for review under the *EBR*. The ministry claims in its briefing material that it has taken a precautionary approach in setting the TCE standard for drinking water. This raises questions about the ministry's interpretation and application of the precautionary principle.

Aside from the 2006 TCE decision there are another six proposals for Drinking Water Quality Standards on the Environmental Registry. Other proposals have been awaiting decision on the registry since 2004 and 2005.

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### Dongara Pellet Factory: Approvals for Vaughan Waste Processing Facility

**Decision Information:**

Dongara Pellet Factory—Section 27 Certificate of Approval for Waste Disposal Site

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| Registry Number: IA05E0806 | Comment Period: 30 days |
| Proposal Posted: May 17, 2005 | Number of Comments: 6 |
| Decision Posted: August 30, 2006 | Decision Came into Force: August 29, 2006 |

Dongara Pellet Factory—Section 9 Certificate of Approval for Discharge into the Natural Environment Other than Water

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| Registry Number: IA05E1272 | Comment Period: 30 days |
| Proposal Posted: August 12, 2005 | Number of Comments: 1 |
| Decision Posted: September 8, 2006 | Decision Came into Force: August 29, 2006 |

**Description**

In May 2005, Dongara Pellet Factory Inc. (Dongara or the proponent) applied to the Ministry of Environment (MOE) for the construction and operation of a 3.5 hectare enclosed waste processing facility that included a pelletization plant and a Blue Box materials sorting and transfer facility. The proponent

requested that MOE grant it a Certificate of Approval (C of A) under section 27 of the *Environmental Protection Act* (*EPA*) allowing for the construction and operation of the facility. The plant, situated in the City of Vaughan, would be used for the processing of 548-800 tonnes of residential waste per day to make alternate fuel pellets (Enerpax).

Dongara states the primary objective of its facility is to reduce the volume and weight of the waste being disposed in landfills and provide a less harmful alternative fuel product that can be used to replace coal or coke at cement factories outside of Ontario and more recently, gasification plants. Dongara contends that the pellets contain significantly lower amounts of harmful compounds. The plant also incorporated a sorting facility to remove all recyclable materials and hazardous materials that are in the municipal garbage bag pick-up and transferred to the appropriate facilities.

In August 2005, Dongara applied for a C of A under section 9 of the *EPA* for emissions associated with the building housing the waste pelletizing process, natural gas fired heating equipment and an emergency diesel generator.

Both Cs of A were issued on August 29, 2006. They included conditions to address fugitive odours, truck traffic and other nuisances. The building where the processing will occur would be kept under negative pressure with the exhaust passing through a biofilter before it is released. Trucks are restricted to certain hours of operation.

**Implications of the Decision**

According to MOE's decision notice for the section 27 C of A, the subject lands were rezoned by the City of Vaughan in By-Law 241-2006 from a Parkway Belt Linear Facilities Zone (PB1S) to Open Space Conservation Zone (OS1) and Prestige Employment Area Zone (EM1) with site specific exemptions to permit an 8,130 square metre waste and recycling facility and 982 square metre storage dome.

Concerns expressed by commenters, and shared by MOE, mainly related to issues of odour, noise, and compatibility in the area. Increased truck traffic may pose a noise nuisance and increase the release of smog related pollutants into the area. Odours from the storage and processing of waste into alternative fuel pellets could become a serious issue for neighbouring landowners if not controlled properly. In addition, wastewater generated from the operation of the facility could have detrimental impacts on water quality if not treated properly.

MOE and the proponent addressed the concerns of the commenters by ensuring the facilities would be kept under negative pressure with the exhaust passing through a biofilter before it is released. Waste storage would be indoors, composting would not occur at the facility and trucks are restricted to certain hours of operation. MOE included as a condition of the two Cs of A a complaint response procedure whereby nuisances could be reported to the proponent and the proponent is required to respond to the complaint.

One of the concerns raised by environmental groups (in their comments on separate but related proposal notices) relate to the use of the Enerpax waste pellets as alternate fuels in cement kilns (as proposed by Lafarge) and gasification plants (as proposed by Arbour Power, in consultation with the Town of Ajax). Groups such as Sierra Legal contend that the burning of municipal waste pellets violates section 36 of O. Reg. 419/05 under the *EPA*, which prohibits the burning of waste or fuel in any fuel burning equipment or incinerator for which it was not designed. Environmentalists worry that waste pellets will contribute to increased emissions of particulate matter and other pollutants including dioxin and furans. It is unclear what the exact chemical composition of pellets would be and the environmental impacts of burning it. The Cs of A state that the facility will handle municipal post recycled residential domestic waste and admixture which is defined as polyfilm, carpet, petcoke and wood from industrial, commercial and institutional sources. Environmentalists are concerned that the admixture materials could release toxic substances when processed or burned. Currently, Enerpax customers must apply to the ministry for permission to use the pellets as alternative fuel since they are still considered to be waste under the *EPA*.

**Public Participation & *EBR* Process**

Both proposals were posted on the Environmental Registry for a 30-day comment period. The proponent, in support of their section 27 proposal, included a two-page description of the pelletization operation, the safeguards in place and the expected environmental benefits that could be attained.

Dongara conducted a public consultation meeting at a conference centre on the section 27 proposal. As a result, the facility's neighbours filed five written comments in May 2005. An additional comment was sent by lawyers and planning consultants for the Catholic Cemeteries of Toronto (CCAT) in June 2005, in response the registry posting. It outlined preliminary concerns and requested additional information and time to fully assess the impacts of the project and comment on the proposal.

The comments expressed concerns over foul odours, noise, visual impact, the effect on surrounding property values and business ventures, increased truck traffic and the lack of information on the projects and its impacts. One commenter met with the proponents and after seeing the plant's designs withdrew his concerns regarding increased truck traffic. Another commenter also withdrew his objections after speaking with the proponents and getting assurances that odours would not be a problem since the facility would not be composting materials.

In September 2005, the lawyers for CCAT submitted detailed comments relating to both proposals. CCAT asserts the Queen of Heaven Cemetery, located directly opposite the Dongara Site, is expected to be "a place of peace and tranquility, free from objectionable nuisances." CCAT is concerned that potential nuisance odours will detrimentally impact its $30 million cemetery and the $10 million mausoleum. CCAT urged MOE to thoroughly review the Emission Summary and Dispersion Modelling (ESDM) Report submitted under the section 9 C of A and ensure that Dongara will be able to ensure that odours do not affect its neighbours. CCAT suggested that the Cs of A include conditions requiring: 1) the maintenance of a specific pressure differential between the inside and outside of the building (negative pressure); 2) a system of monitoring the pressure differential; 3) mandatory procedures to minimize the potential for fugitive odour emissions; and 4) alarm and response requirements in the event that negative pressure is lost. They also suggested that the operation of the plant be conditional upon the existence of source-separated organics programs in areas to be served by the plant.

In both decision postings MOE stated that the concerns raised were consistent with concerns of the ministry and as a result terms and conditions were added to the Cs of A. MOE states that the proponent demonstrated that the odour impacts met the ministry's odour guidelines. The section 9 C of A requires odour levels at nearby receptors due to odour emissions from the facility to not exceed one odour unit under all atmospheric conditions. The section 9 C of A also requires Dongara to carry out source testing to determine the actual odour emission from the facility. In addition, the Cs of A require Dongara to monitor the processing building to ensure that it is maintained under negative pressure at all times to reduce the potential of fugitive emissions. Doors shall remain closed.

The Cs of A require that Dongara prepare a complaint response procedure for receiving and logging odour and nuisance complaints from the neighbouring public and the resulting actions. The section 9 C of A also requires Dongara to prepare an operation and maintenance manual that would include among other things emergency procedures, measures to minimize odorous emissions, procedures to respond to insufficient negative pressure indicated by an alarm and inspections of equipment.

The section 27 C of A allows only municipal waste including post-recycled residential domestic waste and admixture materials and source separated Blue Box material. Liquid waste, hazardous waste, and liquid industrial waste are prohibited at the site. The public also may file a complaint with Dongara for nuisance noise.

With respect to the noise concerns, the section 9 C of A requires trucking activities and generator testing be conducted between the hours of 7:00 to 19:00. The noise limits shall comply with those set in Publication NPC-205: "Sound Level Limits for Stationary Sources in Class 1 & 2 Areas (Urban), October 1995."

There were concerns over the negative visual impact of the facility and appropriateness of the location of the facility and impact on land values. MOE states that the section 27 C of A does not permit the outside storage of waste. Zoning and planning are municipal issues and beyond the scope of the approval. On July 6, 2006, the City of Vaughan passed By-Law 241-2006 to amend Zoning By-Law 1-88 thereby rezoning the lands with site specific exemptions to permit an 8,130 square metre waste recycling and processing facility and a 982 square metre storage dome.

The section 27 C of A states that Enerpax fuel pellets remain a waste and shall only be disposed of at an approved waste disposal site or at a location with the appropriate jurisdictional approval or license. All waste generated shall be disposed of in accordance with Regulation 347.

Wastewater would be treated internally and reused to the fullest extent possible. The section 27 C of A requires steps to minimize and ameliorate any adverse effect on the natural environment or impairment of water quality that results from operation on site.

In a letter to MOE dated December 16, 2005, York Region outlined five recommendations made by its Solid Waste Management Committee related to the facility. The Regional Solicitor was given the authority to prepare contracts with Dongara to receive 100,000 tonnes of residual waste per year and convert it to alternative fuels. The City of Vaughan would be the primary municipality sending its curbside residual waste to the Dongara facility starting January 2008. The region also requested MOE to allow the use of Dongara's Enerpax product to be used in Ontario as an alternative fuel product.

**SEV**

As reported in the ECO's 1994/1995 Annual Report, MOE takes the position that the ministry is not required to consider its SEV when it makes decisions on instruments. Therefore, the ministry would not have considered its SEV when making this decision. The ECO strongly disagrees with MOE's interpretation of how the SEV requirements apply to instruments and believes that all environmentally significant ministry decisions are subject to SEV consideration under section 11 of the *EBR*.

MOE's SEV states it will place priority first on preventing and second on minimizing the creation of pollutants that can damage the environment. When the creation of pollutants cannot be avoided, the Ministry's priority will be first to prevent their release to the environment and second, to minimize their release. The Ministry will exercise a precautionary approach in its decision-making. When there is uncertainty about the risk presented by particular pollutants or classes of pollutants, the Ministry will exercise caution in favour of the environment.

**Other Information**

In November 2006, MOE posted a proposal notice for a regulation which will exempt all users of Enerpax from the mandatory hearing requirements under section 30 of the *EPA* (RA06E0016). Dongara submits that the discretionary hearing provision, section 32, permits a site-specific assessment to determine if a hearing is required. Arbour Power, in consultation with the Town of Ajax, is proposing to construct and operate a gasification facility that would use Enerpax waste pellets to generate steam for the district heating system and electricity for public consumption. Arbour Power requested that its proposed facility be exempted from preparing an individual EA as required by the *Environmental Assessment Act* (*EAA*) and instead use a proponent-driven self-assessment process similar to O. Reg. 116/01. However, this process would not include provisions for requests for elevation to an individual EA. Arbour Power also requested that its facility be exempted from the mandatory hearing requirements under the *EPA*.

In September 2007, the ministry advised that due to lack of support for their proposals and the creation of the new Waste Management Projects regulation under the *Environmental Assessment Act*, Dongara and Arbour Power have withdrawn their proposals relating to the use of the waste pellets.

On December 21, 2006, MOE approved Lafarge's Cs of A under the *EPA* for air and waste for its proposal to use Enerpax waste pellets in its cement kilns. Lawyers for environmental groups and citizen groups filed for leave to appeal this decision with the Environmental Review Tribunal on January 5, 2007. Leave to appeal was granted in late March 2007, and preliminary hearings commenced in May 2007.

**ECO Comment**

The ECO commends MOE for addressing the concerns raised by the commenters in their decision notice and in the two Cs of A. In issuing the Cs of A, MOE emphasized the responsibility of the proponent for operating the site in a manner that does not result in a nuisance or hazard to the health and safety of the environment or people in the area. The complaints response procedure included in the Cs of A is positive - in the event there are complaints made to the proponents or MOE there is a mechanism to ensure that they are resolved effectively, and quickly. MOE and the proponent are also commended for providing a detailed description of the pellet facility operation in the section 27 proposal notice.

The end use of the Enerpax waste pellets is controversial for environmental stakeholders. MOE currently has legislative and regulatory restrictions on the use of waste as alternative fuels. MOE has approved a facility whose product cannot be used in Ontario without prior ministry approval because the use of pellets is still classified as waste disposal. The uncertainty over the environmental risks of such products will need to be studied further before changes are made to the legislative safeguards in place. The ECO will await a decision by MOE on the current proposal to exempt Enerpax customers from *EPA* mandatory hearings and the decision of the Environmental Review Tribunal related to the appeal of MOE's decision to allow Lafarge to use Enerpax waste pellets.

As of May 2007, Ontario was still shipping much of its waste to Michigan. However, York and Durham regions have begun to review proposals for incineration to deal with waste and an Energy From Waste (EFW) facility has operated in Peel Region since 1990. Although there are laws, regulations and policies in place that regulate aspects of waste, Ontario has yet to develop a broad waste management strategy to ensure maximum diversion in the province. Facilities such as these should not replace a comprehensive strategy to reduce waste generated and diversion initiatives including regulations on packaging, bag fees, improved recycling and stricter standards and targets.

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### *Environmental Assessment Act (EAA)* Designation and Exemption of Integrated Power System Plan (IPSP)

**Decision Information:**

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| Registry Number: XA06E0006 | Comment Period: 27 days |
| Notice Posted: June 15, 2006 | Number of Comments: 1,373 |
| Decision Posted: none | Came into Force: June 12, 2006 |

**Description**

In June 2006, Ministry of the Environment created a regulation (O. Reg. 276/06) pertaining to an electricity plan known as the Integrated Power Supply Plan or IPSP / "Plan", which is being stewarded by the Ontario Power Authority. For many observers, this regulation and how MOE chose to handle it under the *Environmental Bill of Rights* was controversial. MOE described the regulation as per the text box below.

In plain language, MOE made a regulation which exempted the electricity Plan known as the IPSP from the requirements of the *Environmental Assessment Act (EAA)*. Then, the ministry decided that this decision was administrative in nature (i.e., not an environmentally significant decision) and thereby posted the regulation as an information notice on the Environmental Registry. An information notice does not have the same requirements as a proposal notice – there is no requirement for a ministry to seek comments from public on the subject of the notice. Since there are generally no comments from the public submitted on an information notice, the ECO has no ability to review the public's opinion on the subject of an information notice, and no ability to review the ministry's handling of public comments. The notice merely notifies the public of a ministry's plan of action.

> "The regulation has the effect of designating the IPSP subject to the EAA [*Environmental Assessment Act*], and then exempting it from the requirement to undertake an individual environmental assessment in accordance with Part II of the EAA and activities of the Crown related to the IPSP. Given that the IPSP is not an undertaking that is subject to the EAA a designation is required in order to exempt it. The regulation confirms and reflects the legislative framework under the *Electricity Act, 1998*, with respect to the OPA and the IPSP, and confirms the government's long standing position that government policy planning as reflected in the Directive is not an undertaking that is subject to the EAA. In this respect, the regulation is administrative in nature. The projects which result from the IPSP will be subject to all applicable environmental assessment processes."

Furthermore, the exemptions embodied in O. Reg. 276/06 are more extensive in scope than MOE described. For example:

> "3. (1) Any enterprise or activity related to an integrated power system plan, or any proposal, plan or program in respect of such enterprise or activity, carried out by or on behalf of Her Majesty in right of Ontario is exempt from Part II of the Act [*Environmental Assessment Act*]. O. Reg. 276/06, section 3 (1)."

This means that future projects and activities related to the IPSP (which plans out for two decades) will be exempt from the *Environmental Assessment Act*.

**Implications of the Decision**

As a result of O. Reg. 276/06, the package of energy-related directions, concepts and initiatives known as the IPSP will not undergo an environmental assessment under Ontario's *Environmental Assessment Act*. Many observers felt strongly that the Plan as a whole, should undergo a formal environmental assessment since the Plan, if implemented, will result in new or refurbished nuclear reactors, plus expansion of other forms of generation including natural gas, wind and hydro generation, as well as conservation and demand management measures. Transmission line upgrades are also expected under the Plan. A formal EA hearing would allow interveners and experts to challenge the assumptions and conclusions of the OPA's Plan, particularly its ecological and environmental assumptions and conclusions.

**Public Participation & *EBR* Process**

A great number of people (1,373 as of Autumn 2006) commented on MOE's approach of using a regulation to exempt the plan from the *EAA* and then post it as an information notice, rather than a proposal notice on the Environmental Registry. (Letters of concern continued to arrive at the ECO in late 2006 and early 2007). Unfortunately, the comments have virtually no ability to affect the decision.

On June 19, 2006, the Environmental Commissioner of Ontario publicly criticized MOE for this approach (the use of an information notice) which had the effect of denying the public its right to meaningfully

comment on, what most would consider, an environmentally significant decision MOE made on the IPSP. The ECO said:

> *"First, the government made the announcement to proceed with their Integrated Power System Plan for generating electricity, which includes plans to rely on nuclear power,…Then they passed a regulation that bypassed the* Environmental Assessment Act *– so that the plans for nuclear facilities are exempted from having to undergo a provincial environmental assessment…it's the third decision that is most important [to the ECO:] The government made the decision to bypass Ontario's* Environmental Bill of Rights. *They escaped the process whereby the people of Ontario should have been able to review and comment on the regulation to exempt the nuclear plans from an environmental assessment."*

**SEV**

The Ministry of the Environment did not complete an SEV consideration for this decision as MOE considered this decision to be administrative in nature. Under Ontario's *Environmental Bill of Rights*, there is not a requirement for Ministries to consider their SEVs before posting information notices.

**Other Information**

Within days of MOE's and ENG's announcement of the path forward on the IPSP, the Canadian Environmental Law Association filed with the ECO an application for review of O. Reg. 276/06. In particular, the organization requested that the regulation be revoked (see also review of R2006004 in this Supplement).

In the early 1990s, Ontario Hydro released its 25-year Demand/Supply Plan which for the first time incorporated demand-management as well as supply assessment into electricity planning in Ontario. At that time, the Province elected to hold an environmental assessment hearing of Ontario Hydro's Demand/Supply Plan at which evidence of need was presented and challenged by experts.

**ECO Comment**

O. Reg. 73/94 (General Regulation, under Ontario's *Environmental Bill of Rights*) clearly stipulates that the *Environmental Assessment Act* is prescribed for the purposes of posting proposals for regulations.

MOE's decision to make a regulation to allow the Minister of Energy to avoid making the IPSP subject to a full EA under Ontario's *EAA* and then post this exempting regulation as an information notice, as opposed to a proposal, violated the principles enshrined in the *EBR.* MOE's action ensured that the government's directive about the general make-up of the Plan did not receive *EAA* treatment, and that this exemption decision would not receive *EBR* treatment, e.g., allowing the public a proper comment process period before the decision went ahead.

The sweeping nature of the O. Reg. 276/06 is troubling. It appears that the regulation ensures that even the permits and certificates of approval for facilities created for projects under the Plan will not be posted on the Registry as proposals for public comment. This is because the Plan was designated under the *EAA*, then exempted. Since this is considered treatment under the *EAA*, any instruments (e.g., a certificate of approval or permit to take water for generating station) associated with these projects, will not be subject to the notice and comment process under the *EBR*. That is, instruments needed for the Plan's projects, which might normally be posted on the Environmental Registry, will not be posted for public comment. However, many of these instruments will remain subject to the investigation and review processes of the *EBR*. The ECO is disappointed with MOE's approach on handling this very environmentally significant decision.

## Ontario's Protected Areas Legislation

**Decision Information:**

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| Registry Number: AB04E6001 | Comment Period: 61 days |
| Proposal Posted: September 9, 2004 | Number of Comments: 2,768 |
| Decision Posted: December 18, 2006 | Decision Implemented: June 20, 2006 |

**Geographic Area:** Province-wide

**Description**

In September 2004, the Ministry of Natural Resources (MNR) proposed revising the legislation governing Ontario's protected areas. The primary piece of legislation at issue, the *Provincial Parks Act*, was introduced in 1954 when there were only eight provincial parks in Ontario. Indeed, many different stakeholders, independent experts, and government panels have called for such reforms over the years, stating that the law did not reflect modern science, planning or environmental realities.

In October 2005, Bill 11, *Provincial Parks and Conservation Reserves Act, 2006*, was introduced for first reading in the Legislature. In June 2006, it passed third reading and was given Royal Assent. This Act brings all of Ontario's protected areas that are administered by MNR under a single piece of legislation, with significant legal changes to their purpose and management. For the first time, the law now explicitly recognizes that these areas exist to protect the province's biodiversity.

Protected areas are the very foundation of any concerted effort to conserve biodiversity. The loss of natural areas is one of the greatest threats to biodiversity worldwide, including within Ontario. Protected areas are places meant to maintain and restore ecological and natural heritage values. They should be havens for wild species, conserving the diversity among and within them. Ideally, these areas serve a crucial conservation role at a local level, but, equally as important, they also should function as an interconnected network at a landscape level. The degree to which the law actually protects these areas is critical, marking the difference between them existing as simple lines on a map or places where biodiversity is truly safeguarded.

In our 2001/2002 Annual Report, the ECO recommended that the Ministry of Natural Resources create a new legislative framework for provincial parks and protected areas, including conservation reserves, with the mandate of conserving biodiversity. This recommendation was the result of two separate *EBR* applications, both of which the ministry denied. The *Provincial Parks Act* was out of date and severely flawed, the *EBR* applicants said, because it placed no onus on maintaining and restoring the ecological integrity of parks; failed to require adequate public consultation or park management planning; and failed to prohibit incompatible activities such as logging, mining, sport hunting and hydroelectric development.

Ontario's system of protected areas includes 329 provincial parks, 292 conservation reserves, and 10 wilderness areas, all of which are managed by MNR. These three types of protected areas combine to cover approximately nine per cent of the province's total land base.

Provincial parks, formerly regulated under the *Provincial Parks Act*, account for 88 per cent of the total land base of protected areas in Ontario. Provincial parks range dramatically in size and purpose from small areas intended mainly for recreation, such as Devil's Glen Provincial Park with 61 hectares, to huge wilderness parks such as Woodland Caribou Provincial Park encompassing more than 450,000 hectares. Within this protected areas system, operating parks have 18,810 vehicle-accessible campsites and 7,000 interior campsites. According to MNR, Ontario's parks host more than 10 million visits each year and generate an economic impact of approximately $380 million a year. At the same time, these protected areas are meant to conserve habitat for many of Ontario's 2,900 species of vascular plants, 160 species of fish, 80 species of amphibians and reptiles, 400 species of birds and 85 species of mammals.

Conservation reserves make up about 12 per cent of the protected areas network. This type of protected area was created in 1994, under the authority of the *Public Lands Act.* According to MNR, conservation

reserves were intended primarily to protect significant features and provide recreational opportunities. These areas had fewer restrictions on recreational and commercial uses than provincial parks, although they did exclude logging and mining. However, the ECO has previously reported that "the *Public Lands Act* was not intended or designed to protect natural heritage features such as sensitive habitats or important species, and thus it is not a good public policy mechanism for protecting these values in conservation reserves."

Wilderness areas are regulated by MNR under the *Wilderness Areas Act*. They make up about 0.001 per cent of the protected areas system. A total of 33 wilderness exist in Ontario, although no new wilderness areas have been established in decades. Only 10 wilderness areas are located on their own, outside of existing provincial parks or conservation reserves.

**Implications of the Decision**

All provincial parks, formerly regulated by the *Provincial Parks Act*, and all conservation reserves, formerly regulated under the *Public Lands Act*, will now be administered under the *Provincial Parks and Conservation Reserves Act, 2006.* MNR will also evaluate the ten wilderness areas, regulated under the *Wilderness Areas Act*, that are outside provincial parks and conservation reserves. Where natural values justify protection, the ministry will regulate these areas through a public consultation process as either provincial parks or conservation reserves.

This new Act repeals *The Algonquin Provincial Park Extension Act, 1960-61*, the *Provincial Parks Act*, and the *Wilderness Areas Act*. It also makes minor amendments to the *Algonquin Forestry Authority Act*, the *Crown Forest Sustainability Act, 1994*, the *Historical Parks Act*, the *Kawartha Highlands Signature Site Park Act, 2003*, the *Mining Act*, and the *Off-Road Vehicles Act*.

*Principles to Guide the Management of Protected Areas:*
The purpose of the *Provincial Parks and Conservation Reserves Act, 2006* is "to permanently protect a system of provincial parks and conservation reserves that includes ecosystems that are representative of all of Ontario's natural regions, protects provincially significant elements of Ontario's natural and cultural heritage, maintains biodiversity and provides opportunities for compatible, ecologically sustainable recreation." This purpose statement is notable as for the first time Ontario's protected areas are expressly mandated to maintain biodiversity. Further, it also recognizes that provincial parks and conservation reserves are intended to be managed as a system, rather than as isolated areas.

The most significant change to the governance of Ontario's protected areas is that ecological integrity is now the guiding purpose for planning and management. The Act states that the "maintenance of ecological integrity shall be the first priority and the restoration of ecological integrity shall be considered" for all provincial parks and conservation reserves. Unlike its legislative predecessor, the *Provincial Parks and Conservation Reserves Act, 2006* also explicitly recognizes that opportunities for public consultation shall be provided in the planning and management of protected areas.

Importantly, the new Act defines ecological integrity as "a condition in which biotic and abiotic components of ecosystems and the composition and abundance of native species and biological communities are characteristic of their natural regions and rates of change and ecosystem processes are unimpeded." The inclusion of a definition of ecological integrity is of fundamental importance for both ministry staff in administering the Act and for the public to clearly understand the purpose of Ontario's protected areas. The *Provincial Parks and Conservation Reserves Act, 2006* also further defines ecological integrity as including "healthy and viable populations of native species, including species at risk, and maintenance of the habitat on which the species depend" and "levels of air and water quality consistent with protection of biodiversity and recreational enjoyment."

In a similar fashion to the old *Provincial Parks Act*, the new Act contains relatively benign language that dedicates the parks to the people of Ontario and others for reasons such as their enjoyment and education. However, the *Provincial Parks and Conservation Reserves Act* significantly expands upon this dedication by specifying that provincial parks and conservation reserves "shall be managed to maintain

their ecological integrity and to leave them unimpaired for future generations." This language is important as it reinforces that the legal mandate of these areas is to maintain ecological integrity and that all other activities should be managed within that context.

*Goals and Objectives:*
The legal objective of both provincial parks and conservation reserves will now be "to permanently protect representative ecosystems, biodiversity and provincially significant elements of Ontario's natural and cultural heritage and to manage these areas to ensure that ecological integrity is maintained." This objective is a significant improvement as the old *Provincial Parks Act* was silent in this regard and somewhat weaker objectives for provincial parks were relegated to being found only in ministry policy. Indeed, prior to this new legislation, conservation reserves lacked many basic legal protections when they were regulated under the *Public Lands Act*.

Provincial parks also have the new legal objective to provide opportunities for "ecologically sustainable outdoor recreation," in addition to providing opportunities for visitors to increase their knowledge of Ontario's natural and cultural heritage. These objectives vary slightly for conservation reserves in that they may be managed to provide "ecologically sustainable land uses, including traditional outdoor heritage activities." Provincial parks and conservation reserves also both have the objective of facilitating scientific research and serving as benchmarks to monitor ecological change on the broader landscape.

*Classification and Zoning:*
The *Provincial Parks and Conservation Reserves Act, 2006*, akin to its predecessor, recognizes six classes of provincial parks: wilderness, nature reserve, cultural heritage, natural environment, waterway, and recreational class. However, the new Act now states the specific objectives of each of these classes, whereas previously these directions were left to ministry policy. Further, the Act also creates a new aquatic class of provincial park, at a date to be proclaimed later by the Lieutenant Governor.

The new Act allows for a system of zoning to be applied to both provincial parks and conservation reserves. This is a similar approach to that of the old *Provincial Parks Act*, in which detailed policies would then apply to specific areas within a given class of park. However, the *Provincial Parks and Conservation Reserves Act, 2006* states that zoning shall not constrain hunting in conservation reserves.

*Mandatory Management Direction and State of Protected Areas Reporting:*
In our 2003/2004 Annual Report, the ECO recommended that MNR require the preparation and timely revision of management plans for all protected areas, including provisions for public consultation. At that time, only 38 out of 548 protected areas (seven per cent) in Ontario had approved plans that involved public consultation and that were not in need of review. Without sound planning and conscientious management, Ontario's provincial parks and conservation reserves are little more than "paper parks" – simple lines on a map. The ECO also observed that the province should undertake a review of whether MNR had adequate resources to implement the ministry's legal responsibilities and policy commitments for protected areas.

MNR now is required to prepare "management direction" for all provincial parks and conservation reserves. These directions may apply to one or more protected areas and shall identify site-specific management policies to cover a 20-year period. Management directions may take one of two forms, either a detailed "management plan" or a "management statement" when addressing non-complex issues. Unlike the old *Provincial Parks Act*, the new legislation also explicitly requires that public consultation occur when producing, reviewing or amending management direction. The new legislation also contains language, similar to the *Canada National Parks Act*, which would make it possible for MNR to enter into co-management agreements with First Nations for specific provincial parks and conservation reserves.

Given that ecological integrity is now the first priority for all provincial parks and conservation reserves, the ECO believes that indicators of ecological integrity should be expressly identified in the management plans or statements for each protected area. Ideally, the use of identified indicators and measurable objectives in each management direction would also form the basis of each protected area's ecological monitoring program. MNR also should ensure that each management direction contains a description of

how visitor use stresses the protected area's ecological integrity and how such stresses are being mitigated or eliminated.

The *Provincial Parks and Conservation Reserves Act, 2006* requires the preparation of a planning manual, to replace the Ontario Provincial Parks Management Planning Manual. Known as the Blue Book, it was last significantly updated in 1992, and it contains the detailed policy directions for provincial parks. Conservation reserves lacked similar detailed policies and they will now be covered under the new manual.

The new Act requires that MNR produce a state-of-the-parks report every five years, in a similar fashion to Parks Canada's system-wide reports for national parks. These reports will contain an assessment of the extent to which the objectives of provincial parks and conservation reserves are being achieved, including "ecological and socio-economic conditions and benefits, the degree of ecological representation, number and area of provincial parks and conservation reserves, known threats to ecological integrity of provincial parks and conservation reserves and their ecological health and socio-economic benefits." The Act states that MNR will post these reports on the Environmental Registry.

*Major Industrial Uses:*
The *Provincial Parks and Conservation Reserves Act, 2006* explicitly prohibits the following activities in protected areas: the commercial harvest of timber; the generation of electricity; prospecting, staking mining claims, developing mineral interests or working mines; and, extracting aggregate, topsoil or peat. The inclusion of these prohibitions is a dramatic improvement compared to the old legislative framework, as historically such details were left to the whim of policy. However, the Act does include numerous exceptions to these prohibitions, such as allowing for electricity generation facilities for communities that are not connected to the IESO-controlled grid.

The most environmentally significant exception to these prohibitions is that commercial timber operations are allowed to continue in Algonquin Provincial Park. The Act essentially defers to the *Algonquin Forestry Authority Act* that states that the management of this protected area be balanced between recreation and "the public interest in providing a flow of logs from Algonquin Provincial Park." As stated in our 2005/2006 Annual Report, the ECO urges MNR to conduct a public review of the appropriateness of commercial logging in Algonquin and to address "how the proposed park management goal of ecological integrity would be achieved if this policy is allowed to continue."

The *Provincial Parks and Conservation Reserves Act, 2006* reasonably addresses the issue of resource access roads. In some instances, these roads are necessary as a protected area may surround sites with mineral tenure or timber operations on Crown land may be inaccessible without a road to cross a protected area. The Act states that such resource access roads may only be constructed if there is no reasonable alternative, lower cost is not a justification, and all reasonable measures will be undertaken to minimize harmful environmental impacts and to protect ecological integrity. Further, when the road is no longer required for the purpose for which it was approved or will not be used for a period of five years or more, it will be closed, effective measures will be taken to prevent its use, and the rehabilitation and removal of any infrastructure (i.e., bridges) will be undertaken.

*Non-Industrial Uses:*
Human use is a part of the nature of protected areas, but some forms, levels or timings of activities are incompatible with ecological integrity. Further, what may be an appropriate activity in one protected area may not be suitable in another area. Experts also recognize that any determination of what is an appropriate activity should not be based on the need for revenue generation. With few exceptions, almost all non-industrial uses are not addressed in the legislation itself and are left to regulation or policy.

The *Provincial Parks and Conservation Reserves Act, 2006* does distinguish, in one specific instance, the differences between classes of provincial parks and which activities are appropriate. Borrowing from ministry policy, the new Act now states that visitors to Ontario's eight wilderness class parks may only travel by "non-mechanized means" or engage in "low-impact recreation." These terms are not defined, but MNR will presumably provide further detail in the regulations that will accompany the legislation.

The new Act does not change the manner in which hunting is permitted in Ontario's protected areas. By default, recreational hunting is permitted in all conservation reserves. By exception, recreational hunting is permitted in provincial parks. However, that exception has been extended to allow recreational hunting in 132 provincial parks. Consequently, recreational hunting is allowed in more than two-thirds of Ontario's protected areas. The ECO notes that the recreational harvest of species can conflict with the maintenance of ecological integrity in a protected area and can impair their utility as true ecological benchmarks. The Act does not explicitly address trapping, but existing MNR policy dictates that it will be phased out of all provincial parks by no later than January 2010.

One recurring "appropriate use" issue that the new legislation does not address is that of cottages in provincial parks. Algonquin Provincial Park has 305 cottages and Rondeau Provincial Park has 295 privately occupied cottages within their respective boundaries. These cottages currently have 25-year leases that are to expire in 2017. Unfortunately, governments of the day have historically renewed these leases due to political pressure, despite a clear commitment in MNR policy that cottages within protected areas are inappropriate. Ideally, this commitment will be reinforced in the regulations under the Act.

*Deregulation and Disposition of Land:*
The *Provincial Parks and Conservation Reserves Act, 2006* establishes new conditions for the deregulation and alteration of boundaries of provincial parks and conservation reserves. The Lieutenant Governor in Council may dispose of an area of a provincial park or conservation reserve that is less than 50 hectares or less than one per cent of the total area, whichever is the lesser. For any larger disposition, the Minister of Natural Resources must table the disposition before the Legislative Assembly and obtain its endorsement. However, dispositions do not have to follow this process if they are part of a land claims settlement, an addition to a national park or marine conservation area, or part of a transaction that increases the size of the protected area and enhances ecological integrity.

The ECO believes that no dispositions or alterations of boundaries should be allowed for the purpose of circumventing the prohibited uses listed in the legislation. A long-standing criticism, voiced by many stakeholders over the past decade, is that protected areas may be used as "floating reserves" and that boundaries may be re-drawn to accommodate industrial activities such as mining. The ECO also believes that the new legislation should have given the authority to the Minister to order the withdrawal of lands from mineral staking for all candidate protected areas. (For further information, refer to pages 117-120 of the ECO's 2001/2002 Annual Report.)

**Public Participation & *EBR* Process**

The ministry posted a proposal notice on the Environmental Registry in September 2004 with a 61-day comment period. MNR advanced eight legislative proposals as a central part of its consultation and invited Aboriginal, public, and stakeholder reaction to these proposals. The eight legislative proposals addressed the following topics: principles to guide the management of protected areas; goals and objectives to be included in legislation; classification and zoning; assessment of wilderness areas; mandatory management direction and state of protected areas reporting; major industrial uses; address non-industrial uses in policy; and, administration and enforcement.

MNR stated that the following objectives were the basis of its proposal: recognize that ecological integrity is of primary importance, while recognizing that compatible activities can occur where appropriate; include in legislation the policies that support sound management of protected areas and promote protection of ecological integrity; and, include in legislation measures that will enhance transparency and public accountability, such as mandatory reporting on the state of protected areas.

The ministry created a dedicated website for its proposal, providing contact information and support materials. This website contained a discussion paper on the proposed legislative reforms, titled "It's in Our Nature: A Shared Vision for Parks and Protected Areas Legislation." An online questionnaire, based on the ministry's eight legislative proposals, also was available for the public to complete. Additionally,

the recommendations report "Fulfilling the Promise" by the Ontario Parks Board was posted on the website.

MNR also held a series of eight open houses in cities across the province in the fall of 2004. A total of 425 people attended these open houses. Information displays were set up at each open house. MNR employees were present to answer questions and explain the legislative proposals.

*Questionnaire:*
MNR received 1,510 valid questionnaires. According to MNR, there was generally positive public support expressed for the ministry's eight legislative proposals. For example, 63 per cent of respondents strongly agreed with ecological integrity becoming the new mandate of the legislation, whereas only 31 per cent strongly agreed that activities such as hunting should be left to policy and not included in the new legislation. According to the ministry's summary of public consultation, the averaged input was 75 per cent of respondents somewhat agreeing or strongly agreeing with the ministry's proposals.

*Written Submissions:*
MNR received 141 written submissions on its proposals including nine from First Nations, 16 from province-wide organizations, 58 from local organizations, and 58 from members of the public. Additionally, a total of 1,118 campaign form letters or faxes were received from non-governmental organizations with environmental, sport hunting, and forestry interests. MNR then produced a summary of the written submissions and questionnaires and posted it online for public viewing.

There was broad support for the proposal that ecological integrity be the over-arching principle of the new legislation. A range of different stakeholders also expressed the need for better planning, management, and reporting, in addition to ensuring adequate resources for ministry staff. Industry stakeholders were supportive of the proposal, but, generally, sought to limit its effect on their interests such as by commenting that mineral staking or commercial forestry be permitted within protected areas. Other stakeholders, such as hunting and trapping organizations, commented that the activities of their members should not be impeded by the new legislation.

As noted in our 2005/2006 Annual Report, the ECO commends MNR on its early consultation on this proposal. However, more than a year later, when all the details of the proposal were finalized, and Bill 11 was introduced in the Legislature for first reading, there was no new public consultation via the Environmental Registry. As such, the public was unable to submit their comments on the specific content of Bill 11.

*Ontario Parks Board of Directors:*
The Ontario Parks Board of Directors is a public advisory committee established by the Minister of Natural Resources. In September 2004, the Minister of Natural Resources requested that the Ontario Parks Board provide advice with regard to the ministry's legislative proposals. The Ontario Parks Board heard presentations from 19 different organizations.

In May 2005, the Ontario Parks Board released its report entitled "Fulfilling the Promise." The Ontario Parks Board endorsed the ministry's legislative proposals, but made a number of suggestions for improved clarity and effectiveness. In particular, the Ontario Parks Board recommended additions to the proposed law to promote the effective application of ecological integrity as the guiding principle for the planning and management of provincial parks and conservation reserves. The Ontario Parks Board made the following recommendations:

- "Conservation reserves should be retained as distinct and separate from provincial parks, and these important differences guaranteed in one comprehensive act entitled 'The Ontario Provincial Parks and Conservation Reserves Act.'
- Ecological integrity should be imbedded in the new Act and its application made manifest by including: a dedication; a purpose; a definition; an objective; a management principle, indicators and consideration in government decisions about lands near protected areas.

- Enhanced administrative and enforcement powers should be provided to optimize efficiency and enable protection of ecological integrity.
- Application of 'Areas of Concern' and other flexible approaches to protection should be emphasized for conservation reserves, but the power to apply natural area zoning policies should be retained.
- The scientific and education role of protected areas should be recognized, and the tourism objectives should apply to conservation reserves, as well as provincial parks.
- Recognizing the abundance of water in Ontario, an aquatic class of provincial park should be recognized in legislation
- The *Wilderness Areas Act* is redundant and should be rescinded. But first, the 10 areas under this act should be evaluated through a consultation process, then regulated as provincial parks, or conservation reserves, or revert to Crown land.
- 'Management Direction' should be required for all protected areas, with legislation providing an appropriate balance between rigour and flexibility, using public reporting as a tool to promote accountability.
- The Board supports the prohibitions on industrial activity in MNR's legislative proposals and proposed exceptions for essential access roads and utility corridors, but guidance should be included as to where these roads and corridors may be allowed.
- Other 'permitted uses' should be addressed in regulations or policy, as appropriate;
- The current approach to hunting should be continued whereby hunting is prohibited except where allowed by regulation in provincial parks, and allowed in conservation reserves, except where prohibited by regulation (with consideration for public safety and ecological integrity).
- Algonquin Provincial Park is unique, faces exceptional challenges and is too complex to be addressed through this legislative review. The Board recommends that the Minister initiate an independent review of Algonquin Provincial Park within one year, with the review considering the park's role in the protected areas network, park management practices, and the park's legislative and governance framework.
- The Act should respect Aboriginal rights and interests and MNR should seek opportunities to reflect that respect through policy and program initiatives."

*Standing Committee of the Legislative Assembly:*
In May 2006, Bill 11 was referred in second reading to the Standing Committee of the Legislative Assembly for the purpose of public hearings and clause-by-clause consideration. The following month, 11 non-governmental organizations representing industry, environmental groups, and hunting stakeholders presented deputations before the committee. Additionally, six Aboriginal organizations and one member of the public made presentations to the committee.

**SEV**

MNR considered its Statement of Environmental Values (SEV) in reaching a decision.

**Other Information**

In our 2004/2005 Annual Report, the ECO extensively reviewed changes to Ontario's planning regime undertaken by the Ministry of Municipal Affairs and Housing (MAH). In the Supplement to that report, the ECO reviewed the Provincial Policy Statement, 2005 and commented on its deficiencies with regard to provincial parks and conservation areas. The ECO wrote that "development and site alteration should not be permitted on lands adjacent to these protected areas unless it can be demonstrated that there will be no negative ecological impacts. By recognizing the integral contribution of these protected areas to the conservation of natural heritage, MAH would be positioning the PPS to take a systems approach rather than a narrow site-specific approach. Further, this approach would make MAH's land use policies more consistent with MNR's proposed revisions to its protected areas legislation."

**ECO Comment**

The *Provincial Parks and Conservation Reserves Act, 2006* is a dramatic improvement to the legislative framework governing Ontario's protected areas. The ECO commends the Ministry of Natural Resources on its diligent effort to enact this legislation. While not flawless, this new legislation moves Ontario from the back of the pack to near the forefront of protected areas law in Canada. It is a promising beginning to the much-needed overhaul of how our provincial parks and conservation reserves are managed. As next steps, MNR must now revise the regulations and policies for protected areas and the ECO will report on these changes in future Annual Reports.

Despite this new legislation, the ECO has concerns with how Ontario's protected area system is managed overall by the Government of Ontario. Firstly, both the ECO and the Auditor General of Ontario have expressed concern that the Ontario Parks branch of MNR does not have sufficient resources to properly fulfil its mandate. Ontario is among the only jurisdictions in North America that is attempting to run its protected areas system on a cost recovery basis and its funding is very low given the vast amount of land that is involved.

The Government of Ontario only allocates approximately $15 million a year for MNR to plan, manage, protect, and monitor almost 94,000 $km^2$ of protected areas in Ontario. In our 2003/2004 Annual Report, the ECO noted that almost half of all operating provincial parks do not have sufficient staff or funding to meet existing minimum standards of operation. Further, the majority of non-operating parks were visited only once a year or not at all by ministry staff. Therefore, if a protected area is not paying for itself, there is no assurance that the law – maintaining ecological integrity – is being upheld. The ECO believes that it will be extremely difficult for MNR to adequately administer and enforce the *Provincial Parks and Conservation Reserves Act, 2006* unless there are significant increases to its budget.

Secondly, it is a common fallacy that protected areas are unimpaired swaths of wilderness with pristine natural conditions. In reality, Ontario's provincial parks and conservation reserves are threatened by numerous stresses, some of which originate beyond their boundaries. Indeed, in most cases, the boundaries of protected areas are political constructs and do not reflect natural boundaries. As such, there may be an issue of concern outside of a protected area that affects its management, but it is beyond an imaginary line and cannot be effectively addressed by Ontario Parks staff.

In contrast, the *Canadian Environmental Assessment Act* may require that an environmental assessment be conducted for any project outside the boundaries of a national park that may adversely affect its ecological integrity. Ontario's laws fail to contain any similar safeguards. Unlike national parks, the land inside and outside of most protected areas in Ontario has the benefit of being managed by the same entity; yet, the Government of Ontario has no explicit mechanisms to restrict incompatible land uses near the boundaries of its protected areas.

What is needed is an ecologically sensible landscape-level approach to Crown land management. Different branches or ministries – all part of the same government – should not be seen as threatening or competing against each other's interests. Protected areas should be given the priority and recognition that they deserve. Provincial parks and conservation reserves must be managed on a greater ecosystem basis in order to fulfil their mandate of protecting Ontario's ecological integrity. Wildlife and natural processes know no boundaries; therefore, failing to take this wider perspective imperils our protected areas.

**Northern Boreal Initiative: Community-based Land Use Strategy for the Whitefeather Forest and Adjacent Areas**

**Decision Information:**

Registry Number: PB03E1003

Comment Periods: 3 periods of approx. 60 days each

Proposal Posted: May 14, 2003

Number of Comments: 46

Decision Posted: June 26, 2006

Decision Implemented: June 26, 2006

**Geographic Area:** Northern Ontario

**Description**

In June 2006, the Ministry of Natural Resources (MNR) adopted a land use strategy for the Whitefeather Forest and Adjacent Areas (WFAA) as provincial land use policy. The WFAA includes the Whitefeather Forest, a 1.2 million hectare area in the northern boreal forest, occupied by the Pikangikum First Nation and used for traditional hunting, fishing, trapping and harvesting of non-timber forest products, as well as for the operation of a few remote tourism establishments. The WFAA also includes three smaller adjacent areas – the Valhalla Area, the Crossland Lake Area and the Blondin Lake Area. The "Community-based Land Use Strategy for the Whitefeather Forest and Adjacent Areas" (the WFAA Strategy) provides direction for future land uses and resource management activities for this remote area in Ontario's far north.

The WFAA Strategy is the most recent step in the effort to open up Ontario's far north to commercial forestry and other forms of resource development. In 1999, MNR, the forest industry and a coalition of environmental groups signed the Ontario Forest Accord. One of the commitments of this Accord was to open up the north to commercial forestry as quickly as possible, subject to the full agreement of affected First Nations communities, approval under the *Environmental Assessment Act* and the creation of parks and protected areas. In 2000, to meet this commitment to the forest industry, and to respond to the expressed interest of several First Nations communities in developing commercial forestry opportunities, MNR established the Northern Boreal Initiative (NBI).

The NBI sets out an approach for developing new commercial forestry and other sustainable resource opportunities in the region above the northern limit of the area where commercial forestry is currently permitted, known as the "Area of the Undertaking" (AOU). As timber harvesting has not yet been allowed this far north, the NBI area includes one of the largest intact forests in the world. The boreal forests in the NBI area have global significance, identified by the World Resources Institute as remaining frontier forests, and by the United Nations Environment Program as one of the world's remaining significant 'closed canopy' forests.

The NBI established a process in which First Nations lead the planning process for their respective areas with support and input from MNR and other provincial agencies. In 2002, MNR adopted a Community-based Land Use Planning approach as a framework to guide this planning process and the development of land use strategies. The process is intended to produce land use strategies that recommend appropriate land use designations and allocations for protected areas, commercial forestry, sustainable resource development, tourism, recreation, waterpower and traditional uses.

In June 2003, Pikangikum First Nation, with the assistance of MNR, began developing the first land use strategy using the policy and planning framework of the NBI's community-based land use planning process. In addition to Pikangikum, another 14 First Nation communities are expected to develop land use strategies in the NBI area using similar community-based planning processes. According to MNR, six of the First Nations have begun to actively proceed with this planning process.

*The WFAA Strategy:*

The WFAA Strategy is one of the NBI development steps, as well as a key component of Pikangikum's Whitefeather Forest Initiative. The Whitefeather Forest Initiative is a program established by the

Pikangikum First Nation with the goal of acquiring commercial forest license management responsibilities and related opportunities for the Pikangikum peoples. Through this initiative and the WFAA Strategy, Pikangikum First Nation hopes to secure economic renewal, employment opportunities and resource stewardship, while maintaining their cultural integrity. Unemployment in the First Nation communities in this region is high, especially among the youth. Pikangikum aims to balance any new land uses with its traditional uses, philosophies, cultural heritage and stewardship responsibilities.

The WFAA Strategy is a guidance document that provides strategic direction for future land uses and activities in the WFAA. The WFAA Strategy identifies zoning areas within the WFAA and applies three main categories of land use designations to these areas, as follows:

- Dedicated Protected Areas: areas that are set aside to protect special natural and cultural heritage features, and which prohibit commercial forestry, mineral sector activities, commercial electricity generation, aggregate extraction and peat extraction. The Dedicated Protected Areas also include numerous "Cultural Landscape Waterways", a special land use category that recognizes the cultural, historic and ecological value of waterways.
- General Use Areas: areas in which all land use activities are supported.
- Enhanced Management Areas: areas in which a wide range of uses (including commercial forestry and mining activities) may occur, but which include more detailed or area-specific land use direction to protect special interests or features, such as cultural and historic values, fish and wildlife habitat, and remoteness objectives. The majority of Enhanced Management Areas are located adjacent to Designated Protected Areas or surrounding Cultural Landscape Waterways to provide a gradient of uses between these more sensitive areas and the General Use Areas.

The WFAA Strategy designates approximately 36 per cent of the total WFAA as Dedicated Protected Areas, 29 per cent as General Use Areas, and the remaining 35 per cent as Enhanced Management Areas. Accordingly, 64 per cent of the WFAA is open to at least some development.

The WFAA Strategy also provides accompanying direction for each of the specific land use intents, which is to be followed in subsequent steps (such as the preparation of a forest management plan). The WFAA Strategy proposes that a 'Management Direction Statement' be prepared within each zone in accordance with the objectives set out in the WFAA Strategy to guide the manner in which the future activities proceed.

The WFAA Strategy also recommends that, where new access roads are desired in any zone, regardless of its designation, a 'Strategic Access Planning Approach' be prepared to achieve the broad objective of remoteness in the WFAA. Currently, there is only one all-weather road running through the WFAA. To maintain this level of remoteness, the WFAA Strategy recommends that the planning approach consider the need for new access, and include a review of the implications of the proposed access on the overall objectives for the WFAA. This strategic review is intended to inform the subsequent management planning for all activities in the WFAA.

The planning team also produced a background document – "Keeping Woodland Caribou on the Land: Cross-Cultural Research in the Whitefeather Forest" – setting out the indigenous knowledge and other research collected relating to woodland caribou, as well as 12 background 'Land Capability Maps', which accompany the WFAA Strategy. MNR also prepared an additional background document entitled: "Woodland Caribou Conservation and the Whitefeather Forest and Adjacent Areas Land Use Strategy, June 2006," to supplement the discussion of woodland caribou in the WFAA Strategy.

**Implications of the Decision**

The WFAA Strategy was endorsed by the First Nations through community-based procedures, as well as approved by MNR under the authority of the *Public Lands Act*. Upon approval of the WFAA Strategy, MNR immediately adopted the land use direction and area dedications set out in the WFAA Strategy through a major amendment to the Crown Land Use Policy Atlas. The WFAA Strategy, as incorporated

into provincial land use policy, creates zoning areas in the WFAA for Dedicated Protected Areas, General Use Areas and Enhanced Management Areas.

*Designation of Protected Areas:*
In our 2002/2003 Annual Report, the ECO recommended that MNR "develop objectives and targets in order to establish a protected areas network for the Northern Boreal Initiative area as a whole." Protected areas serve a critical role in protecting species at risk, preserving ecologically significant features and maintaining biodiversity. The new *Provincial Parks and Conservation Reserves Act, 2006*, which was passed in June 2006, recognizes that protected areas should be managed as a system, rather than as isolated areas. (For a review of this Act, see page 61 of this Supplement.) The NBI area, which contains fully functioning and intact ecosystems, provides a unique planning opportunity for creating a system of protected areas based on ecological principles.

The parties to the planning process all acknowledged at the outset that, although the planning and decision-making was to be done at the community level, some subjects, such as protected areas and the conservation of woodland caribou, need to be addressed at the broader landscape scale. Accordingly, MNR assumed responsibility for ensuring that the broader ecological, provincial and landscape-level objectives were incorporated into the planning process.

The WFAA Strategy states that, in identifying Dedicated Protected Areas, the planning team considered landscape-scale geography (such as ecological regions and watersheds), landscape-scale policies and objectives (such as Ontario's parks and protected areas system and provincial objectives for ecological conservation), and landscape-scale analyses of ecological representation. However, unlike the AOU to the south, there has not been any broad-scale land use planning for the entire NBI area – such as landscape targets and objectives for preservation of species at risk and biodiversity – to guide the land use decisions in the WFAA. While the WFAA Strategy does create protected areas, the WFAA represents a mere 3.5 per cent of the total NBI area. Without landscape-level guidance, the NBI's piecemeal, community-based planning approach misses the opportunity to create a regional system of protected areas for all of the NBI area that best protects species at risk and conserves biodiversity.

*Regulation of Dedicated Protected Areas:*
The WFAA Strategy states that the "Dedicated Protected Areas" designation is only an interim designation. The intent is to regulate these areas under provincial legislation using a protected area designation to be determined through ongoing dialogue between Pikangikum and MNR. MNR's Crown Land Use amendment form states that the interim designation is to be used pending regulation of the areas as either provincial parks or conservation reserves; however, the WFAA Strategy itself does not provide any such commitment.

If the Dedicated Protected Areas are not regulated as either provincial parks or conservation reserves, there is no certainty that these areas will receive the level of protection provided by the *Provincial Parks and Conservation Reserves Act, 2006*. Without a regulated protected area designation, there is a risk that commercial forestry (and other activities) will not be legally prohibited in the Dedicated Protected Areas. For example, the existing declaration order for the AOU allows commercial forestry anywhere in the AOU, except for regulated provincial parks. Moreover, the Ontario Forest Accord requires that there be *regulated* protected areas before any commercial forestry activities may be permitted.

*Woodland Caribou:*
MNR states that the WFAA Strategy contributes to the protection of forest-dwelling woodland caribou, a species at risk, through: the designation of key habitat and calving areas as Dedicated Protected Areas; the conservation of high-use caribou habitat areas through a deferral of harvesting until alternate suitable habitat is available nearby; the monitoring of regeneration areas considered to have potential as future woodland caribou habitat; a commitment to maintain remoteness and habitat connectivity through strategic access planning; and direction for future resource management planning that ensures that woodland caribou remain on the land. MNR also states that the WFAA Strategy embraces an adaptive management approach that includes carefully monitoring the degree of success (or failure) of new activities and modifying management directions accordingly.

While these proposed measures are laudable, they may not be sufficient. Woodland caribou have a very low tolerance threshold to disturbances, such as logging and new roads, and require extensive networks of protected areas to remain viable (see pages 75-81 of the Annual Report). With a substantial portion of woodland caribou habitat in Ontario already lost, the remaining intact forests of the northern boreal contain important habitat, calving areas and travel corridors essential for the future survival of this species. New activities, such as commercial forestry and road construction, which are to be permitted in the WFAA are likely to have a significant impact on the habitat of woodland caribou. Furthermore, while an adaptive management approach is to be encouraged, given the fact that the time lags between habitat disturbance and caribou disappearance are long and difficult to monitor, a conservative and precautionary approach to development in the WFAA is essential.

*Forestry and Other Resource Development:*
Although the WFAA Strategy does not, in itself, confer any new authorities with respect to development in the WFAA, the WFAA Strategy identifies where forestry and other resource development may occur, as well as sets out objectives and provides direction for the next steps.

Before commercial forestry may proceed in the WFAA, MNR must seek coverage (i.e., approval, a declaration order or an exemption order) under the *Environmental Assessment Act* (*EAA*). Once MNR is granted coverage under the *EAA* permitting commercial forestry in the WFAA, a forest management plan and sustainable forestry licence will be required. These processes will include further public consultation. Resource management plans will also be prepared for other resources before development commences in the WFAA.

In November 2006, MNR posted an information notice on the Environmental Registry stating that it is seeking permission to proceed with forestry activities in the WFAA by means of a declaration order under the *EAA*, and that the declaration order being sought will be modeled after the Declaration Order MNR-71 for the AOU. The WFAA Strategy does not provide details regarding the direction of future forestry practices in the WFAA. However, if the *status quo* approach to forestry policy is applied in the WFAA, there will likely be negative impacts on woodland caribou and other ecological values. There is evidence that existing forestry policies being applied in the AOU are resulting in the increasing loss of woodland caribou habitat (see pages 75-81 of the Annual Report).

Moreover, forestry in the northern boreal – if it is to be permitted at all – requires different approaches than in the south because of the physical environment, harsh climate, short growing season, and lower diversity of forest tree species. In 1999, the federal Senate Subcommittee on the Boreal Forest recommended that "in those parts of the boreal forest approaching the tree line, where adequate silvicultural methods have not been developed, logging should not be allowed." Similarly, in our 2002/2003 Annual Report, the ECO recommended that MNR "should carry out a thorough assessment of forest management approaches that are ecologically suited to the northern boreal forest." However, as of March 2007, no assessment has yet been made public.

Although additional steps must still take place before forestry, mining and other resource development may proceed in the WFAA, the WFAA Strategy provides strong enabling direction for new development in the WFAA. The WFAA Strategy states: "Subsequent resource management planning and proposals for activities will follow the direction provided by Land Use Intents and Area Dedications unless exceptional circumstances are presented, in which case an amendment to the WFAA Strategy may be recommended." These new activities will likely have significant impacts on the fragile northern boreal forest and on the species at risk that occupy this area.

**Public Participation & *EBR* Process**

MNR provided numerous opportunities for public consultation throughout the planning process. At each new stage of the process, MNR posted or republished a proposal notice on the Environmental Registry, as well as mailed and advertised notices, informing the public of open houses being held in Pikangikum and Red Lake and inviting comments. At the open houses, Pikangikum and MNR representatives were

available to provide information, answer questions and collect comments. The planning team also held several meetings and workshops with environmental groups, tourist operators, forest industry and mineral sector representatives, local hunters and anglers, the Municipality of Red Lake, and neighbouring First Nation communities. In total, approximately 25 meetings were held over a three-year period.

MNR published the first proposal notice on the Registry early in the process at the 'Invitation to Participate' stage in May 2003. Open houses and meetings were held at that time to allow the public to view the Terms of Reference and other background information, and to provide comments on the development of the WFAA Strategy. MNR republished the proposal notice in spring 2004 to notify the public about the second round of open houses and meetings and the opportunity to review and comment on the planning team's analysis of opportunities in the WFAA and its objectives. MNR again republished the notice in fall 2005 to provide the public with an opportunity to comment on the draft WFAA Strategy and the associated proposed amendments to Crown land use policy. Additional open houses and meetings were held to allow the public to review and comment on the draft WFAA Strategy.

One environmental group expressed concern that supplementary materials outlining the land use objectives were available only at the open houses and in the MNR offices in Thunder Bay and Red Lake, and thus residents and groups in other areas of Ontario were not provided with a meaningful opportunity to comment on the land use objectives and opportunities. In the subsequent planning stage, MNR provided weblinks in the notice to all relevant supplementary materials.

MNR provided a comment period of approximately 60 days at each stage. Two environmental groups requested an extension of the period to comment on the draft WFAA Strategy on account of the significance and complexity of this proposal, and because of the timing of the comment period over the December holiday season. MNR turned down the request stating that the comment period was reasonable and adequate; MNR did offer, instead, to hold additional meetings with interested parties.

*Additional Consultation:*
Two additional workshops, attended by ministry scientists, environmental groups, and scientists affiliated with several academic organizations, were held to share information and views specifically on the topic of the conservation of woodland caribou. The workshops were intended to help the WFAA planning team address this landscape scale subject.

In addition, a "Protected Areas Working Group", including Pikangikum, neighbouring First Nations, environmental groups and MNR staff and science advisors, met several times a year during 2003 to 2005 to discuss the landscape scale issue of protected areas. However, this group's original intended role to recommend and evaluate proposed protected areas was greatly diminished by MNR. MNR noted in the decision notice that: "The working group did not develop recommendations for a protected area design for the ecoregion, recognizing that recommendations must come from community level planning." The ECO feels that it is unfortunate that MNR did not take advantage of the full potential value of this multi-stakeholder group.

*Summary of Comments:*
A total of 46 comments were received from the public throughout the planning process, including 22 written comments on the draft WFAA Strategy. Most of the comments received were from First Nation Organizations and individuals, environmental groups, university professors and students, and local tourist operators.

*Community-Based Planning Approach:*
Many of the comments received praised MNR and Pikangikum on the collaborative planning process, the comprehensive sharing of information, and on Pikangikum's extensive documentation and mapping of traditional knowledge, as well as its strong lead role in the community land use planning. A number of commenters recognized this process as a model for First Nation decision-making and land use planning.

Although most commenters acknowledged the excellent community-based planning that took place, a number of environmental groups expressed concerns that the community-based approach falls short in

addressing landscape-scale issues. Several groups commented that MNR should have conducted a broad, landscape-scale planning approach that defines protected areas across the far north based on science-based knowledge from landscape ecologists, forest ecologists and wildlife and conservation biologists in advance of, or concurrent with, the community planning.

Several academics specializing in evolutionary biology jointly commented that the NBI's piecemeal, community-based planning approach is certain to result in protected areas that are too few, too small and too disconnected to conserve ecological integrity. These commenters expressed concern that this unique opportunity to develop a planning process for all of the NBI area to effectively delineate protected areas should not be squandered. MNR responded that, while landscape-scale issues must be considered, broad landscape-scale planning is inconsistent with the NBI's community-based land use planning approach, and further, that it is important for First Nations to lead the planning and participate in decisions affecting their future.

*Incorporation of Landscape-Scale Principles:*
A number of stakeholders, including local tourist operators, First Nation Organizations and academics, observed that the WFAA Strategy achieves a balance between objectives for local economical renewal and objectives for conservation and sustainability.

Conversely, many environmental groups commented that, despite MNR's commitments to ensure that the provincial and landscape-scale interests would be integrated with the local-level objectives in the planning process, MNR failed to incorporate such landscape-scale principles in the WFAA Strategy. Commenters provided detailed comments on two main areas of provincial interest – protected areas and conservation of woodland caribou – which are set out below.

*Designation of Protected Areas:*
A number of commenters stated that the Dedicated Protected Areas set out in the draft WFAA Strategy did not meet ecological representation objectives for this part of the province and did not satisfy MNR's obligation to conserve biodiversity. One group commented that this failure was, in part, a consequence of MNR's decision not to seek greater input from the Protected Areas Working Group. Another group noted that if Pikangikum wishes to achieve Forest Stewardship Council (FSC) certification, one of the requirements is an ecologically representative network of protected areas.

Two environmental groups commented that the selection of protected areas appears to focus on areas of least value for timber harvesting and mineral tenure, rather than on a consideration of areas that are most important for conservation values. These groups both expressed disappointment that wood supply commitments and mineral claims appeared to undermine the planning for conservation values. These groups cited, as an example, the mineral staking around Nungessor Lake, which precluded the designation of this regionally significant caribou calving area as a protected area.

*Conservation of Woodland Caribou:*
Many commenters expressed concern regarding the adequacy of the draft WFAA Strategy with respect to the conservation of forest-dwelling woodland caribou – a species at risk. A number of groups pointed out that the woodland caribou's tolerance threshold to disturbances is very low, and its continuing existence in Ontario is precarious. A university forestry professor commented that the "maintenance of caribou populations is incompatible with commercial forestry." An environmental group noted that experts predict that the species could become extinct in Ontario in less than 100 years if development pushes forward in the intact areas. This group further commented that the WFAA Strategy did not appear to incorporate the best of western science from conservation biologists and wildlife scientists with the First Nations traditional knowledge with regard to species at risk.

Several groups felt that the chosen Dedicated Protected Areas in the draft strategy did not include sufficient current-use habitat, calving islands and travel corridors for woodland caribou. These groups commented that the WFAA Strategy needs to increase the amount of current-use habitat in permanent protection if it hopes to keep woodland caribou on the landscape.

Two environmental groups, plus 53 form letters sent to MNR, recommended that the entire Valhalla Adjacent Area be reassigned as a Dedicated Protected Area to ensure that this high-use area by woodland caribou is protected. These groups also recommended that a larger buffer area around Nungessor Lake, which is considered a regionally significant caribou calving area, be reassigned as a Dedicated Protected Area. Another commenter recommended that buffer zones of at least six kilometres be instituted around all critical caribou areas.

In response to these comments, a description of the planning team's approach to the conservation of woodland caribou was added to the final WFAA Strategy, as well as a supplementary background paper providing further detail on this issue. These additional materials did not alter the direction of the WFAA Strategy, but simply provide more detail about the information used to support the planning decisions and the manner in which the WFAA Strategy balanced conservation efforts with development opportunities.

MNR's decision notice stated that the recommendation to reassign the Valhalla Adjacent Area was reviewed by the planning team, but not accepted. MNR noted that the Valhalla Adjacent Area will be managed through a deferral of harvesting to retain caribou occupancy in this area until habitat is available nearby. In response to the request for additional protected areas around Nungesser Lake, the final WFAA Strategy provided a small new "Waterway Protected Area" on the western shore of Nungesser Lake and on the islands without mining claims. However, the central portion of Nungesser Lake remains as an Enhanced Management Area, which permits mineral sector activities (but not new forestry activities). According to MNR: "This direction retains access to areas of high Provincially Significant Mineral Protection while reducing the need for access and industrial activity."

*Forestry:*
Many First Nation organizations and individuals commended the WFAA Strategy's direction for forestry as a new land use. The WFAA Strategy was praised for balancing the two objectives of conservation and economic renewal, and for enabling a First Nation to meaningfully move towards acquiring commercial forest management tenure. These commenters also supported the direction in the WFAA Strategy to promote a greater focus on value-added forestry opportunities.

A number of environmental groups and academics noted that the draft WFAA Strategy did not provide sufficient details regarding future forestry practices. Several of these commenters stated that they supported much of the direction set out in the WFAA Strategy – such as the objectives for maintaining remoteness, First Nation stewardship of the land, a "light footprint", and the use of conservation biology principles in forestry – however, they noted that the WFAA Strategy did not provide any details regarding the proposed forestry practices to demonstrate how these objectives would be achieved. These commenters felt that greater direction needed to be included in the WFAA Strategy to ensure that these ideas do not turn out to be mere rhetoric. One commenter noted that similar language regarding sustainable forestry practices was used in the planning process for the AOU, yet forestry in the AOU has resulted in "large clearcuts and high offtakes."

Several environmental groups and academics also cautioned that MNR's forestry policies being applied in the AOU since the mid-1990s have not been effective in mitigating the impact on caribou and ecological values, and should not be used in the NBI area. One group commented that if conventional logging practices are pursued, experience demonstrates that caribou will disappear.

Two separate individual commenters recommended that the WFAA Strategy explicitly specify the maximum annual volume of wood that may be harvested from the WFAA, to ensure that the forestry practices do indeed represent a light footprint, and also to ensure that the community will take only what it needs (i.e., to create employment and economic renewal) in keeping with the First Nations' traditional practices. MNR responded that the WFAA Strategy is not an appropriate document in which to provide the kind of detailed information requested by the commenters.

MNR carried out a commendable and thorough public consultation process. MNR appears to have considered all of the comments and concerns; however, other than the addition of a small Dedicated

Protected Area around Nungesser Lake, MNR did not make any significant changes to the proposal as a result of the comments.

**SEV**

During the development and adoption of the WFAA Strategy, MNR thoroughly considered its Statement of Environmental Values (SEV). MNR concluded that there were no aspects of the WFAA Strategy that conflict with any provisions or commitments set out in MNR's SEV and that the WFAA Strategy serves several purposes of the *EBR*.

**ECO Comment**

Pikangikum's WFAA Strategy brings the province one step closer to opening up Ontario's far north to commercial forestry and other resource development. The introduction of new development in the NBI area has significant implications for the environment and species at risk. Given the potential implications of allowing these activities in the northern boreal forest, the ECO is disappointed that MNR has not developed a broad integrated land use planning system for the NBI area or published landscape-level objectives prior to proceeding with the first of the NBI's community-based land use planning processes.

The ECO commends MNR and Pikangikum on their excellent public consultation throughout the planning process, as well as on the extensive planning work that went into the WFAA Strategy. The information, mapping and local knowledge collected in the WFAA planning process provided important contributions to the WFAA Strategy. Furthermore, the ECO recognizes the importance of enabling First Nations to meaningfully participate in decisions affecting their future. However, as MNR has acknowledged, certain subject matters (such as protected areas, species at risk and conservation of biodiversity) must be considered on a landscape scale. Furthermore, MNR bears the responsibility for managing the Crown lands in the WFAA on behalf of the people of Ontario.

The ECO recommended in our 2002/2003 Annual Report that MNR develop objectives and plans with respect to protected areas for the entire NBI area, and that these be incorporated into the various NBI community-based plans. It is disappointing that important zoning decisions have already been made within the WFAA without the benefit of NBI-wide plans. The ECO continues to encourage MNR to take advantage of the unique opportunity available in the north to create a system of protected areas that is sufficient to protect species at risk and preserve biodiversity, before significant development commences.

The WFAA Strategy suggests that a new sustainable approach to forestry will be applied in the WFAA; however, the WFAA Strategy does not provide any details regarding how this will be achieved. The ECO is concerned that the commercial forestry policies of the AOU were applied to the WFAA in the WFAA Strategy, and will continue to be applied in subsequent steps. For example, the WFAA Strategy applied a one-kilometre forest-harvesting buffer around most caribou calving lakes, which reflects current forestry policy in the AOU; however, more recent studies have concluded that a surrounding zone of intact forest of at least 13-kilometres is needed to maintain caribou on Ontario's northern boreal landscape.

Evidence suggests that the existing forestry policies being applied in the AOU have not proven to be effective in mitigating the impacts on caribou and some ecological values. Moreover, the character of the forest ecosystem in the NBI area is different than that of the AOU. If MNR simply applies the forestry guidelines and policies developed for the AOU to the WFAA, significant environmental consequences and irreparable harm to species at risk may result. As recommended in past Annual Reports, the ECO urges MNR to undertake a meaningful assessment of commercial forestry specific to the NBI area before continuing to seek coverage under the *EAA*.

The ECO is also concerned about the failure of the WFAA Strategy to include any assessment of the cumulative impacts of development on the WFAA. The combined effects of development – from forestry, mining, tourism, hydroelectric generation and the necessary new roads – will likely have significant impacts on the northern boreal ecosystem. An assessment of the potential cumulative impacts of the proposed development in the WFAA should be conducted before new activities commence.

Finally, the ECO is concerned about the failure of the WFAA Strategy to include any specific steps or timelines for the regulation of the Dedicated Protected Areas. Without deadlines, these areas could retain this interim, unregulated designation for years. The ECO urges MNR to build on the substantial amount of work accomplished during this process – the consultation, planning and broad agreement – and take immediate steps to regulate the Dedicated Protected Areas. In particular, the ECO believes that these areas should be regulated as either provincial parks or conservation reserves under the *Provincial Parks and Conservation Reserves Act, 2006,* to ensure that they receive the protection provided by this Act. Land use zoning under the Crown Land Use Atlas does not provide adequate protection. As discussed in our 2003/2004 Annual Report (pages 92-94), the ECO believes that all of Ontario's protected areas should be managed under a single piece of legislation.

The WFAA Strategy espouses many commendable objectives. However, it will be a significant challenge to meet the competing objectives of economic renewal and increased employment on the one hand, and sustainability, biological conservation, stewardship of the land and remoteness, on the other. With the inevitable tension between the goals for conservation and for development, there will need to be clear and explicit rules governing new development, based on local ecology.

The ECO reminds MNR that it bears the ultimate responsibility for ensuring that any forestry permitted in the WFAA is sustainable, and also reminds MOE, as the decision-making body under the *EAA*, that it has the responsibility for ensuring that any new forestry activities will not result in harm to the environment. The ECO also urges MNR and Pikangikum to not only follow the direction set in the WFAA Strategy to move ahead with the next steps carefully, but also to apply the precautionary principle.

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### MNR's Manual of Policies and Procedures for the Aggregate Resources Program

**Decision Information:**

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| Registry Number: PB05E6006 | Comment Period: extended to 90 days |
| Proposal Posted: May 31, 2005 | Number of Comments: 45 |
| Decision Posted: April 7, 2006 | Decision Implemented: April 1, 2006 |

**Description**

In April 2006, MNR finalized the revisions to its Policies and Procedures Manual for the Aggregate Resources Program ("the Manual"). The Manual was first developed in 1991 after the *Aggregate Resources Act* (*ARA* or "the Act") was enacted, but it had not yet been revised to reflect the major changes made to the *ARA* in 1997.

The Manual is intended for the use of MNR staff who administer the *ARA*, its supporting regulations and the Aggregate Resources of Ontario Provincial Standards (AROPS or the "Provincial Standards") adopted by regulation in 1997. MNR said that the updated Manual will accomplish the following: ensure a consistent approach to the administration of the *ARA* across the province; provide a transparent process for the aggregate industry, stakeholders, municipalities and others; and direct staff to properly interpret the Act and Provincial Standards.

The updated Manual is over 700 pages and contains approximately 180 policies and procedures covering all aspects of the aggregate resources program. The Manual is divided into eight main policy areas:

- General – including delegation of the minister's authority to MNR and Ministry of Transportation staff;
- Licences – rules for pits and quarries on private lands designated under the *ARA;*
- Wayside Permits – rules for short-term pits for public road projects;
- Aggregate Permits – rules for pits and quarries on Crown lands throughout the province;

- Miscellaneous – including *EBR* policies and rules for operations in provincial land use plan areas;
- Rehabilitation;
- Enforcement;
- Fees and Royalties;
- Appendices – Memoranda of understanding, forms and protocols.

**Implications of the Decision**

The revised Manual should improve the consistency of the administration of the *ARA* across MNR offices and provide some certainty to industry, stakeholders and the public. By law, applications for licences and permits and the operation of pits and quarries must meet the requirements of the *ARA* and be in accordance with the Provincial Standards approved in 1997. The Provincial Standards include mandatory requirements for: site plans; prescribed conditions; notification and consultation; reports; day-to-day operating standards; and annual reporting. MNR has incorporated the Provincial Standards into the Manual, but fleshed out additional procedures and updated some policies to reflect some changes in other provincial law and policy, as well as MNR's procedural experience in administering the Act and Provincial Standards since 1997. This has generated some inconsistencies between the Provincial Standards and the Manual.

*Policies and Procedures for New Pits and Quarries on Private Lands:*
The ECO's review focuses on the policies relating to licences for operations on private lands, including the mechanisms for protecting the natural environment and allowing for public and agency participation in decision-making processes. These policies received the most public comment. Issues relating to rehabilitation and enforcement policies as well as fees and royalties have been reviewed by the ECO in this Supplement, see page 185.

Arguably the most important procedure in the Manual is MNR Procedure A.R. 2.01.02, which sets out a 46-step process for applications for new licences. Following the direction in the *ARA* and the Provincial Standards, the application process for new pits and quarries described in the Manual is "proponent-driven". The proponent is required to prepare an application, site plan, summary report and technical reports prepared by qualified persons. It is expressly the proponent's responsibility to determine who should be contacted and to liaise with any appropriate agencies.

The procedure states that, upon receipt of the application, MNR staff will review it to ensure that all information has been submitted as required, but will not review the merits of the application. If the MNR staff considers the application complete, they direct the proponent to conduct the required notice and consultation, and to circulate the application to all specified agencies, including MNR, for a 45-day comment period. The proponent is required to provide public notice and hold a public information session. The procedures specifically advise MNR staff not to attend public information sessions unless there are "special circumstances." MNR staff are responsible for posting a proposal notice inviting public comment on the application on the Environmental Registry, corresponding to the proponent's 45-day comment period.

If MNR has any concerns or objections related to its mandated program areas (such as natural heritage protection) the ministry must register its objections during the comment period similar to other circulated agencies. Any concerns must be registered as formal objections during the comment period, and the proponent is responsible for attempting to resolve all concerns and objections. The proponent then submits documentation of the notification and consultation, and describes any outstanding objections. If objections are not resolved, those persons submitting objections must confirm them in writing a second time or they will be considered withdrawn.

Once MNR staff determine that all documentation is complete, MNR staff has 30 days to refer the application to the OMB for a decision, or make a recommendation to the minister to either issue or refuse to issue the licence. The procedure says that MNR will scope out any objections relating to need, or that can be addressed under the prescribed conditions attached to every licence. The *ARA* decision can be

referred to the OMB, or if decisions on the application are also required under other provincial legislation, the application may be referred to a Joint Board under the *Consolidated Hearings Act*. New procedures in the Manual provide direction to MNR staff on their role and conduct in the event of a public hearing by the OMB or Joint Board.

*Considering Impacts on the Environment:*
The Manual states that the purpose of the *ARA* is to minimize the adverse environmental impact of aggregate operations, while managing the aggregate resources to meet provincial, regional and local demand. The Act requires the decision-maker, either the minister or OMB, to consider the effect of a proposed operation on the environment, defined broadly as "air, land and water, or any combination or part thereof", referring to both on-site and off-site. The Manual does not require comprehensive collection of information or assessment of impacts on the environment, however, scoping the matters to be addressed in technical studies. The Manual states "the Ministry of the Environment (MOE) can play a lead role in assessing many potential off-site impacts, including dust, noise, vibration, drainage, etc." However, it also explicitly limits the circulation of applications to MOE to those issues which involve extraction below or close to the water table, and only with express instruction from MNR to the applicant to circulate the application to MOE.

Technical reports on hydrogeology, natural environment, cultural heritage resources, noise and blasting must accompany all licence applications. The policies and procedures outlining the Natural Environment Reports and Hydrogeology Reports received most public comments. Applicants must prepare a Natural Environment Level 1 report which determines whether there is fish habitat or any significant natural heritage features (wetlands, endangered and threatened species, Areas of Natural and Scientific Interest, woodlands, valley lands and wildlife habitat) on-site or within 120 metres of the site. If any of those features exist, then a Level 2 report is required to assess negative impacts and propose preventative, mitigative or remedial measures.

Consistent with the Provincial Standards, the Manual only requires identification and protection of provincially significant natural heritage features, as defined in the Provincial Policy Statement (PPS). For wetlands, the Manual states that, even if municipalities or other planning authorities consider non-provincially significant wetlands to be regionally or locally significant, they do not need to be addressed. One welcome revision is that proponents cannot assume that unevaluated wetlands are non-significant unless agreed to by MNR, and the applicant may need to hire a trained wetland evaluator to evaluate the wetland. This is notable, since many wetlands (and most in Central Ontario) have not been evaluated by MNR for their significance (see discussion in the Annual Report at page 35 and the Supplement at page 200). Other types of natural heritage, which are supposed to be identified as "significant" by municipalities rather than MNR under the province's land use planning system, may not be addressed at all. The Manual states that, if neither a municipality nor MNR can provide information or criteria for identifying features, they do not have to be addressed. The Manual does not provide guidance on what applicants should do to mitigate impacts on natural heritage features, although it does quote the 2005 PPS policies regarding natural heritage features, for example, that development and site alteration shall not be permitted in significant coastal wetlands or significant wetlands in certain parts of the province.

The Manual sets out requirements for Level 1 and, if necessary, Level 2 Hydrogeology reports, which determine the location of the water table and assess impacts of proposed operations on surface and groundwater. But it fails to reflect new initiatives for source water protection.

*Additional Requirements in Environmental Plan Areas:*
The Manual also provides additional guidance for applicants in the Oak Ridges Moraine Conservation Plan Area, Niagara Escarpment Plan Area and the Greenbelt. Some aspects of this guidance are equivocal, and in the ECO's opinion, legally incorrect. The Manual describes the requirements of the ORMCP, for example, but then states that the *ARA* is not specifically prescribed under the *ORMCA*, and MNR should merely "*have appropriate regard to* its requirements when making decisions on the issuance of, or amendments to, licences and wayside permits under the *ARA*." The ECO believes this is a serious gap in the implementation of the *ORMCA* and frustrates the intent to place special conditions on aggregate operations on the Oak Ridges Moraine. The Manual lays out the requirements of the ORMCP

with regard to aggregate pits and quarries, but then provides MNR staff with the discretion to approve applications that do not comply with the ORMCP.

*Municipal Regulation of Pits and Quarries:*
The new policy describing municipal regulation of pits and quarries explains that the guiding principle of the Act is to establish MNR as the lead agency in regulating pits and quarries. While the Act provides many opportunities for municipalities to participate in the process (e.g., by commenting on licence applications), it attempts to avoid inconsistent or conflicting regulation. The new policy reflects a 1999 change to the *ARA* (section 66) which states that the *ARA* and aggregate licences and site plans take precedence over municipal official plans, zoning by-laws, agreements and other instruments. The policy states that municipalities can control the *location* of pits and quarries through zoning lands to permit aggregate operations, but that they cannot specify what kinds of pits or quarries are permitted, or regulate depth of extraction or other operational matters.

*Public Participation Policies:*
The Manual contains policies and procedures outlining the *EBR* notification requirements and appeal rights, as well as descriptions of the public notice and consultation requirements for each type of licence or permit application. Applications for wayside permits and all aggregate permits on Crown lands do not require mandatory notification or consultation and are not posted on the Environmental Registry. The decision to not prescribe these instruments was made by MNR in 2001 when it finalized its instrument classification regulation under the *EBR*. New licences (except in newly designated areas of the province), changes to licence conditions, and some site plan amendments, are posted on the Environmental Registry for public comment, as described above.

**Public Participation & *EBR* Process**

MNR posted the proposal for 60 days, then extended the comment period by a further 30 days. The ministry's decision notice said it received 39 comments, but it actually received 45, including six submissions from MNR staff from different program areas and districts. Other comments were submitted by municipalities, conservation authorities, planning agencies (e.g., the Niagara Escarpment Commission), consultants and industry, interest groups and individuals.

MNR dismissed most of the comments because they would require amendments to the *ARA* and/or the Aggregate Resources of Ontario Provincial Standards, which were not the subject of the consultation. Many commenters recommended:

- changing and adding to the technical reports
- increasing commenting periods and circulation distances
- changing application requirements in newly designated areas
- adding termination dates to licences
- restricting MNR's power to modify OMB conditions
- increasing the municipal portion of licence fees

MNR also described other comments recommending broader changes to the Aggregates Program:

- the policy Manual should be combined with the Provincial Standards into an *ARA* regulation
- a stronger provincial regulatory role is required
- the number of aggregate inspectors is inadequate
- a provincial aggregate management plan or strategy should be developed
- provincial targets are needed for recycling
- MOE should play a lead role in regulating the industry
- make The Ontario Aggregate Resources Corporation (TOARC), the industry-led agency that administers the rehabilitation program, more transparent and accountable

MNR did subsequently take action on a few of these recommendations through amendments to the *ARA*, a new regulation and increasing the number of aggregates inspectors. Please see details below under "Other Information."

Many commenters raised concerns about pre-consultation between the MNR aggregate program staff and industry, whereas stakeholders, municipalities and even other MNR staff were not consulted until the draft Manual was posted for comment on the Environmental Registry. Many of the substantial concerns may have been addressed if MNR had carried out a broader pre-consultation.

*Municipalities and Conservation Authorities:*
The Association of Municipalities of Ontario established an Aggregates Task Force and in early 2006 they provided a list of concerns to MNR and the ECO. The AMO expressed serious concerns about: 1) the provincial policy approach to aggregate extraction, 2) the impacts caused by extraction and transportation of aggregates, 3) the oversight of the industry, and 4) the accountability of the industry. They asked for municipalities to be empowered to adequately regulate local pits and quarries. These concerns were echoed by individual municipalities in their comments to MNR on the proposed Manual.

Municipalities and conservation authorities asked for mandatory notification of more types of site plan amendments. Conservation Ontario, on behalf of all conservation authorities, recommended that the Manual should specify that conservation authorities be circulated all proposed site plan amendments that have implications for natural heritage, natural hazards, and/or surface and groundwater resources. The *ARA* states that "major" site plan amendments must be circulated to municipalities and are posted on the Environmental Registry. But "minor" amendments are not circulated to municipalities or posted on the Environmental Registry for public comment. MNR lays out what kinds of amendments are considered "major" and "minor" in one of the policies and several municipalities suggested that certain types of amendments be elevated from minor to major. Other commenters asked that all site plan amendments be subject to notification and consultation.

Several municipalities raised the issue of applicants initially applying to extract above the water table and then a few years later initiating an application for below the water table extraction. One regional municipality said, "This process makes a mockery of the entire application process as it misleads local residents and municipalities as to the extent of the 'development.' In almost all other development applications reviewed by municipalities, developers provide an indication of the complete extent of the development." MNR did develop a new policy in response to these concerns to require formal notice and comment for site plan amendments for below water table extraction.

Conservation authorities raised concern about the Natural Environment Report requirements. One CA stated "Most municipalities have yet to identify significant wildlife, woodlands and valley lands…as a minimum, all applications should identify the existing natural resources regardless of the label 'significant'."

Municipalities and CAs also expressed disappointment that the revised Manual is silent on source water protection and stated that the Manual does not provide sufficient direction to ensure that studies properly evaluate the impact on groundwater and surface water. For example, one regional municipality suggested that, considering all the changes in groundwater protection and the source protection legislation, the Hydrogeology Report standards should identify issues other than the depth to and influence on the water table, and that source protection should be added to the AROPS as well. Several municipalities recommended MNR require at least a Hydrogeology Level 1 study for above the water table extraction. Conservation Ontario said that the requirements for the Hydrogeology standards are too vague to ensure sufficient quality of the reports, and made a number of specific recommendations for additional requirements. Conservation Ontario also recommended that MNR review and revise the Manual in light of all the recommendations made by the Watershed-Based Source Protection Planning Technical Experts Committee.

Conservation authorities stated that the policies and procedures do not always convey the importance of environmental protection. For example, "while licences within the Greenbelt or on the Oak Ridges

Moraine are subject to more rigorous environmental protection requirements, the Grand River watershed relies on groundwater for a significant portion of its drinking water and the moraines within the Grand River watershed need to be considered for a high level of protection from potential adverse impacts from extraction operations." Municipalities and conservation authorities also said that there is a need for a process to measure the cumulative impact of extraction activities. It is noteworthy that the ECO received two applications in 2006 calling for protection of the Waterloo Moraine (see page 182 in this Supplement).

Several municipalities requested more specific rules, particularly timelines, for "progressive" and final rehabilitation, and provided statistics to demonstrate how little of the acres of land disturbed for extraction in their municipalities have been rehabilitated. Many municipalities protested the description of aggregate operations as "interim" land uses. Halton Region said that quarrying almost invariably permanently changes the landscape and can preclude many other subsequent land uses. The current policy framework makes it very difficult to address cumulative impact and limit how many "holes" (future lakes) a given area can accommodate.

*Interest Groups and Individuals:*
Most of the concerns raised by interest groups and individuals related to the public notice and consultation requirements and the hydrogeology and natural environment report standards. They also raised concerns about the ability of MNR to oversee the aggregate industry, and stated a need for more involvement by other ministries such as MOE. Several commenters pointed out that MNR does not have adequate expertise or resources in hydrogeology (MNR has one hydrogeologist). Many commenters suggested that MOE needs to be more involved in reviewing applications and overseeing operations, given the number of adverse effects that fall within MOE's jurisdiction such as dust, noise, and water quality and quantity issues.

Groups and individuals who may be interested in participating in licence applications or have ongoing concerns about neighbouring operations raised concerns about the many references in the Manual to the applicants' right to withhold information about a proposed pit or quarry. MNR stated that the reports and other documents related to an application do not become MNR property until a licence is issued. For that reason, MNR's new procedures state that the public can only access information supporting an application at an MNR office, or request copies of the information from the proponent.

*MNR Staff:*
MNR staff from other program areas as well as District and Regional offices provided comments on the draft Manual during the *EBR* comment period. Most of the MNR concerns related to the Natural Environment Report Standards for Aggregate Licence Applications. These comments illustrate the ministry's conflicting roles, overseeing both resource extraction and natural heritage protection. The comments also confirm some of MNR's capacity constraints, including insufficient funding to carry out wetland evaluations, collection of information about natural heritage features, and the development of decision support tools such as guidelines or criteria for mapping the habitat of endangered and threatened species.

One MNR district office said that attempts by district staff and consultants representing aggregates industry clients to interpret provisions of the draft policies had caused frustration, confusion and conflict. That district office recommended providing additional procedural detail in the policy. They pointed out that MNR has not identified significant habitat nor can it provide the criteria for the identification of significant habitat. What is the obligation of an applicant to address significant woodlands, valley lands and wildlife habitat where the municipality has not identified these features and MNR has nothing to contribute? MNR did revise this policy to provide additional guidance for this scenario.

Several MNR staff suggested the Manual reference Natural Heritage Systems to recognize the PPS policy on diversity and connectivity, to require consideration of whether the site is within a municipally or provincially identified natural heritage system. MNR staff pointed out that the 2005 PPS (and other related changes to the *Planning Act*) gives municipalities the authority to identify and protect natural heritage systems in their official plans and the *ARA* application process should address this. The individual features and functions may not all be provincially significant under the criteria identified by

MNR, but it should be necessary to identify the impacts that proposed aggregate extraction would have on a natural heritage system, to avoid or mitigate them. Aggregates Program Staff did not accept this proposed change because natural heritage systems are not recognized in the 1997 Provincial Standards.

Several MNR staff and district offices disagreed with the Aggregates Program staff in their interpretation of the ORMCP, saying that MNR's responsibility is clear, that all applications under the *ARA* should be consistent with the Plan. They suggested deleting sections of the new MNR policies and procedures, which give MNR staff discretion to approve non-conforming applications.

MNR staff also recommended that the Provincial Standards and proposed Manual be updated to reflect current provincial policy, including changes to the *Planning Act* and PPS, as well as the ORMCP and other land use plans. They also recommended that all natural heritage features should be identified, for example all wetlands and ANSIs, not just those considered provincially significant, and that MNR should consider all natural heritage information in considering applications. They stated that the Provincial Standards and Manual inappropriately hold aggregate licences to a lower standard than other development applications under the *Planning Act*.

Interestingly, MNR staff pointed out that MNR has the mandate for protecting natural heritage, and raised concerns that too much responsibility was being delegated to applicants and municipalities. They argued that the policies should allow MNR to comment or object regarding natural heritage concerns such as woodlands, valley lands and wildlife habitat, and if natural features have not yet been identified by the municipality, that MNR has a duty to determine whether the PPS should apply, based on the best information. MNR commenters stressed that where there has been no previous identification of features on the site, inventories should be scoped toward the identification of all natural heritage features and areas, regardless of their significance.

One District Office also recommended that changing from an above water pit or quarry to a below water operation should not be treated as a major amendment to the site plan because it is a different type of licence. It should require a new licence application.

In order to address these substantive concerns from MNR District and Regional staffs, MNR held a meeting with managers from different program areas. Additional text was added to clarify the Natural Environment Report Standards, but Aggregates Program staff did not make any of the substantive changes requested, because they felt they were bound by the 1997 Provincial Standards.

*Industry and Consultants*:
Industry concerns were minimal, perhaps because the ministry had consulted extensively with industry representatives before releasing the proposed Manual for public and agency comment. One commenter raised concerns that the procedures were too onerous. That commenter said there was no need to require hydrogeology studies for pits and quarries for above water applications, and that it was a significant change to past practice. One consultant said that there was no need for hydrogeology studies for all new licences, that he had been involved in five new licence applications in rural areas without the need for such studies. Concern was also expressed that the Natural Environment Report standards exceed the PPS requirements by establishing 120 metres as the study area for assessing potential impacts. They pointed out that the PPS leaves "adjacent" undefined.

The Ontario Stone, Sand and Gravel Association (OSSGA) was particularly concerned that the Manual states that all operations will cease on public holidays, and using the *Interpretation Act* definition of holidays. OSSGA said that policy adds three days to the *Employment Standards Act* definition of holidays, which the aggregate industry uses. Implementation of that policy would have immediate impacts on all aggregate operations in the province. Industry also raised concerns about the policy on the use of inert fill for rehabilitation, suggesting that they shouldn't have to meet the stated parameters for soil quality.

One consultant raised concerns about the identification and evaluation of natural heritage on Crown lands (for aggregate permits), stating that none of the local MNR district offices (specifically Peterborough and

Bancroft) have identified or evaluated natural heritage features. For licences, the consultant questioned whether a qualified person could identify the presence of these features on private lands because they cannot be identified without an approved methodology. Again, in rural municipalities such as Haliburton and Peterborough counties, criteria for identifying natural heritage features have not been approved by councils or provided to them by MNR.

*MNR's Description of the Effect of Public Comments on the Decision:*
MNR's decision notice was vague and did not adequately describe the changes made between the draft and final Manual, or the effect of public comments on the ministry's decision. MNR said that significant changes included: the addition of policies regarding Aggregate Operations in the Niagara Escarpment Plan Area and The Ontario Aggregate Resources Corporation; revision of policies to require a registered Professional Geoscientist to establish the water table for all applications; and the revision of policies for site plan amendments to extract within the water table to include a formal public/agency notification and consultation process.

The ministry's decision notice also mentioned "additional changes made by the ministry" but did not describe those changes. MNR did not provide adequate information to the public about some of the major changes, and in fact the public has had difficulty accessing the text of the final Manual. MNR provided an Internet link to the proposed text of the Manual, but did not update that link when it posted notice of the ministry's decision. The ministry has made the full Manual available on its internal web site (MNR intranet) but has refused requests by the ECO and members of the public to make the final text of the Manual available on its public website. The ministry informed the ECO that it would provide the full text of the Manual on disc to members of the public but the ECO has received many complaints from the public about their difficulty in accessing and/or obtaining the Manual. This issue is also discussed on page 113 of the Annual Report.

**SEV**

MNR provided a detailed Statement of Environmental Values briefing note that concluded that the policy is consistent with MNR's SEV and all three purposes of the *EBR*.

**Other Information**

MNR addressed some of the higher level issues raised during the consultations on the Manual, and also raised in *EBR* applications for review, by amending the Act, regulation, and issuing new direction to MNR staff regarding rehabilitation and compliance issues (see the ECO summary of one such application for review on pages 44-49 of the Annual Report and page 186 of the Supplement).

The *ARA* was amended in June 2006 to strengthen enforcement provisions. In October 2006 MNR announced that the *ARA* would now apply to more of Central and Northern Ontario, and raised the fees charged to licensees and permittees. This change was made by regulation and took effect on January 1, 2007. The Manual includes policies and procedures describing how existing pits and quarries in the newly designated areas of the province will be brought into compliance with the Act.

The province also finalized changes to the Planning Act in October 2006, improving front-end consultation and documentation requirements for planning decisions, but reducing appeal rights for certain decisions. See the ECO's review of Bill 51 on pages 23-25 of the Supplement and page 17 of the Annual Report).

Ontario also finalized the *Clean Water Act* in October 2006. See the ECO's review of the new legislation on pages 118-124 of the Annual Report and pages 40-51 of the Supplement. The aggregates industry provided comments on the proposed legislation stating that "the aggregate industry does not adversely affect the water resource." They suggested that the existing approvals processes under the *ARA* and other legislation was adequate to protect drinking water sources and that aggregate extraction should not be treated as a "threat of provincial concern" under the *CWA*. It is unclear at this time how the Ontario

government intends to respond to the industry's comments and whether aggregate extraction will be regulated under the *CWA*.

MNR released a November 2006 study it commissioned entitled "Applied Research on Source Water Protection Issues in the Aggregate Industry". The report is phase I of MNR's proposed three-phase project to address concerns raised in a 2004 report from the Source Water Protection Implementation Committee about the impacts of aggregate operations on source water.

**ECO Comment**

The policies and procedures in the Manual do not require adequate information gathering or consideration of potential impacts on natural heritage or water resources unless they are "provincially significant." This is a concern because MNR and municipalities have identified so few "provincially significant" natural heritage features and areas. The ECO agrees with commenters, including MNR staff, who pointed out that the minister is not restricted to protecting natural features identified as "provincially significant" when considering a licence application under the *ARA*. One of the purposes of the *ARA* is to minimize negative impacts of aggregate operations on the environment, and in making a decision on an application, "the minister…shall have regard to (a) the effect of the pit or quarry on the environment". In addition, the 2005 PPS includes policies that relate to the protection of all natural features and areas, regardless of their significance. Proponents should be required to provide information about all natural heritage and MNR should be required to consider it when considering approval of a pit or quarry application, especially given the ministry's mandate for natural heritage protection.

The Manual does not adequately integrate the provisions of provincial land use plans, including the ORMCP, NEP and GB Plan, into the *ARA* application processes. While MNR did respond to concerns by adding new policies to the Manual, the final text still does not adequately describe the special rules, policies and procedures for considering aggregate applications in those areas. The ECO believes that MNR's *ARA* decisions must conform to the ORMCP, and urges the ministry to resolve this implementation gap. Applicants need to understand precisely what additional studies and evaluation reports are required for sites within the NEP, ORM and Greenbelt. The criteria MNR staff will use to make decisions about applications in these areas should also be set out in the Manual for increased transparency and consistency. Further, MNR must incorporate the requirements of its technical guidance for the ORM and Greenbelt Plan into the Provincial Standards and Manual.

Many commenters said the *ARA* Manual includes outdated provisions for considering impacts on water and is silent on source water protection. Municipalities pointed out that the province needs to adequately protect local and regional natural environment features and water resources. If MNR will not do it through the *ARA*, municipalities demand the powers to mitigate the environmental and health impacts of aggregate sites on neighboring residents and the larger community. MNR should consider these legitimate concerns. This is especially important given that municipalities and conservation authorities will have lead responsibility for source water protection planning. The ECO will monitor how aggregate extraction is addressed under the *CWA*.

The policies in this Manual describe a minimal role for MNR in overseeing the applications process, and particularly in resolving conflicts or concerns, even on issues within the ministry's mandate. Commenters characterized MNR's role in the Manual as performing a "clerical function" in ensuring that proponents submit the required information, then referring most matters to the OMB for decisions. Both MNR staff and interest groups suggested that the *ARA* gives responsibility to the Minister to ensure that a comprehensive review is undertaken and that MNR should review an application given the breadth of issues and provincial interests in the ministry. An *EBR* application for review discussed on page 85 of the Supplement and page 44 of the Annual Report (SLUG) requested review of the *ARA* and *Planning Act* processes for approving licence applications. MNR turned down the request for review, in part because it said the *ARA* provides for adequate study and opportunities for resolution of concerns. The ECO shares the expressed concerns and urges the province to develop a new mechanism for resolving disputes about proposed aggregate operations. The mechanism should allow for applications with unacceptable

environmental impacts to be screened out early (see the ECO's discussion of this issue on page 44 of the Annual Report).

Many commenters raised concerns about MNR capacity, including the need for MNR to hire additional hydrogeologists and aggregate inspectors, who not only inspect aggregate sites but also process applications. The ECO recently examined MNR's capacity to administer its Aggregates Program in a Special Report released in April 2007. There is no doubt that the ministry role laid out in the Manual was determined in part by resource constraints. Addressing MNR's capacity problems is a necessary first step in strengthening the ability of MNR staff to administer the aggregates resources program.

The ECO agrees with commenters, including MNR staff, who are concerned that the ministry's policy and procedures Manual and the 1997 Provincial Standards are not consistent with broader provincial policy. Further, MNR rejected many reasonable proposals for change on the basis that they would require amendments to the Provincial Standards. The ECO notes that recent changes to the *Planning Act* require all planning decisions to be consistent with the most current PPS and provincial plans. It is imperative that MNR update the Provincial Standards to reflect recent changes in provincial policy (e.g., changes to the *Planning Act* and PPS) and other legislation and land use plans, such as the ORMCP and Greenbelt Plan, to incorporate the stronger direction for environmental impact assessment and technical studies. Some of the matters covered in the policy Manual should be incorporated into the AROPS, which are legally binding, by reference in the *ARA* in order to make them enforceable.

The ECO is also concerned that MNR is still not providing enough transparency in the administration of its aggregates program. The public and proponents need access to the ministry's policies and procedures in order to participate in the process and have some certainty about how the Act will be implemented. MNR has a responsibility to make the final text of the Manual available on its website, which is as simple as replacing the proposed text version with the final version. A few of the policies are already out of date, and will need to be revised to reflect new legislation such as the revised *Endangered Species Act*, *2007, Planning Act* and revisions to the *ARA* and its regulations. MNR should ensure that the public is aware of changes to the Manual and able to access subsequent updates.

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**Re-Designation of 18 Forest Reserves in Portion or Entirety, and Portions of Two Conservation Reserves and One Provincial Park**

**Decision Information:**

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| Registry Number: PB06E2024 | Comment Period: 45 days |
| Proposal Posted: September 20, 2006 | Number of Comments: 1 |
| Decision Posted: December 22, 2006 | Came into Force: various dates |

**Description**

In 1999, the Ministry of Natural Resources (MNR) released Ontario's Living Legacy (OLL) Land Use Strategy, which recommended the creation of 378 new protected areas on Crown lands in Ontario. However, it later was revealed that 66 of these proposed provincial parks and conservation reserves either had mining claims when they were proposed or there were mining claims staked before MNR requested that the Ministry of Northern Development and Mines (MNDM) remove the areas from staking. This decision notices pertains to the re-designation of 21 of those sites.

*The Process of Mining Disentanglement:*
In late 2002, MNR and MNDM began closed-door negotiations with the Partnership for Public Lands (PPL) and the Ontario Prospectors Association (OPA). The PPL and OPA were asked to reach agreement on how to disentangle the 66 sites. By March 2003, after working on a site-by-site basis, they submitted their recommendations to MNR and MNDM.

In November 2004, the ECO informed both MNR and MNDM that it was concerned that the issue of mining disentanglement remained unresolved for many sites, and that the time had come for a transparent and accountable public participation process to resolve this environmentally significant issue. In December 2004, the ministries replied that an announcement would be made shortly in response to the recommendations of the two stakeholders and that public consultation would occur.

In May 2005, MNR advised in an information notice posted to the Environmental Registry that a consensus had been developed by the PPL and OPA on a proposed approach for 55 of the 66 sites where the disentanglement of overlapping mining claims and protected areas remained an issue. The sites for which agreement was reached were then to be subject to posting as policy proposals on the Environmental Registry. In its information notice, MNR provided recommended strategies for all 66 of the sites.

In September 2006, MNR posted a policy proposal notice on the re-designation of 18 forest reserves (in portion or entirety), portions of two conservation reserves and one provincial park in MNR's Northeast Region.

The recommendations to separate pre-existing mining lands from proposed protected areas were provided by PPL and OPA. As a result of those recommendations, changes in name and land use designation were proposed for 18 forest reserves, in part or entirely, as well as portions of two conservation reserves and one provincial park. Where lands were removed from forest reserves they were converted to General Use Areas (GUAs) or Enhanced Management Areas (EMAs). According to MNR, GUAs account for 70 per cent of the OLL planning area. GUAs allow for all resource and recreational uses allowed on Crown Land. EMAs are similar to GUAs except that particular EMAs may by subject to modifications to resource management practices to reflect and support the value of the areas.

The PPL and OPA recommended that for the following seven sites, the forest reserve designation be removed and those sites be re-designated to General Use Areas or Enhanced Management Areas, without seeking replacement protected areas; though such areas may be sought over time:

F159 – McLaren Forest FR
F215 – Gough Outwash FR
F1594 – Grassy River Halliday Lake Forests and Lowlands FR
F1628 – Trollope Lake Burnt Hill Poplar Spruce FR
F1704 – Hilliardton Marsh FR
F192 – Spanish River FR
F1591 – McMurchy Township End Moraine FR

For the following 11 sites, it was recommended that the forest reserve designation be removed in whole or in part and that the site be re-designated to General Use Area or Enhanced Management Area, with replacement areas sought:

F1584 – Tatachikapika River Plain FR
F1597 – Night Hawk Lake Shoreline Bluffs FR
F1600 – Mistinikon Lake Uplands FR
F1602 – Whitefish and East Whitefish Lakes Sandy Till Uplands FR
F1603 – Elspeth Lake White Birch Outwash FR
F1626 – South Grassy Lake Outwash FR
F1705 – McGarry Township Forest FR
F1712 – Coral Rapids Wetland FR
F173 – Sturgeon River FR
F1632 – Gem Lake Maple Bedrock FR
F1715 – West Montreal River FR

According to MNR, replacement lands for these sites will be sought adjacent to or adjoining the 11 protected areas where the forest reserves listed area being removed.

As a result of the removal of forest reserve designations there are small disjointed appendages of portions of two conservation reserves and one provincial park isolated from the rest of the protected area. MNR decided that these small areas would also be re-designated to either General Use Area or Enhanced Management Area. The effected areas are:

C1584 – Tatachikapika River Plan Conservation Reserve
C1712 – Coral Rapids Wetland Conservation Reserve
P173 – Sturgeon River Provincial Park

*The McLaren Forest EBR Application for Review:*
The McLaren Forest was originally identified by the Ministry of Natural Resources (MNR) as a provincially significant natural heritage area in 1997. It was listed as a candidate conservation reserve in 1998, but was not announced until 1999, as part of OLL. The McLaren Forest is possesses old growth pine, the most accessible in the area. Trees on the site have been estimated to be at least 230 years old.

In early June 2001, MNR stated on its website that the McLaren Forest site was protected from mining. However, on June 26, mining claims were staked on the site. On June 28, 2001, MNR proposed official regulation of the site and its boundaries. It was not until November 2001, that MNR requested that the Ministry of Northern Development and Mines (MNDM) withdraw the entire site.

An *EBR* application reported on in the ECO's 2001/2002 Annual Report requested a review of the necessary statutory, regulatory, and policy changes to protect the McLaren Forest Conservation Reserve legally and permanently, as identified in OLL in 1999. More broadly, the application also requested a review of changes needed to protect all conservation reserves and provincial parks of Ontario from any industrial activities including any activities relating to mining access, staking, exploration, sampling or development. The applicants pointed out that the McLaren Forest was one of many sites with overlapping mining claims.

The application dealt with the McLaren Forest and seven other sites, setting out concerns about the pre-existing mining tenure within protected area boundaries. MNR and MNDM each denied the application for review. The ECO expressed a number of concerns with the denial of the McLaren Forest application for review. In denying the McLaren Forest application for review, MNR noted that the policy direction for the site was from OLL, a decision made within the previous five years. MNR also admitted that the applicants had raised legitimate concerns, but it stated that those concerns were administrative in nature.

In March 2002, months after rejecting the McLaren Forest application for review, the Ministers of Natural Resources and Northern Development and Mines announced that a process would be initiated to examine options to address mineral claims on the proposed OLL sites. Approximately 66 OLL sites containing hundreds of mining claims were recognized.

**Implications of the Decision**

One of the reasons behind the existence of mining claims on OLL sites was that MNR had not followed its own policy on requesting for candidate protected areas to be withdrawn from staking. In the McLaren Forest example, the result was legal staking of the site for over two years after it should have been removed from staking, because MNR did not request the removal of the site. That request could have been made by MNR as far back as 1997, when McLaren Forest was declared a provincially significant natural heritage area. In MNR's response to the *EBR* applicants, the ministry responded that the potential for environmental harm would not result from the denial of a review, because the environmental gains of the new OLL protected areas outweighed the concerns of potential impacts to forest reserves. The ECO found the reasons for denial inadequate.

This decision brings to an end the long process of regulating protection for these 21 sites, announced as part of Ontario's Living Legacy. However, eight years after OLL was announced eight sites still remain unregulated to due the presence of mining claims. As a result, those areas are not yet protected.

**Public Participation & *EBR* Process**

The Ministers of Natural Resources and Northern Development and Mines chose two groups to represent the broader stakeholders with concern over the overlap of mining and conservation lands. That consensus-based process was not open to the public. This notice allowed for a 45-day public comment period on the changes to protected areas being undertaken by MNR, as a result of the recommendations it received to resolve conflicts of existing mining claims overlapping proposed protected areas. There were no public meetings held.

This notice pertained to 18 forest reserves, two conservation reserves and one provincial park in MNR's Northeast Region. One comment was received pertaining to the Sturgeon River Forest Reserve. The commenter wrote to oppose the removal of the forest reserve designation from a portion of the site. According to MNR, they "decided to proceed with the proposal for this site and remove the forest reserve as originally proposed. The management intent for this process is to respond to areas where existing mining fabric is in conflict with recommended protected areas and help facilitate for increased certainty for resource industries while providing the formal protection of protected areas, where replacement options exist."

**SEV**

MNR wrote a lengthy Statement of Environmental Values (SEV) Briefing Note showing its SEV was considered in its decision. MNR stated that "The objective of the disentanglement exercise is clearly linked to sustainable development in that this initiative is aimed at optimally balancing provincial mineral resources values and interests with the protection of natural spaces. The exercise attempts to secure the future opportunity of both intents by assessing where provincially significant mineral values and interests lie within the landscape while concurrently seeking to determine where protected areas adjacent to these interests can be protected for future generations."

**Other Information**

The ECO also reviewed the *Provincial Parks and Conservation Reserves Act, 2006* in this year's Supplement to our Annual Report (see pages 99-106). In that decision review, the ECO wrote that it "believes that the new legislation should have given the authority to the Minister to order the withdrawal of lands from mineral staking for all candidate protected areas."

**ECO Comment**

The mining disentanglement exercise coming out of the Lands for Life/OLL process has long been a concern for the ECO. A handful of the sites identified for disentanglement still require resolution and, ideally, their regulation as protected areas. Problems still remain - almost 10 years after sites were recommended for protection and five years after MNR and MNDM said they initiated a process to fix the situation. For example, among the remaining sites with unresolved claims are the proposed Lake Superior Highlands Conservation Reserve and the Lake Superior Archipelago Conservation Reserve. Together, these two sites represent over 95,000 ha of land.

There has been a lack of public transparency, particularly during the later stages of the process. Tracking the evolution of mining disentanglement as it pertains to the 66 sites based on the Registry postings is confusing at best, involving at least twelve exception notices, one information notice and seven policy proposals. Over the years, a number of individuals have contacted the ECO as they have encountered difficulty making sense of this process.

Of the 66 sites that were identified as being subject to the disentanglement process, 17 have undergone consultation and been regulated, 27 have been regulated without an opportunity for public consultation, seven have undergone consultation, but not yet been regulated, and five have undergone neither consultation nor regulation.

The ECO believes that MNR, with the full cooperation of MNDM, should bring the disentanglement process to an end. There must be clarity brought to the land in determining which lands are to be protected for their ecological values and which lands are suitable for mineral exploration. The ECO believes that MNR should regulate the remaining sites and MNDM should offer reasonable settlement to individuals holding a conflicting claim or lease. Conversely, MNR also can make the decision that these sites will not be regulated and that a commensurate area of land of equal or greater ecological significance will be added elsewhere within the protected area system.

MNR and MNDM have a duty to ensure that this conflict between the regulation of protected areas and mineral exploration does not occur again in the future. The ECO believes that lands should be withdrawn from staking when MNR identifies them as candidates for protection. This manner of conflict is attributable to the disjunction between the laws for managing Crown land that are administered by MNR and those governing mineral development by MNDM.

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**Dissolved Oxygen Criteria for Protection of Lake Trout Habitat**

**Decision Information:**

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| Registry Number: PB06E6807 | Comment Period: 45 days |
| Proposal Posted: January 19, 2006 | Number of Comments: 4 |
| Decision Posted: May 29, 2006 | Decision Implemented: May 29, 2006 |

**Geographic Area:** Province-wide

**Description**

The lake trout *(Salvelinus namaycush)* is a species indigenous to North America and is a slow growing, late-to-mature fish, adapted to the deep, cold Canadian Shield lakes. Its qualities make it an avidly sought after target of the sport fishery. Trout populations are adapted to a narrow range of environmental conditions and they are particularly vulnerable to human impacts from over-fishing, nutrient enrichment, acidification, species introductions, and habitat destruction.

A key determinant of the health of lake trout populations is ample dissolved oxygen (DO) in the deep sections (the hypolimnion) of lake trout lakes. In January 2006, MNR posted to the Registry a proposed minimum DO criterion 7.0 mg/L mean volume-weighted hypolimnetic DO (MVWHDO) for lakes designated as lake trout lakes on the Precambrian Shield. Following a 45-day public comment period, the decision to adopt this criterion was posted on the Registry.

MNR stated in the Registry notice that its purpose is to provide a "uniform standard dissolved oxygen criterion to determine development capacity on inland lake trout lakes on the Precambrian Shield for use by MNR field staff and municipalities." MNR notes that "there has been a general decline in both the quality of the sport fishery for lake trout and in lake trout habitat in many lakes." The ministry further states: "Approximately 5 per cent of the province's lake trout populations have already become extinct; 43 per cent of the extinct populations were in southeastern Ontario." Only about one per cent of Ontario's lakes support lake trout, but this represents 20 – 25 per cent of all the lake trout lakes in the world.

The new policy is intended to support revised wording of the Provincial Policy Statement, which states:

> "2.1.5 *Development* and *site alteration* shall not be permitted in *fish habitat* except in accordance with *provincial and federal requirements*" and *where provincial and federal requirements* are defined as: "...legislation and policies administered by the federal or provincial governments for the purpose of the protection of fish and fish habitat, and related, scientifically established standards such as water quality criteria for protecting lake trout populations."

The PPS also states that:

> "*development* and *site alteration* shall not be permitted on *adjacent lands* to the *natural heritage features and areas* identified in policies [2.1.3, 2.1.4, and 2.1.5] unless the *ecological function* of the *adjacent lands* has been evaluated and it has been demonstrated that there will be no *negative impacts* on the *natural features* or on their *ecological functions*."

*Development* as defined by the PPS includes: "the creation of a new lot, a change in land use, or the construction of buildings and structures, requiring approval under the *Planning Act". Site alteration* means "activities, such as grading, excavation and the placement of fill that would change the landform and natural vegetative characteristics of a site."

In the past, various approaches were used by MNR district offices to assess the health of lake trout lakes, and to determine the capacity for development on their lakeshores. For example, informal standards used in the past included 6 mg/L MVWHDO for some lake trout lakes, and alternatively, a specification for some fraction of the hypolimnion volume (e.g., 20 per cent) being at optimal DO condition. The new 7 mg/L MVWHDO standard makes MNR's criterion for lakeshore capacity determination uniform across all MNR regions.

**Background**

*Limnological Background:*
Most lakes inhabited by lake trout are thermally stratified between June and October in Ontario. That is, layers of water in deep lakes form with a relatively shallow warm surface layer (the epilimnion), a middle-depth layer (the thermocline) in which temperatures fall off sharply with depth, and an extensive deep layer of cold water (the hypolimnion). It is this deeper zone which provides the favoured habitat for lake trout, owing to the well-oxygenated, and cooler temperature conditions prevailing throughout the year in this zone.

The amount of oxygen which can be dissolved in water is related to its temperature - the colder the water, the more oxygen it can hold. For example, bottom water (i.e., the hypolimnion) at 10 degrees celcius can hold up to 11.3 mg/L when saturated, while surface water, at 23 degrees celcius can only hold 8.6 mg/L when saturated.

Oxygen mixed into the water at the surface generally does not efficiently reach the bottom layers during the stratification period - it is predominantly during the fall and spring ice free periods, when the water column becomes well mixed that atmospheric oxygen becomes substantially incorporated into the water body. During the warm summer period, oxygen in the hypolimnion tends to become depleted gradually as a result of respiration by micro-organisms in bed sediments and in the water column, fueled by settling organic matter from the upper water layers where plankton production occurs during the late spring and summer growing season.

Hence, the suitability of the bottom water habitat for lake trout in terms of DO, will be initially high during the early part of the season, but if productivity and decay is high, by late summer and early fall it can diminish to sufficiently low levels to cause stress to the trout. Measured late season hypolimnetic DO provides a good indication of suitability of any particular lake for lake trout habitat; the 7 mg/L DO standard provides a basis for comparison.

The algal productivity of a lake trout lake with naturally reproducing, healthy trout populations is typically low, and algal growth is limited by loadings of nutrients, particularly phosphorus (P). Increases of P from sources such as grey water discharge, faulty or poorly sited septic systems, and erosional runoff can increase algal production. This has the potential to reduce the late season DO condition through oxygen uptake by micro-organisms which break down biomass in the water column. Lake management strategies designed to protect lake trout habitat therefore typically focus on controlling P sources in the watershed of these lakes.

*The Lake Trout Strategy:*
The fact that the inland lake trout populations were in jeopardy was recognized by the Ontario government over 20 years ago. At that time, a number of expert working groups were set up, and they submitted a series of technical and summary reports in 1991. The combined "Lake Trout Synthesis", contained 69 recommendations addressing fisheries administration, exploitation, habitat, fish stocking, species interactions and assessment of stocks.

Although some of the recommendations from the Lake Trout Synthesis have been implemented in some parts of the Province, no major program had been brought forward to promote sustainability of the remaining lake trout populations until October of 2005, at which time MNR announced a "coordinated strategy to protect lake trout populations in Ontario" . This multi-faceted strategy, entitled "The Lake Trout Strategy", was described in an information notice (XB05E6802) posted to the Registry October 13, 2005.

When implemented, the Lake Trout Strategy will consist of a number of components:

- The dissolved oxygen criterion which is the subject of this decision review.

- A consolidation of land management policies affecting the disposition of Crown lands contiguous to lake trout lakes. When finalized, these policies will lead to amendments to the relevant area-specific land use policies provided in the Crown Land Use Atlas, and inclusion of a relevant appendix to land use policies under the *Public Lands Act*. The principal intent of the policy is that: "...the ministry will not dispose of vacant, undeveloped Crown land, where the disposition of Crown land could subsequently lead to impacts to habitat or lakeshore carrying capacity for lake trout." This policy was posted on the Registry (*EBR* Registry No. 010-0172) on March 27, 2007, and re-posted May 10, 2007, to extend the comment period to June 25, 2007.

- Listing of lakes confirmed as lake trout lakes for management purposes. The list, consisting of a compilation of information on 2,283 inland lakes, has now been published. This document was not posted to the Registry as it was considered by MNR to be a consolidation of existing information and management policy; it is available for downloading by following the links from the Registry posting of the DO criterion (PB06E6807).

- New regulatory proposals for the management of the lake trout sport fishery. A proposed package of regulatory guidelines was posted to the Environmental Registry for a 60-day public comment period and a decision notice was published on February 5, 2007, (*EBR* Registry No. PB06E6003). The package includes a "tool kit" which describes regulatory guidelines, e.g., catch limits, seasons, size limits etc. It should be noted that a new Ecological Framework for Recreational Fisheries Management in Ontario has been developed by MNR, and the new regulatory approach for lake trout is being developed within that context.

The ECO notes that the above-mentioned proposal to consolidate ministry policy for disposition of Crown lands makes reference in its Appendix A to determination of lakeshore development capacity based on the new DO criterion. This proposal further indicates that "Application, data collection protocols and interpretation of the 7mg/L dissolved oxygen criterion will be consistent with the *Guidelines for the Application of a Dissolved Oxygen Criterion for the Protection of Lake Trout Habitat*." While the guideline document had not been released as of May 2007, it is important in regard to interpretation of the new DO criterion and it would have been beneficial to have simultaneously published it with the proposal for the DO standard.

*Lakeshore Capacity Planning:*
As a result of changes to the municipal planning system in 1996, many responsibilities under the *Planning Act* were downloaded to municipalities and planning boards. Local governments have to deal with proposed lakeshore development proposals, and under the *Strong Communities (Planning Amendment) Act 2004,* must make decisions consistent with the Provincial Policy Statement. The current planning framework involves a one-window service where MMAH provides the single point of contact for advice and approval. MNR and MOE may be involved at the Official Plan development stage and provide input

to MMAH on fisheries and water quality management requirements to assist in setting growth capacity limits around lakes. Routine decisions on lot severances, plans of subdivision and site plans are essentially made at the municipal level.

Since provincial downloading, municipal governments have been struggling to implement decisions consistent with MNR's lake trout lake management policies, and MOE's policies on water quality management. The Lakeshore Capacity Model has been used by MOE to assist municipalities in the process of establishing lakeshore capacity for development around all types of inland lakes since the 1970s. For many years, MNR, MOE and MMAH have been attempting to bring forward a more comprehensive set of lakeshore capacity assessment procedures which would have also included advanced modelling capability for P and DO, and proposed criteria for evaluating lake phosphorus and hypolimnetic DO.

Provincial agencies and municipal governments are cognizant of the need for controlling lake shoreline development for the protection of recreational water quality as well as for the protection of fish habitat. The District of Muskoka, for example, has independently established guidelines for the protection of recreational water quality of lakes within their municipality. These guidelines are based on lake phosphorus status and sensitivities of lakes to P loading, and are *not specifically tied to dissolved oxygen.* Although planning decisions of the District of Muskoka must take into account MNR's lake trout lake capacity status, decisions on lot severances etc. are based on application of the recreational water quality guidelines, based on phosphorus loading considerations.

For lakes where both phosphorus status and hypolimnetic DO indicate that some level of further development may be appropriate, the municipality will need some means of determining the limits to that growth. At present, the District of Muskoka bases its planning decisions for not-at-capacity lakes upon phosphorus sensitivity and has classified its lakes into various categories on this basis. Clearly, there are two disparate decision-making criteria being considered for planning purposes. MNR, MOE and MMAH should address this issue through continued development of lakeshore capacity management decision support tools and guidelines.

**Implications of the Decision**

It is difficult to state categorically what the implications of the new DO criterion will be, at least until all listed lake trout lakes have DO data for consideration. In conjunction with other lake trout assessment and management strategies, strategic implementation of this standard appears to be capable of affording protection for a species which has experienced serious reductions in population and diversity during the last 50 years.

The ECO notes that this policy does not make any distinction between "Put-Grow-Take" lake trout lakes wherein the lake trout fishery is sustained through stocking, and naturally reproducing lake trout lakes. Presumably either category of lake could be listed as "at capacity" by MNR, based on a consideration of DO regime. Some municipalities believe that more public input should be involved in this decision for the stocked lakes - i.e., should development for other purposes than fishing of artificially supported lake trout stock be allowed? However, MNR has pointed out that the existence of stocked lakes relieves the fishing pressure on trout populations in naturally reproducing lake trout lakes .

**Public Participation & *EBR* Process**

On January 19, 2006, MNR posted a proposal notice on the Environmental Registry for a 45-day comment period. In the notice, MNR also indicated that it had carried out a direct mailing of the proposal to 80 key stakeholder groups and associations.

MNR received four sets of comments on the Registry proposal for this policy. Comments were generally supportive.

One commenter was concerned with how a key study which contributed to the establishment of the DO criterion was carried out. Part of this process involved a questionnaire survey of MNR fisheries biologists in four districts. Respondents reported end-of-season DO conditions and ranked lakes according to recruitment success on a qualitative scale. The commenter was concerned with lack of detail in the survey process and results. MNR agreed with the comment and responded by providing further details in a revised section of the technical paper in question. The revised version of the paper is available through a link from the decision notice posting.

Another comment focused on the desirability of making mean volume weighted hypolimnetic DO data available on a lake-by-lake for listed lake trout lakes. MNR agreed that this would be a worthwhile addition to the listing of lake trout lakes and stated that it will endeavour to include such data where available in the next revision of the lake trout lakes listing.

Commenters pointed out that many lake trout lakes with DO consistently below 7 mg/L in the hypolimnion have supported healthy lake trout populations for generations, implying that some degree of adaptation may have taken place in these populations. MNR responded that there is evidence that lake trout recruitment success is in fact lower in lakes with DO below 7 mg/L, and reiterated its background physiological study data supporting a 7 mg/L criterion.

Some very extensive and detailed comments were submitted by commenters on the linkages between lakeshore use and development practices and lake trout DO. In particular, one commenter suggested that MNR should have provided data to demonstrate that lake trout habitat has been lost through shoreline residential development. MNR responded that linkages between anthropogenic activities (e.g., shoreline development) phosphorus loading, production, and hypolimnetic DO are irrefutable. Commenters expressed concern about blanket exclusion of development, even where strenuous controls prevent environmental impacts .

Another comment concerned the need to consider Georgian Bay in the light of this new criterion. While MNR acknowledged that the science behind the 7 mg/L criterion can inform decisions about lake trout fishery management on Georgian Bay, it responded that the criterion was specifically developed for use in determining shoreline development capacity on inland lake trout lakes on the Precambrian Shield.

**SEV**

MNR provided the ECO with a detailed statement of how its Statement of Environmental Values was considered in the development of the dissolved oxygen criterion. The ministry explained the particularly sensitive nature of lake trout and the necessity of firming up the approach taken to managing its habitat to ensure its protection.

MNR indicated that it anticipated that the economic, social and environmental consequences of the new criterion would be positive. In particular, the MNR statement says the protection for the lake trout resource provided by this criterion will ensure the continuation of a viable sport fishery which contributes to the province's economy.

**Other Information**

The lake trout management strategy has been developed during a period of rapid evolution for the province's recreational fisheries management framework. An update on the new framework will be found in the ECO Annual Report, page 87.

MOE's Provincial Water Quality Objectives specifies an oxygen objective of 54 per cent of saturation DO concentration for the protection of cold water biota. At optimal temperature ranges for trout of 10 to 12 degrees celcius, the MOE objective would range from 5.8 mg/L to 6.1 mg/L. MNR's dissolved oxygen criterion of 7 mg/L appears slightly more stringent than MOE criteria, however, trout also inhabit colder water, as low as five degrees celcius, which would correspond to an MOE DO objective of 6.9 mg/L. It is also worth noting that MOE's objective is qualified as follows: "In situations where additional physical

and/or chemical stresses are present these minimum levels may prove inadequate and more stringent Objectives may be necessary."

The Lakeshore Capacity Model which is used to determine shoreline development capacity has undergone changes over many years. A recent version focuses entirely on the effects of phosphorus on water quality, but does not attempt to model DO impacts. As a result, it is currently not possible to use this model to determine the effect of new lakeshore development on existing hypolimnetic DO. Guidance for determining shoreline development capacity for lakes with MVWHDO greater than 7.0 mg/L therefore is currently lacking a decision support tool based on oxygen changes - the basis of land use capacity decisions for the use of residual shoreline capacity is allowed to rest on phosphorus modelling alone.

Several recent OMB hearings have addressed disputes concerning lot severances, zoning by-law changes and Official Plan amendments related to development around MNR-designated "at capacity" lake trout lakes. The outcome of these hearings has varied, but in some cases the Board has taken a stance that would allow development to proceed based on septic system siting requirements derived from a consideration of the Lakeshore Capacity Model. A further option has been put forward in two Muskoka townships involving establishing tile field soil type, depth and flow path distance from the lake.

MNR has historically provided information to municipalities on lake trout lakes "at capacity". In the past, some lake trout lakes have changed in status from "at capacity" to "not at capacity" and vice versa over time. These changes may be attributable to changes in assessment procedures over the years. The establishment of the new DO criterion should stabilize the categorization process; however, it will require backing up with implementation guidelines from MNR.

The Natural Heritage Reference Manual contains guidance on section 2.1 of the PPS concerning Natural Heritage features including fish habitat. This MNR manual is out of date (see review by ECO in our 1999/2000 Annual Report, pages 68-69) and does not reflect changes to the 2005 PPS or to the new lake trout lake DO criterion. The ECO urges MNR to update and revise this manual to incorporate these changes.

**ECO Comment**

The establishment of a standard DO criterion addresses one of the environmental variables linked to development pressure that can impact on lake trout populations. However ECO believes more guidance is needed on how this policy is to be implemented. The ECO urges MNR to develop guidelines on implementation procedures for this policy in the near future, and to consult with municipalities and the public prior to their finalization. Some of this guidance may be provided by the yet to be released Guidelines for the Application of a Dissolved Oxygen Criterion for the Protection of Lake Trout Habitat, to which MNR refers in its proposal for policies on land disposition around lake trout lakes.

In addition, there will need to be guidance on assessment procedures to establish MVWHDO for lake trout lakes. DO measurements vary from year to year and particularly where MVWHDO is very close to the DO standard, some guidance on categorization of lake trout lakes would certainly be required.

ECO is also concerned that an unknown number of lake trout lakes exist which have not been listed in MNR's inventory of lakes designated for lake trout management. ECO urges MNR to develop a timeframe for updating this list, giving priority for areas where development pressure or other stresses to lakes are high. Initially, it would be desirable for MNR to identify the scope of this undertaking.

There are some gaps in interpretation of the criterion which need to be addressed. Where lake trout lakes are not meeting the new DO standard, MNR needs to clearly state its intention that no development would be anticipated around these lakes, and whether action plans need to be developed, or under what conditions lot development may occur. As an indication of the urgency of this need, several municipalities have developed rules under which lot creation and development may occur on "at capacity" lake trout lakes. These strategies are based on attempts to minimize or eliminate phosphorus loading, e.g., locating septic systems at a distance greater than 300 metres from the water's edge. ECO is concerned that

pertinent variables other than phosphorus from septics might be ignored by such an approach. Erosion resulting from natural vegetation removal, and shoreline modifications, for example, are two additional concerns which could impact directly on trout habitat.

Clear guidelines for determining land use strategies around lake trout lakes which are not "at capacity" are needed. At the present time, there are no procedures available to municipalities to make decisions on lot severances, or other development plans around such lakes. The default strategy for determining lot development scope on lake trout lakes above the DO standard, at least in the District of Muskoka, would appear to be based on phosphorus modelling.

ECO believes there should be ministry-led strategies developed in partnership with local governments and residents which will endeavour to maintain and upgrade lake trout habitat. The DO standard is a valuable tool, but alone will not guarantee sustainability of lake trout populations - each lake is different and failure to respect the sensitive nature of the lake trout, ensuring that other physiological and ecological needs, including ample food supply and spawning habitat are met, could have disastrous consequences. In other words, there are many other factors aside from DO which can and should be taken into account in determining the status of a lake trout lake before planning authorities and the OMB make land use management decisions.

Finally, the ECO believes that the success of the Lake Trout Strategy will depend in part on adequate resources being dedicated to the study and management of lake trout populations and their habitat. In its March 2005 progress report to the ECO, MNR stated that it will be considering a State of the Resource monitoring program for lake trout in the context of its new ecological framework for fisheries management, but since that time there has been no sign of progress. The ECO urges MNR to dedicate adequate resources to monitoring lake trout populations, and extend its limnological studies to support the new DO criterion and to work with other agencies, and municipal planning authorities to develop monitoring and management strategies.

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**Draft Recovery Strategy for Forest-dwelling Woodland Caribou (*Rangifer tarandus caribou*) in Ontario**

**Decision Information:**

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| Registry Number: XB06E6016 | Comment Period: 56 days |
| Information Notice Posted: July 10, 2006 | Number of Comments: 298 |
| Decision Posted: n.a. | Decision Implemented: Unknown |

**Geographic Area:** Northern Ontario

**Description**

In January 2001, the Ministry of Natural Resources (MNR) began the development of a recovery strategy for forest-dwelling woodland caribou. In 2006, more than five years after its initiation, MNR released a "draft" recovery strategy for this species at risk. This population of woodland caribou is listed as a "threatened species" under the federal *Species at Risk Act* and has a similar status in provincial policy. The Canadian Council of Forest Ministers also has recognized this species as an indicator of forest sustainability and its populations are declining across the country.

Population declines of woodland caribou are characterized by a pattern of range fragmentation accompanied by an immediate population decline, followed by a period of persistence of isolated populations exhibiting slow decline and eventual extirpation. Much of the range recession of woodland caribou over the past century in Ontario is coincident with landscape-level fragmentation of habitat and the subsequent isolation of caribou populations caused by logging, land clearing, and roads. Timber

harvesting also has been linked to a series of related threats to this species at risk, including changes to forest composition, increased forest fire suppression, and elevated levels of predation.

In Ontario, woodland caribou now are only found mainly north of 50°N, north of Hearst and Dryden, with isolated populations occurring along the north shore and some islands of Lake Superior. The northern extent of their range bisects the Hudson Plain at about 53°N latitude. Woodland caribou have disappeared from much of their southern historical range across Canada, with an estimated loss of half of their range in Ontario in the last century.

As recently as the late 19th century, woodland caribou ranged as far south as central Ontario to approximately 46 degrees latitude around North Bay. It is estimated that 20,000 woodland caribou remain in Ontario, of which the majority are known as the "forest-tundra" population and are not identified as a species at risk. However, approximately one quarter of Ontario's woodland caribou primarily inhabit the boreal forests and are described as the "forest-dwelling" population that is a species at risk. MNR speculates that about 3,000 forest-dwelling woodland caribou remain in the area set aside for commercial forestry, south of roughly 51°N. However, available estimates of the numbers of woodland caribou in Ontario "are essentially guesses."

Independent scientific research concludes that woodland caribou have lost an average of almost 35,000 square kilometres of range per decade in Ontario over the last century, an area approximately five times the size of Algonquin Provincial Park. This loss of range has effectively caused a northward recession of range of roughly 34 kilometres per decade. At this continued rate, and in the absence of substantive action, independent scientists have hypothesized that forest-dwelling woodland caribou will be wiped out in Ontario by the end of this century.

**Implications of the Decision**

The goal of the recovery strategy is to "maintain self-sustaining, genetically-connected forest-dwelling woodland caribou populations where they currently exist; ensure security for, and (reproductive) connections among, currently isolated mainland populations; and re-establish caribou in strategically selected landscape units to achieve self-sustaining populations and ensure connectivity."

Five recovery zones (Northwest, Northeast, Lake Nipigon, Lake Superior Coast and the Central Highlands) are proposed based on differences in caribou distribution, ecological conditions, and threats. Specific guiding principles are proposed for each recovery zone to assist with the creation of these yet-to-be developed action plans. To meet the recovery goal, 11 recovery objectives have been identified by MNR:

- "Establish benchmarks for range occupancy and population health of woodland caribou across Ontario in order to track changes.
- Establish and maintain a woodland caribou range occupancy database and related map to track changes in occurrence and connectivity of populations.
- Maintain or enhance the status and health of woodland caribou populations consistent with the strategic approaches for specific Recovery Zones across Ontario.
- Reduce known threats associated with range recession and population decline in the area of continuous woodland caribou range, specifically that of the Northwest and Northeast Recovery Zones.
- Reduce known threats associated with range recession and population decline of woodland caribou through immediate action within the Lake Nipigon, Central Highlands, and Lake Superior Coast Recovery Zones.
- Identify, evaluate, protect and manage habitat features and landscapes essential to caribou survival and recovery.
- Define metapopulations, refine Recovery Zones and identify recovery priorities by investigating genetic relationships among woodland caribou populations in Ontario.

- Protect and manage current caribou range and habitat, including future connections and rehabilitation areas by creating plans at multiple spatial and temporal scales.
- Better understand populations, meta-populations, habitat, threats, genetics, and other knowledge gaps by conducting scientific research.
- Generate support and partnerships for recovery implementation by promoting education and awareness of woodland caribou and boreal forest ecosystems.
- Develop policies and legislation to promote the protection and recovery of woodland caribou."

The recovery strategy also recommends that "a comprehensive provincial woodland caribou policy" be developed. According to MNR, the ministry is indeed working on a "caribou conservation framework" that will address actions that are needed to conserve all of Ontario's herds of woodland caribou. MNR has committed to the ECO that this particular policy will receive proper public consultation opportunities whenever it is completed.

*Targets for Population Recovery:*
Rates of change in the population size, either positive (increases) or negative (decreases), are central to determining the effectiveness of recovery efforts. However, MNR admits that "little information is available on the rates of [population] growth of Ontario caribou." Further, the ministry takes a 'hold the line' approach, essentially deeming the strategy successful if the numbers of woodland caribou do not drop. For example, MNR states that the strategy will be "successful" in its opinion if:

- Population numbers do not continue to decline on a constant basis;
- Population numbers only decline for a small portion of the population;
- Population numbers remain the same or increase for a large proportion of the population at the edge of current caribou range; and,
- Population numbers remain the same or increase for the small isolated populations that are confined to Pukaskwa National Park and the Slate Islands Provincial Park.

The central point of any recovery strategy should be to actually *recover* the population in question, boosting its numbers to the point where it is no longer considered a species at risk. The ECO believes that the strategy sets unambitious, and arguably defeatist, objectives that create a best-case scenario for forest-dwelling woodland caribou to remain as a "threatened species."

*Targets for Habitat Recovery:*
MNR states that the success of the strategy will be evaluated by a number of indicators, with range occupancy acting as the overall measure of caribou recovery. Currently occupied range, as defined by the present zone of continuous distribution and current use patterns of known populations, will serve as a baseline for recovery initiatives. However, again, the ministry is resigned to holding the line and focuses almost exclusively on existing range. The strategy seeks to – at best – maintain the species, rather than to promote its recovery:

> "Full recovery of former range southwards to Lake Nipissing is unfeasible. Biological, social and economic constraints dictate that even the maintenance of currently occupied range and populations will be a tremendous challenge. Recovery of former range will likely be limited to (i) specific locations along the southern limit of continuous occupied range and (ii) the establishment of linkages with isolated populations. Recovery will be an extremely difficult, expensive and long-term initiative, at a spatial and temporal scale not previously required under other provincial species recovery strategies."

The apparent lack of will to restore this threatened species to its former range is underscored by the fact that the five proposed recovery zones are almost exclusively limited to existing woodland caribou range. These zones were based on ecoregional or ecodistrict boundaries, as well as "social and ecological factors." These zones largely appear to cover existing range with few areas of historical range included and, therefore, the strategy admits that "recovery of former habitat will take decades to achieve."

*Forest Management Practices:*
MNR states that it has been modifying forest management practices to mitigate the effects of timber harvesting on woodland caribou habitat since the mid-1970s, but early attempts were unsuccessful, according to the ministry. In 1994, the ministry began applying its "Forest Management Guidelines for the Conservation of Woodland Caribou." This regulated guideline prescribes that forestry operations should harvest timber in 10,000 ha or greater blocks to minimize forest fragmentation, while ensuring comparable sizes of undisturbed old-growth forest for woodland caribou habitat. This guideline only applies to northwestern Ontario and, according to MNR, regional direction for forest management plans in woodland caribou range in northeastern Ontario is being developed.

In our 2001/2002 Annual Report, the ECO reviewed the caribou guidelines and MNR was urged "to use the boreal population of woodland caribou as a measurable indicator of forest sustainability." Further, the ECO also encouraged MNR to consider woodland caribou habitat and range occupancy in the creation of new protected areas. In the same Report, the ECO reviewed MNR's Forest Management Guide for Natural Disturbance Pattern Emulation, which has enormous implications for a range of species, and cautioned that this approach was a "grand experiment."

The *Crown Forest Sustainability Act* requires that all forest management units be independently audited at least once every five years. Given the importance of MNR's forest management guidelines for woodland caribou, the ECO conducted a review of relevant independent forest audits to assess its application (see box below). The ECO believes that a clear pattern emerges from our review in that woodland caribou habitat is progressively being lost due to current forestry policy.

*Critical Habitat:*
The proposed recovery strategy does not identify the critical habitat that is necessary for the survival of forest-dwelling woodland caribou. Instead, the recovery strategy defers the identification of critical habitat to the five action plans that are to be developed at some future date. The federal *Species at Risk Act* requires the identification of critical habitat, although the law does allow for it to be identified in an action plan rather than in the strategy itself. It is noteworthy that the government of Canada can order the government of Ontario to actually protect the critical habitat of forest-dwelling woodland caribou if it is of "the opinion that the laws of the province do not effectively protect the species or the residences of its individuals."

**Can Forestry and Woodland Caribou Co-Exist?**
MNR has been applying its "Forest Management Guidelines for the Conservation of Woodland Caribou" in northwestern Ontario since 1994. The ministry's recovery strategy relies on these guidelines "to protect caribou habitat." Given these facts, the ECO sought to determine the impact of current forest management practices on woodland caribou. The *Crown Forest Sustainability Act* requires that all forest management units be independently audited at least once every five years. In reviewing these audits, the ECO believes that a clear pattern exists in which woodland caribou habitat is progressively being lost due to current forestry practices.

<u>Cochrane Moose River Management Unit, Independent Forest Audit, 2000-2005</u>
"Due to inadequate caribou habitat and population information OMNR and Tembec had cooperated by modifying access and harvest activities when new information became available…. The auditor notes information with respect to caribou is limited."

<u>English River Forest, Independent Forest Audit, April 1, 2000 – March 31, 2005</u>
"Appendix 27 of the plan, which was written by MNR staff, also portrays the tension on the planning team: '….the basic premise of wildlife habitat retention was consistently disputed by Bowater. As a result it wasn't possible to examine the potential for additional management actions during this plan'. While the MNR author's frustration is evident in this quote, Company personnel presented a similar level of frustration at what they characterized as intransigence on the part of MNR members on the planning team to consider their perspectives on wood supply management…. MNR staff in Ignace have collected data which provide good evidence of caribou inhabiting areas south of the caribou line. MNR has not identified a corporate approach as to how to deal with such situations, other than to acknowledge that the Class EA

and FMPM require them to accommodate the habitat needs of species at risk… The present FMP (Table FMP-5) predicts a decline in caribou winter habitat of more than 20 per cent at the time of the Desired Future Forest Condition, calling the sufficiency of present management somewhat into question.… Corporate MNR should develop a strategy for dealing with the integration of caribou habitat requirements and forest management in instances where caribou are present south of the caribou line."

Kenogami Forest, Independent Forest Audit, 2000-2005
"The audit team learned that years of survey information on woodland caribou winter habitat and calving areas was not entered into NRVIS because provincial data standards were not finalized. It would seem prudent for MNR to finalize the data standards and enter these data as soon as possible to ensure these values are properly addressed through the AOC planning process and to make data provincially available for use in the woodland caribou recovery strategy…. Company was active supporter of woodland caribou research project."

Ogoki Forest, Independent Forest Audit, April 1, 2000 – March 31, 2005
"Nevertheless, the amount of caribou habitat will fall by 57 per cent over the next 100 years. The Audit Team is aware that the present management guidelines represent the Ministry's good advice on management of caribou habitat. However given evidence that caribou are a sensitive species, and that their habitat is projected to decline markedly, the Audit Team believes the Ministry must provide strong objective evidence that the projected decline in habitat will not further endanger caribou. The Audit Team recommends that the Ministry conduct an objective assessment of the viability of the caribou population on the Forest, and that the results of the assessment be incorporated into subsequent forest management plans."

Red Lake Forest, Independent Forest Audit Report, 2000-2005
"The woodland caribou mosaic is a significant landscape impact that influences wood supply (social and economic objectives)…. Clearly, the Red Lake Forest is challenged in its future ability to maintain the DEMAND wood supply targets while at the same time implementing the landscape objectives as they relate to woodland caribou and marten. There is no margin that allows for the potential risks of any future fire or catastrophic wind events without further worsening the wood supply outlook."

Smooth Rock Falls Forest, Independent Forest Audit, 2000-2005
"Corporate Ministry of Natural Resources must make every effort to finalize woodland caribou values information data standards."

Wabigoon Forest, Independent Forest Audit, 2000-2005
"The 2003-2008 FMP states that, "The Woodland Caribou (foraging and winter) can be a locally featured species, however the Forest is located south of the Caribou's range, therefore habitat for the species will be reported as a regionally select species but not actively managed as a locally featured species". This was consistent with the direction of the FMPM."

Caribou Forest, Independent Forest Audit (April 1, 1999 – March 31, 2004)
"The Audit Team is concerned that progressive weakening of the habitat targets may lead to excessive population reduction in the longer term…. Given the marked declines in caribou habitat, it is certainly reasonable to ask whether caribou will be maintained on the forest…. The fact that the planned future forest will be less hospitable for caribou and that it will provide considerably less habitat for most indicator species suggests that a re-examination of the desired age-class structure of the future forest may be in order… Management measures which will foster a more caribou-friendly future on the Caribou Forest may well involve trade-offs between wood supply and caribou habitat."

An Independent Audit of the Forest Management on the Armstrong Forest for the Period of 1995-2001
"The auditors are concerned about how draft woodland caribou forest management guidelines were incorporated into the strategic modeling of the 2000 forest management plan…. There is very little information on woodland caribou habitat and presence over most of the Armstrong Forest."

Independent Forest Audit, Kenora Forest, 1998-2003

"Little is known about the specific habitat preferences for the provincially threatened woodland caribou."

An Independent Audit of Forest Management on the Nagagami Forest for the Period 1997 to 2002
"Regional input regarding caribou was included in the preparation of the 2001 FMP, but provincial or regional strategies to address woodland caribou populations in fringe areas south of the "caribou line" were lacking…. Although the measures taken on the NF to account for caribou appear reasonable, the adequacy of this approach cannot be determined because of the poor understanding of caribou habitat requirements on the Forest…. The OMNR should improve its collection of fisheries and caribou values data to support forest management planning and ensure the protection of these values."

An Independent Audit of Forest Management on the Lake Nipigon and Auden Forests for the Period 1996 to 2001
"Combined with a lack of data on caribou distribution, habitat relations, and abundance on the Auden Forest, it was difficult for the audit team to determine the potential effectiveness of the caribou mosaic from that plan…. The audit team, however, is concerned with the continuing lack of effort to collect the necessary and outstanding values information required to support forest management planning…. Establishment of a full caribou management mosaic on the Lake Nipigon Forest was not appropriate, given the small proportion of the Forest that is north of the caribou line."

*Monitoring and Research:*
The recovery strategy astutely recognizes that the persistence of woodland caribou in Ontario will depend on an adaptive management process that incorporates long-term research. As woodland caribou numbers are poorly suited to direct population assessment, research initiatives "must investigate direct measures of population health (i.e., measures of population growth) to the pattern, quantity, and distributions of various habitats, especially related to habitat attributes used in forest management planning."

The recovery strategy states that "the major research objectives must include an examination of the effects of landscape disturbances created by commercial forestry operations on woodland caribou populations in Ontario." Specifically, it cites the need for increased research on caribou occurrence and density; (ii) forest landscapes, densities of other ungulates, and predation; (iii) caribou habitat dynamics and habitat selection; (iv) the ability of forest harvesting and silvicultural practices to create a managed forest suitable for caribou; and (v) the cumulative impact of direct and indirect threats to woodland caribou.

MNR is in the process of consolidating all woodland caribou observations and satellite telemetry locations to create a provincial database. The recovery strategy states that "the database will be a critical component of the long-term monitoring process required to effectively track range occupancy." The ministry states the need to develop standards for monitoring range occupancy including a detailed survey protocol, frequency (i.e., inter-survey interval), intensity (degree of coverage), and criteria for selecting survey areas.

*Fire:*
Fire has been an integral component in the dynamics of the boreal forest for thousands of years. The forest-dwelling boreal population of woodland caribou depend upon fire as an ecological process to renew their habitat. However, over the last century, human fire suppression and logging practices have significantly altered natural fire regimes. The recovery strategy makes little mention of this issue other than to suggest that "input into the review of provincial and regional fire strategies in the interest of maintaining current or creating future caribou range" will be provided.

In reviewing MNR's Forest Fire Management strategy, in our 2004/2005 Annual Report, the ECO raised concern that "there are serious inconsistencies… with landscape-level ecological implications." For example, specifically with regard to woodland caribou, the ECO cautioned that "it is not known how this policy choice – to replace naturally occurring fires with forest harvesting – will affect this species at risk."

*Forest Species Composition and Age Class Imbalance:*
Older conifer forests provide caribou with a source of arboreal and terrestrial lichens, which is an important component of the winter diet for this population. Mature conifer forests are generally used less by other ungulate species, which are more reliant on early successional forests. The recovery strategy acknowledges that "habitat change resulting from forestry activities often leads to improved habitat conditions for deer and moose and other prey species, which can lead to greater predator densities."

*Predator-prey Dynamics:*
Low population densities and the use of large tracts of older conifer forest and peatlands allow caribou to isolate themselves from moose and deer and their associated predators. However, the recovery strategy states that as disturbances occur, such as logging or severe forest fires, moose populations increase in the short-term in response to an increase in early successional forest and edge. The recovery strategy suggests that moose populations within caribou range should remain at levels similar to those occurring under a natural fire regime. It recommends the development of "species-specific management objectives and alternate habitat and landscape management prescriptions for caribou, moose and deer in areas of overlapping range."

Woodland caribou and wolves naturally co-exist in a viable predator-prey dynamic. However, that balance is upset when landscape disturbances occur and other ungulates – moose and deer – migrate into an area, causing an increased prey base for wolves that increases their population density. North of approximately 49°N latitude, estimates of wolf density are six to 7.5 wolves per 1,000 $km^2$ in occupied woodland caribou range. These wolf densities correspond with the tolerances described for woodland caribou in their forest management guidelines, although scientific studies conducted in other jurisdictions in North America report higher tolerances.

Generally, in areas that have historically been intensively logged, estimated wolf densities rise to 15 to 28 wolves per 1,000 $km^2$. The application of the moose guidelines in unoccupied historic range virtually guarantees that woodland caribou will not re-occupy these lands due to the elevated moose and wolf numbers alone.

The apparent conflict between two regulated guidelines under the *Crown Forest Sustainability Act* makes a difficult situation even worse for the forest-dwelling woodland caribou. MNR's "Forest Management Guidelines for the Conservation of Woodland Caribou: A Landscape Approach" prescribes logging in very large blocks of 10,000 ha or more to minimize forest fragmentation and edge in order to decrease moose habitat. MNR's "Timber Management Guidelines For the Provision Of Moose Habitat" prescribes cutting in small blocks to maximize forest fragmentation and edge to increase moose habitat. Consequently, the moose guidelines alter landscape patterns, causing increased wolf densities and unsustainably high mortality risks for caribou. Even if the moose guidelines are not applied in occupied caribou range, their application encourages a northward range expansion that pressures woodland caribou.

MNR does not consider impacts on other species when managing moose populations through regulated hunting. The ministry estimates that there are approximately 99,000 moose in harvestable areas in Ontario, of which only a small fraction are found south of the French River or 46°N. According to MNR's 2004 hunter survey, almost 7,550 moose were harvested which translates to an approximate annual yield of seven per cent of the overall moose population. The ministry uses a lottery system to allocate moose tags and the quota for available tags varies by wildlife management unit (WMU) depending on local moose population levels. In 2005, almost 15,000 tags were issued province-wide, although the number of individual tags issued varies drastically between wildlife management units. The ECO believes that MNR should aim to achieve pre-anthropogenic disturbance population levels of moose when setting quotas within occupied woodland caribou range and where re-colonization of woodland caribou is feasible.

*The Role of Protected Areas:*
Protected areas serve an integral role in conserving biodiversity and protecting species at risk. However, there is broad scientific consensus that even the largest protected areas in Ontario in which woodland caribou are present – Woodland Caribou Provincial Park (4,500 $km^2$) and Wabakimi Provincial Park

(8,920 $km^2$) – are insufficient for maintaining this species at risk. As stated in the recovery strategy, woodland caribou require ranges in the order of thousands of square kilometres of little disturbed or undisturbed boreal forest. The only action that the recovery strategy suggests is that management planning for protected areas within caribou range should explicitly consider woodland caribou. However, that is arguably a moot point, as the applicable laws implicitly require this consideration.

South of their continuous range, isolated populations of woodland caribou exist in several provincial parks and a national park. These protected areas include Slate Islands Provincial Park (67 $km^2$), Michipicoten Island Provincial Park (367 $km^2$) and Pukaskwa National Park (1,878 $km^2$). These protected areas contain unique habitats that allow woodland caribou to avoid high levels of predation. However, as these populations are reproductively isolated, the recovery strategy states that "their long-term survival is in question."

While protected areas may sometimes serve as small safe havens for species such as woodland caribou, adjacent land uses can compromise this protection. For example, as discussed in the ECO's 2005/2006 Annual Report, "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 to the ecological integrity of this protected area, but the ministry approved the forest management plan with only a minimal modification." The strategy does attempt to address such concerns in stating that land practices should be modified "in a delineated zone in vicinity of Pukaskwa National Park and including portions of managed forest," but no details as to how or when this would occur are provided.

The ECO is concerned that the recovery strategy makes no mention of the need for new protected areas in northern Ontario. Protected areas only cover 7.7 per cent of the northern boreal, north of the Area of Undertaking. Numerous independent scientific studies have concluded that a network of protected areas, including some areas that are *at a minimum* 9,000 to 13,000 $km^2$, are necessary to have a minimal prospect of maintaining viable herds of woodland caribou. Further, there is a broad consensus among many non-governmental, First Nations, and industry groups that upwards of 50 per cent of the boreal forest must be within protected areas to maintain its ecological processes.

*Hunting:*
The hunting of woodland caribou by non-First Nations has been banned since 1929 in Ontario, according to the strategy. Subsistence hunting by First Nations with treaty rights does currently take place, although no data exists on the annual harvest levels. The strategy estimates that 610 to 730 woodland caribou are harvested annually, of which roughly a quarter are from the forest-dwelling population. MNR hypothesizes that the number of animals that are illegally hunted by non-First Nations is low based on the fact that there are few legal prosecutions, which the ECO believes is questionable logic, because there is little surveillance by enforcement staff.

The hunting of woodland caribou is not as steadfastly "banned" as stated by the strategy. A species should be listed as "specially protected" under the *Fish and Wildlife Conservation Act* (*FWCA*) for it to be effectively banned from hunting. In fact, woodland caribou are listed as a "game mammal" that may be hunted under the authority of a licence issued by MNR. However, the regulation under the *FWCA* that prescribes open seasons for hunting lists woodland caribou as possessing a year-round closed season. The use of such a minor technicality to prohibit the hunting of a threatened species at risk is not reassuring.

*Climate Change:*
The recovery strategy does not substantively address the impacts of climate change on this species at risk. The recovery strategy states that "climate change leading to changes in precipitation, decreased fire return intervals, or increased severity of fires could affect caribou by changing vegetation communities." Beyond the impacts of resource development, climate change is likely to be one of the most critical threats to many species at risk in Ontario and it is alarming that the recovery strategy gives minimal treatment to it. The recovery strategy does state that there is a need for predictive models "to assist in evaluating the ways in which landscapes can be modified to maintain and improve caribou population

persistence (probability of survival and reproduction) under increased economic activities and climate change."

The strategy does acknowledge that the present pattern of climate change may continue to favour the expansion of white-tailed deer range. This is of particular concern as populations of deer and caribou rarely overlap. Caribou are very susceptible to a parasite that is naturally hosted in deer, the meningeal worm (*Parelaphostrongylus tenuis*), and they suffer high mortality rates due to infection.

**Public Participation & *EBR* Process**

MNR posted this recovery strategy as an information notice with a comment period on the Environmental Registry, rather than as a proposal notice as required by the *Environmental Bill of Rights* (*EBR*). By not adhering to the *EBR* in this case, MNR does not have to legally consider public comments, consider its Statement of Environmental Values (SEV), nor post a decision notice describing the final course of action. In September 2006, the ECO advised MNR that it should re-post the recovery strategy as a regular proposal notice on the Environmental Registry.

MNR takes the position that recovery strategies are "advice to government" by a given recovery team and that they are not government policies. The ministry also uses the rationale that recovery strategies are "science" and, as such, do not require proper public consultation. MNR also states that it is under no obligation to implement the recovery actions that are recommended, therefore, recovery strategies are not policy. Lastly, MNR believes that public consultations that may occur under the federal *Species at Risk Act* are sufficient.

The *EBR* defines a policy as any "program, plan or objective and includes guidelines or criteria to be used in making decisions." By that legal definition, recovery strategies are government policies and must be properly posted on the Environmental Registry to ensure government accountability and transparency. Further, the federal *Species at Risk Act* is not a timely or equivalent public participation process given the prominent role of MNR in conserving Ontario's species at risk.

The improper posting of recovery strategies is a systemic problem that the ECO has repeatedly requested that MNR resolve. Recovery strategies fit the definition of a policy under the *EBR*, regardless of the composition of a recovery planning team. In this case, 15 of the 16 recovery team members are MNR staff. Further, other rationales put forward by MNR, such as a policy being "science-based" or containing actions that may not be implemented, are not cause to exempt the ministry from adhering to the *EBR*. Indeed, the very policies that drive this systemic problem were not posted for public consultation, as discussed in the ECO's 2003/2004 Annual Report.

MNR received 16 comments on the recovery strategy from a wide array of stakeholders groups. The ministry also received 282 form letters calling for increased protection for woodland caribou, as well as hundreds more after the 56-day comment period. This high degree of public interest also underscores the value of treating it as a regular policy proposal on the Environmental Registry.

The Ontario Forest Industries Association (OFIA) did not support the approval of this strategy and stated that additional consultation with the forest industry was necessary. The OFIA suggested that the approval of the recovery strategy be "suspended" as it "needs to be simplified and streamlined to ensure that recovery initiatives are not only effective, but efficient (i.e., consider and minimize impacts on social and economic values)." In particular, the OFIA sought to ensure that any recovery strategy "dovetails" with existing forest management direction.

Weyerhauser, one of Ontario's largest forestry companies, provided extensive comments on the strategy. Weyerhauser commented that much of the information on which the strategy relies is "circumstantial" evidence, including historical population sizes and range occupancy. Indeed, Weyerhauser posed the rhetorical question, "Are woodland caribou in Ontario truly a species at risk?" Among their many other concerns was the need for MNR to dispel the notion that "caribou are in immediate danger from forest management activities and that nothing is being done to protect caribou and their habitat." Weyerhauser

also stated that the prohibition on commercial forestry and mining within protected areas "may in fact be detrimental to caribou habitat in the long-term."

The Ontario Federation of Anglers and Hunters (OFAH) expressed numerous concerns about the recovery strategy, including that the harvest of woodland caribou by First Nations was "not sustainable." The OFAH believe that "predation and Aboriginal caribou harvests are significantly limiting caribou populations and these factors must be actively minimized." Further, this organization also expressed concern that MNR would be prioritizing this species at risk over others, as "caribou provide few social or economic benefits for Ontario residents while both moose and deer provide significant recreational opportunities and generate significant economic wealth for the province." The OFAH also criticized the recovery strategy for calling for the decommissioning of forest access roads as this proposed action would cause "losses of hunting and angling opportunities."

The Wildlands League supported the objectives of the strategy to recover woodland caribou, but it expressed serious concerns with its content and timing. This organization stated that MNR was responsible for the "unconscionable delay" in recovering the species, as well as failing to adequately consult the public due to its "distorted use" of the Environmental Registry. Of key concern to the Wildlands League was the failure of the strategy to identify and legally protect critical caribou habitat. This organization recommended that MNR put "a halt to all development north of the Area of Undertaking (AOU) until a comprehensive, conservation based land use planning process" is implemented that ensures the protection of woodland caribou.

Sierra Legal Defence Fund (SLDF) also took issue with the "distorted public process" that MNR used to consult the public on its proposed strategy. This organization was "gravely concerned" that MNR had not adhered to its obligations under the *EBR* to post the strategy as a proposal notice on the Environmental Registry. SLDF stated that the "draft recovery strategy should be considered MNR policy and thus should trigger the public's right to comment and to have those comments duly considered."

The Wildlife Conservation Society Canada (WCS Canada) expressed concerns that there has been a "protracted delay in moving forward on meaningful recovery actions" for Ontario's woodland caribou. In particular, this organization was critical of the proposed recovery strategy's failure to define and delineate critical habitat for this species at risk. WCS Canada also stated that it is "alarming" that no new legal measures to protect habitat were proposed in the recovery strategy given that the sizes of existing protected areas are regarded as insufficient to adequately protect woodland caribou. This organization also suggested that the northern boundaries of the recovery area be extended all the way to Hudson Bay, as the ranges of forest-dwelling and forest-tundra woodland caribou types are based on outdated "best guesses" that are increasingly in question.

A coalition of organizations, including Ontario Nature and the David Suzuki Foundation, jointly submitted a comment on the strategy. They expressed concern that the strategy fails to implement on-the-ground actions to protect the species as it "allows the *status quo* to continue in terms of logging, road building and other human development in woodland caribou habitat." These organizations criticized the strategy for failing to identify and protect critical habitat, as well as voicing the urgent need to develop a provincial road strategy to mitigate the effects of logging on woodland caribou.

Forest Ethics commented that the strategy's "apparent lack of urgency is unacceptable" as it effectively promotes a "business as usual" approach. This organization also criticized the strategy's failure to consider the impact of climate change on woodland caribou, including predictions and scenarios addressing population size and habitat supply. Forest Ethics also took exception to the strategy's reliance on MNR's Forest Management Guidelines for Woodland Caribou due to the lack of evidence of caribou re-colonizing habitat that has been logged, the absence of monitoring to determine the effectiveness of the guidelines, and the use of questionable baseline information to determine existing range occupancy. This organization recommended that MNR immediately defer all forestry operations in woodland caribou range in the AOU, as well as declare a moratorium on all development activities north of the AOU pending a comprehensive land use plan.

A scientific consulting firm, which has conducted work on behalf of DeBeers and its Victor Diamond Mine, submitted comments on the strategy. This firm commented that the strategy does not sufficiently address the migrations of woodland caribou, particularly the movement of the forest-dwelling population between Ontario and Manitoba. In monitoring radio-collared woodland caribou, this firm has noted that some individual caribou from the Attawapiskat area travel upwards of 500km between summer and winter ranges. This firm also stated that the delineation between the forest-dwelling and the forest-tundra populations is based on dated information and should be updated as it has major conservation implications. As well, they also expressed concern that the recovery team had no First Nation representatives and the recovery plan "will not be of much value" if it does not have the support of First Nations.

**SEV**

As noted above, MNR decided that the recovery strategy did not require a regular notice on the Environmental Registry and, further, the ministry did not prepare a consideration of its Statement of Environmental Values (SEV).

**Other Information**

In February 2006, a workshop was convened at the University of Ottawa for academic and non-governmental scientists to explore areas of consensus related to woodland caribou recovery. Based on an agreement of woodland caribou biology, behaviour, and habitat requirements, these scientists concluded that several management implications are evident:

- "Woodland caribou management and conservation decisions should not occur at a smaller scale than that of a herd's range.
- The entire woodland caribou range, across all herds, should be designated as critical habitat.
- Low levels of industrial development within a woodland caribou range may threaten the viability of the herd.
- Large areas must be free from industrial activity to maintain woodland caribou herds.
- The effects of industrial development on woodland caribou are likely permanent.
- Extirpation of woodland caribou from disturbed regions will be delayed.
- Timing of human activity has little effect on woodland caribou populations.
- Commonality likely exists between herds across Canada regarding impacts.
- Thresholds of disturbance are not fully known but appear to occur at the scale of kilometres or more."

In October 2006, the Wildlands League submitted an application for review under the *EBR* on "the extent and sufficiency of existing guidance material and support mechanisms regarding the management of woodland caribou produced by OMNR to date, including a determination of the need for new policy and regulation for the protection of woodland caribou." The ECO forwarded this application to MNR, MOE, ENG, and MNDM.

**ECO Comment**

Woodland caribou epitomize why significant changes should be made to the way in which the Ontario government regulates and plans for northern Ontario, particularly within the boreal forest. In our 2005/2006 Annual Report, the ECO recommended that "MNR, MOE, MNDM, and ENG consult the public on an integrated land use planning system for the northern boreal forest, including detailed environmental protection requirements that reflect the area's unique ecology." The continued lack of "big picture" thinking and a comprehensive land use planning process are serious barriers to environmental protection in northern Ontario.

Woodland caribou represent the "hard-to-perceive, slow-motion crisis" that faces many species at risk. Woodland caribou also are a species that exhibits an 'extinction debt' – there is a lag time of

approximately 20 years between when their habitat is impacted by human activity and when they undergo local extirpation. Given that the Canadian Council of Forest Ministers has recognized woodland caribou as an indicator of forest sustainability, concerted and sustained action regarding this species at risk is essential.

The ECO is gravely concerned about the long-term survival of Ontario's woodland caribou. After waiting more than five years for this draft recovery plan to be developed, Ontarians have been provided with few reassurances that this species at risk will survive until the next century. In reviewing independent forest audits required by the *Crown Forest Sustainability Act*, the ECO believes that a clear pattern emerges that current forestry policies are not preventing the decline of woodland caribou in Ontario.

This recovery strategy is best described as an endorsement of the status quo and it is a further delay in taking tangible action. The strategy describes some pressures, but it fails to genuinely tackle threats to the species. It also fails to identify critical habitat and the need for new protected areas. Simply put, it does not meet the basic needs of this species at risk to maximize its chance of survival.

The ministry takes a 'hold the line' approach, essentially deeming the strategy successful if the numbers of woodland caribou do not drop. Indeed, it is preposterous that the ministry's primary measure to "protect" this species at risk are forestry guidelines on how to progressively log its habitat. The central point of any recovery strategy should be to actually *recover* the population in question, boosting its numbers to the point where it is no longer considered a species at risk. The ECO believes that the strategy sets unambitious, and arguably defeatist, objectives that creates a best-case scenario for forest-dwelling woodland caribou to remain as "threatened species."

The recovery strategy states that conserving this threatened species "will be an extremely difficult, expensive and long-term initiative, at a spatial and temporal scale not previously required." These facts are true. However, the ECO believes that the strategy's lack of effective measures to conserve woodland caribou appears to be influenced more by such political considerations, despite MNR's assertion that recovery strategies are purely "science-based."

The *Crown Forest Sustainability Act* commits the Ontario government to sustainable forestry. This law states that "large, healthy, diverse and productive Crown forests and their associated ecological processes and biological diversity should be conserved." That is the vision and the ideal. Perhaps the recovery of woodland caribou in the industrial forest is the ultimate test of that vision and in the end we may fail in the task, but we should not fail because we did not commit the research and resources necessary to make a sincere and competent effort. We owe that to those who cast the vision of sustainable forestry for Ontario and we owe that to the caribou.

# SECTION 5

## ECO REVIEWS OF APPLICATIONS FOR REVIEW

# SECTION 5: ECO REVIEWS OF APPLICATIONS FOR REVIEW

## Ministry of Agriculture, Food and Rural Affairs

### Review of Applications R2006001, and R2006002

### Review of the Regulatory Framework for Sewage Biosolids (Review Denied by MOE and OMAFRA)

**Background/Summary of Issues**

For over 25 years, municipal sewage biosolids have been applied to farmland for the purpose of enhancing crop growth. Farmers have benefited because the use of sewage biosolids reduces their reliance on more costly fertilizers, while the practice offers municipalities a convenient and cost effective means of disposing of this end product of the sewage treatment process. However, this practice has been controversial. Concerns about the public health and environmental effects have not been quelled, even though the practice is regulated and quality standards and land application best management practices have been implemented. In addition, operational challenges, such as the increasing shortage of suitable farmland, have arisen.

Lystek International Inc. (Lystek) has developed a new technology that it claims exceeds current quality standards, thereby providing a higher level of public health and environmental protection. The applicants have requested that the regulatory framework for sewage biosolids management be enhanced to recognize the benefits that improvements in the quality of sewage biosolids can provide to the environment and to society.

*Background:*
Municipal sewage treatment plants (STPs) process sewage from residences and other sources including industry (under sewer use by-laws.) Most incoming sewage is treated to produce a liquid effluent that is discharged into lakes and rivers, and sewage sludge. Comprised mostly of water, sewage sludge also contains organic material and microbes, including protozoa, rotifers, bacteria, viruses and parasites. It may also contain metals and persistent organic chemicals from industrial operations, and pharmaceuticals and any other materials that are flushed down sinks and toilets. Municipal STPs treat the sewage sludge to reduce its odour and the concentration of pathogens, e.g., bacteria, viruses and parasites, that could cause human and wildlife diseases. The resulting product, called sewage biosolids, contains nitrogen, phosphorus, potassium and micro-nutrients, and can be used as a fertilizer and soil conditioner.

In Ontario, sewage biosolids are often deposited in a landfill site or applied to farmland. Several municipal STPs incinerate sewage biosolids. Although other disposal options are available, including land application to forests, disturbed land and mine tailings, composting and gasification, they are not widely practiced in Ontario.

> Municipal STPs produce over 300,000 tonnes of sewage biosolids every year.

*U.S. EPA Part 503 Biosolids Rule:*
Since 1993, the U.S. Environmental Protection Agency (EPA) has provided a regulatory framework that recognizes two classes of pathogenicity in sewage biosolids. Under the U.S. EPA regulation – Title 40 of the Code of Federal Regulations, Part 503, Subpart D – biosolids are classified as either “Class A” or “Class B” depending on the level of pathogens. Class A biosolids do not have detectable levels (often described as pathogen-free) of fecal coliforms and *Salmonella sp.* bacteria, enteric viruses (e.g.,

poliomyelitis) and viable helminth ova (worm eggs.) In the U.S., Class A biosolids can be applied to all types of land including lawns and home gardens without land application restrictions if pollutant and vector (e.g., flies, mosquitoes and other disease-carrying organisms) attraction reduction requirements are met. Class B biosolids have detectable levels of pathogens and, although they cannot be applied to lawns and home gardens, can be applied to farmland if appropriate actions are taken to prevent human and livestock exposure to the sewage biosolids after application. Class B sewage biosolids are considered to be of lower quality than Class A sewage biosolids.

*Application of Sewage Biosolids to Farmland:*
Although the application of sewage biosolids to farmland provides municipalities with a low-cost means to recycle their sewage biosolids, suitable farmland is not always available within a reasonable distance and is generally located in southern Ontario where geology and weather are considered to be more favourable than in northern Ontario.

According to studies reviewed by the Ministry of the Environment (MOE), the probability that stabilized sewage biosolids applied according to the guidelines may still contain sufficient concentrations of pathogens to cause disease is low. Sewage biosolids may also contain some heavy metals, such as mercury, lead and arsenic, pharmaceuticals and antibiotics. They also have the potential to produce unacceptable odours, contaminate surface and ground waters, and may be toxic to or cause disease in plants or animals. To reduce the risk of harm to people, livestock, wildlife, crops, plants, soil and water, MOE published the Guidelines for the Utilization of Biosolids and Other Wastes on Agricultural Land in 1996, which replaced earlier versions of the guide. The guidelines define quality and other requirements for sewage biosolids including: maximum concentrations of metals (namely, arsenic, cadmium, cobalt, chromium, copper, mercury, molybdenum, nickel, lead, selenium and zinc) and non-biodegradable materials such as glass and plastic; pH; sampling; and record keeping. The guidelines also define best management practices related to land application including: application rates and methods; storage restrictions; record keeping; setbacks from surface water and water wells; and waiting times before crops grown on land that has received sewage biosolids can be harvested and livestock can be allowed to graze on it.

*Deposition in a Landfill Site:*
Sewage biosolids may also be deposited in a landfill site or used as a daily cover in a landfill site. This disposal approach is common, particularly in northern Ontario. Landfilling is also used as a contingency measure in case the primary disposal method becomes unavailable. However, public complaints about odour and declining landfill capacity are making landfilling less attractive. For instance, Toronto and Windsor shipped large amounts of sewage biosolids to the Carleton Farms Landfill site in Michigan until August 2006, in part, due to a lack of suitable farmland and landfill capacity in Ontario. However, the owner of the site, Republic Services, was ordered by the state to stop accepting municipal sewage biosolids after receiving complaints about the odour.

*Incineration:*
Several municipal STPs incinerate sewage sludge including Duffin Creek Water Purification Control Plant (York Durham Region, City of London and Highland Creek WPCP (City of Toronto.) The sewage sludge is first dewatered and then incinerated in a process that produces flue gas and non-hazardous fly ash that can be used by cement manufacturers, or deposited in a lagoon or a landfill site.

*Regulatory Framework for the Handling and Disposal of Sewage Sludge and Biosolids:*
The handling and disposal of sewage sludge and biosolids is regulated according to the intended destination.

*Environmental Protection Act (EPA), Regulation 347, R.R.O. 1990:*
Under the *EPA*, sewage biosolids can be deposited in a landfill site or on agricultural land, or incinerated.

All haulers of sewage biosolids are required to obtain a waste management system Certificate of Approval (C of A) from MOE under Part V of the *EPA* and Ontario Regulation 347, R.R.O. 1990. If sewage biosolids are to be landfilled, a C of A for a waste disposal site is required or, if the sewage

biosolids are to be spread on farmland, a five-year Organic Soil Conditioning Site C of A must be obtained from MOE for the site.

If sewage sludge is incinerated, a C of A for air emissions from MOE under Part II of the *EPA* is required. Approval under the *EAA* may also be required.

*Nutrient Management Act, O. Reg. 267/03:*
The recently passed nutrient management regulation, O. Reg. 267/03, is still being phased-in and applies to the application of materials, such as manure and sewage biosolids, onto land for the purpose of enhancing crop growth. Under O. Reg. 267/03, sewage biosolids are regulated as a nutrient instead of as a waste and the Ministry of Agriculture, Food and Rural Affairs (OMAFRA) is the primary contact for stakeholders instead of MOE.

Since January 1, 2005, large municipal sewage treatment plants (STPs) have been required under O. Reg. 267/03 to prepare nutrient management strategies (NMSs) that include information about the quantities and quality of sewage biosolids produced and their disposal. They must also obtain a waste management system C of A under Regulation 347, R.R.O. 1990. NMSs must be approved by OMAFRA and renewed every five years.

Large livestock operations, e.g., operations with at least 210 milking Holstein cows, and smaller livestock operations located within 100 metres of a municipal well and planning to apply sewage biosolids to farmland are also required to comply with O. Reg. 267/03. A key provision is the requirement to prepare nutrient management plans (NMPs) that include information about the quantities of sewage biosolids to be received and land application practices, such as setbacks and application rates. Compliance with O. Reg. 267/03 is required in addition to obtaining an Organic Soil Conditioning Site C of A. NMPs that include the application of sewage biosolids to farmland must be approved by OMAFRA and renewed every five years.

In November 2006, OMAFRA decided to delay, by two years, the phase-in of small- and mid-sized STPs and livestock operations not already phased-in by two years. OMAFRA had received numerous complaints from stakeholders about having to comply with Regulation 347, R.R.O. 1990 and O. Reg. 267/03. As a result of this amendment to O. Reg. 267/03, affected STPs and livestock operations will continue to be subject only to the sewage biosolids provisions in Regulation 347, R.R.O. 1990. STPs and livestock operations already phased-in under O. Reg. 267/03 will continue to be subject to the provisions of both regulations. OMAFRA noted in the decision notice that the two-year delay will give it and MOE time to resolve the duplication in the two regulations. (For additional information, refer to decision notice RC06E0001 on the Registry.)

After the enactment of O. Reg. 267/03, MOE posted a policy proposal on the Registry in November 2004, to replace the Guidelines for the Utilization of Biosolids and Other Wastes on Agricultural Land (March 1996) with a new guide that would bring the guidelines into compliance with the nutrient management regulation, O. Reg. 267/03. The proposed guide outlines quality and application criteria that are similar to those outlined the U.S. EPA for Class B biosolids although the specific restrictions differ. As of June 2007, no decision has been posted on the Registry regarding this proposal. (For additional information, refer to the notice PA04E0008 on the Registry.)

*Environmental Assessment Act* (*EAA*):
There is increased interest in using sewage sludge as an energy source. O. Reg. 116/01 under the *EAA* defines sewage sludge as waste biomass and allows its use as a feed source to generate electricity. In general, electricity generating plants are required to do an assessment of the potential environmental effects of using waste biomass; however, municipal waste pilot project sites are now exempted, subject to meeting some conditions, from the *EAA* requirements under an amendment made to the regulation in March 2007. (For additional information about this amendment, refer to notice RA06E0008 on the Registry.) Electricity generating plants are required to obtain Cs of A for air emissions under the *EPA*. Currently there are power plants in Ontario that use waste biomass as a power source, including the Hamilton (Digester Gas) Cogeneration Project, several on-farm anaerobic digesters including one that

takes off-farm waste and potentially some facilities using wood waste to generate electricity. In addition, Liberty Energy has a proposal to build a power plant in Hamilton that would use up to 1,500 tonnes of waste biomass (including more than 1,100 tonnes of biosolids) per day to generate sufficient power for 8,000 homes. This project is currently being screened under the Waste Management Projects Regulation under the *EAA.*

*Summary of Issues:*
In June 2006, the applicants requested a review of the existing sewage biosolids and land application rules in O. Reg. 267/03, and of the need for a new regulation similar to the U.S. EPA's regulation for Class A biosolids. According to the applicants, Lystek has developed a treatment technology that will produce sewage biosolids in Ontario that meets the U.S. EPA Class A biosolids requirements in a low-cost, energy-efficient process.

The applicants report that the technology involves adding water to dewatered sewage biosolids, heating, adding chemicals and then mixing. The resultant sewage biosolids meet existing equipment requirements for application to land and Class A pathogen requirements, and can be stored for a year without significant changes in product characteristics and quality, and without re-growth of pathogens. The applicants advise that the resultant sewage biosolids could be used as a soil conditioner or for land reclamation without health or environmental ramifications. They note that sewage sludge disposal is currently regulated to protect the public from direct and indirect exposure to pathogens and pollutants that are contained in some sewage sludge.

According to the applicants, Lystek's technology has been proven in tests performed at the Guelph municipal STP and meets land application requirements defined in the *NMA*. They state that Lystek's technology "represents a proactive step towards meeting the future challenges of beneficial biosolids reuse in an environmentally manner." They requested that the existing regulatory framework and the need for a new regulation consistent with the U.S. EPA's Class A rules should be reviewed "in view of better technologies available to tackle environmental hazards associated with the biosolids application to agricultural land."

The ECO forwarded the application to MOE and OMAFRA for review.

**Ministry Response**

MOE 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. MOE explained its rationale using the criteria for considering applications for review outlined in the *EBR*. MOE noted that if a decision on the subject of the requested review has been made within the last five years that included public consultation according to the requirements of the *EBR*, there was no requirement to do the review. MOE contended that the Cabinet decision in 2003 to pass O. Reg. 267/03 met the above criteria.

Regarding a review of the need for a new regulation, MOE noted that it has been approving biosolids land applications for 25 years without any documented health or environmental impacts when standards are followed. Using the criteria established in the *EBR*, MOE decided not to conduct the requested review since "the potential for harm to the environment is low based on the current regulatory standards associated with the management of this material."

MOE advised the applicants that it was already reviewing the regulatory framework for non-agricultural source materials including sewage biosolids, and future revisions would "retain the necessary environmental controls for the management of this material."

OMAFRA also denied the applicants' request for review stating that it agreed with MOE's rationale for denying the review.

Neither OMAFRA nor MOE gave any indication that it plans to introduce a sewage biosolids classification system similar to that found in the U.S. EPA regulation. MOE suggested that the applicants monitor the

Registry for information on proposed changes to the regulatory framework and provide comments at such time as proposals are posted.

In September 2007, MOE included information about the quality of sewage biosolids in its response to the ECO's comments on this application. The information is included here verbatim.

> *A study for Environment Canada in June 2006 entitled "Fate and Significance of Contaminants in Wastewater Sludge generated at Municipal and other Publicly-Owned Wastewater Treatment Facilities" concluded that "with respect to heavy metal contents, Canadian wastewater sludges do not represent a significant human, animal or environmental health risk following land application according to existing guidelines/ regulations. With few exceptions, Canadian wastewater sludges meet the U.S. EPA "Exceptional Quality" (Class A) criteria and many also meet the European Community limits."*
>
> *The April 2001 Water Environment Association of Ontario report entitled "Fate and Significance of Selected Contaminants in Sewage Biosolids Applied to Agricultural Land Through Literature Review and Consultation with Stakeholder Groups" said that "Information concerning the environmental impacts of pathogens in land applied sewage biosolids has been comprehensively and frequently reviewed ….. the review articles consistently conclude that properly managed land application of stabilized biosolids presents minimal risk to human and animal health and the environment."*
>
> *The Washington University concluded in its 1997 literature review study (Gaus et. al. 1997) that:*
>
> - *in most cases, pathogens are retained in the upper 5 to 15 cm of soil and parasites are generally strained out at the soil surface because they are larger and heavier than bacteria and viruses:*
> - *very few bacteria have been detected in groundwater from biosolids-amended sites;*
> - *even though surface water runoff has been found to contain some indicator bacteria; bacterial contamination of surface water seems unlikely, as the survival time of enteric bacteria and viruses in soil is relatively short.*
>
> *The Ohio University conducted a three-year epidemiological study between 1978 and 1982 (US EPA, 1985). The study concluded that there were no significant health risks to people and their domestic animals when biosolids were applied at the rate of 4 to 10 dry tonnes/ha/year. Ontario guidelines limit biosolids application to 8 dry tonnes/ha/5years.*
> *Pike and Carrington report in 1986 (Pike and Carrington, 1986) that surveillance of human and animal disease in the United Kingdom showed that properly managed land application of stabilized sewage biosolids prevents infection from sewage biosolids-born pathogens following land application.*

**ECO Comment**

MOE and OMAFRA were not justified in denying this application for review for two reasons. First, none of their decisions in the last five years regarding sewage biosolids included a proposal for a "pathogen-free" sewage biosolids product. In addition, current proposals – the review of the regulatory framework for land application of sewage biosolids and the 2004 draft guide – don't include consideration of or accommodation for a Class A sewage biosolids product.

Second, there is social, economic and scientific evidence that it was in the public's interest to undertake this review. Despite MOE's and OMAFRA's assertion that sewage biosolids are safe, many members of the public, as well as some farmers and municipalities, are not convinced. In fact, some U.S. jurisdictions have attempted to ban the practice and have had the ban reversed by the courts. In Ontario, municipalities have lost access to farmland application sites and farmers to an inexpensive source of nutrients. The issue of land application of sewage biosolids has divided communities, pitting neighbour against neighbour. Increasingly, municipalities have only two disposal options: – landfilling or

incineration, both of which have met with resistance from the public. The ECO believes that MOE and OMAFRA should have agreed to develop quality standards that are similar to the U.S. EPA's Class A standards and would result in a stable "pathogen-free" product. Such standards would improve confidence in the product and provide greater access to much needed farmland. In fact, this application illustrates how development and implementation of innovative waste management technology can be hampered when government fails to set a clear direction and update requirements in a timely manner.

With the implementation of O. Reg. 267/03, users of biosolids are required to comply with approval requirements under both the *EPA* and *NMA*. They are concerned that sewage biosolids are being treated as a higher risk material than manure and that MOE is fuelling the ongoing negative public perception regarding sewage biosolids. In response, MOE and OMAFRA agreed in 2005 to review the approval requirements for sewage biosolids. In July 2006, they announced that it would take another two years to propose and implement a revised regulatory framework and in September 2007, MOE advised the ECO that it would be considering the U.S. EPA's pathogen standards as part of its review.

Furthermore, in June 2007, MOE posted a proposed policy statement on the Registry that would require municipalities to prepare waste management plans including plans for the management of sewage biosolids. The proposed policy statement encourages municipalities to give preference to reduction, recycling and reuse approaches for waste management over thermal treatment and landfilling approaches with or without energy recovery. The ECO plans to review the decision on this policy statement and progress on its implementation. (For additional information about this proposal refer to Registry number 010-0420.)

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## Ministry of Energy

### Review of Application R2006018

### Measures to Conserve Woodland Caribou (*Rangifer tarandus caribou*) and its Habitat (Review Denied by ENG)

This application was reviewed in conjunction with R2006015 (MNR), R2006016 (MOE), and R2006017 (MNDM). Please see page 204 of the Supplement for ECO's full review of these applications.

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### Review of Applications R2006019 and R2006020

### Need for a Review of Ontario's Policies on Transboundary Smog, Mercury Emissions and Climate Change

### (Review Denied by ENG, No response from MOE in 2006/2007)

**Background/Summary of Issues**

In the fall of 2006, the applicants requested that the Ministry of Environment (MOE) and the Ministry of Energy (ENG) identify measures to eliminate the health, social and environmental impacts caused by the Ontario government's plan to continue to operate its coal-fired generating stations into the future. In 2003, the Minister of Energy stated that the Ontario government planned to close the stations by 2007. That date was later extended to 2009. Then in June 2006, the Minister of Energy announced that it could not

proceed with its timetable to close all coal-fired generation by 2009. As of May 2007, the planned dates of closure were established for the period between 2010 and 2014. In April 2005, the Ontario government did close the Lakeview Station which had been a major source of smog emissions in the Great Toronto Area.

The applicants noted that the coal station closure promise, made in 2003 with closure in 2007, was to be the cornerstone of the Ontario government strategy to reduce transboundary smog and mercury emissions and deal with climate change. The applicants referred to three environmental initiatives which could be furthered by closing the coal stations:

i) *Ontario's compliance with the terms of the Ozone Annex to the 1991 U.S.- Canada Air Quality Agreement*;
ii) *Ontario's compliance with the proposed Canada Wide Standard on mercury*;
iii) *combating climate change*.

The applicants also cited annual figures of $3 billion in healthcare costs and $371 million in environmental costs associated with the emissions of the coal stations. These cost figures were obtained from an Ontario government sponsored study called "Cost Benefit Analysis: Replacing Ontario's Coal-Fired Electricity Generation."

This application for review was filed on behalf of a number of organizations including the Registered Nurses Association of Ontario, the Canadian Association of Physicians for the Environment, the Muskoka Lakes Association, the Georgian Bay Association, World Wildlife Fund Canada, and the Sierra Legal Defence Fund. At the time of submitting this application, these organizations also produced a media release announcing the plan to submit this application.

**Ministry Response**

*Ministry of Energy (ENG):*
The Ministry of Energy denied this application in a letter to the applicants in December 2006, and provided a number of reasons for its decision in its letter.

*Ministry of Environment (MOE):*
As of May 2007, the applicants and the ECO are awaiting MOE's response. To comply with the requirements of the *EBR*, MOE should have provided a response to the applicants by mid-December 2006.

**ECO Comment**

In early 2007, two of the applicants wrote to the ECO to raise their concerns about the delayed response from MOE and requested that the ECO prepare a special report on the matter. The ECO responded to the applicants by letter, indicating that the ECO shares their concerns about MOE's procedural delays. The ECO also raised the matter with MOE at the time. The ECO will continue to monitor MOE's handling of this application and will report on both MOE's and ENG's responses in our 2007/2008 Annual Report.

## 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 11 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 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 is 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. However, the review remains in progress; in March 2007, MOE advised our office that the "ministry is still actively completing the review of the guideline, taking into consideration the sensitive and complex issues surrounding the proper management of biomedical waste."

**ECO Comment**

The ECO will review the handling of this application for review in the 2007/2008 Annual Report.

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**Review of Application R2005005**

**Review of the Need for a New Policy - Comprehensive Land Use Planning in the Northern Boreal**
**(Review Denied by MOE)**

**Geographic Area:** Northern Ontario

**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 northern Ontario.

This 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). MNR, MNDM, and ENG each denied this application in November 2005 (See pages 134-138 of the ECO's 2005/2006 Annual Report). In December 2006, more than a year past the deadline for providing a decision as required by the *Environmental Bill of Rights* (*EBR*), MOE also denied this application.

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, according to the applicants. 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 28 First Nations;
- the full complement of biodiversity existing in the region for approximately the last 8 -10,000 years;
- valuable ecosystem services, including mitigating climate change; and
- natural capital that supports an internationally significant wilderness tourism industry.

SLDF and the Wildlands League believe that MNR's ongoing 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 as 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. Instead, it covers a broad swath of central Ontario where commercial logging currently takes place.

The 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 kilometres north of the current Declaration Order. In part, the 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 Ontario 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 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 stressed 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 argued 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.

**Ministry Response**

MOE denied this *EBR* application, stating that a review was not warranted. The ministry consulted with staff from MNR, MNDM, ENG, and the Ontario Secretariat of Aboriginal Affairs as it does not have "the expertise required to address all the areas raised by the applicants." Further, MOE implied that existing *Environmental Assessment Act* (*EAA*) coverage was sufficient to address any concerns with development in northern Ontario.

MOE focused almost exclusively on the concerns that the applicants raised with regard to the Victor Diamond Mine. The ministry states that "the province has taken a one-window approach on this project through MNDM" with involvement from MOE, MNR, and the Ontario Energy Board. Indeed, MOE states that MNDM is "the lead ministry for the North" through its promotion of northern economic development and mineral sector competitiveness.

In rationalizing its decision to not undertake this *EBR* review, MOE largely portrayed itself as solely being an administrator of the *Environment Assessment Act* and made the following statements:

- "MOE received a request to designate the entire Victor Diamond Mine Project. The provincial Minister of the Environment (Minister) determined that an individual environmental assessment for the entire Victor Diamond Project was not required and denied this designation request."
- "DeBeers completed a provincial Class EA using the Class Environmental Assessment for Minor Transmission Facilities for the transmission line that will provide a permanent power source to the mine by twinning the existing coastal transmission line from Otter Rapids to Attawapiskat and constructing a new line from Attawapiskat to the mine site. MOE received a bump-up request and the Minister determined that an individual EA was not required and denied the request."
- "DeBeers has completed a screening under Ontario Regulation 116/01, The Electricity Projects Regulation, for the use of 3.6 MW of temporary diesel generators for the advanced exploration and construction of the mine. DeBeers has completed a Category B screening for the project under O. Reg. 116/01 because the proposed electricity generation capacity is between one and five MW. MOE received a request to elevate the project to an individual EA and the Director of the EAAB denied the request. The Minister did not received any request under the Electricity Project Regulation to review the Director's decision."
- "MNR has completed a screening under the MNR's Class Environmental Assessment for Resource Stewardship and Facility Development Projects (RSFD Class EA) for the disposition of

Crown resources and land use permits under the *Public Lands Act* and permits under the *Lakes and Rivers Improvement Act*. The EA requirements for the disposition of Crown resources by MNR were coordinated through the federal comprehensive study and the transmission line Class EA which was then used by MNR to screen the project as required by the RSFD Class EA. MOE received a request for a Part II order and the Minister determined that an individual EA was not required and denied the request. MNR may now issue its Statement of Completion and may proceed with issuing licences and permits."

- "In addition, the federal Environment Minister made a determination that the Victor Diamond Mine Project is not likely to cause significant adverse environmental effects with the mitigation measures outlined in the comprehensive study report."

In a broader context, the ministry stated that it is currently reviewing the recommendations of the Environmental Assessment Advisory panel "to improve the EA process by making it more transparent and efficient."

MOE attempted to reassure the applicants that the Victor Diamond Mine would require additional approvals under the *Ontario Water Resources Act* (*OWRA*) and the *Environmental Protection Act* (*EPA*) for its discharges to the natural environment. However, as illustrated in our 2003/2004 Annual Report (see pages 11-13), the Certificate of Approval (C of A) process under such legislation is not integrated into a comprehensive assessment of the impacts of such a large scale undertaking. In that Report, discussing another mine site in northern Ontario, the ECO wrote that "Each of the ministries followed their formal approvals processes. However, the system's current checks and balances did not prevent a result with potentially distressing environmental consequences: mining effluent will be piped into a river that was meant to be protected for its natural, wilderness-like qualities."

In denying this *EBR* application, MOE made little mention of the issue that there currently is no environmental assessment coverage for commercial forestry in the northern part of the boreal forest. The ministry only stated that it "is working closely with MNR to ensure any *EAA* requirements of the NBI are met." Indeed, no mention was made by MOE that it is the final decision-making body under the *EAA* with respect to commercial forestry north of the existing Area of Undertaking (AOU). It is noteworthy that the federal Senate Subcommittee on the Boreal Forest recommended in 1999 that "in those parts of the boreal forest approaching the tree line, where adequate silvicultural methods have not been developed, logging should not be allowed." In our 2002/2003 Annual Report, the ECO made a similar recommendation that MNR "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." However, as of the spring of 2007, no assessment has yet been made public.

The ministry made no mention of the "interim" Declaration Order that allows MNDM to dispose of Crown resources, such as issuing mining licences, and to administer the *Mining Act* without requiring it to conduct individual environmental assessments. Originally approved as a one-year interim order in 2003, it has twice been extended and now expires in June of 2008. All of the commenters on the original proposal for this Declaration Order objected to it, including suggesting that a Class EA should be prepared. Indeed, the Ontario Round Table on Environment and Economy made exactly the same recommendation for a Class EA in 1991. MNDM is working on a Class EA, but its completion is still likely years away. It is not reassuring that MOE has repeatedly extended this "interim" Declaration Order based on MNDM's failure to prepare a Class EA.

**ECO Comment**

The ECO believes that significant changes should be made to the way in which the Ontario government plans for and regulates the northern boreal. MOE does not accept that such change is warranted, because it believes that the various approval processes currently in place are adequate. However, it is clear that these existing measures operate in isolation from one another and they do not take a comprehensive approach. As stated in our 2005/2006 Annual Report, the ECO believes that the northern boreal has a unique and varied ecology that merits the same standard of planning that applies to the rest of the province, if not higher.

MOE did not sufficiently address the central point of this *EBR* application: the need to create an inter-ministerial comprehensive land use planning system for northern Ontario. As the ministry within the Ontario government charged with ensuring environmental protection, MOE unquestionably has a central role to play in such a process. The ministry inferred that any such planning system is not directly their responsibility. For example, it states that MNR has been exploring "potential approaches" since 2005.

The ECO is troubled that MOE appears to have cast its role in the boreal as largely being an administrator of the *Environmental Assessment Act*. The ECO believes that ministry's mandate calls for a more proactive approach to environmental protection. Indeed, the ministry's strategic vision is "An Ontario with clean and safe air, land and water that contributes to healthy communities, ecological protection and sustainable development for present and future generations." The ECO believes that this mandate applies to the boreal forest and northern Ontario beyond simply having the ministry function as an approvals body on a case-by-case basis.

On individual industrial developments in the north, the Ontario government has chosen to take a "one-window approach" using MNDM as the lead ministry. The consequence of such an approach is that environmental and land use planning concerns are of secondary importance and a lower priority than they ought to be. Unfortunately, environmental and land use planning issues are not parts of MNDM's core responsibilities or mandate. Like MOE, MNR also then functions in a secondary role despite the fact that it is "the lead conservation and resource management agency in the province… managing Ontario's natural resources in an ecologically sustainable way by safeguarding nature's capacity to renew itself."

There is a groundswell of public concern about how the northern part of the province should be managed. Despite this fact, four different ministries of the Ontario government assert that undertaking this *EBR* application was not in the public interest. Many stakeholders - ranging from First Nations, to forestry companies, to conservation organizations - have been united in their call for a new framework to protect much of the boreal and to ensure that land use planning is completed in advance of industrial development. It is troubling that the Ontario government is resisting this tide of concern, particularly given that it is the single largest landholder in northern Ontario. Indeed, the federal Senate Subcommittee on the Boreal Forest recommended in 1999,

> "Portions of Canada's remaining natural, undisturbed boreal forest and its areas of old growth are now at risk, from both climate change and over cutting. In addition, the demands and expectations placed on Canada's boreal forest have escalated to the point where they cannot all be met under the current management regime."

This Senate report proposed that the boreal be divided into three land use classes. The Senate report proposed that 20 per cent of the boreal be intensively managed for timber and fibre production, 50 per cent be managed less intensively for a wide variety of forest users, and the remaining 20 per cent would be set aside as protected areas. Building on this idea, the partners of a coalition called the Canadian Boreal Initiative proposed in 2003 that half of the boreal be managed for sustainable resource development and the other half be enshrined in a network of protected areas. Such proposals about how to manage the boreal need not be literally applied in northern Ontario, but they serve as an invaluable starting point for public debate and government action.

**Review of Application R2005013**

**Review of Certificate of Approval A032006 for Blackwell Road Landfill (Review Undertaken by MOE)**

**Geographic Area:** Sarnia

**Background/Summary of Issues**

In December 2005, an application was submitted requesting a review of the Certificate of Approval for a Waste Disposal Site A032006 (C of A) required for the operation of the Blackwell Road Landfill in Sarnia. The landfill was closed in 2001 after operating for 30 years. The applicants stated that the C of A was based on erroneous information and has applied to various operators since 1972, and therefore should be considered void. They requested that particular attention be paid to the amendment approved in 1995. The applicants alleged that the Ministry of the Environment (MOE) displayed negligence in allowing the landfill to expand in area and volume, and in allowing leachate from the landfill to enter the storm sewer and contaminate land, water and air in the surrounding community. They further alleged that MOE did not follow procedures required by the *Environmental Protection Act* (*EPA*) and the *Environmental Bill of Rights* (*EBR*). The applicants requested that the area contaminated be restored as per 17(a) of the *EPA*.

To support their application, the applicants submitted two volumes of evidence containing letters, maps, photographs and excerpts of reports pertaining to the landfill and C of A. Also included was a copy of the first C of A for Blackwell Road Landfill from 1972 that the applicants alleged was incorrect in specifying a site area of 110 acres (44.5 hectares) across part of lots 47 to 51. The correct area, the applicants advised, was not supposed to exceed 15 hectares of land. To support their allegation, the applicants provided landfill property maps showing a smaller footprint in 1972 compared with 1980 and a list that suggests the alleged expansion was facilitated through a series of land purchases under different company names.

The applicants further claimed the landfill capacity approved by MOE in 1972 was reached in the 1980s and filling beyond that constituted expansion, requiring approval with a public hearing under the *EPA*. They stated that the alleged expansion contravenes the zoning by-law. The evidence included a letter sent by MOE in 1985 to the landfill owner requesting cessation of dumping in the south part of lot 48, an area not approved by the C of A. The applicants also allege that in 1990, waste was dumped over the entire 44.5 hectares rather than the 32.4 hectares specified in the C of A. Another piece of evidence was a letter from consultants Proctor and Redfern Limited to the City of Sarnia sent in 1994 asking for approval to amend the zoning bylaw to increase the area of surface water runoff from 9.4 to 42.2 hectares, the actual area draining into the Clark Drain. The applicants declared that this should have been recognized as a violation under section 36 of the *EPA* and MOE should have called for a public hearing.

In their evidence, the applicants described constant odour problems since 1985 and alleged that putrescible wastes were dumped into the landfill contrary to the C of A. The applicants also alleged that groundwater contaminated by leachate was pumped out and discharged into an unknown drain. They regarded the landfill water quality monitoring as faulty, based on surface water samples diluted by runoff and groundwater samples from insufficient depths. They complained that the detention pond required at the south end of the site was never built. The applicants purported that Electric Arc Furnace ("EAF") Dust, a hazardous substance deposited at the landfill, was exposed and blowing offsite. The applicants were also worried about the sand and gravel base of the landfill being too porous to provide safe storage for waste. They were concerned that leachate would travel with ground and surface water to Lake Huron.

The applicants raised concerns about the 1995 amendments to the C of A, primarily because MOE authorized continued waste disposal without acknowledging expansion of the site. The applicants viewed the settlement between the Landfill Advisory Committee (LAC) and the landfill owner as a buy off. They remarked that LAC is not a legitimate advisory committee; that the local municipal Council should have

formed it. The applicants also disagreed with the change in the final use of the site from a golf course to a public park and expressed dissatisfaction with the treed buffer planted by the landfill owner to screen operations. Photographs from 2005 submitted as evidence show few, very scattered trees along what appears to be the perimeter fence of the landfill.

In directing blame for the above complaints, the applicants implicate the landfill owners for not adhering to the Cs of A; MOE for not requiring amendments and hearings and for permitting discharge of contaminants; and the ECO for not intervening in the situation.

*Background:*
Waste management is largely regulated under Part V of the *EPA* and Regulation 347, R.R.O. 1990, both administered by MOE. Section 27 requires waste disposal site owners to seek approval for the conditions under which they may operate in the form of a C of A. Public hearings are required for the "use, operation, establishment, alteration, enlargement or extension of a waste disposal site for the disposal of hauled liquid industrial waste or hazardous waste as designated in the regulations or any other waste that the Director ascertains, having regard to the nature and quantity of the waste, is the equivalent of the domestic waste of not less than 1,500 persons" under section 30 of the *EPA*. Under section 36, the Director may require a public hearing to consider whether or not a municipal bylaw affecting the location or operation of a proposed waste disposal site should apply. The Director is empowered by section 17(1) of the *EPA* to order the repair of damage incurred to the natural environment through operation of the waste disposal site.

*History of the Site:*
In 1971, K & E Sand and Gravel (Sarnia) Limited, filed an application for the operation of a landfill at a sand and gravel pit on Blackwell Road in an area that was largely residential. The following year MOE issued the company a provisional C of A, after verifying that no township bylaws were violated. When the *EPA* was enacted in 1972, all existing landfill sites, including Blackwell Road Landfill, were grandparented and approved without a public hearing.

Conditions in the 1972 C of A were based on the property description provided by the owner which indicated a site of 44.5 hectares, 32.4 hectares of which could be landfilled to a depth of 9.1 metres and a height of 1.5 metres above the original ground surface, not including the landfill cover. MOE approved the total capacity for the site as approximately 3,456,000 cubic metres. Fill content was listed as 10 per cent non-hazardous industrial waste, including fluidized coke from Imperial Oil, and 90 per cent construction materials, including shingles, concrete, demolition wastes, as well as logs and brush from the city. The provisional C of A also stated that expected use upon landfill closure was a golf course. However, in the 1980s, test pits examined during a hydrogeological investigation revealed foundry waste and primarily foundry sand, as well as concrete, wood, scrap metal and household appliances.

Community newspaper articles submitted as evidence describe odour complaints from 1990 reported by residents living adjacent to the landfill and conclude with an article describing an aeration system installed by the owners of the landfill to mitigate the problem. Odour complaints continued following this date, however. According to the Blackwell Road Landfill Annual Report from 1997, half of the 22 complaints received between June 19th and September 9th 1997 were due to odour while the remainder were from a combination of dust, litter, noise, grades on the buffer and water and mud in a homeowner's yard. The report declared that all complaints but one were acted on to address the issue. A community newspaper article from 2001 described foul odour persisting after a flare was installed to burn off methane gas.

Among the other issues featured in attached newspaper clippings was an account from 1990, in which two members of council resigned from LAC to protest a lack of cooperation by landfill owners in circulating the amended C of A to residents as arranged. The evidence also included an investigation by MOE into the illegal dumping of hazardous material (calcium carbide) on the landfill site, from the same year. A 1998 report by consultants for MOE disclosed large air quality exceedences.

Over the years, site ownership has transferred numerous times (see Table 1). When Philip Environmental Group assumed ownership of the landfill in 1989, they formed a landfill advisory committee to address

community concerns and set aside money for future landscaping of the site. In 1990, they installed a passive ventilation system to address gas migration and an aeration system to minimize odour-causing anaerobic decay. Also in 1990, non-putrescible domestic waste was added to the Provisional C of A, to include dry, bulky waste from residents in the immediate vicinity. The company reported water quality records from 1973 to 1990 as favourable, showing no deterioration or better. Surface water monitoring from 1993 and 1994 indicated no significantly deleterious effect on aquatic life from landfill leachate.

**Table 1: Showing Site Ownership, 1972-2007**

| Year | Blackwell Road Landfill A032006 Certificate of Approval Holder |
|---|---|
| 1972 | K & E Sand and Gravel (Sarnia) Limited |
| 1980 | K&E Solid Waste Management, a Division of Wm. Kuindersma & J. Esser Ltd. |
| 1990, 1991 | W. Kuindersma & J. Esser Ltd., (operating as K & E Solid Waste Management) |
| 1995 | K & E Waste Resource Inc. |
| 1995 - 1999 | Philip Environmental Inc. |
| 1999-2003 | Canadian Waste Services Inc. |
| 2004-2007 | Waste Management of Canada Corporation |

Hydrological investigations confirmed that offsite groundwater migration was prevented by the inward hydraulic gradient created by pumping surface water from the series of ponds in the landfill. Once surface water channels are filled with waste, it was proposed that this hydraulic gradient be sustained using a series of onsite perimeter pumping wells. The plan for the final cover of the landfill was a minimum of 0.75 m low permeability soil and 0.15 m topsoil designed to reduce infiltration. Runoff over the covered and graded waste would be conveyed by perimeter ditches to a detention pond to be constructed at the south end of the site for uncontaminated water. Surface water that contacted the waste would be controlled with the leachate management system.

In 1994, the Philip Environmental Group applied for an amendment to the C of A to comply with MOE's new landfill requirements calling for a minimum 5 per cent slope to improve surface water drainage and a 30 metre buffer zone (see Environmental Registry Notice IA5E0787). This meant the owner had to increase the height of the landfill to make full use of the capacity approved in the original C of A, since access to additional volume at the base of the landfill was prohibited by the ministry. They proposed the allowance of 0 to 35 feet (10 metres) above the ground surface.

Throughout their years of ownership, Philip Environmental Group conducted extensive public consultation, entailing 20 LAC meetings open to the public, five public information meetings, two workshops, one telephone survey and the distribution of newsletters and other information. During this time they learned that local residents wanted the landfill closed as soon as possible and made into a golf course. To meet the accelerated closure date, the company proposed an increase in the daily fill rate from 100 to 1,000 tonnes per day with a maximum of 1,500 tonnes per day.

MOE accepted the revised contours, on condition that the owner complete a ground and surface water monitoring program every three months and develop a contingency plan to address offsite migration of contaminants from mounded leachate. Among the requirements of the plan was the replacement of the existing leachate collection system with a perimeter collection system supported by a detailed sampling and testing program and contingency measures that would be activated by a trigger mechanism.

The proposal was placed on the Registry in 1995 generating 315 comments mostly dealing with volume, fill rate, final height and local impacts resulting from dust, odours and noise. In response to a request from LAC, the ministry extended the comment period on the section 27 instrument proposal and issued interim approval for an increased rate of fill to leave time for mediation between the company and the community.

LAC agreed to the conditions for the C of A as proposed by MOE, provided that they include: a community trust, vegetative master plan, golf course trust, property value protection and no fault claims plus nuisance compensation and an odour abatement strategy. The odour abatement strategy, where

three odour incidents ban a material from the site, was one of the environmental controls the C of A holder included to address community concerns. Other controls included: the first phase of a leachate collection system, completed by the end of 1995; berms and operating time restrictions to reduce noise; site monitoring and road cleaning to reduce dust; and road reconstruction and traffic reductions. The closure date for the landfill was set for no later than September 12, 2002. MOE determined there was no need for a hearing on the amendment considering the extensive public consultation addressing all issues.

LAC's complaints did not end with the 1995 agreement. The following year they applied to the Environmental Appeal Board for leave to appeal under section 38 of the *EBR* on a decision posted on the Registry to resume depositing stabilized EAF Dust at the Blackwell Road Landfill. The Environmental Appeal Board refused the appeal on the grounds that MOE did not act in an unreasonable manner and that the Director had taken reasonable measures to address all risks to the environment related to the deposit of EAF dust at the site.

Landfill gas was another ongoing issue and the approvals sought between 2000 and 2007 for the installation of gas migration controls and a flaring system, attest to the response by the company. In 2006, MOE received a noise complaint in response to the proposed approval of the C of A, and they advised that under C of A 8788-5LFNR7, levels were within ministry noise limits.

This is not the first *EBR* application for review of the Blackwell Road Landfill C of A submitted by the applicants. In 1998, they requested a review on the same grounds as the current application, but at that time the request was denied. MOE declined, considering that the applicants had had two opportunities to apply for leave of appeal on instrument proposals in 1995 and 1996, and they decided not to apply. Additionally, as a recent decision consistent with the intent and purpose of Part II of the *EBR* with no new information available, under section 68 of the *EBR*, it did not warrant a review.

When Canadian Waste Services Inc. bought the landfill in 1999, they convinced residents to abandon the plans for a golf course since the irrigation required to maintain it would increase the leachate and the need for pumping. This led to an amendment of Condition 52 to the C of A changing end use from golf course to park. No comments were received in response to the Registry proposal notice.

The landfill received its last load of waste in March 2001. Waste was covered with a final layer of clay and topsoil and the site was converted to naturalized parkland with wildlife habitat and nature viewing. Blackwell Road Landfill became among three of the first landfill sites in Canada to be certified with the Wildlife Habitat Council, a non-profit group that helps landowners manage unused lands to benefit wildlife. The certification program recognizes outstanding wildlife habitat and requires periodic renewal to maintain this standing. The St. Clair Region Conservation Authority assisted in the project and by 2004, site naturalization and hiking trails were completed. The community park officially opened in 2005.

**Ministry Response**

MOE responded to the applicants' request for a review in December 2005. In February 2006, the ministry advised the applicants and the holder of C of A A032006, WMCC, of its decision to undertake a scoped review focusing on C of A conditions related to containment of landfill gases and the management of leachate. The purpose of the review was to determine whether conditions of the existing C of A would adequately protect and conserve the natural environment. MOE agreed to follow up on compliance issues related to title and registration, though they were beyond the scope of a review under the *EBR*. The ministry informed the applicants that the review would take about seven months to complete.

Both MOE's decision and its review were delivered in reasonable time. MOE's rationale was, for the most part, clearly explained using sections from the *EBR* to substantiate its decision on each of the applicants' complaints. Further, although MOE advised that some of the issues they raised on landfill gas collection were already part of an MOE review process for two instruments, it elected to examine aspects of them in response to the applicants' request.

*Issues Scoped Out of the Review:*
MOE's decision responded to each of the applicants' issues, quoting applicable sections of the *EBR* to explain its decision. Some issues were excluded from review because they dealt with conditions of Cs of A that preceded the existing C of A from 1995. Since 1995, amendments to the C of A have been relatively minor, involving a change in C of A holder and in final land use. Neither of these amendments warranted a review under section 68 of the *EBR*, as they were made in the last five years and according to MOE were consistent with the intent and purpose of Part II of the *EBR*.

With regards to the landfill capacity issue, MOE stated that a hearing was not required considering that the 1995 C of A was based on the same area, depth and volume specifications as the previous C of A (32.4 ha, 10.6 m with 9.1 below original ground level and 1.5 m above, and 3,456,000 $m^3$). A hearing was also not required for the EAF dust, as it was determined to be non-hazardous under Regulation 347, R.R.O. 1990 and this was legally specified in C of A A100140 issued to Philip Enterprises Inc. on July 12, 1996. Suitability of the site for waste disposal would not be reviewed on the basis that the geological conditions of the site were considered when engineered environmental control systems were reviewed. In the ministry's opinion, revision to the final use of the landfill had received sufficient public participation and did not warrant a review (section 68(1)).

Other issues included in the applicants' evidence, such as dust, litter, noise, daily cover of waste, site access, visual buffering and waste recording, were considered inappropriate for review because they related to disposal of waste, an activity no longer occurring at the site. This left leachate, landfill gases and title as concerns still relevant with the closure of the landfill, and after the exclusions cited above.

*Review Outcome:*
In November 2006, MOE provided the results of a review that involved ministry staff from the Sarnia District Office (Southwestern Region), the Legal Services Branch and the Environmental Assessment and Approvals Branch. The review, which was laid out in order of conditions to the C of A appropriate to the discussion, included a list of references extracted from ministry files and appendices displaying the existing and proposed Condition 20. WMCC provided a submission that refuted the allegations made against them in the applicant's submission, asserting they had complied with the 1995 C of A and any MOE directions. However, it did not provide evidence to support its statements.

Leachate and gases were addressed under several conditions to the C of A, as they related to management, annual reporting and site closure. MOE advised that the existing Condition 20, requiring regular surface water monitoring of the south pond at the intake to the discharge pipe, was adequate for determining potential impact from leachate on the Clark Drain. Five years of monitoring indicated that leachate-impacted groundwater had not deleteriously impaired the water quality of the pond. MOE further explained that the ministry does not permit landfill owners to dilute leachate-impacted groundwater with stormwater to meet water quality objectives, stating that such practice does not reduce the absolute amounts of contaminants entering the environment and that, "where leachate-impacted groundwater is directed to a central receiving location as in the case at the Blackwell Road Landfill, current ministry practice suggests application of treatment prior to discharge."

MOE declared that it previously had begun to review containment of landfill gases at the site, which, under section 67(2c) of the *EBR*, exempts MOE from having to review this problem. The C of A holder has filed two applications for approval of systems to contain landfill gases. One is for a system that collects landfill gas to burn through an onsite flare, a process that mitigates odours; and the other is for a system that prevents lateral migration of subterranean landfill gases by introducing air pressure. Both applications, as Class II proposals under the *EBR* due to potential risk, were posted on the Registry and the ministry considered comments received during the 30-day public notice. MOE informed applicants that following complete review of the technical materials supporting these applications, ministry staff would post its decisions (i.e., two).

The ministry determined that conditions to the C of A dealing with requirements for landfill closure are satisfactory; that Conditions 52.5, 52.6 and 52.8 adequately addressed the considerations for filing a closure plan and that Conditions 53.1, 53.2, 53.3 and 53.4 adequately addressed "containment of landfill

gases through the installation of a temporary air injection system, monitoring of gas concentration along the landfill perimeter, assessment of the effectiveness of the system, and maintenance of system equipment." The C of A holder has filed a closure plan that MOE is currently reviewing. In its review of the closure plan, MOE is evaluating a gas containment barrier and evolving approaches to leachate treatment. The ministry will look for monitoring and control systems that harmonize all Cs of A affecting the landfill.

MOE provided information on another application it is currently reviewing submitted by the C of A holder but not under C of A A032006 that involves alteration to the south pond. It notified the applicants that MOE will post an instrument proposal on the Registry should its potential to harm the environment be deemed significant.

The last issue MOE examined for possible revision was registration on title. MOE declared that the C of A holder registered a certified copy of the certificate as an instrument in the Land Registry Office, as required by Condition 3 to the C of A, and therefore no action was necessary.

As a result of its review of the 1995 C of A, MOE determined it was appropriate to propose modifications to Condition 20, to require additional monitoring of leachate-impacted groundwater collected beneath the waste cell prior to discharge to the south pond. This proposed revision also requires the addition of a trigger mechanism to identify the need for management and/or treatment of collected water, and the submission of a contingency plan for the management and/or treatment of leachate-impacted groundwater generated at the site. The ministry completed its review by informing the applicants of the opportunity to comment on the proposal and appeal the decision through postings on the Registry as required by the *EBR*.

**Other Information**

In its review, MOE suggested that where leachate-impacted groundwater is directed to a receiving location, it is treated before being discharged; yet it also stated that treatment of leachate occurs when trigger mechanisms have been invoked (existing Condition 20). With regards to the proposed amendment of Condition 20 to the C of A, the ministry neglected to explain why it was deemed appropriate. Further, although the appendices provided an opportunity to clarify differences between the existing and proposed Condition 20, the existing Condition 20 was not presented in enough detail to do so.

The ECO sought clarification on these matters through correspondence with MOE. A ministry representative explained that the amendment to Condition 20 requiring additional sampling was deemed appropriate in relation to the new use for the landfill site. As a public park, MOE was required to ensure onsite public safety. Sampling of groundwater prior to discharge was proposed as a precaution to ensure that water in the south pond met MOE guidelines and did not pose a safety hazard to park visitors. The revision to Condition 20, if implemented, would require sampling at the existing and new locations, that is, prior to discharge into the pond and at the point of discharge from the pond into the municipal drain. MOE's explanation for the required treatment practice was unclear.

Through additional communication with MOE, the ECO learned that the onsite detention pond was not constructed as required by the 1995 C of A and that an unapproved area was used for detaining potentially contaminated groundwater and stormwater. As of 2006, MOE decided it would issue an order requiring the site owner to seek approval for the existing pond under the *Ontario Water Resources Act* as part of their landfill closure plan. This provincial officer's order is under appeal with the Environmental Review Tribunal.

**ECO Comment**

The applicants have long-standing, wide-ranging and contentious concerns related to the Blackwell Road Landfill. The ECO commends MOE for agreeing to undertake this review and for providing a thorough and carefully organized response sensitive to the history behind the application. The ECO also recognizes that the ministry's review extended beyond the anticipated scope.

The ministry's review was well organized, however some of its explanations could have been more clearly articulated. For example, the ministry's response to the applicants' concern regarding the monitoring of diluted leachate, that the absolute amounts of contaminants were the same, was inadequate. An explanation that the purpose of the measure was to ensure the waters discharged into the Clark Drain meet MOE water quality guidelines would have been of greater value. A complete response, in view of the applicants' issues, would have addressed the hydraulic gradient and the potential for leachate to bypass the current collection and treatment system.

The applicants' evidence indicates that others in the community shared their complaints. The issues were predictable for residents living adjacent to an operating landfill. Residents are to be sympathized with, considering that they did not expect the degree of disturbance they were subsequently exposed to. The landfill began as a comparatively small area receiving non-hazardous, non-putrescible waste consisting primarily of construction materials. Over time, the site generated increasing nuisances and impacts including unanticipated odours, threats of hazardous materials and waste disposal operations that encroached increasingly on the surrounding community. The applicants were concerned for the health of their families and the environment.

Based on information provided by the applicants, the ECO feels that issues raised over the years could have been dealt with more effectively. Certainly, the applicants have developed a deep sense of distrust about MOE authorities and the owners of the site. The clarifications obtained by the ECO and outlined in the Other Information section of this review could have assisted the applicants in understanding of some key aspects of their complaints and helped to dispel suspicion. If this review is any indication of the nature of the communication between the site owners, MOE and the applicants, there may be opportunities to improve existing relations. The ECO encourages MOE to meet with the applicants, mend gaps in understanding and see that conditions of the 1995 C of A, such as the treed buffer, are implemented as promised.

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**Review of Application R2005014**

**Review of O. Reg. 101/94 regarding Large Leaf and Yard Composting Operations in Sensitive Ecosystems**

**(Review Denied by MOE)**

**Background/Summary of Issues**

The applicants requested a review of Ontario Regulation 101/94 (Recycling and Composting of Municipal Waste) under the *Environmental Protection Act* (*EPA*). The request centers on the applicants' concern that large commercial leaf and yard waste composting facilities can be established without any assessment of the potential for environmental impact because the regulation exempts these facilities from sections 9, 27, 40 and 41 of the *EPA* as long as there is a 100 metre setback from the site boundaries and/or any lake, river, pond, stream, reservoir, spring or well. The applicants argue that O. Reg. 101/94 does not set criteria for the type of terrain, or require any hydrological or groundwater impact assessment in order for a leaf and yard waste composting site to be exempt from the above-referenced sections of the *EPA*.

The applicants use the Harmony Road leaf and yard waste composting operation in Oshawa to illustrate their concerns about O. Reg. 101/940. They say the site is located adjacent to an area designated as one of high aquifer vulnerability on the crest of the Oak Ridges Moraine, and provide monitoring data that suggest contamination has already occurred as a result of this operation. They argue that evidence exists indicating 'the real possibility of groundwater contamination' but unfortunately this has not resulted in more stringent controls because such requirements do not exist under O. Reg. 101/94.

**Ministry Response**

The Ministry denied this request for a review, indicating that it disagrees with the applicants' assertion that O. Reg. 101/94 is not adequate to protect surface and groundwater at leaf and yard waste composting sites. Instead, MOE explained that, while O. Reg. 101/94 exempts specific recycling sites such as leaf and yard waste composting sites from sections 9, 27, 40 and 41 of the *EPA,* the regulation does not relieve a proponent from addressing concerns related to surface and groundwater impacts as required under the *Ontario Water Resources Act*.

In its response the Ministry added that, in lieu of the *EPA* requirements that apply to most waste management facilities, O. Reg. 101/94 imposes a host of other requirements including the 100 metre setback, emergency response plans, processing requirements and criteria for use of the final compost product.

The Ministry also explained that a requirement exists for leaf and yard waste composting facilities to obtain a certificate of approval under section 53 of the *OWRA* if leachate or surface runoff is collected, transmitted or treated and discharged to a storm sewer, watercourse, or onto the surface of the ground for the purpose of disposal. The certificate of approval would set out the criteria for the discharge of this leachate and/or runoff.

In addition, MOE explained that section 5.2 of *'A Guide to Approvals for Recycling Sites, Leaf and Yard Waste Composting Sites and Compost Use'* (referred to hereafter as the MOE Guide) provides direction for the on-site management of water at these sites. MOE noted that the document sets out site selection criteria for the management of leachate and runoff including separation distances, grading and impermeable bases for composting pads. Further, the MOE Guide recommends that site owners should undertake a hydrogeological or soils study if the conditions of their site are unknown.

However, the MOE response to the application for review made no reference to the Harmony Road leaf and yard waste composting site and whether any of the above measures had been taken at the site to address the concerns raised by the applicants.

**Additional Information**

Due to MOE's lack of comment on the Harmony Road composting site, an effort was made by the ECO to obtain some basic information about the site. More specifically, the ECO attempted to gather some basic information about how the site was affected by the requirements set out in O. Reg. 101/94 and the relevant recommendations found in the MOE Guide.

MOE staff at the York Durham District office who were familiar with the Harmony Road site were contacted and asked several questions:

1. Does a site plan exist for this facility? Does a vicinity map exist for this facility?

These plans are required for a leaf and yard waste composting facility under O. Reg. 101/94. The MOE Guide indicates that a vicinity map "..should show information such as prominent landmarks, waterways, transportation routes and neighbouring land uses." MOE staff went on to state that a site plan "…should identify each major physical feature of the site in relation to other features." Further, O. Reg. 101/94 "requires that site plans must show all services (electrical, water, gas), buildings, processing units, roads, loading areas, unloading areas and storage areas."

MOE provided the ECO with three maps, one of which satisfied the basic requirements of a vicinity map and none of which satisfied the regulatory requirements for a site plan map. Aerial photographs of the site in combination with an MOE Environmental Features map provided by the applicants appear to confirm the presence of a creek located approximately 40 metres from compost piles on the site, in apparent contravention of the 100-metre setback requirement that exempts theses sites from *EPA* requirements for waste management facilities contained in Regulation 347, R.R.O. 1990.

In August 2007, MOE provided additional information about the site after reviewing the ECO draft Annual Report. The ECO reviewed preliminary information provided by the ministry; however, the company's site plan was not included in the attachment. MOE explained that this was "an oversight" and a copy was provided to the ECO in August 2007.

In the summer of 2007, MOE staff further investigated the site and staff have confirmed that the creek referred to in the ECO draft Report is a swale, in a low lying area, where storm water may channel during a significant storm event. Based on field measurements by ministry staff, the areas of compost storage are at least 100 metres away from the swale. Ministry staff have not observed a consistent flow of surface water in this area that would indicate the presence of a creek. However, as a precaution, the company moved sections of several compost rows farther away from this low lying area. The company periodically re-grades in this area to limit ponding.

2. What measures are in place for the management of any leachate generated from the composting operation at this site?

In response to this question, the York-Durham District Manager for MOE indicated to ECO staff that the Harmony Road composting site has no leachate collection or storm water management system. MOE explained that district staff have not observed any significant generation of leachate or storm water on the site. The explanation for this lack of leachate or storm water, according to MOE staff, rests with the fact that "(T)he site is situated on sandy soils – most precipitation soaks into the soils and the leaf and yard waste itself is typically not damp enough to generate any significant moisture or leachate.

The MOE Guide includes a section that addresses the issue of on-site water management. In this section, the MOE Guide states the following:

> When selecting a composting site, the management of leachate and runoff should be considered. On-site water, generated as leachate from the compost mass or resulting from precipitation runoff must be managed to prevent contamination of surface and ground waters and to prevent odours arising from ponds. In most situations, contamination can be avoided by maintaining the required distance from surface waters, wells, and other areas of concern, and by ensuring that the site is properly graded.

The MOE Guide also explains the following:

> Section 53 of the *Ontario Water Resources Act* requires a Certificate of Approval in cases where runoff or leachate is discharged to a receiving body of water or the ground. To obtain a certificate, a sampling and testing program may be required and the effluent may have to receive some degree of treatment before discharge.

Further:

> To eliminate the need for a Certificate of Approval under the *Ontario Water Resources Act*, site design should include provisions to ensure that leachate and runoff are contained. These provisions may include grading, berms and collection ditches and ponds. By locating the site on a naturally impermeable base, or by constructing an impermeable base, any potential impacts on ground water from leachate and runoff can be reduced. The owner of the site should consider doing a hydrogeological or soils study if site conditions are unknown.

In August 2007, MOE provided further comment on these issues. MOE explained that section 4.4 of the Compost Guideline is meant to provide general direction only and is not intended to replace the provisions of the *OWRA*. There is no evidence of concerns with respect to leachate generation or discharges at the site. If conditions at the site change and controls for surface water and leachate are considered by the MOE to be necessary, the ministry will require the operator to apply for and receive approval under section 53 of the *OWRA*.

**ECO Comment**

The ECO concurs with MOE's conclusion that there is no need to review O. Reg. 101/94. Requirements in the regulation in combination with recommendations in the accompanying MOE Guide are designed to ensure that leaf and yard waste composting sites do not impose any harm to the environment within the boundaries of and beyond a facility site.

However, regulations are only effective if they are enforced and guidelines need to be followed. The applicants raised very specific concerns about one operating leaf and yard waste composting site. While their application for review zeros in on O. Reg. 101/94 and what they believe are the shortcomings of this regulation, they also raise significant concerns about operating compost sites within a sensitive ecosystem. Despite concerns raised by the applicants about the site, MOE made no comment in its formal response to the application for review regarding the status of the Harmony Road leaf and yard waste composting site. It is surprising to the ECO that MOE would not have moved from explaining the purpose of the regulation and associated MOE Guide to using the Harmony Road site as an illustrative example of how the regulation and MOE Guide are applied in order to allay the concerns raised by the applicants. In our draft Report, the ECO urged MOE to further investigate the site and ensure that the operation did not pose a risk to the environment. In response, MOE agreed to undertake further investigations of the site in the summer of 2007. The ECO commends MOE for undertaking this further work.

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**Review of Application R2005018**

**Regulation 339, R.R.O. 1990 (Road Salts Exemption)**
**(Review Denied by MOE)**

**Background/Summary of Issues**

In January 2006, Sierra Legal Defence Fund, on behalf of their clients, RiverSides Stewardship Alliance, submitted an *Environmental Bill of Rights* (*EBR*) Application for Review to the Ministry of the Environment (MOE) requesting that the ministry review Regulation 339, R.R.O 1990 made under the *Environmental Protection Act* (*EPA*). The applicants are concerned by the exemption of road salts from being treated as a contaminant under the *EPA*. The applicants requested that Regulation 339 be revoked and replaced with a phased-in mandatory road salts management regime under the authority of the *EPA*.

Regulation 339 exempts any substance that is a contaminant used by a road authority for the purpose of highway safety in snow or ice conditions from the provisions of the *EPA* and its regulations. Consequently, MOE does not regulate road salts the way it regulates most contaminants, i.e., by issuing Certificates of Approval and pollution prevention and/or abatement orders. If this exemption was repealed, then road salts could be treated as a contaminant and those who apply this contaminant to our roadways could be subject to regulatory oversight from the MOE, including the possibility of prosecutions. This regulation has not been amended since it came into force in the 1970s.

Regulation 339 conflicts with the *Ontario Water Resources Act*, which does not exempt road salts from its provisions. Section 30 of the Act makes it an offence for a person to discharge any material into any waters that may impair water quality.

Since their introduction in the 1940s, road salts have been the primary de-icing agent on North American roads. Road salts lower the freezing point of water. The salt combines with water and the brine mixture breaks the bond between the snow or ice and the road surface. By far the most commonly used road salt

is sodium chloride. Calcium chloride, magnesium chloride, and potassium chloride are used to a lesser degree. Ferrocyanide is added to chloride salts to prevent clumping. The different salts work at different temperatures and vary in toxicity.

The urbanization of Ontario, increased road densities and bare pavement policies have led to the upward trend of increased tonnage and application rates of road salts since the 1970s. The two greatest users of road salts in Ontario are the Ministry of Transportation (MTO) and the City of Toronto, using on average 617,000 and 135,000 tonnes annually respectively. They both have introduced liquid applications of 31.9 million and 2.2 million litres of brine respectively. In total, including municipalities and MTO, it is estimated that Ontario uses two million tonnes of road salts per year.

Runoff from roadways, salt storage yards and snow disposal sites have contributed to a rising trend of elevated chloride levels in surface water, soil and groundwater in Canada, Ontario and the City of Toronto. Approximately 30 to 45 per cent of all chlorides present in the Great Lakes are a result of winter road salts application. Excessive concentrations of chlorides in aquatic ecosystems detrimentally impact aquatic plants and animals by creating a toxic environment for native species and a favourable environment for salt tolerant species. Increased salt concentration also affects the vertical mixing of water bodies leading to oxygen depletion in lower levels and re-suspends metals attached to sediments in the water column. Road salts can also compromise drinking water quality, especially for communities relying on well water. Road salts also contaminate soils and damage terrestrial ecosystems. Salts inhibit a plant's ability to absorb water and nutrients from the soil or are outright toxic to plants. In 1984, the Ontario Court of Appeal found the Crown responsible for orchards damaged by the use of salt on an adjoining road, and in 1987 the Supreme Court of Canada upheld this decision.

Road salts also take a toll on Ontario's infrastructure and motor vehicles. Roads, bridges, sidewalks, parking lots and vehicles undergo inconvenient and expensive repairs and maintenance annually due to the highly corrosive nature of road salts. Environment Canada's Regulatory and Economic Analysis Branch estimates annual automobile depreciation and anti-corrosion expenditure of $459 per annum and the American Automobile Association (AAA) calculated depreciation of a 2004 vehicle to be $3,782 per year of ownership. The AAA report ranked road salts as the primary degrader of automobile value. Environment Canada estimated that 1.5 per cent of existing bridge surface needs repair annually because of road salts and the cost of repairing a damaged bridge deck averaged $736 per square metre per year. Repairing structural elements of bridges is estimated to cost $125 million to $325 million per year. An American report calculated the indirect costs of infrastructure damage caused by traffic delays and lost productivity at more than 10 times the direct cost of corrosion maintenance, repair and rehabilitation.

In 1975, Ontario acknowledged that road salts were an environmental concern. The Ministry of the Environment (MOE) established *Procedure B-4-1: Guidelines for Snow Disposal and Deicing Operations in Ontario,* which recommended that the amount of chloride introduced into the environment be kept to a minimum. In 1995, MOE undertook an internal review of Regulation 339 and reaffirmed the environmental impacts of roads salts, and its "direct conflict" with the Ministry's mandate. However, MOE concluded that exemption would "continue until a more environmentally benign substance is available at reasonable cost."

Since then, several reports have been produced that recommend the restricted use of road salts because of their detrimental impact on the environment. Recommendation 17 of the Walkerton Inquiry Report (Part Two) urged the regulation of industries, including those that spread road salts, in a manner consistent with drinking water source protection. The Provincial Implementation Committee on Source Water Protection and the Provincial Technical Experts Committee on Science also recognized the threat road salts pose to the environment.

At the federal level, the *Canadian Environmental Protection Act Priority Substance List Assessment Report (for Road Salts)* was released in December 2001, after a five-year study by Environment Canada and Health Canada. The report recommended that road salts be considered toxic and added to the List of Toxic Substances in Schedule 1 under the *Canadian Environmental Protection Act* (*CEPA), 1999*.

However, road salts have yet to be officially added to Schedule 1. After the report's release, a multi-stakeholder working group led by Environment Canada developed the *Code of Practice for the Environmental Management of Road Salts* (Code of Practice) in April 2004, after a two-year consultation process. The Code of Practice is a voluntary salt management program for road authorities using more than 500 tonnes of road salts per year or applying salts near vulnerable ecosystems. It recommends the use of salt management plans to reduce the quantities of road salts being applied. Several Ontario municipalities, including the Town of Renfrew, have successfully implemented salt management plans and many others have expressed an intention to create plans of their own.

The applicants recommend that Regulation 339 be replaced with a mandatory phased-in road salts management regime under the authority of the *EPA*. The new regime would require every road authority to seek a Certificate of Approval issued on a watershed basis. They also proposed additional regulations that would set targets for road salts reduction, establish monitoring and reporting practices, promote winter driving safety and best practices for snow removal, and set penalties to ensure compliance.

**Ministry Response**

In December 2006, MOE denied the Application for Review. MOE stated that "the ministry has a comprehensive list of initiatives that we believe adequately addresses the issues at this time." MOE stated that it referred to the factors listed under section 67 of the *EBR*.

*SEV (EBR, section 67(2)(a)):*
MOE did not refer to its statement of environmental values (SEV) in its notice of decision, although the SEV does prescribe that the ministry will prevent and minimize the release of pollutants to the environment.

*Potential for Harm to the Environment (EBR, section 67(2)(b)):*
MOE acknowledged the well-documented damage road salts caused to plants, animals, and aquatic organisms and the threat to it posed to groundwater. As discussed above, MOE's water quality monitoring reveals an upward trend of road salts concentration in Ontario water resources, particularly Lake Ontario tributary streams in the Greater Toronto Area. Modelling shows chlorides can accumulate and remain in groundwater systems for up to 100 years. The environmental harm is expected to worsen if road salts are not properly managed in light of increased urbanization and road densities. Despite the potential harm to the environment, MOE denied the request to review.

*Matters Otherwise Subject to Periodic Review (EBR, section 67(2)(c)):*
MOE explained that one reason for not conducting the review is that they participated in Environment Canada's road salts review that was very recent and no new substantive science has emerged in the last six years. MOE also described how since the development of Environment Canada's Code of Practice, 202 municipalities and organizations responsible for road maintenance in Ontario have indicated that they either intended to or already prepared a salt management plan and implemented best management practices.

However, Regulation 339 was not a part of the Environment Canada review and MOE has not conducted an external review or revised Regulation 339 since its inception in 1972. There have been several significant developments to water resource management in Ontario in recent times including the publishing of the Walkerton Inquiry Report and the passing of the *Clean Water Act*. Regulation 339 may undermine these efforts and those initiated by Environment Canada.

*Social, Economic, Scientific or Other Evidence (EBR, section 67(2)(d)):*
MOE recognized that road salts have significant social impacts given that it contributes to the deterioration of road and bridge infrastructure and the premature rusting of vehicles. Road salts can contaminate ground water. Rapidly growing municipalities in southwestern Ontario, such as Kitchener-Waterloo, which rely on groundwater for their drinking water supplies are potentially at greater risk. The ministry noted that protection of drinking water resources is of paramount importance to the ministry.

MOE also stressed that the Ontario government has the obligation to ensure public safety and the exemption exists because there are no cost-effective alternatives to salts for winter de-icing. MOE further asserted that alternatives are not available in the quantity needed for the province.

Other initiatives MOE discussed include its authority to issue Certificates of Approval for approximately 30 per cent of salt storage domes and to investigate and prosecute salt users causing environmental damage through improper storage or transport of road salts. In addition, the ministry maintained tributary, surface water and groundwater monitoring networks to identify chemical changes in water resources including chlorides from salt.

The Salt Institute, a salt industry association, requested they be named as an interested party to the application for review. They advocated for "sensible-salting" initiatives to lessen the impacts of road salts on the environment including better salting methods and training for operators. MOE thanked the Salt Institute for its comments and recommendations but did not discuss them in the notice of decision.

The ministry did not meet the timeline requirements of the *EBR* to issue its decision. On January 30, 2006, the applicants filed an application for review, which MOE received on February 2, 2006. Both the applicants and the ECO wrote to MOE in October and November 2006 enquiring when a decision could be expected and outlining that the *EBR* requires ministries to send a notice of decision with the reasons for the decision within 60 days of it receiving the application. MOE finally issued its decision on December 21, 2006, almost 11 months after the application was filed. MOE did not explain why the notice of decision was delayed more than eight months past the deadline.

The ministry did not commit to any follow-up actions or propose any alternatives. The ministry stated MOE would inform the applicants if an "abrupt change or unexpected circumstance" occurred that required the ministry to take appropriate action. The ECO notes that this is an odd statement for MOE to make.

**Other Information**

MOE's notice of decision briefly mentioned that the province has an obligation to ensure public safety on roads and highways. In 1999, the Transportation Association of Canada (TAC) released a primer on road salts and snow and ice control. It outlined how Canadians rely on a safe and efficient road network for transporting goods and services, travelling to work, recreational activities and for emergency and security services. Snow and ice can compromise the safety and efficiency of roads, highways and bridges resulting in lost productivity or damage to human health and property. Roads salts are used to reduce accidents and travel delays. Nevertheless, in bad weather both are inevitable. The Primer discussed initiatives to minimize the harmful effects of road salts including limiting the accumulation of snow and ice on the roads, more accurate predictions of when and where salts need to be applied, improving the precision of road salts application and better storage.

Although MTO is one of the biggest salt users in the province (using on average 500,000 to 600,000 tonnes annually) it is not mentioned in the MOE notice of decision. In MOE's March 2007 Progress Report to the ECO, it stated that it would defer to MTO with respect to the environmental impacts arising from transportation.

In its SEV, MTO commits to continue studying ways to improve salt management practices and to minimize releases to the environment. MTO's website contains information about the ministry's salt management practices. MTO developed a Code of Practice and pledged to follow best practices in storage and application processes and to employ the latest winter maintenance technologies. It equipped its salt spreading trucks with Electronic Spreader Controls for more efficient salt usage, expanded the use of pre-wetted salt, increased the use of snow hedge innovations to prevent snow drifting on the highway, installed truck and weather monitoring technology to ensure application rates conform to MTO standards and eliminated unnecessary salt applications. Additional trials and pilot programs are being conducted by MTO. MTO also participates in an international partnership of public agencies that performs joint research activities. It is also a member of a national Road Salt Management working group that identifies

the latest salt management practices. MTO stresses it is dedicated to exploring "new and emerging technologies to further enhance road salt management practices."

MTO stores its salt indoors and is moving towards indoor loading and delivery. It has commenced construction on secondary containment for liquid in pre-wetting facilities. MTO asserts that its contractors are trained, monitored and audited to ensure they are complying with ministry standards. MTO's website does not discuss the use of chloride-free alternatives to road salts such as calcium, potassium and sodium acetates, sodium and potassium formats, sand and urea.

MOE did not cite recent legal decisions assigning liability to municipalities and MTO for failing to adequately salt roads and bridges as a factor for denying the application for the review. For example, in 2002, the Supreme Court of Canada refused to hear an appeal of an Ontario Court of Appeal decision ordering MTO to pay $6 million in damages to a woman who suffered serious injuries after her car flipped on an icy bridge. Fear of rising insurance premiums and lawsuits could become a significant roadblock to the implementation of a mandatory road salts management plan in Ontario.

The ECO has received a number of public complaints and some previous applications related to road salts. In one case, farmers in the County of Oxford had a farm next to the county's salt storage yard. In 1992, the farmers noticed that vegetation on their farm was dying on the part of their property adjacent to the salt yard. In 1994, MOE testing confirmed that the road salts had leached into the river flats and creek. MOE informed the County that it was in violation of the *Environmental Protection Act* and *Ontario Water Resources Act* and asked the County to develop a plan to ensure no further pollution occurred. MOE did not lay charges or initiate mandatory enforcement action. The farmers contacted the ECO in 2003 and 2004 about using the *EBR* but ultimately decided to launch a civil action.

In 1993, MOE received a complaint about salt contamination in a drilled well originating from runoff from a snow dump owned and operated by MTO. MOE investigated and decided that the contamination could not be attributed to any one source. The well owner was not satisfied by MOE's response and pursued court action against the City of Thunder Bay and the Province but lost the case. In 2001, the well owner also submitted an application for investigation under the *EBR*; however, this was denied by the MOE because the limitation period to bring charges had expired.

**ECO Comment**

The ministry was not justified in denying this request for review. The applicants proposed that Regulation 339 be revoked and replaced with a mandatory phased-in road salts management regime. MOE did not explain why reviewing Regulation 339 was neither feasible nor warranted. Instead, the ministry cited other road salts reviews and initiatives as adequately addressing the environmental concerns of the applicants and consequently a review of the exemption was not necessary at this time. However, the initiatives referenced by MOE did not constitute a public review of Regulation 339, or address the concerns raised in the application.

The ECO is troubled by the ministry's extended delay in releasing its decision despite repeated inquiries by the applicants and the ECO to MOE about the long-passed deadline. MOE did not provide an explanation for the delay. Such delays frustrate the public interest, undermine the *EBR*, and hamper the ability of the ECO to report to the Legislative Assembly.

The reasons provided in the notice of decision and their level of detail did not reflect the long delay in issuing the response to the request for review. The reasons provided were general and did not address the issues raised by the applicants. Much of the information was already referenced by the applicants in their application for review and in their report on the environmental impacts of road salts. The ministry put forward little information on the province's road salts management plans. No analysis was provided on the feasibility of rescinding the regulation or the potential consequences flowing from such action. The ministry did not respond to the applicants' recommendations on the proposed mandatory phased-in road salts management regime. It is unclear why the ministry needed 11 months to draft this decision.

The recommendations put forth by the applicants for reducing Ontario's dependency on road salts, such as Certificates of Approval and pollution prevention/abatement orders, were not considered by the MOE. The ministry did not discuss whether Ontario would implement the Code of Practice on a province-wide basis or if it would be voluntary or mandatory. MOE was satisfied to allow municipalities and other salt users to voluntarily implement plans without direction from the ministry. Furthermore, the ministry did not discuss how they would mitigate the increased demands for road salts from intensified urbanization and road densities. The ministry did not address the adequacy of current MOE water quality guidelines for chlorides that focus on aesthetics rather than environmental health. MOE also argued that they had the authority to issue Certificate of Approvals for approximately 30 per cent of salt storage domes but MOE did not discuss how many of these storage domes have been investigated or prosecuted for improper storage or transport of salt. The ministry does not consider public consultation opportunities for the road salts exemption. MOE did not offer to examine the recommendations or undertake additional efforts to reduce the use of road salts in the province.

MOE stated the factors under section 67 of the *EBR* were considered in the decision to deny the request for review. Nevertheless, MOE did not demonstrate to the ECO's satisfaction that there would not be potential for significant environmental harm if the review was not conducted. It is likely that Ontario's demand for road salts will continue to increase as our winters experience more freeze/thaw events and urban sprawl continues to spread. MOE has accepted that road salts are an environmental threat to terrestrial and aquatic ecosystems and pose a risk to clean drinking water. Road salts are also responsible for the annual construction delays on our roads and bridges to repair corrosion that occurred over the winter season. It does not appear that MOE intends to create comprehensive plan to tackle this issue or attempt to prevent or mitigate damage from road salts.

Although these facts have been recognized by MOE since the 1970s, Regulation 339 has not undergone public review and it still remains in its original form. In a 1995 internal regulation review for Regulation 339, MOE stated "… this regulation is in direct conflict with the Ministry's mandate and objectives because it allows for a contaminant to be widely distributed to the natural environment resulting in substantial chronic contamination." MOE's internal review demonstrated that there have been long-standing concerns within the ministry about the environmental impacts of road salt, and that regulatory options such as mandatory operator training were under consideration.

Many reviews and reports have been produced recommending that road salts be treated as a threat to water resources and properly managed. The applicants did not request that the ministry conduct another study of the impacts of road salts. Instead, they wanted the findings and recommendations from the studies already conducted to be implemented in Ontario through a province-wide mandatory salt management regime. Several municipalities are currently realizing the benefits of implementing such a plan. Provincial guidelines and best management practices would assist other municipalities and large salt users design a salt management plan suited to their geography, roads and water conservation area. Aside from participating in Environment Canada's consultation process, the ministry did not describe MOE activities aimed at managing and reducing Ontario's dependency on road salts.

The ministry's decision to maintain the status quo contradicts its promises to protect the province's water resources and could undermine the legislative objectives of the recently adopted *Clean Water Act*. MOE has not demonstrated that the status quo protects the environment in the long-term. It is not appropriate for the ministry to wait until an "abrupt change or unexpected circumstance" occurs before it does anything on this issue. Environmental principles, namely the precautionary principle, intergenerational equity and polluter pays, dictate that MOE should respond to this issue based on the scientific evidence that exists. The ability to reverse the environmental damage from high chloride concentrations will be very difficult, will take a long time and will undoubtedly be more costly than switching to less harmful alternatives, using smarter application procedures and legislating salt management plans. Any initiative by MOE should include the opportunity for public consultation.

In conclusion, the ECO finds MOE's rationale for denying the review to be unpersuasive and believes a review of Regulation 339 is warranted. In order to ensure water resources are protected from the increasing application of road salts, ECO urges MOE to develop a comprehensive strategy in consultation

with MTO and municipalities, that could benchmark the observed environmental impacts of road salts in Ontario as well as assess regulatory options for instituting a salt management system that includes best management practices, salt alternatives and technological advancements. A review could examine options for rescinding the regulation and replacing it with a framework of new regulations and guidelines to create a province-wide salt management regime, as well as institute winter road safety practices. Furthermore, consultations could focus on advancing the widespread adoption of gains made by MTO's best practices for the storage, transport and application of road salts and municipal salt management plans.

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**Review of Application R2006001**

**Review of the Regulatory Framework for Sewage Biosolids**
**(Review Denied by MOE)**

This application was reviewed in conjunction with R2006002 (OMAFRA). Please see pages 112-117 of the Supplement for ECO's full review of this application.

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**Review of Application R2006003**

**Application for Review of Regulation 347, R.R.O. 1990**
**(Review denied by MOE)**

**Geographic Area:** Niagara Region, with province-wide implications

**Background/Summary of Issues**

In June 2006, two applicants requested a review of Regulation 347, R.R.O. 1990 made under the *Environmental Protection Act* (*EPA*) as it pertains to asbestos waste. They contend that asbestos waste should not be defined as a "non-hazardous solid industrial waste" under Regulation 347 and also recommended that the Ministry of the Environment (MOE) take a number of actions. These included the following:

1) MOE should legislate a "cradle to grave" approach for all aspects of the handling and disposing of asbestos wastes;

2) MOE should provide a "single window" approach to upgrade communications and develop legislative and regulatory protocols, procedures, standards and guidelines for asbestos handling and disposal, along with all health and safety requirements;

3) MOE should immediately mandate that asbestos should not be disposed in landfills regulated and designed to accept non-hazardous solid waste; and

4) the ministry should carry out mandatory random inspections and investigations, without prior notice, of landfills regulated and designed to accept non-hazardous solid waste to ensure that asbestos wastes are being handled at those facilities in the manner required by Regulation 347.

Both applicants are members of a Citizens Liaison Committee (CLC) for a landfill operating in Niagara Region. They expressed concern that asbestos waste is being improperly accepted and buried at the landfill and at other Ontario landfills regulated to accept non-hazardous solid waste.

To support their application, extensive evidence was provided in two volumes. The applicants included copies of sections of a number of regulations administered by MOE and the Ministry of Labour (MOL). In addition, the applicants also included copies of sections of Certificates of Approvals, some related Registry notices, information about the work of their CLC, and correspondence exchanged between the applicants, local officials in Niagara Region and the MOE.

The application material also included publications and articles from peer-reviewed journals, newspapers, magazines and a number of web sites. Moreover, the applicants provided a copy of a publication issued in 2005 by the Canadian Auto Workers titled, Pure White: Asbestos – A Canadian Scrapbook. Some of the publications included in the evidence was by a group of Ontario-based experts in occupational health and safety (OHS). Their reports and papers argue that asbestos is the "most pervasive environmental hazard in the world," and further claim that the substance is responsible for thousands of preventable cancer deaths globally each year.

The applicants contended that by allowing asbestos waste to be regulated under the current weak provisions of Regulation 347, MOE was potentially liable to charges of criminal negligence under the federal *Criminal Code* because asbestos has been used in the production of dozens of products including: brake and clutch linings and gaskets for cars and trucks; insulation; flooring and shingles; cement; and plastics. They noted that there is a lack of proper enforcement under existing laws and regulations to ensure that these types of products, which sometimes contain asbestos, are handled under the appropriate provisions of Regulation 347. The applicants also disputed the argument made by regional municipal and MOE officials that “a little bit” of asbestos is deposited in Ontario landfills “now and then” and there is no risk to the public when this happens.

In addition, the applicants questioned why asbestos is a designated substance under legislation administered by the Ministry of Labour but it is not provided special recognition by MOE under Regulation 347 and in its other regulations and policies. As of May 2007, MOL has identified and designated 11 substances.

To raise the profile of their application, the applicants encouraged a number of residents in Niagara Region and some stakeholder groups (e.g., the Occupational Health Clinics for Ontario) to write letters and e-mails to the ECO and express support for the application. Some of the letters were included in the application. Two of the letter-writers suggested that better regulation of asbestos waste and improved mapping of deposits of asbestos wastes in landfills is important because this will facilitate landfill mining in the future. Landfill mining is premised on the concept that future Ontario governments may wish to allow owners of closed or operating landfills to “mine” portions of the landfills to recover valuable recyclable materials such as paper, plastics, aluminum or steel and remove hazardous materials that may threaten groundwater supplies.

*Background on Asbestos:*
Asbestos is from a family of fibrous silicate minerals that occur naturally. Since asbestos can withstand corrosive chemicals and does not ignite when exposed to high temperatures, it was once widely used as an insulating and fire-proofing substance in a number of applications. It has been estimated that 300 million tonnes of asbestos was mined in the 20th century.

Thousands of buildings constructed in Canada between 1930 and 1975 still contain asbestos insulation (often in sprayed form) that may release airborne fibres when disturbed during maintenance work, repairs or renovations. The use of asbestos in building construction began to sharply decline in the 1970s as the carcinogenic properties of asbestos became better known.

According to one study, asbestos has been used extensively in more than 3,000 commercially manufactured products. Some of the categories of materials and products that are known to have been manufactured using asbestos include the following:

- Thermal insulation (e.g., pipe and boiler insulation);

- Fire-proofing materials (e.g., sprayed insulation, fire door insulation);
- Asbestos cement/fibrocement products (e.g., roof and wall claddings);
- Decorative and acoustic applications;
- Electrical switchboards, insulators, gaskets and fittings;
- Asbestos felts and paper-like products;
- Friction materials (e.g., brake linings);
- Paints, coatings, sealants, vinyl floor coverings and adhesives;
- Textiles (e.g., woven cloths, blankets); and
- Miscellaneous products (e.g., asbestos socks, phone boxes and gas masks).

Many uses of asbestos in commercially manufactured products have been phased out in the past two decades. For example, asbestos was widely used in many automotive applications such as brake linings for cars and trucks between 1908 and the early 1990s. Today, other braking systems such as ABS have become popular, and asbestos is less widely used.

The health hazards associated with asbestos depend on the type and dimensions of the fibres and the way in which the asbestos is used. In its guidelines, the Ministry of Labour notes that heavy occupational exposure to air-borne respirable asbestos fibres can lead to three diseases: asbestosis, lung cancer, and mesothelioma. There is no substantial evidence that ingesting small amounts of asbestos fibres can cause chronic diseases.

The first regulatory initiative to control asbestos exposure in factories was implemented in the United Kingdom in 1931. By the 1940s, there was growing medical evidence that asbestos miners and factory workers and installers who handled asbestos materials suffered from a higher incidence of several respiratory diseases. In the 1950s, Dr. Richard Doll published peer-reviewed evidence of links between asbestos used in textiles and increased lung cancer in textile production workers. By the 1960s, evidence of a link between mesothelioma and asbestos exposure began to grow, particularly after Professor Chris Wagner published a study of South African miners.

According to most experts, asbestos fibres are primarily an occupational risk rather than an environmental risk. Thus, the risk to the general population from environmental levels of asbestos fibres in air (e.g., in a typical building containing asbestos insulation) and in water, and from asbestos products (where the fibres are bound) is negligible.

Research evidence indicates that the dangerous air-borne fibres are those between five to eight microns (µm) in length and thinner than 1.5 microns, which have the ability to lodge in the alveoli of the lungs. The strength and durability of the fibre affects its persistence in lungs. If the body's normal lung clearance mechanisms are overwhelmed because of the quantities of fibres or impaired by other activities such as smoking, this increases the risk of disease. Data collected for the Ontario government by the Royal Commission on Matters of Health and Safety Arising from the Use of Asbestos in Ontario (RCA) in the early 1980s suggests that asbestosis and lung cancer related to asbestos exposure tend to develop over latency periods ranging from 15 to 45 years.

According to MOL, asbestos-removal workers and maintenance workers are at greatest risk from respirable dust and fibres because these may be released during their work. To reduce their risk of exposure, MOL has developed a range of regulatory requirements such as special job-site enclosures, dedicated clothing, respirators and hygiene procedures. These are intended to protect these specialized workers from exposure to the dust created and fibres released by asbestos disturbance or removal activities.

In the 1970s, public health authorities in Ontario, the media, and the public in general, became concerned about the health effect of asbestos materials on building occupants. In Ontario, asbestos in buildings is most commonly found in sprayed-on insulation or fireproofing, fibrous or corrugated paper pipe insulation, cement pipe, drywall and drywall joint compound, floor and ceiling tiles. To determine whether public anxiety related to asbestos materials in buildings was justified, the Ontario government appointed the

RCA in 1981. The RCA concluded that asbestos does not pose a significant problem for the general occupants of a building, except in certain rare circumstances. Thus it was "rarely necessary to take corrective action in buildings containing asbestos insulation in order to protect the general occupants of those buildings." They further noted that air sampling undertaken by consultants had shown that airborne asbestos levels in buildings with sprayed asbestos are no higher than outdoor levels, unless the friable asbestos or asbestos debris is being disturbed at the time of the sampling. (Friable asbestos means it is dry and can be easily crumbled or crushed into powder by hand.) In the past two decades, the MOL, some academic researchers and experts and authorities in other jurisdictions have supported the general conclusions of the RCA.

As a result of public concern about the risks to health and safety associated with asbestos mining and milling operations in Canada, in 1977 the federal government passed regulations to limit asbestos emissions to air under the federal *Clean Air Act (CAA)*. The regulations limit the concentrations of asbestos emitted from any mining or milling operation to two fibres per cubic centimetre measured over a thirty-minute period according to a detailed Environment Canada manual. In 1978, *CAA* regulations controlling asbestos emissions from manufacturing operations were proposed but never given effect. While there are limits on concentrations (per cubic centimetre during a certain period of time) that can be discharged by a plant, there is no overall limit on the total amount of asbestos that an operation may discharge. In 1990, these asbestos regulations were updated when the *CAA* was repealed and the *Canadian Environmental Protection Act* was enacted in 1988. At present, Environment Canada places prohibitions on the production, emission, import, and export of many toxic substances through regulations issued under the Act. The effect of the federal regulations is that, under the paramountcy doctrine in Canadian constitutional law, the federal government sets the floor on standards. Thus, it would be open to a provincial government to develop laws that are more stringent than those developed under *CEPA* but lower standards would be viewed as unconstitutional by the courts. Ontario has not developed similar *EPA* regulation to control discharges from mining or milling and this means that the federal regulations, enforceable by Ontario Region's Environment Canada staff, would govern in Ontario.

*How MOE Regulates Asbestos Waste:*
Most asbestos wastes are generated when insulation or fireproofing materials are removed from equipment or buildings, and MOE has developed a detailed regulatory framework to address the safe handling and disposal of these "bulk" wastes.

Regulation 347 permits the disposal of asbestos waste in any landfill site approved for the disposal of municipal waste. Section 1 of Regulation 347 states that "non-hazardous solid industrial waste" means industrial waste that is not liquid industrial waste and is not hazardous waste *and includes asbestos waste*. [Emphasis added] Section 1 goes on to specify that "asbestos waste" means solid or liquid waste that results from the removal of asbestos-containing construction or insulation materials *or the manufacture of asbestos-containing products and contains asbestos in more than a trivial amount or proportion.* [Emphasis added] Neither the *EPA* nor Regulation 347 define "trivial" but the Oxford English Dictionary suggests that a trivial amount would be "small and of little importance." Regulation 347 goes on to define both "commercial waste" and "domestic waste" as including asbestos waste. Presumably these definitions are intended to facilitate disposal of commercial and domestic products that contain small amounts of asbestos in municipal landfills. To provide further clarity, "liquid industrial waste" is defined in section 1 as waste that is both liquid waste and industrial waste but does not include asbestos waste.

Other jurisdictions in Canada take a similar approach. In British Columbia, the Hazardous Waste Regulation defines "asbestos waste" as a hazardous waste if the waste contains more than one per cent by weight, of asbestos fibres, and the asbestos waste is either a powder or friable. The BC regulation further states that asbestos that is tightly bound in products such as used brake linings or woven cloth so that it is not friable is not considered a hazardous waste.

In addition to allowing asbestos disposal in regular landfill sites, section 17 of Regulation 347 imposes standards for waste handling, packaging, transportation, vehicles and disposal sites related to asbestos.

Operators are required to obtain a Certificate of Approval (C of A) for a waste management system under section 27 of the *EPA* before they can transport any waste.

Under section 17 of Regulation 347, asbestos waste transported to a waste disposal site must be shipped in a rigid, impermeable, sealed container of sufficient strength to accommodate the weight and nature of the waste, or it must be shipped in bulk by a hauler with an approved C of A that specifically authorizes the transportation of bulk asbestos waste.

Subsection 17(10) stipulates that asbestos waste may be deposited only at locations in a landfill that "have been adapted for the purpose of receiving asbestos waste or are otherwise suitable for that purpose," and section 17(11) goes on to state that the waste may be deposited at a landfilling site only while the depositing is being supervised by the operator of the site or the person's designate. Subsection 17(12) requires that deposited asbestos waste must be covered by at least 125 centimetres of solid waste or cover material "in such a manner that direct contact with compaction equipment or other equipment operating on the site is avoided."

MOE also has developed two guidelines that relate to the handling of asbestos waste. Guideline C-6, titled the Handling, Transportation and Disposal of Asbestos Waste in Bulk (Guideline C-6 or the guideline) provides basic standards for the assessment of vehicles, equipment and procedures used for the collection, transportation and disposal of asbestos waste in bulk. The guideline, last updated in 1994, is "intended for use by operators of bulk asbestos waste handling and transportation systems, and by Ministry staff during their review and assessment of C of A applications for bulk asbestos waste systems and during monitoring." The guideline also requires that asbestos waste should be "transported directly to a landfill site at which the operator has been informed in advance of the quantity of the waste and the approximate time of arrival."

Guideline C-6 also recommends that asbestos wastes generated when insulation or fireproofing materials are removed from equipment or buildings "be removed manually by scraping or brushing, or by using high pressure water." MOE also advises that removal of asbestos by any of these methods "usually involves the use of water to lower the friability of asbestos and minimize the amount of fibres which may become airborne." In addition, MOE recommends that industrial vacuum loaders be used to collect asbestos removed using these methods. These vacuum loaders "consist of a blower preceded by particulate removal equipment and a debris or waste collection box. The vacuum induced by the blower is used to draw the asbestos waste into the debris box through a hose/boom arrangement."

Procedure C-10, titled Removal Procedures at Sites Containing Substantial Quantities of Asbestos Waste (Procedure C-10), is intended to protect the environment during the removal of asbestos waste from sites designated for redevelopment or other purposes. Last updated in 1994, the procedure applies to sites containing substantial quantities of asbestos waste.

Procedure C-10 recommends that all employees working on the operations "shall be protected by the use of respirators and clothing as necessary or as directed" by the consultant or Ministry of Labour staff and stipulates that "the requirements of the *Occupational Health and Safety Act* and its regulations shall be adhered to by all personnel involved in the operations."

Procedure C-10 also suggests that ambient air at the worksite shall be "monitored according to ministry procedures," and the results evaluated against MOE's primary criteria for ambient air which is no more than "0.04 asbestos fibres of length greater than five µm per cubic centimetre of air" near sites containing large quantities of asbestos wastes. In addition, samples shall be taken around the fence perimeter of the site. The number of samples is determined by the consultant and reviewed by MOE staff and results are evaluated in accordance with the MOE's primary criteria for asbestos in ambient air.

Procedure C-10 goes on to state that "should visible emissions occur on site, remedial measures shall be taken" and the proponent's consultant "shall maintain a log of such events that records the time, duration, location, probable cause and remedial measures applied" and make this log available to the Ministry. The log data are reviewed and compared with pertinent asbestos analytical data to ascertain if a

relationship between the visible emission and asbestos fibre counts exists. In addition, the MOE requires that post-removal air monitoring of the excavation site be conducted in a manner and frequency as determined by an MOE Director.

In cases where contractors or waste operators fail to comply with provisions of Regulation 347, MOE has prosecuted them. For example, in the fall of 2002, a London-based contractor was awarded a demolition contract requiring him to remove and dispose of asbestos waste at a long-term care facility for senior citizens. The contract clearly set out the requirements for the disposal of the waste in accordance with Regulation 347. At the time, the contractor bagged some of the asbestos waste and transported it to asbestos waste bins owned by a disposal company in London without notifying that company. In July 2003, the ministry learned that some asbestos waste from the senior citizen's home had not been handled in accordance with Regulation 347. An investigation by the MOE's Investigation and Enforcement Branch confirmed that a quantity of asbestos waste was transported without a C of A for a waste management system contrary to section 27(1) (a) of the *EPA* and the contractor was charged. In June 2005, the contractor was fined $45,000 for transporting waste without a C of A.

*How MOE regulates Asbestos in Ontario's Ambient Air:*
MOE sets environmental quality standards "to protect human and ecosystem health, prevent damage such as soiling and corrosion to the physical environment" and minimize odours. MOE uses the term "standard" to refer to any limit it places on the presence of a contaminant in the ambient environment. Contaminant is defined in the *EPA* as any solid, liquid, gas or other discharge "that causes or may cause an adverse effect." MOE notes that its standards "can be either numerical values (for example, the maximum allowable concentration of a contaminant in air)" or "narrative descriptions" (e.g., the requirement that odour associated with treated drinking water be inoffensive). Environmental standards form the basis of many of the ministry's programs and "are developed for a wide variety of media including air, soil, ground water, surface water, drinking water, sediments and biota."

According to MOE, standards are used by ministry staff and management to: determine compliance with Ontario's environmental regulations; define the legal limits for discharges to air and water in certificates of approval, control orders and program approvals issued under the *EPA* and the *Ontario Water Resources Act*; assess general environmental quality and trends; and assess "the need for the cleanup or remediation of contaminated soils and sediment."

MOE published its first list of desirable ambient air quality criteria (AAQC) in 1974. These criteria for 24 contaminants were not legally enforceable standards but were indicative of desirable levels for the contaminants. The levels were expressed in average amounts desirable in specified time periods. AAQC are used for assessing general air quality and the potential for causing an adverse effect.

In the late 1960s and the early 1970s, MOE began to regulate many air polluters using the concept of corresponding point of impingement (POI) limits. POI limits are used primarily to review applications for certificates of approval for emissions to air and to assess compliance with Regulation 346, R.R.O. 1990 (General - Air Pollution) made under the *EPA*. Asbestos is not included as a regulated substance under Regulation 346.

Ontario's first standard for asbestos in ambient air was established in the late 1970s when additional ambient air quality criteria and the corresponding POI limits were developed. Until 2005, MOE's primary criterion for asbestos in ambient air was no more than 0.04 asbestos fibres of length greater than five µm per cubic centimetre of air.

In Ontario, regional air quality criteria are set out in Regulation 337, R.R.O. 1990 (Ambient Air Quality Criteria) made under the *EPA*. This regulation, which was last amended in 1994, sets out desirable ambient air quality criteria for each contaminant during a certain exposure period which ranges in length from one hour to 30 days. Asbestos is not included as a regulated substance under Regulation 337.

In October 1996, MOE published a plan to update its various environmental standards and posted it on the Registry for a 60-day comment period. The plan described the types of standards used by the

ministry, provided an overview of the standards-setting process and listed the priorities for developing new or revising existing standards during the ensuing three years. The 1996 plan was updated in 1999, and MOE posted a decision notice on it in 2000. (For a review, see the ECO 1999/2000 Annual Report on page 74.)

In its 1999 update to its standards-setting plan, the MOE proposed to reaffirm its standard for a number of chemicals and substances. Substances were placed in Group 1 or Group 2 based on toxicity, releases to the atmosphere in Ontario, and identification as priorities by federal and national committees. According to the plan, development of air standards for substances in Group 2 is considered a lower priority than those in Group 1. All standards for substances in Group 2 were assessed against published guidelines, standards or exposure limits used by a number of other regulatory agencies. On the basis of that review, the ministry decided to reaffirm the values for 75 standards that were being used at the time because MOE experts felt that the standards are adequate and a formal risk assessment approach was not warranted. While asbestos was classified as a Group 2 substance along with hundreds of others, asbestos was not one of the 75 substances reaffirmed in 1999, leaving open the opportunity for further work. Details of the review process and rationales for each air standard being reaffirmed were made available in an accompanying report, titled Reviewing Ontario's Air Standards.

In 2001, the Ontario government passed O. Reg. 127/01 (Airborne Contaminant Discharge Monitoring and Reporting) under the *EPA*. This regulation required facilities in the electricity generation, industrial, institutional, commercial and municipal sectors to monitor and report their emissions of airborne contaminants. All reports were to be submitted to MOE and made available to the public. (For a review, see the ECO 2001/2002 Annual Report, pages 91-94.)

O. Reg. 127/01 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 are also required to report to Environment Canada under the National Pollutant Release Inventory (NPRI) must provide the same air emissions data to MOE. MOE also introduced two lists of contaminants not covered by NPRI. Under O. Reg. 127/01 specific dischargers of friable asbestos including certain types of mining and manufacturing plants are required to report to MOE. These dischargers are required to follow MOE's guide titled Step by Step Guideline for Emission Calculation, Record Keeping and Reporting for Airborne Contaminant Discharge, dated April 2001.

O. Reg. 127/01 was amended by the MOE in 2005. In general, the changes served to reduce the reporting requirements for many Ontario companies because these companies already are required to report to Environment Canada to comply with the NPRI. (For a review, see the ECO 2005/2006 Annual Report Supplement, page 37.)

In 2005, the Ontario government passed O. Reg. 419/05 to update the regulatory framework for local air quality and also amended its AAQCs and POI guidelines. The amendments included the development of contaminant-specific AAQCs protective of human and environmental health. These criteria are effects-based and were developed to be protective of the most sensitive ecological receptors or human populations, such as children and the elderly, and do not consider technological or economic issues. These new standards also were developed using a risk assessment approach after several stages of public consultation and a number of Registry proposal notices. (For a review, see ECO 2005/2006 Annual Report, pages 89-96.) They include screening values for one-hour POI Standards as well as possible AAQCs for 10 minute, one-hour, and 24-hour periods to provide a more realistic exposure assessment. The effects-based averaging period for health-based air standards are typically on a daily (24-hour) basis, whereas the effects-based averaging period for odour-based compounds is generally over a 10-minute averaging period. O. Reg. 419/05 and the new Ontario Air Standards apply to all non-mobile source of air pollution in the province. Generally, any facility that is required to obtain a section 9 C of A will be responsible for completing an Emission Summary and Dispersion Modeling (ESDM) report using the new models approved by the MOE.

As part of its air standards updating process related to O. Reg. 419/05, MOE released a summary of the new POI guidelines and revised AAQCs. Under O. Reg. 419/05, an MOE Director can issue notices and

impose certain notification requirements on dischargers. Exceedence of a POI guideline or of an AAQC may cause adverse effects and could trigger the issuance of a Director's notice.

With respect to asbestos, the 2005 criteria for ambient air is no more than 0.04 asbestos fibres of length greater than five µm per cubic centimetre of air in a 24-hour period. The POI guideline is five µg per cubic metre of air in a 30-minute period.

Asbestos also is a regulated substance under the National Pollutant Release Inventory established under the *Canadian Environmental Protection Act*. Designated industries are required to report on discharges of asbestos in its friable form. More than 64 facilities across Canada and 24 in Ontario reported use of asbestos to the NPRI in 2005 and a number of these also reported on-site or off-site discharges.

*How Hazardous Wastes are Regulated under Regulation 347:*

The applicants requested that asbestos be regulated in the same way that other hazardous wastes are treated by MOE under Regulation 347. Under Regulation 347 hazardous waste is expressly defined as excluding asbestos waste as described above. For hazardous wastes that are "subject wastes", section 18 of Regulation 347 requires waste generators to register with MOE, to use manifests for tracking waste movements and to report to the Director. The report is to be completed as directed in a guidance manual issued by the MOE. Subsequent changes to the type of "subject wastes" kept are to be sent to the Director within fifteen days of the change, and records of the waste and how they are disposed are to be maintained by the generator.

The requirements for manifests are outlined in sections 19 to 27 of Regulation 347. These sections require reporting and tracking waste movements whereby generators, carriers, waste disposal site operators and waste-derived fuel site operators must submit copies of multi-part waste manifests to authorities, and maintain copies for two years. For those shipments leaving Ontario or entering Ontario from other provinces or the United States, the use of federal manifests prescribed by the *Transportation of Dangerous Goods Act* and its regulations, which similarly track the movement and ultimate destination of wastes within Canada, may be used. Copies of these federal manifests must be submitted to the MOE. As noted in previous ECO Annual Reports, the system does not operate seamlessly. Indeed, the Auditor General of Ontario and some environmental groups have pointed out serious flaws in tracking hazardous wastes and have noted that large quantities of wastes shipped by generators are sometimes never fully accounted for by operators who supposedly received the shipments.

In 2005, Regulation 347 was updated by MOE to increase requirements for pre-treatment of certain hazardous wastes. (For a review, see the ECO 2005/2006 Annual Report Supplement, page 86.) In addition, new sections (e.g., section 17.1) were added to Regulation 347 regarding procedures to be followed by waste generation facilities that store and handle certain subject wastes.

*How the Ministry of Labour Regulates Asbestos:*

The *Occupational Health and Safety Act* (*OHSA*) is the main law governing workplace health and safety in Ontario. The purpose of the *OHSA* is to protect workers against health and safety hazards in the workplace. It sets out the rights and duties of all parties in the workplace, establishes procedures for dealing with hazards, and provides for the enforcement of the law where compliance has not been achieved voluntarily.

The *OHSA* is based on the principle of the internal responsibility system where the workplace parties – workers and employers – identify and develop solutions to workplace health and safety problems.

The *OHSA* also gives the Ontario government broad powers to make regulations setting out in detail how some of the duties of the various parties are to be carried out. Moreover, the general provision in *OHSA* requires employers to "take every precaution reasonable in the circumstances for the protection of a worker." Thus the Ministry of Labour may cite provisions in any of these regulations as a "reasonable precaution", and cause them to be enforced by a written order. For example, MOL inspectors have in numerous cases invoked Regulation 692, R.R.O. 1990 (Regulation for Industrial Establishments) to control workplace hazards.

The *OHSA* also allows a toxic substance to be "designated", and its use in the workplace to be either strictly controlled or banned. According to MOL, designation is reserved for substances known to be particularly hazardous. As of May 2007, eleven substances have been designated under *OHSA*, including asbestos, lead, mercury and arsenic. Separate regulations have been passed for each one. In general, each regulation sets out the amount of the substance that workers can be exposed to in a given time period, and the ways to both control and measure the substance in the workplace.

*The Evolution of Ontario's Approach to Asbestos Hazards in the Workplace:*
The *Factory, Shop and Office Building Act (FSOBA)* of 1913 provided a legislative framework for regulating workplace hazards in the mining and industrial sectors for more than 50 years but did not strictly regulate asbestos in most workplaces. This changed in 1964 when the *FSOBA* was repealed and replaced by the *Industrial Safety Act* (*ISA*). Under the *ISA* asbestos was identified as a serious occupational hazard in many workplaces. Under O. Reg. 196/64 of the *ISA*, asbestos was for the first time specifically recognized as a health hazard. The *ISA* was significantly revised in 1971 and O. Reg. 259/72 was passed, providing more stringent regulation of asbestos in defined circumstances and also providing for medical examinations, labeling of containers and posting of workplace notices. These changes were enabled by technological developments in air sampling techniques.

Regulation in the construction sector was more elaborate and developed in the early 1960s. Under the *Construction Safety Act* proclaimed in 1962, Ontario employers were required to protect workers by mechanically ventilating hazardous exposures to noxious gas, fumes or dust, including asbestos fibres and dust. In 1973, the Ontario government passed O. Reg. 419/73 under the *CSA*. The regulation was intended to severely limit the use of asbestos spray guns at construction sites but the technology quickly disappeared from the construction industry after the regulation was passed.

In 1981, the Ontario government appointed the Royal Commission on Matters of Health and Safety Arising from the Use of Asbestos in Ontario. The RCA reported to the Lieutenant Governor in Council in April of 1984. A number of the RCA's key recommendations, such as increased protection for workers on construction sites and the creation of the Industrial Diseases Standards Panel, were reflected in amendments to workers' compensation and occupational safety laws and regulations passed in the 1980s.

There are several regulations made under the *OHSA* that provide clear and detailed requirements for the management of asbestos in buildings and during construction and renovation.

In 1982, the Minister of Labour designated asbestos as a regulated substance under the *OHSA* when it passed O. Reg. 570/82, Designated Substance – Asbestos. O. Reg. 570/82 (now Regulation 837, R.R.O. 1990) applies to asbestos risks in the fixed-place processes of mining, manufacturing and assembling goods or products. It prescribes an occupational exposure limit (OEL) to restrict worker exposure to asbestos and "is supported by codes for respiratory equipment, medical surveillance and the measurement of airborne fibres." In June 2007, two Ontario companies were fined more than $175,000 under Regulation 837 after failing to provide workers removing asbestos with appropriate personal protective equipment.

In 1985, the Ontario government passed O. Reg. 654/85 (Asbestos on Construction Projects and in Buildings and Repair Operations) under *OHSA*. This regulation provided clear and detailed requirements for the management of asbestos in buildings and during construction and renovation and required that a facility owner must comply with all parts of the regulation and the Act when the building contains asbestos. In 2005, the Ontario government updated this regulatory regime when it passed O. Reg. 278/05 (Designated Substance - Asbestos on Construction Projects and in Buildings and Repair Operations). O. Reg. 278/05 differs from the approach in Regulation 837 because it neither sets an OEL nor requires monitoring. Instead, O. Reg. 278/05 prescribes safe work procedures (e.g., how to remove asbestos material) and outlines measures to control worker exposure such as the isolation of work areas and the use of air-purifying respirators.

*Public Contacts to the ECO:*
In preparing this review, the ECO examined its public contact records for the past decade. We noted that the handling of asbestos wastes by individuals and contractors is a significant concern for many members of the public and more than 50 Ontario residents have contacted the ECO to request information about handling asbestos or ask for assistance.
*Summary:*
MOE and MOL have developed a fairly elaborate system for regulating the handling of asbestos waste generated by building repairs and site redevelopment, and there is evidence that these regulations are enforced and that the courts tend to impose large fines on contravenors. The current regulatory system does not address the small quantities of asbestos waste associated with manufactured products that are deposited in landfills on a regular basis.

**Ministry Response**

MOE denied the application. In its three page response, the ministry noted that asbestos waste is not defined as a hazardous waste and included in the definition of non-hazardous solid waste to "eliminate ambiguity regarding its classification." MOE further stated that it considered the factors set out in section 67(2) of the *EBR* in making its decision and determined that two factors in section 67(2) warranted its attention. Specifically, MOE decided "the potential for harm to the environment if the review is not undertaken" under section 67(2)(b) did not justify a review and the ministry also considered "social, economic, scientific and other evidence" as provided under section 67(2)(d). However, the ministry failed to elaborate on how exactly it had applied these factors in making its decision.

The ministry went on to note that the review request focused on concerns about the protection of workers and handlers of asbestos but did not "provide any evidence" that disposal of asbestos at a municipal landfill following practices prescribed by MOE "poses an environmental concern." MOE further noted that it is unaware of any studies or research that indicates that asbestos poses a threat after being disposed of in a landfill. Indeed, MOE stated that the material is "inert, not soluble and, if properly disposed in landfill" will be well contained and there is little risk of off-site migration to potential receptors.

The ministry briefly described the current regulatory system employed by MOL for protecting workers and limiting their exposure to asbestos material. This regime has been outlined above.

MOE also noted that it applies various guidelines in the handling of asbestos waste but it did not explain how these guidelines might address the concerns described by the applicants.

The applicants were very unhappy with MOE's decision to deny their application. In April 2007, they wrote to the Director of the Waste Management Policy Branch at MOE after several unsuccessful attempts to contact him by phone. In their letter, they questioned whether MOE had fully evaluated the evidence contained in their original application. They also pointed out that it is troubling that there is no mapping of deposits of asbestos waste in landfills as required by Regulation 347. However, their April 2007 letter did not explain the allegation or describe the nature of the asbestos wastes that they believed were improperly disposed of at the Niagara landfill or other sites.

On July 23, 2007, the Ministry responded to the applicants' letter of April 2007, indicating that having considered all the available information, the Ministry is satisfied with the existing regulatory structure. The current regulatory requirements and guidance for asbestos waste provide acceptable environmental protection. Therefore, MOE has not changed its original decision on the application.

**Other Information**

In 2003, the European Community (Council Decision 2003/33/EC) established criteria and procedures for the acceptance of granular waste at landfills pursuant to Article 16 and Annex II of EC Directive 1999/31/EC on the landfilling of waste. Since July 2005, section 2 of Council Decision 2003/33/EC has permitted the landfilling of suitable asbestos waste (i.e., from construction sites, etc.) in non-hazardous

landfills (but only if the cell is sufficiently self-contained). However, no limits are specified regarding the amount of this waste type that can be deposited.

According to articles in Hazardous Materials Management Magazine in 2004 and 2005, there is evidence that asbestos was a component of some insulation products that were installed in Ontario homes and buildings between the late 1950s and the 1970s. Links also have been made in some Canadian communities to possible health and safety risks and impaired lung function associated with the removal or accidental dislodgement of this insulation material.

*Proposals for Reform in Ontario:*
In 1996, MOE proposed to consolidate and revise existing waste management regulations as part of its Regulatory Reform Project. One goal of this review was to provide clear consistent definitions, focus action on areas of highest environmental significance, increase waste diversion from landfills, improve compliance and set clear, protective environmental standards. In addition, the proposed revisions to Regulation 347 were intended to take into consideration evolving waste management practices and incorporate administrative changes in support of an approvals process based on the level of environmental risk.

In 1998, MOE tabled a detailed outline of its plans. Under the plan, amendments to Regulation 347 would have been introduced to clarify the definitions of asbestos and asbestos wastes to reflect new technologies and practices that were not available in the early 1980s when MOE's first hazardous waste regulations were developed and then passed into law. The MOE claimed that updating the management requirements for asbestos waste would "enhance recycling opportunities, divert wastes from disposal and offer certain cost savings." In 2002, the 1998 proposal was withdrawn by MOE after the ECO requested an update on its status.

**ECO Comment**

MOE's response to the application examined most of the issues raised by the applicants regarding the handling of asbestos waste under Regulation 347. MOE's reasons for denying the application for review were acceptable given there are existing legal and regulatory requirements and a reasonable framework for handling of asbestos waste at Ontario's landfill sites. Furthermore, some of the applicants' concerns included issues such as occupational health and safety standards regulated by MOL and municipal requirements and bylaws that do not fall within the jurisdiction of the MOE. The ECO also notes that neither the MOL nor *OHSA* are currently prescribed for *EBR* investigations or reviews. Thus it presently is not an option for the applicants to file an *EBR* application for review of asbestos standards under *OHSA* to provide additional protection to waste management workers handling small amounts of asbestos waste and products containing asbestos such as brake linings.

The ECO also notes that it has received other applications requesting changes to Regulation 347. For example, in the Supplement to our 2002/2003 Annual Report (page 195), we outlined an application for review requesting that new waste management regulations be developed under the *EPA*. This request (R2001017) was submitted in 2001 because the applicants believed that a waste transfer station operated by Sheldrick Sanitation facility was inappropriately sited in an area adjacent to a school and residential area. Concerns about the handling of asbestos waste also were raised in this 2001 application, as well as concerns about traffic impacts and the adequacy of MOE's monitoring and enforcement. In that case, MOE also rejected the application.

The ECO's review of this application suggests that there is an important difference in the regulation of asbestos waste that is removed from construction and brownfield sites and the regulation and handling of products that contain asbestos that are landfilled with other domestic and commercial wastes. The ECO does not believe that it would be appropriate or practical for MOE to treat these residual asbestos-containing products as hazardous wastes under Regulation 347. While the risks to the environment and human health posed by asbestos in commercial goods and other products are difficult to evaluate, it is doubtful, based on current evidence, that these risks warrant changes to Regulation 347 such as the treatment of these products as hazardous wastes under the regulation. Moreover, product safety is

regulated primarily by the federal government. Thus, it might be more appropriate for the applicants to raise their concerns about products containing asbestos with the federal Commissioner of the Environment and Sustainable Development (CESD), Environment Canada or other federal departments.

One change to Regulation 347 or to associated MOE policies and procedures worthy of further consideration is clarification of the quantities of asbestos waste that would trigger application of the regulation. At present, Regulation 347 stipulates that the asbestos waste must be in a quantity larger than a trivial amount. B.C. regulations are more precise and indicate that "asbestos waste" is defined as a hazardous waste if it contains more than one per cent by weight, of friable asbestos fibres. A similar clarification of MOE law or policy might help to reassure the applicants that the current provisions of Regulation 347 are adequate to protect the health and safety of Ontarians.

The applicants remain unhappy about MOE's decision to deny their application. They continue to raise compliance questions about the mapping of deposits of asbestos waste in landfills as required by Regulation 347. However, they did not fully explain this allegation or describe the nature of the asbestos wastes that they believed were improperly disposed of at the Niagara landfill. Thus, it is difficult for the ECO to ascertain if the waste was asbestos associated with manufactured products or bulk asbestos associated with a construction, redevelopment or repair projects.

We note that it would be open to the applicants to file an investigation if they believe that a landfill operator is failing to comply with the provisions of Regulation 347 by allowing disposal of bulk quantities of asbestos waste removed from construction and brownfield sites in unmapped areas of the landfill and failing to comply with the other requirements in section 17 of Regulation 347. If the amounts of friable asbestos waste could be classified as trivial, it is doubtful that MOE would have the regulatory authority to require it to be disposed of in mapped cells of the landfill.

As noted above, in the late 1990s, MOE expressed interest in relaxing management standards in Regulation 347 that applied to asbestos waste. However, it seems unlikely that the reforms contemplated as part of MOE's 1998 proposal would have addressed the issues raised by the applicants. Indeed, it appears that MOE was trying to promote greater recycling of asbestos for use in construction projects, manufacturing and other activities.

In our 2005/2006 Annual Report, the ECO reviewed MOE's oversight of aging landfill sites and we urged MOE to take a more proactive approach to managing them. MOE also has a regulatory duty to ensure that adequate mapping is undertaken when operators deposit bulk asbestos wastes in their landfills. Based on the ECO's review of this application, it is not clear that all landfill operators, especially those in smaller communities, are aware of the specific handling requirements for bulk asbestos waste. In April 2007, the Environmental Commissioner also outlined his concerns in a Special Report to the Legislative Assembly about the lack of capacity at MOE noting that it was contributing to inadequate inspections of a range of facilities and a lack of monitoring. It is unclear if the applicants' concerns are partially related to capacity issues at MOE such as monitoring of activities at landfills. There may be certain landfills that accept more bulk asbestos waste or used products containing asbestos and a different approach is warranted in those cases. Moreover, it is conceivable that some shipments of construction and demolition waste contain quantities of asbestos waste that were released during renovations to or demolition of buildings constructed in the past century. The ECO also agrees that, should a future Ontario government decide to support landfill mining as a viable program, better information about landfills and the wastes they contain, including bulk asbestos wastes, would be beneficial and assist MOE in its planning work for this activity.

The ECO also notes that many members of the public have contacted the ECO in the past decade to request information about handling asbestos or ask for assistance. As noted above, there is some evidence that asbestos was a component of some insulation products that were installed in homes and buildings in Ontario between the late 1950s and the 1970s. It is apparent that there is ongoing public concern about the possible health and safety risks associated with the removal or accidental dislodgement of asbestos materials and used products manufactured using asbestos. Moreover, the ECO was unable to find any guidance or fact sheets regarding this topic on the MOE's web site. Thus,

the ECO urges the MOE to publish fact sheets for Ontario residents who are seeking guidance on the safe handling and disposing of products containing small amounts of asbestos, asbestos-laden insulation materials and asbestos wastes from construction sites or maintenance and repair work.

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**Review of Application R2006004**

**Need to Re-consider the *EAA* Exemption (O. Reg. 276/06) for the IPSP**
**(Review Denied by MOE)**

**Background/Summary of Issues**

The applicants requested the review (and revocation) of an existing regulation (O. Reg. 276/06 – Designation and Exemption of Integrated Power Supply Plan (IPSP) made under the *Environmental Assessment Act*). The IPSP is the most significant electricity system initiative in Ontario in over a decade. If and when fully implemented it could result in the construction, refurbishment and replacement of many electricity generating and transmission facilities in Ontario, including nuclear plants. The estimated capital investment required to execute the Plan is $70 billion according to the Ontario Power Authority (OPA). The OPA is the agency charged with formulating the Plan and was established in 2005 by the *Electricity Restructuring Act* (Bill100); for a review, see the 2004/2005 ECO Annual Report on page 103.

On June 15, 2006, the Ministry of the Environment (MOE) posted an information notice on the Environmental Registry to inform the public of the creation of O. Reg. 276/06. The purpose of the regulation according to MOE was to designate the IPSP subject to the *Environmental Assessment Act* (*EAA)*, then exempt it from the requirement to undertake an individual environmental assessment in accordance with Part II of the *EAA* and activities of the Crown related to the IPSP. In other words, the plan – which includes projects ranging from nuclear generating stations to natural gas-fired stations – will not have to undergo an individual environmental assessment.

MOE rationalized this approach in the following manner: "Given that the IPSP is not an undertaking that is subject to the *EAA* a designation is required in order to exempt it. The regulation confirms and reflects the legislative framework under the *Electricity Act, 1998,* with respect to the OPA and the IPSP, and confirms the government's long standing position that government policy planning as reflected in the Directive is not an undertaking that is subject to the *EAA*." Instead of a public hearing on the overall plan, projects under the plan will go through more limited screening processes such as those created by O. Reg. 116/01. (O. Reg. 116/01 created a review process called "environmental assessment requirements for electricity projects." The regulation permits some projects which would normally have required an individual EA to instead undergo an environmental screening process created by the regulation. For a review, see the 2001/2002 ECO Annual Report on page 80.)

The reasons the applicants requested this review included that the regulation:

- was not subject to public notice and comment requirements and therefore was made in contravention of Part II of the *Environmental Bill of Rights* (*EBR)*;
- does not represent sound environmental planning and is contrary to the public interest;
- is deficient because it fails to impose any terms and conditions upon the proponent to ensure that the IPSP is developed with meaningful public input; and,
- fails to ensure that the potential environment impacts of the IPSP are adequately identified, analysed, and mitigated.

The applicants also pointed out there had been ample time and opportunity between December 2005 and June 2006 to clarify the relationship between the IPSP and the *EAA*, i.e., how it would be subject to the *EAA*. Since the government waited until June 2006, this approach appeared sudden, rash and concocted.

**Ministry Response**

MOE informed the applicants and the ECO on Dec 21, 2006 that in its view, the public interest would not be served by reviewing O. Reg. 276/06 for a number of reasons. MOE contended the "regulation is administrative in nature." Section 16 of the *EBR* includes an exception to the requirement to post a regulation as a proposal if it is predominantly financial or administrative in nature. O. Reg. 276/06, to MOE's thinking, simply confirmed that the *EAA* does not apply to the IPSP and therefore was administrative in nature. MOE further clarified that the *Environmental Assessment Act* applies only to undertakings of Her Majesty the Queen and public bodies. Since the IPSP is being prepared by the OPA, which was established in legislation as "not an agent of Her Majesty for any purpose, despite the Crown Agency Act" (see box below), MOE concluded that the OPA's activity of developing the IPSP is not subject to the *EAA*. And, in MOE's words, "The regulation [O. Reg. 276/06] simply confirms this."

A second reason MOE offered is that the regulation was made in the last five years, an important consideration according to *EBR* section 68. (1) "a minister shall not determine that the public interest warrants a review of a decision made during the five years preceding the date of the application for review if the decision was made in a manner that the minister considers consistent with the intent and purpose of Part II." Part II of the *EBR* includes provisions for public participation in decision-making (among other things).

**The *Electricity Restructuring Act* and the creation of the Ontario Power Authority**

When the *Electricity Restructuring Act* was drafted, the government decided to construct the Ontario Power Authority in an uncommon manner (see excerpts below). The OPA is not a Crown Corporation, nor is it part of the Ministry of Energy. However, it receives and executes directives from the Minister of Energy, including some for major electricity projects, like power plants. The OPA can generate revenue through fees and licences, but is not a private sector corporation. And, MOE contends that it is not a public body, yet the OPA reports to the Minister of Energy. This corporate formulation confuses the public in relation to which and how various Acts might apply to the entity, e.g., *Freedom of Information and Protection of Privacy Act, Environmental Assessment Act, Environmental Bill of Rights*, etc. Most of the public regards the OPA to be a public agency like many others.

**Excerpts from Bill 100 – the *Electricity Restructuring Act***

Ontario Power Authority
25.1 (1) A corporation without share capital to be known in English as the Ontario Power Authority and in French as Office de l'électricité de l'Ontario is hereby established.

Not for profit
s25.2 (2) The business and affairs of the OPA shall be carried on without the purpose of gain and any profits shall be used by the OPA for the purpose of carrying out its objects.

Capacity
s25.2 (4) The OPA has the capacity, rights, powers and privileges of a natural person for the purposes of carrying out its objects.

Not a Crown agent
25.3 The OPA is not an agent of Her Majesty for any purpose, despite the Crown Agency Act.

Exception
25.6 (2) Despite subsection (1), the Minister shall appoint the first chief executive officer of the OPA, but nothing in this subsection prevents the board of directors of the OPA from appointing any subsequent chief executive officer.

> Fees and charges
> 25.18 (1) The OPA may establish and impose fees and charges to recover,
> (a) the costs of doing anything the OPA is required or permitted to do under this or any other Act; and
> (b) any other type of expenditure the recovery of which is permitted by the regulations, subject to any limitations and restrictions set out in the regulations.
>
> Collection
> (2) The IESO shall, in accordance with the regulations, collect and pay to the OPA all fees and charges payable to the OPA.

**ECO Comment**

The ECO finds MOE's rationale for denying this application unpersuasive. The ministry did not respond to the core concerns of the applicants.

On June 19, 2006, shortly after O. Reg. 276/06 was made, the Environmental Commissioner of Ontario informed the Ministry of the Environment and the public via a media release that the use of an information notice in this instance was inappropriate. The ECO described the decision to post this regulation as an information notice as a "decision to bypass Ontario's *Environmental Bill of Rights*. They [the Ontario Government] escaped the process whereby the people of Ontario should have been able to review and comment on the regulation to exempt the nuclear plans from an environmental assessment."

MOE's decision to grant an exempting regulation allowing the OPA and ENG to evade subjecting the IPSP to a full EA under Ontario's *EAA* and then post this exempting regulation as an information notice, as opposed to a proposal, violated the principles enshrined in the *EBR.* MOE's action ensured that the government's directive about the general make-up of the IPSP did not receive *EAA* treatment, and that this exemption decision would not receive *EBR* treatment, e.g., the public would not be permitted a proper comment process period before the decision went ahead. Also, MOE's approach relieved the ministry of the obligation to post a decision notice, thus allowing the ministry to escape a key accountability measure of the *EBR,* i.e., having prescribed ministries publicly account for their decisions.

The sweeping nature of O. Reg. 276/06 is troubling. It appears that the regulation ensures that even the permits and certificates of approval for facilities created for projects under the IPSP will not be posted on the Registry as proposals for public comment. This is because the IPSP was designated under the *EAA*, then exempted. Since this is considered "treatment" under the *EAA*, any instruments (permits, certificates of approval) associated with these projects, will not be subject to the notice and comment process under the *EBR*. That is, instruments needed for the IPSP's projects, such as a permit to take water for a generating station, which might normally be posted on the Environmental Registry, will not be posted for public comment. However, many of these instruments will remain subject to the investigation and review processes of the *EBR*.

The ECO is disappointed first with MOE's approach on the handling of this regulation. Secondly, the ECO is disappointed that MOE took so much time to respond to the applicant (MOE's response was about four months overdue), especially since the content of the ministry's response was essentially the same as the inadequate explanation they provided in June of 2006. Finally, the ECO regards the plan to move ahead with the IPSP to be a very environmentally significant decision and believes the matter deserves more public scrutiny. This decision will have profound effects on the nature of Ontario's electricity system and corresponding environmental impacts for decades into the future.

**Review of Applications R2006005, R2006006, and R2006007**

**Application for Review to Protect Groundwater of the Waterloo Moraine (Review Denied by MNR, MMAH; Review Accepted by MOE)**

**Background/Summary of Issues**

In June 2006, an application for review was submitted to the ECO outlining the need for a new policy or Act to protect the groundwater and recharge areas of the Waterloo Moraine. The ECO sent the application to the Ministry of the Environment (MOE), the Ministry of Natural Resources (MNR) and the Ministry of Municipal Affairs and Housing (MMAH). A similar application was filed by different applicants in July 2006, and is reviewed on page 165 of the Supplement.

The applicants would like to see the Waterloo Moraine (the moraine) and its environmental features, in particular the groundwater and recharge areas, protected from unsustainable development. The applicants propose that an Act or policy similar to the *Oak Ridges Moraine Conservation Act, 2001*, should be drafted and passed into law.

The application expressed concerns over development occurring on the Waterloo Moraine and its detrimental impact on groundwater and drinking water. Groundwater is Waterloo Region's (the region) main source of drinking water. Additional land development on the moraine is being considered and the applicants are concerned about more road salts and pollutants contaminating regional wells, as well as the risk of floods and water shortages if the recharge areas are not allowed to function naturally. The applicants also note that the moraine is a recharge area for the Grand River, which is a heritage river that contains more than 50 per cent of Canada's native fish species. The applicants further contend that the region's new Environmentally Sensitive Landscape (ESL) policy does not contain adequate source water protection measures for the moraine.

The applicants submitted a wide array of evidence to support their application including:

- An article excerpt detailing how impermeable surfaces upstream could lead to flooding downstream;
- City of Waterloo's approved 2006-2009 Staging of Development program outlining draft plans that will be considered for some of the moraine's recharge areas;
- West Side Lands environmental impact study showing the use of roof run-off to dilute road salts, and articles regarding the toxicity of creosote;
- An article about the pollution risk posed by geese residing near storm management ponds;
- Newspaper articles about road salts exceeding MOE standards in Waterloo wells;
- Articles detailing the relationship between the Grand River and the Waterloo Moraine, and development over the recharge area;
- Description of the website of Emil Frind dedicated to the preservation of Vista Hills;
- Letters from MOE, MNR, MMAH, and the Prime Minister's Office responding to the applicants' letter requesting an Act to protect the Waterloo Moraine;
- Minutes from a Waterloo City Council meeting held June 24, 2002, discussing inspection of subdivisions and the reporting of infringements;
- Photos of the recharge areas; and
- Articles about a SLAPP suit initiated by a developer in relation to a construction site in the region.

Please see page 135 of the Supplement for a discussion on the impact of road salts, as well as pages 14-51 of the Annual Report for a detailed discussion of planning issues in Southern Ontario.

**Ministry Response**

*Ministry of Natural Resources (MNR):*
MNR denied the application in August 2006, stating that the public interest did not warrant a review of the need for a new policy to protect the Waterloo Moraine. The ministry referred to its 1994 Statement of Environmental Values (SEV) to explain that it does not have a legislative mandate to consider a policy review on source water protection or municipal land use planning. These were the responsibilities of MMAH and MOE. MNR also stated that it does provide MOE and MMAH with technical advice and expertise in developing and delivering source water protection programs and on other natural resources and environmental stewardship related matters.

*Ministry of Municipal Affairs and Housing (MMAH):*
MMAH denied the application in August 2006, stating that the public interest does not warrant the granting of a request to review the need for a new policy to protect the Waterloo Moraine. The ministry stated that the Provincial Policy Statement, 2005 (PPS) underwent extensive stakeholder and public consultations and will be reviewed every five years. MMAH also emphasized that the PPS applies to all applications, matters or proceedings commenced on or after March 1, 2005, and section 3(5) of the *Planning Act* provides that all decisions that affect a planning matter should be consistent with the PPS. The ministry also stated that the PPS included enhanced provisions to protect natural heritage systems as well as stronger direction to protect water resources, and it complemented MOE's *Clean Water Act*. MMAH further stated that the PPS represented minimum standards, which municipalities could build upon to address matters that are important to a specific community or area.

*Ministry of Environment (MOE):*
In a letter to the applicants dated April 24, 2007, MOE agreed to conduct a review to determine if there is a need to develop provisions to protect groundwater and source water of the Waterloo Moraine beyond what currently exists in policies and legislation. MOE stated that although it would not review the *Clean Water Act* nor the PPS, any decision arising from the review will be informed by these new initiatives. MOE expects the review to take 16 months.

Section 70 of the *EBR* requires ministries to give notice of their decision within 60 days of receiving the application. Both the ECO and the applicants contacted MOE with their concerns over the eight-month delay in issuing the notice.

The applicants first learned of MOE's decision indirectly in a MOE letter dated April 13, 2007, in response to a different but related matter. The letter sent by the MOE director of the West Central Region noted that MOE committed to undertaking a review of existing policies and legislation to ensure that the moraine is afforded the proper protection it deserves. The applicants forwarded this letter to the ECO on April 19, 2007. ECO staff then contacted MOE in regards to providing the applicants with a proper notice of decision. MOE subsequently provided the applicants, the City of Waterloo and the region letters notifying them that as part of its continuing process to improve water-related best practices and policies, the ministry had agreed to conduct a review.

**ECO Comment**

The ECO commends MOE for undertaking this review to ensure that the Waterloo Moraine and groundwater sources are properly protected. However, the ECO is troubled by the ministry's extended delay in releasing its decision and the confusion over the release of its decision notice to the applicants. Such delays and lack of proper notice of decision frustrate the public interest, undermine the *EBR*, and hamper the ability of the ECO to report to the Legislative Assembly.

The ECO finds that the application contained compelling evidence and strong arguments for MNR and MMAH to undertake a review. MNR and MMAH did not refer to any of the evidence submitted in support of the application. Although MNR used its 1994 SEV to suggest this issue did not fall under its mandate, protecting the Waterloo Moraine could have easily fallen under several of its SEV's objectives.

Furthermore, MNR's mandate clearly includes natural heritage protection and it was instrumental in creating the Oak Ridge Moraine Conservation Plan. One of MNR's stated objectives is watershed planning and sustaining the province's water resources and their hydrologic function.

It is constructive that MNR provides MOE and MMAH with technical expertise, however this does not prevent MNR from taking a more proactive role to "ensure the long-term health of ecosystems by protecting and conserving our valuable soil, aquatic resources, forest and wildlife resources as well as their biological foundations" as outlined in its SEV.

MMAH contends that the PPS adequately addressed the concerns of the applicants and that it is up to municipalities to exceed the minimum requirements of the PPS in order to protect unique ecological features in their areas. However, as seen with the Oak Ridges Moraine, the PPS, ministerial mandates and environmental legislation at the time were not enough to ensure its protection.

Environmental impacts of development on the moraine will affect several jurisdictions and MMAH could ensure the moraine is protected uniformly across municipal boundaries by creating an ecologically based conservation plan that protects the natural and hydrological features of the moraine. Conservation plans have been created for the Oak Ridges Moraine and the Niagara Escarpment. The plan would be mandatory and ensure the development on the moraine is done in a sustainable manner, away from protected areas. The plan would be more detailed than the PPS by including key environmental characteristics of the moraine. The PPS does not specifically account for unique landforms such as moraines. The fact that the PPS is relatively new and is reviewed every five years does not negate MMAH's responsibility to protect the Waterloo Moraine from environmental harm associated with development. MMAH also played an important role in the protection of the Oak Ridges Moraine.

Regardless of the outcome of MOE's review, the ECO urges the three ministries to work together to ensure that the ecological integrity of the moraine is preserved. The ECO will continue to monitor the situation and report on the outcome of MOE's review in a future ECO Annual Report.

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**Review of Application R2006008**

**Review of Section 24 of the Provisional Certificate of Approval for Site 41**
**(Review Denied by MOE)**

**Geographic Area:** County of Simcoe, Township of Tiny

**Background/Summary of Issues:**

*Introduction:*
In July 2006, two applicants requested an amendment to section 24, the Community Monitoring Committee, of the Provisional Certificate of Approval (C of A) #A620278 (formerly #A253106) issued to the Corporation of the County of Simcoe (the County) for the use and operation of the landfill site known as Site 41. After a lengthy approvals process, Site 41 is now at the construction stage. Section 24 describes the purpose, mandate, composition and responsibilities of the Community Monitoring Committee (CMC), some obligations of the County, and two dispute resolution mechanisms. Due to differences of opinion with the County, the applicants have requested that MOE clarify the mandate of the CMC, the role and duties of CMC members and the scope of the County's powers over CMC's activities.

*Background:*
The selection of Site 41 as a landfill site has been the subject of much controversy. After the only landfill site in the area closed in the 1970s, six municipalities created the North Simcoe Waste Management

Association (NSWMA) and eventually selected Site 41 as its preferred landfill site. NSWMA requested approval for the site from the Joint Board of the Environmental Assessment Board and the Ontario Municipal Board appointed under the *Consolidated Hearings Act*. However, in 1989, the Joint Board denied the approval on the grounds that the environmental assessment process had been inadequate. The Joint Board ruled that, although the hydrogeology of Site 41 was suitable for landfilling, the selection of the site had not been arrived at through a "reasonable, consistent and systematic approach" and the comparison to other sites was "deficient and biased."

NSWMA appealed the decision of the Joint Board to the Lieutenant Governor in Council and, in 1990, an Order in Council was passed that required the County of Simcoe to take over all responsibility for local waste management. The Order also required the County to re-evaluate all potential landfill sites, and if Site 41 was still the preferred site, the Joint Board was to reconvene to hear the new evidence.

In 1995, the Joint Board approved Site 41 under the *Consolidated Hearings Act*. In 1996, the Joint Board released the conditions of approval and, in 1998, MOE included the conditions related to the CMC in section 24 of the provisional C of A. For example, Condition 24.1 required the County to establish a CMC prior to the site being constructed and developed. The purpose of the CMC was described as providing "community review of the development, operation, ongoing monitoring, closure and post-closure care related to the landfill site." The CMC will "serve as a focal point for the collection, review and exchange of information relevant to both County and local concerns in connection with the landfill site."

Condition 24.2 outlined the responsibilities of the CMC, including:

- Reviewing operations and providing regular input to the County on all matters pertaining to the operation of the site;
- Reviewing operational and monitoring reports;
- Recommending outside consulting advice to the County;
- Facilitating ongoing dialogue between the County and the community, including residents and businesses in the immediate vicinity of the site; and
- Providing regular reports to the community on issues and seeking public input on these issues and CMC's activities.

Condition 24.7 outlined the dispute resolution approach, i.e., if the CMC and the County can't come to an agreement on a matter relevant to the provisional C of A regarding "ongoing landfill operations, monitoring and the implementation of contingency measures" after a joint discussion, the matter is to be referred to the Regional Director, Ministry of the Environment (MOE). All other matters are to be settled by mediation or binding arbitration.

Condition 15.1, gull management, required the County to provide MOE with a detailed plan that includes design details for an overhead wiring system – the method preferred by the Joint Board – and for the use of supplementary scare techniques. Condition 15.2 required the County to consult with the CMC about hiring an expert to prepare the gull management plan, and required the expert to consult with both the County and the CMC prior to preparing the plan.

In 1998, the Council for the County drafted and approved the Terms of Reference (ToR) for the CMC. The ToR included the above conditions and gave the County the power to appoint the members of the CMC and to "confirm" CMC membership on an annual basis using a by-law. In 2000, the CMC was formed and was comprised of one representative from the County, three representatives from the residents living within three kilometres of the site, two representatives chosen by the Township of Tiny and one non-voting member designated by MOE.

In 2003, MOE provided the County with 81 comments regarding the site's design and operation. In addition, a technical review expressed concern about the sensitive nature of the site and noted that information required to ensure that the environment was protected was missing. In 2006, MOE approved the Design and Operations Plan for the site. The County plans to begin construction of Site 41 in 2007.

The ECO has received three previous applications related to Site 41. In 2001, the ECO received two applications requesting that the 1998 C of A be reviewed since additional technical information was now available. The applicants also questioned the wisdom of siting a landfill in an area of high water pressure. MOE denied both applications stating that it had anticipated the additional information when it approved the C of A in 1998. The ECO disagreed with MOE's reasoning, noting that MOE could not have considered the additional information when it approved the C of A. In 2003, applicants again requested that MOE review the site's C of A. This time, the applicants were concerned about the missing information identified in the 2003 technical review and the pending source water protection requirements. Again the ECO disagreed with MOE's decision to deny the application and urged MOE to undertake a broad review of the C of A. For additional information regarding the first two applications, refer to the Supplement to the 2001/2002 Annual Report and for the third application, refer to the 2003/2004 Annual Report.

Across Ontario, many project-specific public liaison committees have been established in the last 25 years or so in recognition of the importance of engaging the public in projects. Approvals given by MOE for waste management projects, such as Site 41, often require proponents to establish such committees. In 1994, MOE published the "Public Consultation Guide" for use by its staff. One of the chapters discussed the roles and responsibilities of public committees and proponents, selection of committee members and the importance of on-going informal communication between committee members and their constituency. The Guide explained that public liaison committees address site-specific concerns, and that monitoring committees serve as "watchdogs" to ensure that decisions made during the implementation of a project are acted upon. At the time, MOE provided some financial support, e.g., mileage and stationary expenses, for the committees. The Guide is no longer generally available and its status is unclear.

On October 31, 2006, MOE posted a notice on the Registry (Number: PA06E0009) requesting comments on a proposed code of conduct for public consultation replacing two earlier versions. The proposed code of conduct outlines MOE's expectations for appropriate public consultation during the planning, review and approval phases of projects subject to the *Environmental Assessment Act*. In the notice, MOE explained that one of its objectives is to "increase transparency and accountability" during the preparation and review of environmental assessments. Although the proposal does not discuss public liaison or community monitoring committees, it explains that, even after the environmental assessment process is completed, "consultation activities should continue to play an important role during the detailed design phase, seeking other regulatory approvals, construction, operation and decommissioning as part of the implementation of applicable conditions of approval."

*Summary of Issues:*
The applicants believe that an amendment to the provisional C of A is required since the County has "demonstrated a pattern of disregard" for the role of the CMC and has "attempted to control and curtail" and/or exclude CMC from participating in key decision-making. The applicants described two situations – gull management and issuance of press releases – to illustrate their concerns.

*Gull Management:*
The applicants explained that the County decided to use pyrotechnics to manage gulls even though using a scare technique was not the preferred approach described in the conditions of approval by the Joint Board. Furthermore, the County did not consult with the CMC as required by the provisional C of A and the ToR prior to deciding to use pyrotechnics.

*Issuance of Press Releases:*
Although the CMC is required to provide regular reports to the public about Site 41 issues and activities, the County objected to the CMC using a press release in March 2006 to meet this requirement. Stating that the CMC does not have the jurisdiction to issue press releases, the County explained that, under its procedural by-law, it has the right to review and censor press releases issued by special committees established by Council including the CMC. A legal opinion, obtained by the County, confirmed that the County has jurisdiction over the CMC, and can draft and approve CMC's ToR. The legal opinion also clarified that the CMC is a special committee, and therefore subject to the procedural by-law and eligible for insurance coverage. The applicants disagreed with the legal opinion.

The applicants believe that the independence of the CMC is "fundamental to its purpose of reviewing and providing input on Site 41 development and operations." The applicants do not believe that the conditions in the Joint Board's decision and the provisional C of A intended the CMC to be subject to the veto powers of the County Council. Since the Joint Board anticipated that the CMC would draw up its own rules, the applicants contend that the CMC should not be bound by the County's rules.

According to the applicants, the County did not give the CMC its mandate – it was provided by the Joint Board and MOE. At the time of the hearings, the Joint Board and the County described the CMC as a "community service organization." In fact, neither the Joint Board nor MOE required the CMC to be a Committee of Council nor did it give the County unilateral authority to draft CMC's ToR or to impose it. The applicants noted that the CMC differs from a County committee because it is not listed in the County's procedural by-law nor is it on the County's website as a committee. In addition, unlike other County committees, the CMC doesn't submit an annual budget to Council for approval nor do its members get paid for attending meetings or act under the direction of a County employee. In April 2006, the MOE representative on the CMC declined to comment on this issue, except to repeat the requirements in the provisional C of A and explain that the provisional C of A does not "govern how the CMC is to operate."

In 2006, the County asked prospective CMC members for the first time to answer three questions and to sign the questionnaire before it would endorse/confirm them as members of the CMC. Prospective members were asked if they understood the ToR as "clarified by County staff and the MOE;" if they agreed to abide by the "clarified" ToR; and if they understood and abided "by the fact that this is a Committee of the County of Simcoe" and as such, are required to "follow the policies and protocols of that entity?" According to the applicants, no CMC members have completed the questionnaire.

The applicants have requested that an amendment to the provisional C of A answer the following questions:

- Is the CMC an independent community service organization or a County committee?
- Are the County's ToR and procedural by-law binding on the CMC?
- Can the County approve/refuse to approve prospective members on the CMC?
- Does the County have the authority to require prospective members to affirm their position on particular issues?
- Does the County have the power to censor CMC's communications to the public?

Although the applicants accept that the County must confirm membership in the CMC annually to provide insurance coverage, they do not agree that the County has the authority to approve or disprove membership in the CMC.

*County Proposes Revisions to the C of A:*
In May 2006, the County also requested that MOE amend the C of A, in particular, to move "large portions of section 24" of the C of A to a non-binding schedule. The County reasoned that it should not be responsible for provisions that are beyond its control. According to the applicants, the County's proposed amendment would, in effect, "marginalize the CMC's participation in development and operation of Site 41." The CMC responded by proposing that the issues regarding the County's proposed amendment be resolved by mediation or arbitration as outlined by the provisional C of A and the ToR. When the applicants submitted their application for review to the ECO, the County had not yet agreed to mediation.

*Rationale for Amending the C of A:*
The applicants are concerned that the ongoing disagreements over the CMC's role and the County's powers are preventing "effective community involvement in environmental decision-making." For example, without obtaining local knowledge and history, the proponent may not have important information about environmental conditions at the site. The Joint Board intended that the local community participate in the development and operation of Site 41. However, according to the applicants, participation was "seriously curtailed" when the County refused to resolve the issues regarding the role of the CMC and the scope of the County's control over the CMC through mediation or arbitration.

*Matters that MOE Should Consider in its Review of the Application:*
The applicants explained that MOE's Statement of Environmental Values (SEV) requires it to use the precautionary approach and take into account social considerations, such as the ability of the local community to provide input on site development and operations. Failing to do so, according to the applicants, is "tantamount to ignoring the precautionary approach by failing to obtain all available information and input that may influence environmental decision-making about the site." The applicants also noted that, since its SEV requires MOE to foster public participation, MOE should clarify the identity and role of the CMC.

The applicants also believe that MOE should undertake this review since Cs of A are not subject to formal periodic reviews under any statute or any other mechanism.

The ECO forwarded the application to MOE in July 2006.

**Ministry Response**

In September 2006, MOE denied the application for review on the grounds that the parties have not yet attempted to resolve their differences of opinion through the dispute mechanism outlined in the provisional C of A. MOE explained that Condition 24.7 requires that CMC's recommendations to the County regarding the "on-going landfill operations" be discussed at joint meetings of the CMC and the County with the objective of obtaining an agreement. If the County and the CMC cannot agree on a matter related to the provisional C of A, the Regional Director will decide the matter. And, for all other matters, Condition 24.7 requires that they be settled by mediation.

MOE advised the applicants that the County had been notified of the application as required under the *EBR.* In response, the County had advised MOE that it would request the CMC to recommend changes to the ToR and would base future discussions on these recommendations. The County also indicated that it would be amenable to mediation if the discussions failed to resolve all of the issues. MOE advised the applicants that it supported this approach, since both the County and the CMC were amenable to mediation, and that the Office of the Provincial Development Facilitator had agreed to provide mediation services.

In its response, MOE explained that it had considered its SEV and the lack of potential for harm to the environment if the review was not done. MOE noted that the applicants had not provided any evidence to substantiate their claim that harm may be done.

*Further Correspondence on the Matter:*
In a letter to the Minister, MOE, dated January 1, 2007, the applicants expressed their concern that MOE had provided conflicting advice. In 2004, the CMC had requested the Regional Director, MOE to review a matter related to the draft Site Design and Operation Plan under Condition 24.7. The Regional Director had responded in 2004 to the CMC that, under Condition 24.7, the Regional Director could review only disputes related to "on-going landfill operations" – the draft Site Design and Operation Plan dispute did not meet the criterion; however, MOE was now advising the applicants to use the mediation option in Condition 24.7 to resolve CMC's concerns. In light of this conflicting advice, the applicants questioned MOE's jurisdiction regarding Condition 24 stating that, since it was actually a condition made by the Joint Board, it should be resolved by the Joint Board. Regardless, the applicants requested the Minister to reconsider their application.

In a response to the applicants dated January 17, 2007, James O'Mara, Director of the Environmental Assessment and Approvals Branch, MOE, clarified that, in 2004, the CMC requested the Regional Director to review a matter that was not related to "on-going landfill operations" and therefore not subject to review by the Regional Director under Condition 24.7; whereas, in 2006, the applicants requested the Minister to review the roles and responsibilities of the CMC and the County. Although the matter was also not related to "on-going landfill operations" and therefore not subject to review by the Regional Director, it was subject to the mediation dispute mechanism outlined in Condition 24.7 for "all other matters."

**ECO Comment**

The ECO believes that the course of action recommended by MOE is reasonable and commends MOE for taking the additional step of arranging for a mediator if the County and the CMC are unable to resolve their differences. However, the ECO is dismayed at the confusion that Condition 24.7, the dispute resolution process, has caused the applicants. The ECO also found this condition confusing and recommends that, subject to agreement from the CMC and the County, MOE clarify this condition to clearly describe the matters that should be referred to the Regional Director and those that should go to mediation. This would then provide a basis for the County to review the existing ToR and perhaps update it to reflect changes to Condition 24.7.

The ECO does not agree with MOE's stance that it has no obligations regarding how a community monitoring committee operates. MOE often provides proponents with standards or guidelines to assist them with complying with conditions in their Cs of A. However, MOE provides no direction regarding community monitoring committees, despite requiring many proponents to establish such committees and despite promoting public consultation as an essential element of today's environmental decision-making. MOE has never been able to overcome the public's concerns about the selection of Site 41. From the inadequate environmental assessment that led to the Joint Board initially refusing to approve the site in 1989, followed by years of identifying information needs and design issues after approvals for the site had been granted, the public has ample reason to be sceptical of the process and the decisions that have been made.

The ECO is concerned that public liaison and community monitoring committees that are created by and rely on services provided by proponents are not always sufficiently independent to discharge their duties appropriately. Independent public consultation is integral to ensuring that MOE grants environmental approvals in a transparent, accountable and legitimate manner. The ECO believes that it is time to clarify the roles of these committees through amendments to the relevant legislation and to consider government funding, perhaps provided by MOE or the Ministry of Municipal Affairs and Housing, for the activities of these committees.

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**Review of Applications R2006009, R2006010, and R2006011**

**Application for Review to Protect Groundwater of the Waterloo Moraine**
**(Review Denied by MNR, MMAH; Review Accepted by MOE)**

**Background/Summary of Issues**

In July 2006, an application for review was submitted to the ECO outlining the need for a new policy or Act to protect the Waterloo Moraine. The ECO sent the application to the Ministry of the Environment (MOE), the Ministry of Natural Resources (MNR) and the Ministry of Municipal Affairs and Housing (MMAH). A similar application was filed by different applicants in June 2006 and is reviewed on page 157 of the Supplement.

The applicants are concerned over the losses of groundwater volume available in the Region of Waterloo (the region). The applicants attributed the decrease in volume to the land development occurring on the Waterloo Moraine (the moraine). Additional land development on the moraine is being considered and the applicants expect there to be further reductions in groundwater volume as a result. The applicants are unhappy that the region's Environmentally Sensitive Landscapes (ESL) policy protects only a portion of the groundwater recharge lands of the moraine and believe development will occur on the unprotected lands. They further contend that current laws and policies (*Ontario Water Resources Act*, *Safe Drinking Water Act*, Provincial Policy Statement) do not adequately safeguard the ecological integrity of the

moraine. Furthermore, the groundwater is susceptible to contamination from development activities, and such activities contradict Regional By-Law 03-025 that deals with the conservation of water resources.

The applicants asked that the Ontario government protect the Waterloo Moraine and its environmental features, in particular the groundwater and recharge areas from unsustainable development. The applicants proposed that an Act or policy be created that would protect groundwater quality and quantity in the moraine. In the alternative, the applicants suggested that an area-specific policy statement for the Waterloo Moraine should be drafted. This policy statement would be more conservative than what currently exists.

As a first step, the applicants wanted a moratorium on development on the moraine to be put in place. The applicants also urged the City of Waterloo (the city) and the region to inform residents of the actual or projected value of lost groundwater volumes resulting from development projects.

The applicants submitted an extensive array of evidence to support their application including:

- Newspaper articles on the 2006 ESL proposal for the region;
- "Environment First", planning document presented by the City of Waterloo in 2002;
- Newspaper articles on the reduction of water volumes in the region;
- The region's water management strategy, approved May 10, 2000;
- Articles on the Greenbrook pumping station and well contamination;
- By-laws for stage II water emergency due to reductions in groundwater volumes;
- Photos taken in 2002 of a subdivision constructed on the moraine built adjacent to a permanent pond;
- Photos taken in 2005 of houses built over the permanent pond;
- Newspaper articles regarding development and potential threats to water in the region;
- Photos and newspaper articles regarding new subdivisions to be built over the recharge area;
- Articles on a road project in Hidden Valley;
- An MOE press release regarding preventing water contamination in the Kitchener-Waterloo area;
- A City of Waterloo development report presented March 2006;
- Newspaper articles on development on the moraine and concerns about water;
- PhD thesis on the impact of urbanization on the Waterloo West Side;
- Article on St. Agatha water problems;
- Correspondence between the Chair of Waterloo Region Council and a citizen regarding St. Agatha;
- Photos of Vista Hills subdivision prior to approval;
- Newspaper article on development on the moraine including Vista Hills;
- Correspondence with Waterloo city councilor regarding Vista Hills development;
- Articles on groundwater contamination from surface water collections;
- Newspaper article about residents' concerns over groundwater volumes;
- Minutes from the City Council meeting that approved Wideman Road;
- Photos of pumps removing groundwater from Wideman Road;
- Email correspondence between resident and city staff regarding Wideman Road construction;
- Newspaper articles about the construction problems facing Wideman Road;
- Pages from the region's website regarding groundwater volumes pumped in the Region and water and sewerage rates and costs; and
- A letter from applicants to the region regarding their concerns.

Please see pages 14-51 of the Annual Report for a more detailed discussion on planning issues in Southern Ontario.

**Ministry Response**

*Ministry of Natural Resources (MNR):*
MNR denied the application in August 2006, stating that the public interest did not warrant a review of the need for a new policy to protect the Waterloo Moraine. The ministry referred to its 1994 Statement of Environmental Values (SEV) to explain that it does not have a legislative mandate to consider a policy review on source water protection or municipal land use planning. These were the responsibilities of MMAH and MOE. MNR also stated that it does provide MOE and MMAH with technical advice and expertise in developing and delivering source water protection programs and on other natural resources and environmental stewardship related matters.

*Ministry of Municipal Affairs and Housing (MMAH):*
MMAH denied the application in August 2006, stating that the public interest does not warrant the granting of a request to review the need for a new policy to protect the Waterloo Moraine. The ministry stated that the Provincial Policy Statement, 2005 (PPS) underwent extensive stakeholder and public consultations and will be reviewed every five years. MMAH also emphasized that the PPS applies to all applications, matters or proceedings commenced on or after March 1, 2005 and section 3(5) of the *Planning Act* provides that all decisions that affect a planning matter should be consistent with the PPS. The ministry also stated that the PPS included enhanced provisions to protect natural heritage systems as well as stronger direction to protect water resources, and it complemented MOE's *Clean Water Act*. MMAH further stated that the PPS represented minimum standards, which municipalities could build upon to address matters that are important to a specific community or area.

*Ministry of Environment (MOE):*
In a letter to the applicants dated April 24, 2007, MOE agreed to conduct a review to determine if there is a need to develop provisions to protect groundwater and source water of the Waterloo Moraine beyond what currently exists in policies and legislation. MOE stated that although it would not review the *Clean Water Act* nor the PPS, any decision arising from the review will be informed by these new initiatives. MOE expects the review to take 16 months.

Section 70 of the *EBR* requires ministries to give notice of their decision within 60 days of receiving the application. Both the ECO and the applicants contacted MOE with their concerns over the eight-month delay in issuing the notice.

The applicants first learned of MOE's decision indirectly in a MOE letter dated April 13, 2007, in response to a different but related matter. The letter sent by the MOE director of the West Central Region noted that MOE committed to undertaking a review of existing policies and legislation to ensure that the moraine is afforded the proper protection it deserves. The applicants forwarded this letter to the ECO on April 19, 2007. ECO staff then contacted MOE in regards to providing the applicants with a proper notice of decision. MOE subsequently provided the applicants, the City of Waterloo and the region letters notifying them that as part of its continuing process to improve water-related best practices and policies, the ministry had agreed to conduct a review.

**ECO Comment**

The ECO commends MOE for undertaking this review to ensure that the Waterloo Moraine and groundwater sources are properly protected. However, the ECO is troubled by the ministry's extended delay in releasing its decision and the confusion over the release of its decision notice to the applicants. Such delays and lack of proper notice of decision frustrate the public interest, undermine the *EBR*, and hamper the ability of the ECO to report to the Legislative Assembly.

The ECO finds that the application contained compelling evidence and strong arguments for MNR and MMAH to undertake a review. MNR and MMAH did not refer to any of the evidence submitted in support of the application. Although MNR used its 1994 SEV to suggest this issue did not fall under its mandate, protecting the Waterloo Moraine could have easily fallen under several of its SEV's objectives. Furthermore, MNR's mandate clearly includes natural heritage protection and it was instrumental in

creating the Oak Ridge Moraine Conservation Plan. One of MNR's stated objectives is watershed planning and sustaining the province's water resources and their hydrologic function.

It is constructive that MNR provides MOE and MMAH with technical expertise, however this does not prevent MNR from taking a more proactive role to "ensure the long-term health of ecosystems by protecting and conserving our valuable soil, aquatic resources, forest and wildlife resources as well as their biological foundations" as outlined in its SEV.

MMAH contends that the PPS adequately addressed the concerns of the applicants and that it is up to municipalities to exceed the minimum requirements of the PPS in order to protect unique ecological features in their areas. However, as seen with the Oak Ridges Moraine, the PPS, ministerial mandates and environmental legislation at the time were not enough to ensure its protection.

Environmental impacts of development on the moraine will affect several jurisdictions and MMAH could ensure the moraine is protected uniformly across municipal boundaries by creating an ecologically based conservation plan that protects the natural and hydrological features of the moraine. Conservation plans have been created for the Oak Ridges Moraine and the Niagara Escarpment. The plan would be mandatory and ensure the development on the moraine is done in a sustainable manner, away from protected areas. The plan would be more detailed than the PPS by including key environmental characteristics of the moraine. The PPS does not specifically account for unique landforms such as moraines. The fact that the PPS is relatively new and is reviewed every five years does not negate MMAH's responsibility to protect the Waterloo Moraine from environmental harm associated with development. MMAH also played an important role in the protection of the Oak Ridges Moraine.

Regardless of the outcome of MOE's review, the ECO urges the three ministries to work together to ensure that the ecological integrity of the moraine is preserved. The ECO will continue to monitor the situation and report on the outcome of MOE's review in a future ECO Annual Report.

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**Review of Application R2006012**

**Review of a Certificate of Approval (Air), Section 9, *EPA***
**(Review Denied by MOE)**

**Geographic Area:** City of Toronto

**Background/Summary of Issues**

In August 2006, the applicants requested a review of the Certificate of Approval (C of A) issued to the Portlands Energy Centre (the "Centre" or "PEC"), an electricity generating station under construction as of January 2007, on the east side of the City of Toronto. The Certificate of Approval was issued under section 9 (Air) of the *Environmental Protection Act*. The applicants called for the review for two reasons:

- According to the applicants, the planned design of the Portlands Energy Centre Project was modified in a major way after the Centre's C of A was issued on February 10, 2006. The applicants noted that the C of A was issued for a combined cycle facility, but in May 2006, the Centre's president expressed the intention to operate the Centre initially as a simple cycle facility, for the 10-month period between June 2008 and February 2009. A combined cycle facility uses the residual heat from its natural gas fired turbines to generate steam that drives a second set of turbines to generate electricity, making greater use of the fossil-fuel derived thermal energy. A simple cycle plant generates electricity only from the initial thermal energy and has no second cycle. Drawing upon statements made by the Centre's chairman, the applicants noted that a modern combined cycle plant such as PEC would achieve a 55 per cent thermal efficiency compared to conventional

simple cycle plants which would achieve thermal efficiencies in the range of 40 per cent. (Generating a greater amount of electricity from any given amount of natural gas has the obvious advantage of conserving fossil fuels and generating fewer emissions per kilowatt of electricity generated.) The applicants noted that PEC's C of A, Schedule A, specifies that the Centre will operate at a minimum thermal efficiency of 53 per cent.

- The applicants believed that MOE did not adequately take into account the cumulative air pollutant emissions (referred to as a "cumulative effects assessment" in this review) during the review and approval process for this C of A. The applicants described cumulative air pollutant emissions as the combined emissions generated from the Centre, emissions from other local sources in the nearby community, as well as background concentrations. The applicants felt that this particular approval process demonstrates that Ontario's C of A process fails to adequately consider cumulative air pollutant emissions and therefore it does not sufficiently protect the health of Ontario communities. The applicants noted:

  *"Ontario's system for evaluating and approving potential new emitters does not holistically consider an individual's total exposure from on-site and off-site sources plus background concentrations. Therefore a facility, for example the PEC, may meet Ontario's minimum requirements for approval while potentially contributing to health impacts associated with air quality."*

The air emissions of principal concern to the applicants were particulate matter and nitrogen dioxide. For fine particulate matter ($PM_{2.5}$), the applicants indicated that background levels in the vicinity of the Centre already exceed the health-based reference concentration for $PM_{2.5}$. Nitrogen dioxide contributes to the formation of photochemical smog, which has become a recurring health and environmental problem in much of southern Ontario.

Ontario's electricity generating situation, i.e., that demand occasionally approaches or exceeds supply, has a significant bearing on the PEC undertaking. On February 10, 2006, the Minister of Energy issued a directive to the Ontario Power Authority to conclude a contract with the proponents of Portlands Energy Centre for the construction and installation of a natural gas fired combined cycle generation facility in downtown Toronto of approximately 550 MW. On August 18, 2006, the OPA and Portlands Energy Centre executed such a contract. As noted by the applicants, in November 2006, the proponents sought an amendment to its C of A to conduct simple cycle operations at the Centre on a temporary basis. The application for amendment included the preparation of an Emission Summary and Dispersion Modelling (ESDM) report detailing the effect of this change in operations. This amendment was prompted by a request from the Ontario Power Authority (OPA) to ensure that the Centre will begin generating electricity in a timely manner (particularly to help ensure the electricity needs of the City of Toronto can be met during the summer peak demand; the City of Toronto has very little electricity generating capacity within its boundaries; by contrast, some cities like New York generate the majority of its electricity consumed from stations within the city).

One of the reasons that the site, situated in the south-east section of the City of Toronto, was chosen is that it has excellent access to existing transmission lines. The Centre will be situated on a site beside a mothballed generating station (the R.L. Hearn Generating Station). The proponents noted that this site can connect directly to the Hydro One substation located beside the former generating station and that there is no comparable site in the City of Toronto with direct access to a substation as well as rail access, and is close to natural gas pipelines.

**Ministry Response**

MOE denied this application for a review of the Centre's C of A. MOE responded to the applicants by noting that the proponents for this project completed the Environmental Screening Process (ESP) set out in O. Reg. 116/01 (see "Guide to Environmental Assessment Requirements for Electricity Projects", March 2001), including the mandatory public notification and consultation, for a combined cycle facility.

MOE indicated that after submission of documentation by the proponents and completion of the ESP, the ministry received a total of 122 elevation requests for this project (i.e., an appeal for the project to be subjected to an individual environmental assessment under Ontario's *Environmental Assessment Act*) and the Director of the Environmental Assessment and Approvals Branch denied all of them. Subsequent to that, there were 14 requests to the Minister to review the Director's decision. The Minister confirmed the Director's decision to deny the elevation requests.

*C of A Process:*
Respecting the first issue (i.e., operating the Centre as a simple cycle, rather than a combined cycle facility), MOE reported to the applicants that an application for amendment of a C of A would be required to make such an operational change. On November 16, 2006, the proponents submitted to the ministry an application for amendment of its C of A. MOE told the applicants that to obtain a C of A (Air), a proponent must demonstrate compliance with O. Reg. 419/05 and other ministry requirements such as Guideline A-5 – Atmospheric Emissions from Stationary Combustion Turbines. Further, the ministry's response indicated that the approvals process is not prescriptive and does not prescribe technology to be used. Proponents need only demonstrate that regulated limits and other ministry requirements are met.

*Cumulative Effects Assessment:*
Concerning the ESP and its lack of requirement that proponents undertake a cumulative effects assessment, MOE first provided to the applicants a great deal of process description, i.e., the process by which a proponent would obtain a C of A. For example, MOE described for the applicants the Environmental Screening Process under O. Reg. 116/01, and how it includes mandatory notification, public consultation and other requirements.

The ministry indicated that the proponents provided an assessment of predicted maximum ambient air concentrations for "conventional" pollutants relative to the proposed electricity generating facility. This assessment included consideration of "background" pollutant concentrations which the proponents indicated were representative of "reasonable worst case existing conditions". A summary of predicted values based on facility operations was combined with "background" values (obtained from ministry ambient air monitoring programs) and compared to the ministry's Ambient Air Quality Criterion (AAQC). MOE wrote that this represents a "cumulative" or "combined" effects assessment. MOE noted that the assessment supported the proponents' opinion that cumulative impacts of the Centre have been addressed.

Finally, regarding the suggestion of making cumulative effects assessment a standard requirement in the process of applying for a C of A, MOE wrote that: "consideration of cumulative air pollutant emissions and background concentrations is beyond the scope of the C of A review process, and it has been deemed beyond the scope of this *EBR* application to consider cumulative effects for the ministry's C of A program."

(Note: A section of MOE's letter of response to the applicants (dated December 21, 2006) conflicted with MOE's Decision Summary, which was attached to the letter. In its Decision Summary, it indicated that no application for amendment of PEC's C of A had been received by MOE, while in the attached letter, it noted that the applicants had been informed that an application to amend the PEC's C of A had been received on November 16, 2006. The latter appears to be correct. The ECO notes that drafting errors of this nature are confusing for all parties involved.)

**ECO Comment**

*Application Denied:*
The ECO believes MOE had some justification for denying this application for review. As MOE noted in its response to the applicants, subsection 68(1) of the *EBR* provides the minister with reason for not agreeing to the review – the subsection bars ministries from reviewing a decision made within five years of the date of an application, provided the decision was made consistent with the public participation provisions of the *EBR* and that there is not new evidence of significant harm to the environment. MOE relied extensively on the elements of the Environmental Screening Process carried out by the proponents

under O. Reg. 116/01 as evidence of public participation that would be equivalent to that of the *EBR*. For example, public and agency review was carried out, public meetings were held, and the project was subject to numerous elevation requests (all of which were denied). The ministry's decision summary did not deal extensively with this specific C of A amendment process, as the application to amend this C of A was received by MOE at close to the same time that MOE's decision summary was issued to the applicants. However, in its letter to the applicants, MOE noted that the proponents had determined through technical review under its ESP that the modification would not have any negative environmental effects. MOE accepted the no negative effects determination which the proponents provided.

At the time that the application for amendment of the C of A was submitted to MOE, the proponents were establishing a community liaison committee and later notified the public of the application in a January 2007 newsletter. Nevertheless, the ECO has expressed a general concern that permits and Cs of A issued under *EAA* processes like that of O. Reg. 116/01, are often not receiving equivalent treatment as instruments subjected to the *EBR* process. For example, mandatory notification, right to comment and the right to seek leave to appeal many instruments are rights under the *EBR*, but are not observed for many instruments issued under certain *EAA* processes, such as Class Environmental Assessments. In our 2005 Special Report, we recommended that ministry staff have discretion to post proposal notices for any instrument covered under section 32(1)(b) of the *EBR* (commonly referred to as the 'equivalent treatment exemption') if the ministry believes it deserves public input. In this case, the applicants applied for a review of this C of A because they have no established right to comment on the proposed amendment to the C of A.

The Ministry could have agreed to undertake the application for review if the ministry agreed that the application provided new evidence that failure to review the decision could result in significant harm to the environment. MOE also could have agreed to undertake the review if it felt that the application provided evidence that was not taken into account when the decision sought to be reviewed was made. The applicants provided the latter, i.e., the intent to operate the Centre for ten months on a simple cycle basis, but this was not considered sufficient cause by MOE for carrying out the review. For these reasons, the ECO believes that MOE acted on fairly narrow technical grounds to deny this application. Furthermore, the application raised broader and valid concerns about the need to consider cumulative effects assessments as a regular part of applying for Cs of A (air), especially for those facilities proposed for already burdened airsheds. The ECO has commented on this issue in previous Annual Reports (see 2005/2006 Annual Report, page 89).

*Simple Cycle Operation:*
Concerning the proposed amendment to the Centre's C of A, MOE provided a great deal of process description, e.g., how the proponents would go about making an amendment to a C of A. This description was unlikely to be very helpful to the applicants as the applicants were questioning the appropriateness of the nature of the amendment (i.e., to operate the Centre as a simple cycle, as opposed to a combined cycle operation) and not asking how the amendment would proceed through the regulatory process.

On the point of operating the Centre on a simple cycle basis for the 10-month period, the proponents had submitted an application to amend their C of A in mid-November 2006. In December 2006, at the time of MOE's response to the applicants, MOE's letter indicated that the application to amend the C of A was under review by the issuing Director. Before applying for the amendment, the proponents were first required under the Environmental Screening Process to determine whether there would be any negative effects from the operational change and if so, document these effects. The proponents detailed in their Application for Amendment that the maximum predicted off-property point of impingement (POI) concentrations for nitrogen oxides, suspended particulate matter, carbon monoxide and sulphur dioxide would be below MOE's POI criteria.

The ECO understands that a simple cycle operation will have lower thermal efficiency than a combined cycle operation for the 10-month period. More electricity would be generated if the PEC was to operate on a combined cycle basis. Nevertheless, this period of operation is short in duration, and the proponents assert that the Centre will operate on a combined cycle basis after the winter of 2009. MOE did not specifically address the issue of whether or not the PEC would be operating below its stated 53 per cent

thermal efficiency rating other than to say the proponent would need to submit an application to amend its C of A, if the Centre was planning to operate on a simple cycle basis.

*Cumulative Effects Assessment:*
The applicants argued that the C of A approval process should require a cumulative effects assessment which would assess the effects of the combined emissions generated from the Centre, emissions from other local sources in the nearby community, as well as background concentrations. The ECO finds this to be a point of substantial concern. In MOE's response to the applicants, the ministry noted that a cumulative effects assessment was conducted through the Environmental Screening Process under O. Reg. 116/01. MOE did not however provide any description of the outcome of this assessment to the applicants, except for noting that the assessment supports the proponents' opinion that cumulative impacts for the PEC have been addressed.

The ECO recognizes the difficulty with siting new emitting facilities in areas in which air quality is already degraded. Currently in Ontario, proponents of projects are not required to take into account ambient air quality when undertaking dispersion modelling for the purposes of applying for certificates of approval. If O. Reg. 419/05 required proponents to incorporate ambient air quality into dispersion modelling then it is probable that many projects would not be able to meet Ontario's updated air standards. This would mean that many new projects would not likely be approved, or that very costly pollution control equipment would be required in order for approval to be granted especially in already burdened airsheds. This situation could place a large financial burden on the proponent of the newest facility proposing to operate in certain airsheds. Further, proponents might contest such requirements on the basis that they have no ability to control the quality of the air which arrives at their site; and that the state of ambient air quality in the province is the responsibility of MOE (as well as the governments of Canada, the United States and neighbouring jurisdictions because of transboundary agreements).

MOE informed the applicants that consideration of including cumulative effects assessment in the C of A review process is beyond the scope of the C of A review process. However, the issue of taking into account the background concentrations of contaminants in dispersion modelling of a proposed facility is a key to understanding what the future state of local air quality will be like if the facility is built. MOE acknowledges that O. Reg. 419/05 does not adequately address background concentrations, cumulative or synergistic effects, or persistence and bioaccumulation of contaminants. It is important from an environmental and human health perspective that MOE find some means of incorporating these attributes into the modelling of new facilities on a routine, program basis.

The ECO is also aware that throughout Ontario a large number of facilities are operating under outdated Cs of A, which do not reflect modern standards for air quality using modern air dispersion models. As a result there is an inequity between newer-licenced facilities, which generally need to meet the most modern and stringent standards, versus older permitted facilities which often continue to operate on outdated standards and models. The ECO and the Auditor General of Ontario have both identified this as a problem, and MOE has begun to address it with tougher rules being phased in for most existing facilities between 2010 and 2020. Nevertheless, as a consequence of facilities operating under outdated Cs of A, it is likely that many existing sources of air emissions in the City of Toronto are greater emitters of contaminants per unit of fossil fuel combusted, than the PEC will be. Clearly, new approaches will be needed to bring about both improvements in air quality and the accommodation of new facilities in airsheds which are already burdened by air contaminants.

The ECO agrees that where air quality is already of concern, consideration should be given to all available options to reduce further burdening of the local airshed. Since new facilities are apt to use the newest technology and be less emission intensive than older facilities, MOE could focus some effort on updating outdated Cs of A in airsheds where new facilities are seeking entry. Some jurisdictions are requiring proponents to seek emission offsets; these could be considered under this circumstance. Options include paying a local emitter to change technology, providing an incentive to owners of older, more emission intensive vehicles to retire their vehicles, or working with owners of vehicle fleets to convert their vehicles to lower emission fuels. For example, in San Diego County California, a new natural gas powered generating station was accommodated in a burdened airshed by way of offsets. The

proponents replaced a fleet of 120 diesel-fuelled trucks with newer natural gas burning vehicles to help meet air emission limits for the airshed once the station's operation commenced.

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**Review of Application R2006016**

**Measures to Conserve Woodland Caribou (*Rangifer tarandus caribou*) and its Habitat**
**(Review Denied by MOE)**

This application was reviewed in conjunction with R2006015 (MNR), R2006017 (MNDM), and R2006018 (ENG). Please see page 204 of the Supplement for ECO's full review of these applications.

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**Review of Applications R2006020**

**Need for a Review of Ontario's Policies on Transboundary Smog, Mercury Emissions and Climate Change**
**(No response from MOE in 2006/2007)**

This application was reviewed in conjunction with R2006019 (ENG). Please see page 118 of the Supplement for ECO's full review of these applications.

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**Review of Application R2006021**

**Review of Section 11.4 of the *Environmental Assessment Act***
**(Review Accepted by MOE)**

**Background/Summary of Issues**

In October 2006, two applicants requested a review of section 11.4 of the *Environmental Assessment Act* (*EAA*). This section allows residents to request that the Minister of the Environment review a previous EA approval. The applicants made a request for a review of an EA approval issued to the Regional Municipality of Hamilton-Wentworth in 2002. As of June 2007, MOE has failed to issue a decision on that request. The applicants want, among other things, to see the *EAA* amended so that time limits would be imposed on the MOE when it is asked to conduct a review under section 11.4.

**Ministry Response**

MOE agreed to undertake this review in February 2007, more than two months after a decision was required.

**ECO Comment**

The ECO will review MOE's handling of this review in a future Annual Report.

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**Review of Application R2006023**

**Review of the Need to Regulate Noise Criteria**
**(Review Denied by MOE)**

**Background/Summary of Issues**

In December 2006, two applicants who live in a rural area near a transformer for a wind farm requested a review of the need to make the noise guideline, NPC-232 – Sound Level Limits for Stationary Sources in Class 3 Areas (Rural), a regulation under the *Environmental Protection Act* (*EPA*). The applicants believe that the Ministry of the Environment (MOE) would be more inclined to enforce NPC-232 as a regulation than as a guideline. The applicants also requested that the current noise criteria in the guideline be lowered, since the criteria do not adequately protect neighbouring property owners from unacceptable noise levels from transformers.

*Background:*
Transformers and wind turbines produce sound. Although improvements in technology have reduced sound emissions, siting of transformers and wind turbines to minimize sound on neighbouring properties is still an important consideration. Whether or not this sound is perceived as noise, i.e., unwanted sound, depends on several factors, including:

- The characteristics of the sound itself, e.g., frequency and pattern;
- Background sound levels, e.g., vehicular traffic, wind;
- The nature of the terrain, e.g., flat, hilly or treed, between the source of the sound and the receptor;
- The nature of the receptor; and
- The attitude of the receptor towards the source of the sound.

The effects of noise on people can range from annoyance and nuisance to interfering with speech, sleep and learning, and to anxiety, ear ringing and hearing loss. People's tolerance of noise varies widely.

MOE has established separate noise guidelines for urban and rural areas. The guidelines characterize urban areas as having high vehicular noise, not necessarily high population densities; whereas, rural areas have a preponderance of natural sounds and low vehicular noise. The noise criteria for urban areas are outlined in the guideline "Sound Level Limits for Stationary Sources in Class 1 & 2 Areas (Urban) – NPC-205," and for rural areas in "Sound Level Limits for Stationary Sources in Class 3 Areas (Rural) – NPC-232." The noise criteria establish maximum noise levels allowed at neighbouring properties – they do not apply to the properties on which the transformers and wind turbines are sited. MOE cautions that the feasibility of mitigating noise impacts after a project has been implemented is limited.

Sound levels are often reported in decibels (dBs). While individual humans vary in their ability to detect sound, measuring devices can be configured to measure sound in a manner that reflects the average person's perception of loudness. Called A-weighting, these readings are reported as dBA. A typical conversation is about 60 dBA. Average street traffic is about 85 dBA and a pneumatic hammer used in road repairs is about 100 dBA. Each increase of 10 decibels represents a doubling of loudness. Sound levels from stationary sources can also be averaged over time and reported as either the One Hour Equivalent Sound Level ($L_{eq}$) or the Logarithmic Mean Impulse Sound Level ($L_{LM}$).

The applicants focussed on the noise guidelines that apply to Class 3 areas. Defined in NPC-232, a Class 3 area is a "rural area with an acoustical environment that is dominated by natural sounds having little or no road traffic," such as a community of less than 1,000 people, an agricultural area, a cottage or resort, or a wilderness area. The guideline explains that a Class 3 area does not include a residential property that is located in an isolated area if it is beside a major roadway. The guideline describes how to

measure sound levels and establishes limits for sound measured at points of reception that are within 30 metres of a dwelling on a neighbouring property.

As of May 2007, 690 wind turbines were either up and running or in the works in the province.

The *Planning Act* was recently amended to exempt energy projects that have been approved or exempted under the *Environmental Assessment Act* from being evaluated against land-use planning principles. For additional information about this *Planning Act* amendment, refer to page 23, Review of Posted Decision: Bill 51 – Planning and Conservation Land Statute Law Amendment Act, 2006.

*Summary of Issues:*
The applicants suggested that MOE would be more willing to ensure compliance with NPC-232 if the guideline were an enforceable regulation. According to sound tests conducted by one of the applicants, the current noise criteria are too high since the transformer can still be heard above an ambient indoor noise level of 47 dBA. Furthermore, the applicant measured noise levels of 55 dBA outside the house in part due to noise from the transformer reflecting off of a steel shed and to spikes in noise by the transformer when the wind turbines cycle on and off. According to the applicant, despite hearing the transformer for nine months, he has not been able to get used to it.

The applicants also explained that 11 companies are considering locating wind farms in the Township, and at least one and possibly as many as five more transformers may be installed at the site of the existing transformer.

In a separate application, the applicants alleged that the proponent, Canadian Hydro Developers Inc. (CHD), of the subject transformer was not in compliance with two sections of the *EPA*. For additional information on this application, refer to this Supplement on page 253.

The ECO forwarded the application to MOE for review.

**Ministry Response**

MOE 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. MOE explained that any potential for harm to the environment was addressed by the noise guideline, NPC-232, and the requirement to obtain a certificate of approval (C of A) for noise for the wind turbines and the transformer. MOE noted that, since it requires compliance with NPC-232 as a condition of relevant Cs of A, NPC-232 becomes legally enforceable. As a result, a regulation is not required. In addition, section 14(1) of the *EPA* prohibits any person from causing or permitting noise that causes an adverse effect.

Last updated in 1995, MOE explained that NPC-232 was reviewed in 2006 by ministry staff and noise experts, and that no changes were recommended. MOE also noted that the methodology used by the applicants to test noise levels did not meet "existing scientific limits for noise monitoring and assessment."

MOE explained that it had followed-up on previous complaints about noise from the subject transformer, and that CHD had agreed to implement noise mitigation measures. In addition, CHD has applied for a C of A for the transformer and proposed noise barrier. Since ministry staff agreed that the proposed noise barrier would mitigate the noise, MOE allowed construction to proceed prior to the onset of winter and prior to completing its review of the C of A. MOE explained, that if construction had not been allowed to proceed, it would have been delayed until the spring thaw and neighbours would not have benefited from the noise barrier throughout the winter. Construction of the noise barrier was completed in December 2006. MOE indicated that the C of A will require CHD to comply with NPC-232 and to arrange for an independent acoustical audit to be conducted after the noise barrier is installed. If the audit finds that CHD is still not in compliance with NPC-232, CHD will be required to implement additional noise abatement measures.

**ECO Comment**

MOE was not justified in denying this application for two reasons. First, although the subject guideline was reviewed in 2006, the review was not conducted in a manner that is consistent with the intent and purpose of the *EBR*. No proposal was posted on the Registry and the public was not notified of or asked to provide comments on the guideline. In addition, the 2006 review did not include a proposal to make the guideline a regulation.

Second, there is social, economic and/or scientific evidence that is relevant. As noted in MOE's response, the applicants "demonstrated the seriousness" of their concerns when they provided their own test results. If MOE had concerns about the methodology used by the applicants, the onus shifted to MOE to confirm the applicants' findings using an acceptable methodology. In addition, the Ontario government has committed to increasing the per cent amount of electricity generated from wind and other renewable forms of energy and recently has exempted some energy projects from being evaluated against land-use principles in the *Planning Act*. Although the ECO noted in the 2004/2005 Annual Report that the environmental benefits of wind power generally outweigh their negative impacts, it is still important that ongoing concerns related to siting of transformers and noise be addressed proactively. Implementing measures to mitigate unacceptable noise levels after installation is difficult according to MOE. For additional comments related to the *Planning Act* amendments and siting of wind projects, refer to pages 23-25.

The ECO has received a number of complaints from the public about noise emanating from various sources and is concerned that the current noise criteria may not be adequate and/or is not being enforced. The ECO believes that a public discussion on noise criteria would be beneficial and would ensure that criteria are set in an open and transparent manner. Furthermore, if noise criteria were regulated, the public would then be able to request an *EBR* investigation into alleged contraventions of the regulation.

(For additional discussion of noise complaints, refer to page 253 (I2006008) of this Supplement.)

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**Review of Application R2006024**

**Review of the Need for Regulatory Reform Related to Mining Projects**
**(No Response from MOE)**

This application was reviewed in conjunction with R2006025 (MNR) and R2006026 (MNDM). Please see page 230 of the Supplement for ECO's full review of these applications.

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**Review of Application R2006029**

**Review of a Permit to Take Water for a Commercial Water-bottling Plant**
**(Review denied by MOE)**

**Background/Summary of Issues**

On January 24, 2007, an application for review was filed requesting a review of a Permit to Take Water (PTTW) issued by the Ministry of the Environment for a commercial water-bottling facility located in Aberfoyle, Ontario, near the city of Guelph. The applicants expressed concern that, in approving this PTTW, MOE is failing to adequately protect the environment; MOE is failing to take a precautionary

approach; and MOE is failing to take an ecosystem approach to watershed management as the water being taken is not being returned to the watershed.

The ECO forwarded the application to MOE.

**Ministry Response**

On August 9, 2007, MOE denied this application for review because the PTTW was evaluated in detail less than two years ago when the PTTW was issued in June 2005. In addition, after this *EBR* application was submitted, in March 2007, the commercial water-bottling facility applied to renew this PTTW (as the PTTW expired in June 2007). The proposed new PTTW was posted on the Environmental Registry in April 2007 (Registry Number: 010-0317) and was subject to full public consultation and a thorough technical review. A new amended PTTW was issued on August 24, 2007.

**ECO Comment**

The ECO will review the handling of this application in the 2007/2008 Annual Report.

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**Review of Application R2006030**

**Review of MOE's Policies on Issuing PTTWs to Commercial Bottling Facilities (Review denied by MOE)**

**Background/Summary of Issues**

On January 24, 2007, an application for review was filed requesting a review by the Ministry of the Environment (MOE) of its policy under the *Ontario Water Resources Act* on issuing Permits to Take Water (PTTWs) to commercial water bottling facilities. The applicants suggested that MOE should have a policy that states that PTTWs should not be issued to commercial bottlers, as the water taken for these purposes is not returned to the watershed.

The ECO forwarded the application to MOE.

**Ministry Response**

On August 1, 2007, MOE denied this application for review because the ministry has reviewed and consulted extensively on its permit to take water program, including rules for commercial bottling, during the last five years. The ministry notes that from 2003 to 2005, MOE consulted on amendments to the Water Taking and Transfer Regulation under the *Ontario Water Resources Act,* and provided two separate opportunities for consultation under the *EBR* in April 2003 and June 2004.

**ECO Comment**

The ECO will review the handling of this application in the 2007/2008 Annual Report.

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## Ministry of Municipal Affairs and Housing

### Review of Application R2005019

### Review of PPS and the Need for New Legislation to Protect Rail Corridors (Review Denied by MMAH)

**Geographic Area:** Province-wide

**Background/Summary of Issues**

In March 2006, applicants requested that the Ministry of Municipal Affairs and Housing (MMAH) review section 1.6.6.3 of its Provincial Policy Statement, 2005 (PPS 2005), which provides policy direction on the preservation and reuse of abandoned corridors, and that the Ontario government review the need for new legislation for the protection, preservation and development of rail corridors in Ontario.

Section 1.6.6.3 of the PPS 2005 states that: "The preservation and reuse of abandoned corridors for purposes that maintain the corridor's integrity and continuous linear characteristics should be encouraged, wherever feasible." The applicants argued that the language in this policy statement is too weak. In particular, they feel that the phrase "should be encouraged, wherever feasible" should be replaced with the phrase "should be required." The applicants also contended that this statement is weaker than Ontario's previous Provincial Policy Statement, 1996, which stated "corridors and rights-of-way for significant transportation and infrastructure facilities will be protected."

The applicants also argued that, in any event, mere "policy" is not effective enough. They noted that there have been provincial policies to promote preservation of rail lines for a number of years, and yet thousands of kilometres of railway lines have been abandoned in Ontario over the past few decades. Accordingly, the applicants asserted that new enforceable legislation is needed to protect corridors and rights-of-way for rail transportation.

An "abandoned" rail corridor is a railway line on which rail service has been discontinued. Under the *Shortline Railways Act, 1995*, when a shortline railway company intends to discontinue the operation of a railway line, it must first offer to sell or lease the rail line to another rail company for continued operation. If it is unable to transfer the line to another company, it next must offer to sell, lease or otherwise transfer the line to the Government of Ontario (for its "net salvage value"), and then to each municipality in which the railway line is located. If the railway company is unable to transfer the railway line to any of these parties, it may then formally discontinue operating the railway line and dispose of any or all of the assets connected with it. Thus, once a rail corridor is abandoned, tracks may be removed, the property sold and built upon, and the rail corridor may be permanently lost.

The applicants argued that rail corridors are valuable and irreplaceable infrastructure assets, and that, if lost, are extremely difficult to replace. A 2005 report prepared for MMAH stated: "At one-time Ontario was crisscrossed by a network of railroads that contributed to the vitality of rural and urban communities. These rail-lines were imposed on original surveyed parcels by the federal government to develop the local and national rail system… These abandoned rights of ways represent a unique resource that many people contend would be very difficult to recreate."

Over the years, there has been an incremental loss of railway corridors that have been dismantled, sold, and built on. For example, the applicants' request was triggered by their concern that the Canada Southern Railway ("CASO"), a strategic rail corridor that runs through southern Ontario, between two critical border crossings (i.e., Fort Erie/Buffalo and Windsor/Detroit), was being broken up and dismantled. Once rail companies have formally abandoned these lines and disposed of the property, these corridors

and rights-of-way can rarely be retrieved. The applicants argued that the provincial government needs an effective system to ensure that these valuable assets are not lost.

In addition to ensuring that these abandoned rail corridors and rights-of-way are preserved, the applicants also emphasized the need for the province to enact legislation that promotes redevelopment and reactivation of these corridors as new rail lines. The applicants provided information that demonstrated that rail transportation has a much smaller environmental footprint than road transportation, and should be encouraged as an environmental alternative to road travel as much as possible.

The applicants pointed to statistics showing that rail transportation is five times more fuel-efficient than truck transport, and three to four times more fuel-efficient than travel by automobiles. As rail transportation uses less fossil fuel, it consequently produces fewer air emissions, such as nitrogen oxides and carbon dioxide, which contribute to smog and global warming.

Secondly, the applicants argued that railways require far less land than roads to move an equivalent number of passengers and freight. Accordingly, not only can railways relieve traffic congestion from the highways, they reduce the need for new roads and highways. Less road construction means a smaller demand for aggregates, as well as fewer disturbances of lands, thus preserving natural features, agricultural areas and biodiversity.

Thirdly, the applicants argue that, as transit supports dense urban development and reduces sprawl, railways may contribute to more sustainable communities.

**Ministry Response**

Unfortunately, although three ministries – the Ministry of Municipal Affairs and Housing (MMAH), the Ministry of Transportation (MTO) and the Ministry of Public Infrastructure Renewal (MPIR) – play a key role in transportation planning and development, the ECO was only able to send this application for review to MMAH, as neither MTO nor MPIR are currently prescribed for the purposes of applications for review under the *EBR*.

In September 2005, the Ministry of the Environment (MOE) recommended prescribing MTO for the purposes of applications for review under the *EBR*. In March 2006, MOE advised the ECO that it was working on a Registry proposal notice regarding prescribing MTO. Similarly, in our 2004/2005 Annual Report, the ECO urged the Ontario government to prescribe MPIR under the *EBR*, and MPIR agreed to proceed. In May 2006, MPIR reported that this work was ongoing. Unfortunately, as of April 2007, MPIR has not been prescribed under the *EBR*, nor has MTO been prescribed under the *EBR* for the purposes of applications for review.

*MMAH Response:*
MMAH decided not to undertake this review. The ministry responded that it had satisfied the criteria in section 68(1) of the *EBR*, which states that a review of a decision is not warranted where the decision has been made in the past five years, and where the decision was made in a manner that the minister considers consistent with the intent and purposes of the consultation requirements of the *EBR*. MMAH noted that the PPS 2005 came into effect on March 1, 2005 (i.e., during the past five years), and that the PPS 2005 was the result of extensive public and stakeholder consultations between 2001 to 2004. MMAH also noted that it is already required to review the PPS every five years.

In response to the applicants' assertion that the direction in the PPS 2005 is weaker than the previous PPS, 1996, MMAH argued that, to the contrary, the PPS 2005 provides stronger policy direction. MMAH stated that the PPS must be read in whole, and in conjunction with the *Planning Act*. MMAH pointed out that the *Planning Act* now requires that all planning-related decisions must "be consistent with" the PPS 2005, whereas previously, decisions were only required to "have regard to" the PPS. MMAH also referred to other sections of the PPS 2005 that provide policy direction for the protection of transit corridors and the promotion of public transit, including:

- Transportation systems should be provided which are safe, energy efficient, facilitate the movement of people and goods, and are appropriate to address projected needs (section 1.6.5.1).
- Efficient use shall be made of existing and planned infrastructure (section 1.6.5.2).
- Connectivity within and among transportation systems and modes should be maintained and, where possible, improved including connections which cross jurisdictional boundaries (section 1.6.5.3).
- A land use pattern, density and mix of uses should be promoted that minimize the length and number of vehicle trips and support the development of viable choices and plans for public transit and other alternative transportation modes, including commuter rail and bus (section 1.6.5.4).
- Planning authorities shall plan for and protect corridors and rights-of-way for transportation, transit and infrastructure facilities to meet current and projected needs (section 1.6.6.1).
- Planning authorities shall not permit development in planned corridors that could preclude or negatively affect the use of the corridor for the purpose(s) for which it was identified (section 1.6.6.2).

MMAH also concluded that the public interest does not warrant a review of the applicants' request for new legislation for the protection, preservation and development of rail corridors in Ontario; however, it did not provide specific reasons to support its decision to decline this portion of the applicants' request.

**ECO Comment**

MMAH's decision not to review the PPS 2005 was reasonable, given the fact that the PPS 2005 was developed within the past five years pursuant to extensive public consultation. However, the ECO is disappointed that MMAH did not address the applicants' request for a review of the need for new legislation for the protection, preservation and development of rail corridors in Ontario.

Although the PPS 2005 provides direction to municipalities to encourage the preservation and reuse of abandoned corridors, the PPS 2005 alone is not sufficient to address the need for preservation and development of rail corridors. The applicants had emphasized that despite existing policy, corridor abandonment has continued for decades. In most cases, rail transportation requires a regional and intercity strategy. Accordingly, Ontario needs a provincial approach to preserving and developing rail lines that goes beyond simply encouraging municipalities to preserve and reuse local rail corridors.

The ECO believes that the provincial government should be working towards a better transportation strategy that includes provisions for the protection and redevelopment of railway lines. In our 2005/2006 Annual Report, the ECO recommended that "MTO take the lead with MMAH and MOE and collaborate on a strategy to reduce the environmental impact of the transportation sector in Ontario, hold public consultations on the strategy, and post a strategy on the Environmental Registry." MTO advised the ECO in March 2007 that it has begun working on a sustainable transportation strategy for Ontario, however, we have not been provided with any details regarding this strategy.

Rail transportation has a lighter environmental footprint than road transport – it is more fuel-efficient, produces fewer air emissions, requires fewer aggregates and fewer disturbances to the land, and contributes to more sustainable communities. The Ontario Round Table on the Environment and Economy's 1992 task force report on transportation stated that rail is one of the cleanest and most effective ways to move freight over long distances. Yet, little has been done to promote rail transportation since this task force report was released 15 years ago.

The ECO has suggested on pages 28-35 of the Annual Report that the province needs to find new approaches to transportation planning, such as prioritizing transit over passenger vehicle use and making greater use of rail. The Ontario government should consider including a provincial rails policy as part of its transportation and land use strategies, which evaluates key rail corridors throughout Ontario and establishes a strategy for acquiring, preserving and redeveloping those rail corridors that are identified as important.

Rail corridors and rights-of-way are valuable infrastructure that have unknown future potential. The loss of these important assets presents a significant loss far beyond the mere cost of the land and the existing assets. The Ontario government clearly has the power to acquire all rail lines in the province when they become abandoned, as the *Shortline Railway Act* requires that the province be granted first right of refusal to acquire these assets. In addition, once acquired, the province may retain these rights-of-way at no cost because the Crown is not required to pay property taxes. Accordingly, the Ontario government could chose to make a policy to acquire and retain all abandoned railway lines in the province, or, at the very least, those rail corridors that are identified as important. Ontario's Trails Strategy, which encourages the acquisition and retention of abandoned rail corridors to be used as trails, is one effective means of retaining rail corridors and rights-of-way in public jurisdiction, however, this alone is nowhere near sufficient.

The province should also consider reviewing the need for financial support and incentives to assist rail companies and municipalities to retain, acquire, preserve and redevelop abandoned rail lines. Current provincial policies and funding tend to favour highway users over railways. The Ontario government finances the building and maintenance of provincial highways, thus subsidizing the cost of road transport. On the other hand, rail lines are required to pay the entire costs of building and maintaining the rail infrastructure, as well as pay property taxes. MTO continues to make highway building a top priority – committing vast amounts of money to highway construction and improvement.

This application highlights the need for MPIR to be prescribed under the *EBR*, and for MTO to be prescribed under the *EBR* for the purpose of applications for review. Both of these ministries play important roles in transportation policy decisions, but were unfortunately not subject to this application review process. As discussed on pages 28-35 of the Annual Report, the ECO believes that the government – and in particular, MTO – needs to review its provincial policies, which favour highway development over other more sustainable modes of transportation such as rail. The government as a whole should consider new approaches that include preserving and redeveloping abandoned railroad rights of way. The ECO urges the government to act sooner rather than later, for if rail corridors are lost now, they may be lost to us forever.

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**Review of Application R2006005**

**Application for Review to Protect Groundwater of the Waterloo Moraine (Review Denied by MMAH)**

This application was reviewed in conjunction with R2006006 (MOE) and R2006007 (MNR). Please see page 157 of the Supplement for the ECO's full review of these applications.

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**Review of Application R2006009**

**Application for Review to Protect Groundwater of the Waterloo Moraine (Review Denied by MMAH)**

This application was reviewed in conjunction with R2006010 (MOE) and R2006011 (MNR). Please see page 165 of the Supplement for the ECO's full review of these applications.

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**Review of Application R2006014**

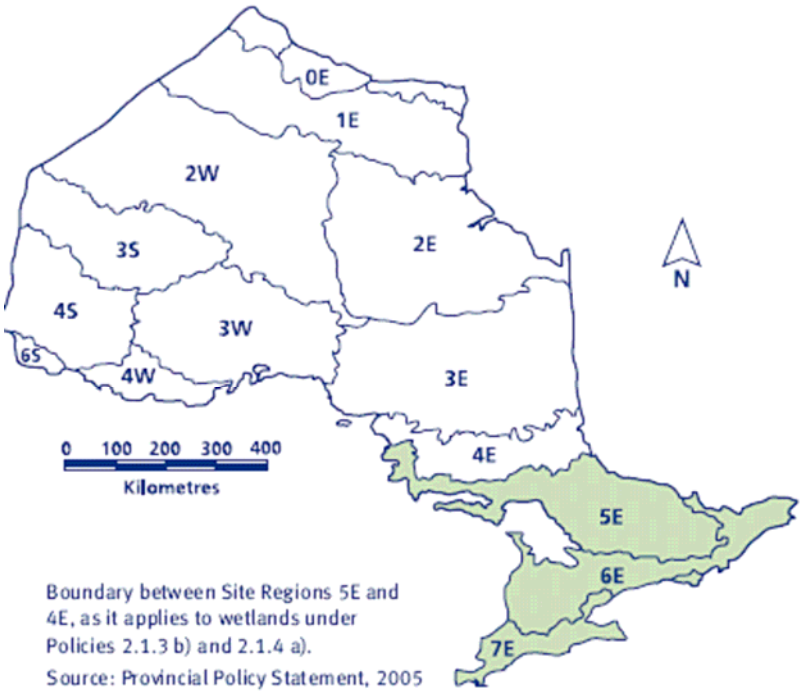
**Review of Wetland Policies**
**(Review Denied by MMAH)**

**Geographic Area:** Southern and Central Ontario; Haliburton County

**Background/Summary of Issues**

The applicants requested a review of the sections of the Provincial Policy Statement (PPS) pertaining to natural heritage. They alleged that subsection 2.1.3, which sets out protections for wetlands, is not being adhered to by the Ministry of Natural Resources. They asked for a full review of how the MNR interprets and complies with the PPS. The ECO sent the application to both MNR and MMAH.

Section 2.1.3 of the PPS states that "development" and "site alteration" shall not be permitted in significant wetlands in Ecoregions 5E, 6E and 7E and significant coastal wetlands.




Significant wetlands are defined in the PPS as areas "identified as provincially significant by the Ontario Ministry of Natural Resources using evaluation procedures established by the Province, as amended from time to time." MNR uses the Ontario Wetlands Evaluation System (OWES), with a Southern Manual and Northern Manual to evaluate wetlands and determine whether they are provincially significant.

The applicants suggested that the PPS wetlands policies are "meaningless" because development is being approved in wetlands that have not been evaluated. They provided evidence that in Haliburton County, 99 per cent of wetlands have not been evaluated or identified by MNR. The applicants suggested that evaluations under the OWES should be mandatory for all wetlands affected by an application for development.

**Ministry Response**

MMAH decided not to conduct a review, citing subsection 68(1) of the *EBR*, which states that a Minister shall not determine that the public interest warrants a review of a decision made during the five years preceding the date of the application for review if the decision was made in a manner consistent with the *EBR*. MMAH pointed out that the PPS was issued in 2005, after substantial public consultation. The ministry also stated that the PPS provides the provincial policy foundation for regulating the development of lands, and that advice provided by commenting ministries can provide guidance to municipal decision makers. The ministry stated that the PPS, 2005 "is mainly implemented through municipal official plans, and through planning authorities' decisions on planning matters."

**ECO Comment**

MMAH's decision not to launch a review of the wetlands policies of the PPS at this time appears reasonable on first view, since the PPS, 2005 was approved less than five years ago and will undergo a legislated five-year review within the next three years. However, section 68(2) of the *EBR* states that the five-year rule does not apply if there is evidence that failure to review a recent decision may result in significant harm to the environment. The applicants did provide evidence of environmental harm, and their concerns are valid. The ECO has confirmed that the applicants' evidence – that only 1 per cent of the wetlands in Haliburton County have been evaluated for their significance under the PPS policy – is correct. MMAH did not acknowledge or respond to the applicants' concerns at all, nor provide any indication how the applicants could resolve those concerns.

It is unfortunate that MMAH attempted to deny any responsibility, stating that ministries merely provide "guidance" to municipal decision-makers. In fact, MMAH is a "decision-maker" in some areas of the province, approving various planning decisions and official plans. For example, in May 2007, MAH approved an Official Plan Amendment to allow residential development in part of the Bainsville Bay Marsh, which is a provincially significant wetland and significant coastal wetland in the Cornwall area, for residential development. MNR's role, set out in the PPS, is to identify significant wetlands to be subject to the PPS policies. MMAH has an even greater role, under the "One Window" protocol signed by the ministries in 1997. MMAH is the only provincial ministry entitled to receive planning notices as a matter of routine circulation to public bodies; MMAH decides when and if ministries such as MNR will provide comments on a planning matter; MMAH is the only provincial ministry with the legal authority to determine a "provincial interest" in a planning matter, or to launch an appeal, or to order a municipality to amend an official plan to conform to the PPS. MMAH is responsible for the *Planning Act* and the PPS. As such, MMAH has a key role to play in ensuring that the wetlands policies of the PPS are being implemented.

The ECO reviewed a sample of OMB decisions involving the natural heritage policies in 2001 and again in 2007. We found that the OMB was more likely to protect wetlands when MNR staff appeared to provide evidence. MNR staff were rarely involved under the One Window protocol however, and their lack of direct particiation contributed to rulings against wetlands protection. Where MNR had not previously inventoried or identified an area as significant, it was more difficult for parties to provide qualified evidence to support the policies. The ECO concludes that the One Window protocol has not been effective in protecting wetlands under the planning system. For example, in one 2006 OMB decision, the Board approved a development, in large part because MMAH had denied a request by the municipality for MNR to evaluate the impact of the proposed development on provincially significant wetlands. The Board member considered this "persuasive evidence" that both ministries considered the wetland boundaries to be correct, and further, that the ministries' decision not to become involved "renders moot the Appellants' suggestion that their appeal is a matter of public interest." The Board also noted that "it is also not the Board's role to call into question the legitimacy or functionality of the One Window planning protocol." The ECO notes that the MNR witness subpoenaed by the appellants said that MNR did not attend on the subject site because of staff resourcing issues.

The ECO has urged the ministries in several previous Annual Reports to improve their mapping and provision of information about natural heritage features such as wetlands, measure the effectiveness and

implementation of PPS natural heritage policies, and enact clearer provincial requirements for municipalities regarding the protection of environmentally significant lands. In the 2001/2002 Annual Report the ECO recommended that MNR and MMAH develop performance indicators for the natural heritage policies of the PPS. The ministries did not release any information about performance indicators during the last PPS review, and again in the 2004/2005 Annual Report the ECO urged MMAH to develop and consult on performance indicators for measuring the effectiveness of the PPS policies, well in advance of the next scheduled revision of the PPS.

After reviewing the 2005 PPS, the ECO observed that "the approach taken by the PPS often forces the defence of environmental interests on a case-by-case, woodlot-by-woodlot, wetland-by-wetland basis." As discussed further on pages 14-51 of the Annual Report, the ECO has concluded that the current PPS implementation process is not providing adequate protection to wetlands. The ECO urges MMAH to review the wetlands policies of the PPS, including a review of the status of wetlands under the planning system; and to review the One Window Protocol, with particular regard to restoring MNR's involvement in municipal planning.

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**Review of Application R2006031**

**Processing Applications for Pits and Quarries under the *Planning Act***
**(Review denied by MMAH)**

**Background/Summary of Issues**

On February 26, 2007, an application for review was filed asking for a new mechanism for screening and evaluating applications for aggregate operations under the *Planning Act* and the *Aggregate Resources Act*. The applicants described their concerns with a proposed quarry in Flamborough, which is located in the Natural Heritage System of the Greenbelt Plan and contains several Provincially Significant Wetlands, significant woodlands and water resource features. The applicants believe that the proposal is incompatible with existing municipal plans and approved developments, including proximity to residential developments. They are also concerned about the potential impacts of the quarry on groundwater quality and quantity, since the site includes the recharge area for the Carlisle Municipal Wellheads and could affect wellhead protection areas.

The ECO forwarded the application to both MMAH and MNR.

**Ministry Response**

On May 2, 2007, MMAH denied this application for review because the ministry has recently made extensive changes to the *Planning Act* and Provincial Policy Statement. MMAH said that application processes have been improved to allow municipalities to require pre-consultation.

**ECO Comment**

See pages 44-49 of the 2006/2007 Annual Report for discussion of some of the issues raised in this application. The ECO will review the handling of this application in the 2007/2008 Annual Report.

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## Ministry of Natural Resources

### Review of Application R2003008

### Rehabilitation of Ontario Pits and Quarries (Review Undertaken 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 relevant 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 despite legal requirements, "less than half of excavated land is actually being rehabilitated." The applicants evaluated available public statistics and concluded that between 1992 and 2001, approximately 6,000 hectares were dug up to extract aggregates – without the rehabilitation required by the *ARA*. They extrapolated that under the *status quo*, approximately 6,000 hectares per decade will continue to be degraded by aggregate operations, without rehabilitation.

The applicants also pointed to the related issue of abandoned aggregate sites, noting that as of 1990, an estimated 6,500 aggregate sites had been abandoned (excavated without rehabilitation) in the era before rehabilitation became mandatory. They asserted that this number might since have grown considerably. Since the industry association had, on average, rehabilitated only 13 such sites per year, the applicants estimated that it could take 489 years for the industry to rehabilitate the large backlog of abandoned sites.

The applicants requested a review of section 6.1 of the *ARA* relating to the Aggregate Resources Trust. The applicants asserted that responsibility for this Trust has been inappropriately assigned to an industry association (The Ontario Aggregate Resources Corporation or TOARC) wholly owned by the Ontario Stone, Sand and Gravel Association (formerly known as the Aggregate Producers of Ontario). In the view of the applicants, this allows an industry "lobbying organization" to control and spend levies (collected on behalf of the public) on rehabilitation work, without adequate public accountability. The applicants pointed out, for example, that the public does not know how abandoned sites are chosen for rehabilitation.

The applicants also requested a review of section 48 of the *ARA,* drawing attention to the following language:

*Duty to Rehabilitate Site:*
48(1) Every licensee and every permitee shall perform progressive rehabilitation and final rehabilitation on the site in accordance with this Act, the regulations, the site plan and the conditions of the licence or permit to the satisfaction of the Minister.

*Minister's Order Requiring Rehabilitation:*
(2) On being satisfied that a person is not performing or did not perform adequate progressive rehabilitation or final rehabilitation on the site in accordance with subsection (1), the Minister may order the person to perform, within a specified period of time, such progressive rehabilitation or final rehabilitation as the Minister considers necessary, and the person shall comply with the order.

The applicants drew attention to the high cost of rehabilitating worked out pits and quarries. They cited an industry report estimating the average cost per hectare to be $12,495. The applicants estimated that Ontario's total rehabilitation costs could amount to $74 million per decade, and asked the following questions: "When will this rehabilitation take place? Who will pay for it? Will this rate of deficit continue in the future?"

The applicants noted that rehabilitation security deposits had formerly been used to guarantee that pits and quarries would actually be rehabilitated, but that the Ontario government dismantled this system in the late 1990s. As a result, the province returned approximately $49 million directly to aggregate operators. The applicants argued that this left little incentive for operators to rehabilitate their worked-out pits and quarries, and proposed a return to an "effective system of rewards and punishments so that rehabilitation actually occurs".

The applicants also submitted a separate request to Ontario's Auditor General in April 2004, for an audit of the Ontario Aggregate Resources Trust.

*Related Background Information:*
Sand, rock and gravel are vital raw materials for construction and manufacturing, and Ontario consumes vast quantities of these materials annually. The extraction of these materials can have wide-ranging environmental and social impacts, ranging from noise and dust complaints to impacts on water tables and stream flows, as discussed in several previous ECO Annual Reports. The following discussion will be restricted to rehabilitation concerns, since the applicants focussed their review on this topic.

Regulators and the industry have long recognized that aggregate operators should not leave an ever-growing legacy of abandoned pits and quarries on the landscape. At a minimum, they give the industry a poor public image, and contribute to public resistance to the establishment of new sites. But worked-out pits and quarries are far more than mere eyesores; they provide little natural habitat, regenerate only very slowly, and can be prone to serious erosion. In some cases their steep-sided slopes may pose safety hazards, and they may also act as easy conduits for contaminants (such as road salt or fuels) to leak into underground aquifers. Returning former aggregate sites to agricultural or recreational uses or natural areas becomes especially important in urban fringe areas, where there is a growing demand for all these land uses. Both MNR and the aggregate industry argue that aggregate extraction deserves treatment as an "interim land use", based, however, on the critical assumption that sites will be rehabilitated afterwards.

Ontario has required rehabilitation of pits and quarries since 1971, when the Ontario Legislature enacted the *Pits and Quarries Control Act (PQCA).* But the *PQCA* was soon found to be ineffective, in part because of weak enforcement provisions, in part because of MNR's failure to exercise its mandated powers, and in part because the security deposits required by the *PQCA* were too low to act as a real incentive. By 1984, MNR acknowledged that the *PQCA* "has not been totally successful" with regard to rehabilitation, and noted that "The establishment of pits and quarries without regard for rehabilitation represents little more than shortsightedness; showing little respect for the value of land, the residents of Ontario or the richness and bounty that nature has bestowed on this province." New rules were finally brought into force with the proclamation of the *Aggregate Resources Act* in 1990. The Minister of Natural Resources at the time stated, "The new Act puts more emphasis on environmental concerns and aggressively promotes the rehabilitation of pits and quarries located on private land. Better site plans, better operating records and better rehabilitation will be required."

Although the new *ARA* required better rehabilitation for operations newly approved starting in 1990, all existing licences and permits were grandparented, so that the rehabilitation and operation requirements of their site plans remained essentially the same as under the old *PQCA*. Most existing licences (for pits and quarries on private lands) still reflect the weak rules of the old legislation, since licences are issued in perpetuity. For example, the vast majority of licences in the GTA are over 30 years old. MNR can require licensees to amend their site plans, but such decisions can be appealed to the Ontario Municipal Board.

By 1990, thousands of worked-out pits and quarries had been abandoned either because their licences pre-dated rehabilitation requirements or because operators found it cheaper to forfeit the small security deposits. To deal with this legacy, the *ARA* created a separate fund for rehabilitating abandoned pits and quarries, and required operators to pay a levy at a rate of half cent/tonne on extracted aggregate. MNR estimated in 1989 that "this fund could permit the rehabilitation of most abandoned pits in the designated areas within 12-15 years." This initiative was called the Management of Abandoned Aggregate Properties (MAAP) Program, and was initially administered by MNR directly.

MNR transferred the MAAP program to the aggregate industry association, (then the APAO) to be managed by TOARC in 1997 as part of larger regulatory reforms and government cost-cutting. A few broad goals were set: to rehabilitate abandoned pits and quarries; to carry out research, including rehabilitation research; and to gather and publish information. Guided by these goals, TOARC's MAAP program has annually funded approximately $400,000 worth of rehabilitation work in recent years. If the year 2005 is considered typical, the program also funds roughly $200,000 worth of research per year and spends roughly $240,000 per year on administration costs. TOARC states it has funded approximately $750,000 worth of research in total, although rehabilitation publications on its web page are almost all MNR documents dating from the 1980s. The MAAP program has also established its own criteria for choosing sites that deserve rehabilitation. The rehabilitation work is carried out at no cost to the landowner, and after rehabilitation, the lands remain in private hands. TOARC has noted that a main barrier to rehabilitating abandoned sites is that landowners do not give their permission. According to TOARC's 2005 Annual Report, a total of 366 hectares have been rehabilitated under the MAAP program since its inception, at a total cost of over $4 million.

**Ministry Response**

In January 2004, MNR agreed to undertake this review. The ministry released its completed review in August 2006 – two and a half years later – providing a detailed and candid insight into the constraints and challenges associated with the oversight of Ontario's sand and gravel resources. The ministry stated that it "is committed to a long term strategic approach to improving the Aggregate Resources Program and rehabilitation of aggregate sites." The 37-page review document included a six-page summary, and ended with 25 recommendations. The ministry stated that it had immediately incorporated 21 of the recommendations into its Aggregate Resources Program; had already hired three additional aggregate inspectors, and had also increased support dollars for all inspectors. The applicants made the full MNR document available on their website, <www.gravelwatch.org>

Key outcomes of MNR's review included the following:

- an acknowledgement that inadequate rehabilitation of aggregate sites is a widespread problem;
- a number of commitments to make site rehabilitation more of a priority in its compliance work, for example by issuing more rehabilitation orders;
- an acknowledgement of a patchy database on site rehabilitation, and recommendations for a number of improvements;
- a rejection of the allegations of the applicants that TOARC decision-making and operations lacked transparency, but also several recommendations to improve transparency of TOARC;
- a conclusion that the fundamental principles of the *ARA* are adequate to ensure the rehabilitation of aggregate sites, and that the act also has adequate enforcement tools; and,
- further proposed measures that would require legislative or policy changes, including options such as: requiring operators to submit annual rehabilitation reports; a rehabilitation incentive system; possibly reintroducing the former rehabilitation security deposit system; and possibly designating all of Ontario's aggregate resource areas under the *ARA*.

*Weaknesses Acknowledged by MNR:*
The ministry acknowledged a number of systemic weaknesses in its oversight of industry rehabilitation efforts, and also described much broader problems with inadequate staffing and resources for the overall aggregates program, as illustrated by the following excerpts:

> "…it is apparent that a significant component of the aggregate industry is not making sufficient efforts to progressively rehabilitate their aggregate sites…"
>
> "Newly disturbed area has exceeded the area rehabilitated for the ten-year period examined but not to the extent (2/1 ratio) alleged by the applicants."

> "There has been a lack of rehabilitation of revoked sites being performed by TOARC."
>
> "The existing rehabilitation data does not allow MNR to accurately analyse the effectiveness and efficiency of the existing management of rehabilitation efforts across the province."
>
> "…even without solid data, it can be argued that many more rehabilitation orders are required."
>
> "Within the Oak Ridges Moraine, an inventory was completed to assess licensee compliance with the *ARA* and the result indicated that 100 sites out of 121 had compliance problems"
>
> "MNR staff levels are low relative to the number of aggregate operations in the province (e.g., some inspectors are responsible for as many as 600 aggregate operations, whereas the preferred number is 150; the latter is the estimated average number of sites that can be effectively administered by one staff person.)"
>
> "Since the 1995/96 fiscal year, the aggregate resources program has seen a decrease in its base funding from a high of $5.2 million to its present level of $1.7 million and associated staff reductions to carry out the core functions. In light of the numerous concerns raised by the public and stakeholders regarding the lack of program delivery, MNR will need to consider whether additional funding of the program is required."

MNR's Responses to Concerns of the Applicants

*Concerns about Inadequate Rehabilitation by Current Aggregate Operators:*

MNR did acknowledge that rehabilitation rates are inadequate, and described database weaknesses as well as inadequate capacity within MNR to carry out inspections and enforcement. The ministry committed to get tough on rehabilitation, effective immediately. Five of the ministry's recommendations directed aggregate inspectors to focus on rehabilitation during inspections of pits and quarries. Inspectors would be asked as of August 2006 to put a priority on existing sites with poor rehabilitation records or large disturbed areas; and to initiate site plan amendment requests for problem sites where existing rehabilitation requirements are unenforceable. Inspectors are also to ensure that new applications have clear descriptions of progressive rehabilitation, and that site plans contain enforceable requirements for rehabilitation. The ministry also mentioned the new tougher rehabilitation rules (described below) applying only to the Greenbelt Plan area for the time being, and promised to consider expanding this approach province-wide to all existing aggregate operations.

MNR noted that "If more enforcement is required to increase rehabilitation, MNR must also consider options to address capacity and funding issues."

*Concerns about the Need for Rehabilitation Security Deposits:*

MNR indicated that this matter requires further consideration by the Ontario government. Dependent on government approval, the ministry proposed the following action: "MNR, in collaboration with key stakeholders, will examine in detail, within two years (i.e., by August 2008), the merits of a rehabilitation incentive system, including the re-introduction of the former rehabilitation security deposit system."

*Concerns about Inadequate Transparency of TOARC:*

MNR committed to seeking "an amendment to the Indenture Agreement to ensure transparent public access to as comprehensive a range of information and data as possible by applying the principles of the *Freedom of Information and Protection of Privacy Act (FIPPA)* to all TOARC Board decisions (including how sites are evaluated and selected for rehabilitation), in co-operation with TOARC and the OSSGA."

*Concerns about Rehabilitation of Abandoned Sites:*

MNR did acknowledge the large scope of this issue, but did not propose a solution. Based on an inventory done in the early 1990s, MNR confirmed a large legacy of abandoned sites left from the pre-regulation era; approximately 6,900 abandoned sites on private lands, of which the industry considers 2,700 candidate sites for restoration, and 70 are considered high priority sites. MNR also confirmed that the industry's MAAP program was rehabilitating only 10-20 such sites per year, though increasing this target to 30 sites for 2005.

MNR explained that under the *Aggregate Resources Act*, the ministry has no authority to direct the industry association to rehabilitate specific sites, although the ministry does have a representative on the TOARC board, and can influence rehabilitation performance in this way.

Currently the MAAP program ranks the priority of abandoned sites using criteria of safety, aesthetics, ecological function, size and proximity to a road – but source water protection (a topic of high concern in Ontario) is not currently a criterion. MNR committed to having this criterion added, but did not indicate how many abandoned sites might currently be presenting a risk to source water.

Additional Issues Raised by MNR

MNR's response described a number of weaknesses in the existing rehabilitation databases, which leave MNR unable to quantify the rehabilitation deficit. The ministry proposed several improvements with self-imposed deadlines. For example, the ministry said it would apply new technologies such as Geographic Information Systems (GIS) and satellite imagery to track disturbed areas on aggregate sites over time. MNR committed to having a pilot project established for the GTA by April 1, 2007, but as of April 2007, was still doing preliminary work on the terms of reference. The ministry also said that it would consult with the industry and develop mechanisms, by April 1, 2007, to improve the accuracy of reported rehabilitation information. As of April 2007, the ministry reported that options were still being explored.

Comments from TOARC

In January 2007, TOARC sent a letter to the Minister of Natural Resources, noting disappointment with certain of MNR's recommendations arising from the *EBR* review, and particular disappointment that TOARC was not consulted on the review's conclusions. TOARC argued that its own mandate is relatively minor, and that the *EBR* applicants' concerns would be better addressed by focussing on MNR's oversight responsibilities. TOARC noted that it can remediate abandoned sites only with the landowner's permission, which is usually not given. TOARC also stated that the number of sites with revoked licences or permits is relatively small; as of 2006, TOARC had open files on fewer than 50 such sites, amounting to less than 100 hectares of disturbed land. (MNR's review had commented that TOARC had rehabilitated only three of 138 revoked sites.)

Recent Progress by MNR

In June 2006, MNR amended the *ARA* to require that operators report on the amount of aggregate removed from a site, and to specify that related documents and inventories of materials must be kept. The amendments also gave aggregate inspectors a new power in the form of a stop-work order, applicable if any provisions of the *ARA* or the regulations are contravened.

MNR also finalized a major overhaul of its Manual of Policies and Procedures under the *ARA,* including significant changes to policies for rehabilitation, enforcement and TOARC, as described on page 79 of the Supplement and page 113 of the Annual Report.

In October 2006, MNR expanded the geographic scope of the *ARA* to include more parts of central and northern Ontario, and also increased the fees and royalties that aggregate operators must pay, effective January 1, 2007. Until this change, annual fees had not increased for 17 years, and the minimum royalty rate for Crown-owned aggregate had not increased for more than 30 years. Annual licence and wayside permit tonnage royalty rates almost doubled, from 6 cents/tonne to 11.5 cents/tonne. MNR stated that the extra revenue would go towards enhancing rehabilitation, and to strengthen compliance by hiring additional enforcement officers. By January 2007, MNR had begun hiring new aggregate inspectors – mostly for northern Ontario to deal with the areas newly designated under the *ARA*.

Status of MNR's Progress on the Recommendations as of April 2007

MNR updated the ECO on its progress in carrying out the 25 recommendations in April 2007. Briefly, aggregate inspectors continue to treat rehabilitation as a priority (recommendations 1, 2, 3, 4, and 6). MNR has begun discussions with the aggregate industry to improve rehabilitation data management (recommendations 9, 13, 14). MNR will publish and maintain a website list of aggregate operations where rehabilitation orders have been issued before the end of 2007 – a delay from 2006 (recommendations 15, 16, 17). MNR is in the process of recruiting 12 new inspectors, and time will tell whether additional staff are needed (recommendation 18). MNR has had very preliminary discussions with the aggregate industry about the merits of a rehabilitation security deposit system (recommendation 19). TOARC has agreed voluntarily to incorporate source water protection as a criterion for selecting sites under the MAAP program (recommendation 20). MNR has encouraged TOARC to rehabilitate more revoked sites, and TOARC has hired additional staff (recommendation 20 and 22). MNR has discussed transparency needs with TOARC, and a voluntary resolution is probable (recommendation 23).

Stricter Rehabilitation Rules in the Greenbelt Plan Area

The Ontario government finalized the *Greenbelt Act* and Greenbelt Plan in 2005 to enhance protection for agricultural areas and natural areas within a broad (1.8 million acre) stretch of land north of the Greater Toronto Area. The Greenbelt Plan's rules include certain new constraints on establishing new aggregate sites in the area (see section 4.3.2 of the Plan). There are also new, stricter rehabilitation requirements for existing aggregate operations – at least in the "Protected Countryside" areas of the Greenbelt. Among other things, "rehabilitation area will be maximized and disturbed area minimized on an ongoing basis during the life-cycle of an operation." As well, the Plan requires MNR to approve a maximum allowable disturbed area for each operation, and operators must rehabilitate any excess disturbed area above the maximum by February 2015, with half completed by February 2011. In March 2006, MNR finalized a new policy (PB05E6810 on the Registry) to explain how the ministry would implement the Plan's requirements under the *ARA*. MNR noted that most aggregate operations in the subject areas will require site plan amendments for rehabilitation in order to comply with the new rules.

Since rehabilitation rules applying in the Greenbelt Plan area are bolstered by area targets and timelines, they are considerably more prescriptive than those applying elsewhere in Ontario. Operators will also be required to submit an annual progress report on meeting their rehabilitation targets and timelines. While commenters generally supported this new policy as progressive, there were also calls for more specific rules, more clarity and more transparency for the public. For example, commenters wondered about the unknown consequences if operators failed to meet the rehabilitation timelines. There was also a call for MNR to ensure that all site plan amendments are posted as instruments on the Registry to allow for transparency. Evidently the policy will need to be fine-tuned and adjusted over time, and MNR has committed to treating this approach as a pilot project to assess whether it should be applied province-wide to all existing aggregate operations. Workload implications for MNR staff will doubtless influence the ministry's decision on this.

**ECO Comment**

*Significant Commitments and Improvements Achieved:*

The outcome of this review demonstrates that the *EBR* application process can deliver helpful responses to public concerns, and can trigger policy and operational improvements within ministries. To the ministry's credit, MNR carefully evaluated the underlying issues, acknowledged a number of structural weaknesses and undertook some immediate improvements to improve rehabilitation rates. The ministry also made numerous commitments to work towards longer-term improvements – commitments that can now be tracked by the public and the ECO.

In 2006, MNR made good progress in a number of areas, with new reporting requirements for aggregate operators, and some new powers for ministry inspectors. The ministry also expanded the geographic scope of the *ARA*, so the rules apply to more areas across Ontario, and began hiring some new inspectors – most of whom are likely to be dedicated to the newly designated regions. As well, the fee structure was updated for the first time in many years.

*Barriers to Rehabilitation:*

*Inadequate Legislation:*
The aggregate industry's poor rehabilitation record has been a long-standing and frustrating concern for citizens, for MNR and for industry alike. Improvements over the decades have come at a glacial pace. There were hopes that the *Pits and Quarries Control Act*, enacted 36 years ago, would usher in good rehabilitation practices. Later there were promises from MNR that the *ARA*, proclaimed 17 years ago, would resolve the ongoing rehabilitation problems and that the legacy of abandoned sites would also be cleaned up by 2002 or thereabouts. Clearly neither has happened, and very significant barriers remain. Although MNR concluded that the legislation itself is fundamentally sound, the fact that the ministry saw the need to create more stringent rules for the Greenbelt Plan area suggests the need for clearer targets and timelines for rehabilitation incorporated into the *ARA*.

*Grandparented Licences:*
One key barrier to adequate rehabilitation is the large number of old licences that were grandparented when the *ARA* was enacted, effectively shielding them from rehabilitation requirements. To address this, ministry staff must try to shepherd through time-consuming site plan amendments on a case-by-case basis. These site plan amendments can be stalled by appeals to the Ontario Municipal Board, adding further challenges for MNR's over-extended aggregate staff.

*Inadequate Resources at MNR:*
MNR's completed review revealed that its aggregate resources program has been significantly under-resourced since 1995/1996, and that (among other things) the ministry's compliance and enforcement obligations have suffered greatly as a consequence. Undoubtedly, MNR's inadequate capacity is one of the underlying causes of the observed poor rehabilitation rates. Without adequate field strength and expertise, staff cannot deliver many of the needed time-consuming site audits, and have not been able to achieve the ministry's long-standing promise to audit 20 per cent of private land licences per year. As well, the ministry has not been able to provide much technical guidance to operators on how to approach rehabilitation, and is relying on the industry (through TOARC) to develop a rehabilitation manual – a responsibility that would more appropriately fall to the regulator, rather than the regulated industry.

Arguably, inadequate capacity has also been a causal factor in some of the closely related problems, such as the unreliable rehabilitation database and the modest achievements of the MAAP program. The database may have been affected because without adequate staffing, the ministry was not able to plan strategically, or identify or resolve its own information gaps, or amend the rules to improve data collection and sharing by the industry.

*Strengthening MAAP:*
While the MAAP program is now run by TOARC, it was MNR's responsibility to set goals, targets and timelines when it handed the program over in 1997. It appears no such targets were set, and fresh, sharp staff reductions within MNR's aggregate program may have been part of the reason. For example, there are no annual area-based rehabilitation targets, nor are there targets to gradually reduce or eliminate the large legacy of abandoned sites – the original intention of the program. The ministry did not set out guidelines for what kinds of sites should receive priority attention – whether, for example, issues of habitat connectivity, local biodiversity values or source water risks should be evaluated. Nor is there ministry guidance on what kinds of final uses of the lands should be encouraged. Given the lack of guidance and oversight by MNR, it would seem that TOARC is running a reasonable, small-scale rehabilitation program, and is supporting a modest amount of research. However, as currently constituted, the program would require hundreds of years to resolve the legacy of abandoned sites – a point made by the *EBR* applicants.

The MAAP program is currently privately operated, but it exists by virtue of legislation administered by MNR. The ECO suggests that a fresh look at the program would be timely, beginning with a re-evaluation

of the geographic scope and environmental significance of abandoned pits and quarries on private lands. What types of sites are in greatest need of being rehabilitated, and how can landowners be brought on board? What types of sites are best left to regenerate naturally? What should the scope and end-point of the program be? These are questions that deserve broad public consultation. Among other things, the program requires measurable objectives and timelines reflecting current priorities for MNR and society, which might include biodiversity, habitat connectivity and source water protection.

*Strengthening MNR Capacity:*
MNR's struggle to cope with inadequate resources has been a long-standing concern, as described in the ECO Special Report released in April 2007. MNR senior staff were warned of the severe staffing shortage in the ministry's aggregate program at least two and a half years before this *EBR* application was submitted. An internal report prepared in spring of 2001 noted that "After four years of operation at these reduced staffing levels, it is clearly evident that the program is significantly under-resourced in parts of South Central Region and that workload(s) in areas such as planning, inspection, and processing of new licence and licence amendment applications are very heavy……The need for and timing of this report is reflected in the growing concerns of a number of managers about our inability to meet current legal and environmental obligations and requirements in the areas of compliance, application processing and planning."

Unfortunately, the public cannot expect that new staff hired by MNR in spring 2007 will be able to resolve the very serious inspector shortages in the South Central Region, where the bulk of Ontario's aggregate is extracted and where vaguely written, outdated site plans are a widespread problem. Most of the newly hired staff will be assigned to northern Ontario areas freshly designated under the *ARA*. To improve enforcement of the *ARA* in southern Ontario, including the rehabilitation provisions, the ministry will need to do much more to build its field strength. Of the many recommendations MNR assembled as a result of this review, recommendation 18 seems especially pertinent: "MNR will immediately undertake an assessment of its capacity for monitoring and enforcement including ensuring the rehabilitation of sites." The ECO encourages MNR to complete this assessment, make it public and respond with a goal of building its field capacity.

*Excessively Delayed Review:*
MNR's review of this application was very protracted, requiring two and a half years. MNR confirmed on January 31, 2004, that it would undertake the requested review. Although the ministry indicated to the ECO and to the applicants in July 2004 that the review was very near completion, MNR evidently 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 the ECO's 2005/2006 Annual Report was going to press.

The applicants found this lengthy waiting period very frustrating, as evidenced by letters of complaint to both the Minister of Natural Resources (January 2006) and the ECO (March 2006). As well, the applicants submitted a Freedom of Information (FOI) request to MNR in March 2006 requesting full documentation about the status of their application, and received over 4,000 pages of partially blanked-out documents in July 2006. The released documents demonstrate clearly that MNR had completed the substantive part of its review by February 2005 (and perhaps much earlier). By June 2005, MNR had finalized an internal package with "strategic considerations", "media research" "communications objective" and "strategy/tactical plan", yet the ministry decided, inexplicably, to delay releasing its review for another 14 months.

A set timeline for ministries to conduct reviews is not stipulated under the *EBR*, but the legislation does state that ministers "shall conduct the review within a reasonable time." MNR demonstrably failed to comply with this "reasonable time" requirement of the *EBR*. The ECO appreciates that ministries need time to check facts, conclusions and to secure internal buy-in to proposed solutions before releasing self-critical reviews, but, in this case, MNR appears to have completed internal deliberations many months before finally making its review public.

Now that the challenges facing the ministry's aggregates program have been shared with the public, the ECO hopes that future discussions on program and policy direction will take place in the broader public

arena, taking advantage of insights and suggestions from the full range of stakeholders. The ECO is encouraged by MNR's commitment to a "long term strategic approach to improving the Aggregate Resources Program and rehabilitation of aggregate sites", and will continue to monitor and report on MNR's progress.

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**Review of Application R2004015**

**Review of Motorized Off Road Vehicle Events on Crown Land under the Free Use Policy (Review Undertaken by MNR)**

**Geographic Area:** Haliburton County with province-wide implications

**Background/Summary of Issues**

In March 2005, an application was submitted requesting a review of MNR's policy for motorized off road vehicle events on Crown land. The use of Crown land for motorized off road vehicle events is governed by parts of MNR's Free Use Policy (PL 3.03.01) under the *Public Lands Act (PLA)*. The applicants expressed concern about large ruts, devastating erosion and habitat loss caused by 4X4 trucks at Greens Mountain in Haliburton County. According to the applicants, off-trail and non-event activities take place at this location. Greens Mountain is significant to local residents for providing one of the most spectacular views in the county and as the site of a provincial government fire tower between 1917 and 1970.

The application included as evidence, personal photos taken by the applicants documenting damage following motorized off road vehicle activities and Internet photos taken while damage occurred. The attachments show evidence of motorized off road vehicle users widening the trail while avoiding areas made impassable by previous users. The applicants also included advertisements from the Internet promoting off-trail experiences at Greens Mountain that include scaling rock outcrops and crossing through wet areas, sometimes assisted by winches. The advertisements indicate that at Greens Mountain, such activities have involved participants from outside of Haliburton County and many from the U.S.A.

The applicants asserted that this use of a public resource is not acceptable without regulation and enforcement and they believe it is in the public's interest to restrict access to off roaders at Greens Mountain. The applicants also requested a review of the need for a new Free Use Policy that requires payment if activities undertaken during off road events do not comply with section 3.3 of the policy. They further requested that the new or amended policy reflect the mission statement and vision outlined in MNR's overall ministry policy titled, "Strategic Directions, February 2005."

*Background:*
About 87 per cent of Ontario's land mass is Crown land and charge and management of these lands and the activities taking place on them are given to MNR under section 2 of the *Public Lands Act*. The first Free Use Policy, approved in 1980 (LM 7.01.05, Free Use of Crown Lands), was developed to provide clearer differentiation of free use activities in response to increasing public demand to use Crown land. Free use activities are defined as those that do not require permission, authorization or payment of a fee and that include transient activities and activities deemed to be free by virtue of other legislation. Users are entitled to use Crown land providing they "undertake their activities in an ecologically sound and socially responsible manner" consistent with the policy goal stipulated in section 3.3 that users must "ensure the continuing availability of ecologically sustainable outdoor recreational opportunities and limited free uses of public land." Free use may be controlled with access restrictions or land use plan directions, depending on the ministry's perception of what is in the broad public interest.

In 1982, MNR staff developed a companion policy to the Free Use Policy requiring car rally organizers to sign an agreement prior to an event. With no requirement to collect information at a central repository, the exact number of agreements signed is unknown; however it was probably limited to about a half dozen. MNR used section 28 of the *PLA* as the authority to erect temporary signs that would allow for organized car rallies while prohibiting other activities during the period of the event.

Over time, the car rally fad waned and other types of motorized off road vehicle use on Crown land grew. During a revision of the Free Use Policy in 2002 (2002 FUP), the Ontario Federation of Anglers and Hunters requested that a clause regarding stewardship and acceptance of risk in use of public land be incorporated to address their concerns. The change was not incorporated at that time due to the "primarily administrative" role of the review. The 2002 FUP indicated April 1, 2005, as the date for the next Free Use Policy review.

In 2003, MNR's field staff working out of the Minden Area Office in Haliburton County adapted the 1982 car rally policy and agreement for trial implementation of a motorized off road vehicle event agreement in response to an observed increase in such activity on Crown land. Motorized off road vehicle events may involve over 200 vehicles and may result, in MNR's words, in "localized environmental impacts" and "short term land use conflicts" with other users. A successful trial period led to a revision of the Free Use Policy in 2004 (2004 FUP) to require organizers of all motorized off road vehicle events to obtain prior written authorization from the ministry, in the form of a Generic Motorized Off Road Vehicle Event Agreement.

The 2004 FUP defines a motorized off road vehicle event as "an organized event which brings together a group of motorized vehicles (i.e., 4X4, ATVs) for off road use." The Generic Motorized Off Road Vehicle Event Agreement places liability for repair of "any excessive damage" from the event, as well as responsibility for emergency notification, posting and adequate insurance, on the organizer. These activities are also subject to the requirements of the Class Environmental Assessment for MNR Resource Stewardship and Facility Development (Class EA-RSFD). MNR is required to ensure the agreement is properly signed and executed. However, the ministry cannot charge event organizers that do not sign. Alternatively, MNR can, with prior knowledge of an event, post warning notices at the site to prohibit motorized vehicles under the authority of section 28 of the *PLA*. In the latter case, individual riders found in violation may be charged rather than the event organizer.

The 2004 FUP goal is consistent with MNR's Strategic Directions from February 2005 entitled "Our Sustainable Future," and its vision of "a healthy environment that is naturally diverse and supports a high quality of life for the people of Ontario through sustainable development" and mission statement "to manage our natural resources in an ecologically sustainable way to ensure that they are available for the enjoyment and use of future generations."

The Ontario Trails Strategy, released by the Ministry of Health Promotion in 2005 to provide direction for planning, managing, promoting and using trails in Ontario, is guided by a similar goal. To manage user impacts, the strategy proposes research, planning and awareness building; and, in relation to accommodating multiple uses, undertaking "a study of needs and issues related to the recreational use of off road vehicles." The Ontario Trails Strategy quotes Ontario Trails Council statistics which indicate that annually, approximately 525,000 people use snowmobile and all terrain vehicle (ATV) trails in Ontario and 800,000 use hiking trails, and that trails contribute at least $2 billion to the provincial economy each year. As stakeholder members of the committee responsible for developing the strategy, ATV organization representatives reported that provision of new ATV trails has not kept up with the increase in user demand and this has led to use of unsuitable areas and increasing pressure on natural and cultural heritage features. MNR contributed to the development of the strategy as a member of the Inter-ministerial Working Group on Trails.

In 2006, Ontario Nature requested a meeting with the Minister of Natural Resources to express growing concern about the environmental damage caused by motorized off road vehicles and the critical need for introducing controls to manage use. They pointed out the vulnerability of provincial parks, conservation reserves, wilderness areas, forests established or managed under the *Forestry Act*, and public property restricted to low intensity use under the Oak Ridges Moraine Conservation Plan and the Greenbelt Plan.

They listed examples of ATV damage throughout Ontario occurring in wetlands, environmentally sensitive areas, species-at-risk habitat and Carolinian Life Zone forest.

Policy decisions posted on the Environmental Registry reflect MNR's efforts to compensate for shortcomings in its legislation. The decision in the case of St. Williams Conservation Reserve was to continue ATV use in permitted areas only. At La Cloche Ridge Conservation Reserve, ATV use is restricted to existing trails in the Access Zone with off trail use permitted only for retrieving large game. At Big Sandy Bay, the interim management approach aims at eliminating motorized vehicle access throughout the area using physical barriers on existing access routes and signs. ATVs are not permitted at Six Mile Lake Provincial Park and are being restricted from crossing a bridge at French River Provincial Park. In 2006, MNR enacted the *Provincial Parks and Conservation Reserves Act*, which will be proclaimed once regulations are finalized. Regulations to come into effect in September 2007, do address ATV and motorized vehicle activities within provincial parks and conservation reserves.

Some provinces have made recent legislative amendments to control motorized off road vehicle use. In 2007, British Columbia authorized fines of $100,000, imprisonment or both for causing environmental damage on Crown land when it amended section 87 of its *Forest and Range Practices Act*. New Brunswick also tabled amendments to its off road vehicle legislation in 2007 and promised it would add a team including a manager and six officers for enforcing ATV and snowmobile driving. The officers will patrol the province's trails equipped with the power to enforce the *Criminal Code* and impound vehicles. In Nova Scotia, the *Off-highway Vehicles Act* was revised in 2006 to prohibit off highway vehicles in parks, wilderness areas, nature reserves and in sensitive ecosystems including wetlands, beaches, sand dunes, barrens, streams, lake shores and core habitat for endangered species. The Nova Scotia law restricts off highway vehicle use on Crown land to designated trails. Those in violation face significant fines and vehicle seizure. Recognizing the importance of enforcement in ensuring success, the Nova Scotia government introduced a dedicated law enforcement unit to support the new regulations along with a permanently staffed toll-free hotline for reporting alleged contraventions.

MNR has long recognized the outdated status of the *PLA* and numerous amendments made since its last significant redraft in 1913 have left a patchwork of provisions with little overall purpose. The ministry is currently in the process of revising the Act and some of the key elements proposed in the draft are: better tools for management and ensuring ecological sustainability; and provisions for enhanced enforcement and improved stewardship, which MNR exemplifies using control of ATV and 4X4 use.

**Ministry Response**

In April 2005, MNR informed the applicants that public interest warranted a review of the matters raised in the *EBR* application and in June 2006, provided the applicants with the results of its review. In its results, MNR recommended that further revisions to the 2004 FUP be deferred for three to five years, allowing more time to properly assess the effectiveness of the policy and the agreement.

The ministry's stated purpose for the review was to assess whether the 2004 FUP is achieving effective regulation of motorized off road vehicle events on Crown land. "Off road" for these purposes MNR defines as "motorized vehicular activity not occurring on designated highways or other public routes, but rather occurring on vacant Crown land including maintained and unmaintained roads and existing and abandoned trails." The application's reference to motorized off road vehicles is interpreted by MNR to mean "all terrain (ATV), 4X4 and related vehicles, but not snowmobiles."

MNR's review of the Free Use Policy included relevant parts of: section 1.0 Definitions; section 3.4.2 Transient Activities; Table A - Free Uses of Public Land; and the Generic Motorized Off Road Vehicle Event Agreement. MNR included a detailed background of the Free Use Policy to build a context for its response. In this background, MNR described the Generic Motorized Off Road Vehicle Event Agreement permittee's degree of liability as "any damage identified by the Area Supervisor" resulting from the event.

During its review, MNR consulted with its field office and program staff as well as other agencies, ministries, key off road vehicle stakeholder organizations, and other trail and equestrian use

organizations. This process revealed that event organizers who have been promoting responsible off road vehicle use are concerned by the prohibitive costs associated with liability insurance and financial assurances; and that these costs are not borne by organizers who do not sign. They would like to see the *Public Lands Act* strengthened with adequate enforcement provisions to address all off road activity. MNR also learned from field staff that motorized off road vehicle events were never authorized on Greens Mountain and that much of the damage noted was caused by individuals or groups of recreational riders rather than organized events. The ministry stated that this type of "random use" of Crown land by groups and solitary riders was significantly higher than the amount of use associated with organized motorized off road vehicle events.

MNR records indicated the 2004 FUP had produced effective controls for motorized off road vehicle events (i.e., terms and conditions were met and no remedial work was required), however, the data were deemed insufficient given the limited scope (seven agreements, all in Bancroft District). The review process revealed, "a lack of information with respect to the number, scale, location and potential environmental and social impacts and benefits of motorized off road vehicle events on Crown land."

In the short term, MNR is working on increasing both awareness of event requirements among motorized off road vehicle users and implementation of the policy by ministry field offices. The ministry posted its Land Management policies on its Internet web site and partnered with four key organizations to produce the fact sheet "Respect the Land - Enjoy the Sport: Be a responsible all-terrain/off road vehicle user of Crown land." The fact sheet advocates the following values and practices: protecting the natural environment; avoiding sensitive features; staying on recognized trails; picking up litter; respecting other users; and determining whether approval is necessary before creating a new trail, building a water crossing or holding an event. The fact sheet represents a contribution by MNR to the Ontario Trails Strategy. In its review, the ministry also agreed to explore options for strengthening the *PLA* to improve control of motorized off road vehicle events, but did not provide a timeline.

**ECO Comment**

The ECO commends MNR for undertaking this review and the Minden field staff for responding to deficiencies in the *PLA* with a mechanism for resolving motorized off road vehicle use issues. The ECO agrees that review of the Free Use Policy pertaining to off road vehicle events on Crown land would be premature based on a total of seven agreements in Bancroft District. Following through on the required proposal notice on the Registry outlining the revised policy may have assisted the ministry in improving awareness. It is conceivable that three to five years of implementation will prove the revised policy effective in controlling impacts of motorized off road vehicle events among organizers who sign. However, this mechanism does not address the bulk of the problem, those cases where event organizers fail to sign the required agreements; nor does it address the type of users who are causing the cumulative, ecological damage at Greens Mountain reported by the applicants.

MNR delivered its response in a reasonable time considering the consultation period involved. However, the ECO feels the ministry did not provide the applicants with an adequate response to their specific concerns. Based on the applicant's evidence and MNR's review, it appears the three to five year test period will only delay a solution at Greens Mountain.

The ECO acknowledges that the operation of motorized off road vehicles is a permitted use on Crown land and that users are entitled to exercise their right. Furthermore, local communities can derive considerable economic benefit from accommodating motorized off road vehicle events. However, impacts associated with these activities lead predictably to conflicts with other users and on unsuitable lands, to environmental damage. Motorized off road vehicles increase soil compaction, surface runoff and erosion; contribute to water, air and noise pollution; fragment natural areas and expand edge effects; and destroy species and their habitats. These negative impacts begin with the passage of a single vehicle. The ECO recommends that motorized off road vehicles be directed away from sensitive areas to lands that can sustain this type of use. Environmental damage and social conflict are contrary to the terms of the Free Use Policy and no amount of research into motorized off road vehicle use, its costs and benefits will alter this fact.

The issues raised by the applicants are not isolated circumstances. The ECO has received a number of complaints over the years regarding ATV use in relation to the introduction of trails; lack of public input to planned use; impacts to the environment and other users; use of unauthorized roads; and an authorized event in a Natural Core Area, a contravention of the Oak Ridges Moraine Conservation Plan. These issues strain an already overburdened enforcement staff (see "Doing Less with Less," ECO Special Report 2007). With motorized off road vehicle use on the increase and demand for trails exceeding supply, the number of complaints will likely grow.

When contacted by the ECO, MNR acknowledged that finding enforcement staff with time and gas allowance to monitor Free Use Policy agreement events, let alone identify, post and monitor unauthorized events, will be a challenge under the current budget regime. The lack of clear definition for what constitutes an "organized event" further complicates enforcement. Given budgetary constraints on travel and enforcement activities, area supervisors use their own judgement in determining whether to survey sites after events and when the amount of damage caused by riders warrants repairs or remediation. An effort is made to direct events to old forestry roads where the potential for damage is less and the area is more likely to rebound quickly.

MNR also informed the ECO that during its review consultation, participating motorized off road vehicle event organizers expressed concern that, due to associated costs, the agreement would act as a disincentive to responsible off road vehicle event organizing. The ministry reiterated the importance of revising the outdated *Public Lands Act*. MNR went on to state that contrary to popular belief, most motorized off road vehicle users come from urban areas, not from the local community and conflicts in Ontario arise primarily south of Highway 17. In relation to the ministry's planned review of the Free Use Policy in 2005, it was postponed to address this *EBR* application.

The ministry has a commendable record in designating areas for conservation purposes but not in assigning the necessary restrictions in use to maintain their quality. The ECO is disappointed that MNR did not capitalize on recent opportunities presented by the Ontario Trails Strategy and the draft *Provincial Parks and Conservation Reserves Act* with restrictions in motorized off road vehicle use to support the ministry's conservation lands program and its Strategic Directions. Delaying such action undermines its program and threatens the credibility of future ministry initiatives.

MNR should adopt a strong stance and prohibit access of motorized off road vehicles on trails with established incompatible use and on environmentally sensitive lands, sending a clear, prominent message backed by stiff penalties and targeted enforcement. Considering the increasing popularity of motorized off road vehicles and the insufficient enforcement resources, it would be prudent of MNR to begin this process in the short term. The ECO strongly supports the amendments to the *PLA*, as discussed in the 2006/2007 ECO Annual Report on page 55, and urges the ministry to refer to recent strong legislative measures and enforcement staff increases adopted by other provinces as examples of proactive amendments.

**Review of Application R2006007**

**Application for Review to Protect Groundwater of the Waterloo Moraine**
**(Review Denied by MNR)**

This application was reviewed in conjunction with R2006005 (MMAH) and R2006006 (MOE). Please see page 157 of the Supplement for ECO's full review of these applications.

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**Review of Application R2006011**

**Application for Review to Protect Groundwater of the Waterloo Moraine**
**(Review Denied by MNR)**

This application was reviewed in conjunction with R2006009 (MMAH) and R2006010 (MOE). Please see page 165 of the Supplement for ECO's full review of these applications.

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**Review of Application R2006013**

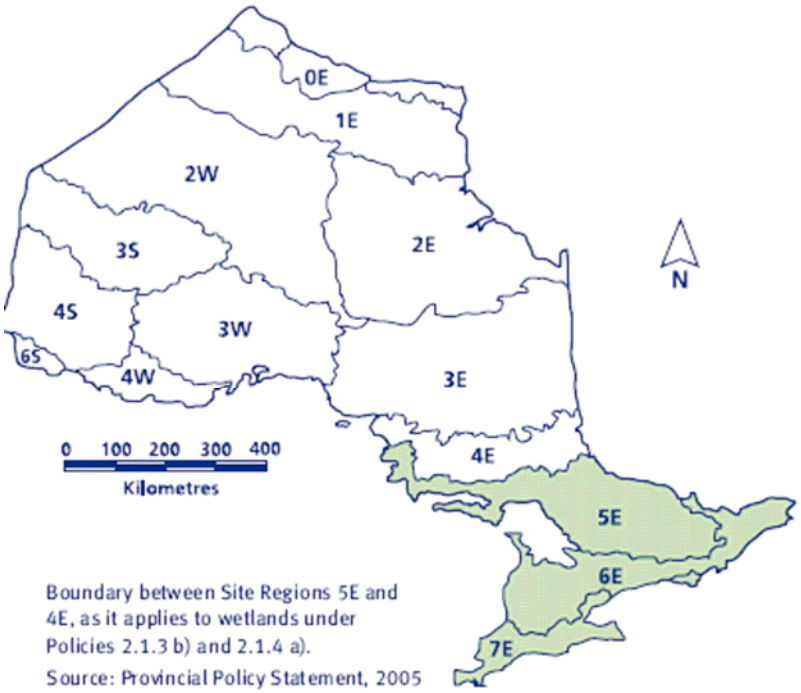
**Review of Wetland Policies**
**(Review Denied by MNR)**

**Geographic Area:** Southern and Central Ontario; Haliburton County

**Background/Summary of Issues**

The applicants requested a review of the sections of the Provincial Policy Statement (PPS) pertaining to natural heritage. They alleged that subsection 2.1.3, which sets out protections for wetlands, is not being adhered to by the Ministry of Natural Resources (MNR). They asked for a full review of how the MNR interprets and complies with the PPS. The ECO sent the application to both MNR and the Ministry of Municipal Affairs and Housing (MMAH).

Section 2.1.3 of the PPS states that "development" and "site alteration" shall not be permitted in significant wetlands in Ecoregions 5E, 6E and 7E and significant coastal wetlands.




Significant wetlands are defined in the PPS as areas "identified as provincially significant by the Ontario Ministry of Natural Resources using evaluation procedures established by the Province, as amended from time to time." MNR uses the Ontario Wetlands Evaluation System (OWES) to evaluate wetlands and determine whether they are provincially significant.

The applicants suggested that the PPS wetlands policies are "meaningless" because development is being approved in wetlands that have not been evaluated. They provided evidence that in Haliburton County, 99 per cent of wetlands have not been evaluated by MNR. The applicants suggested that evaluations under the OWES should be mandatory for all wetlands affected by an application for development.

The application contained several examples of areas that are or could be provincially significant wetlands (PSWs) that are threatened by development. The applicants described threats to unevaluated wetlands from a proposed aggregate extraction operation in the Township of Minden Hills and a proposed asphalt plant at the Royel Paving Aggregate Site at Bark Lake, Irondale. In the Bark Lake case, the applicants contend that small ponds on site were part of a larger wetland complex and should have been evaluated as per the OWES manual before they were destroyed. The applicants also described concerns with proposed shoreline development in the Elephant Lake Wetland, one of only three designated PSWs in Haliburton County.

The applicants described situations in which community groups and citizens participating in their local planning processes have had to hire experts to evaluate wetlands, then apply to MNR to have the wetlands identified as significant, because the ministry and municipality have failed to carry out an evaluation. The applicants also alleged that infractions of several federal and provincial laws occurred in the assessment of the Royel Paving Aggregate Site, and that MNR did not post notice of the proposed site plan amendment for an asphalt plant on the Environmental Registry for public comment.

**Ministry Response**

MNR denied this request for review. The ministry cited the "five-year rule" of the *EBR*, which states that a ministry does not have to review a decision made during the preceding five years. The PPS has a statutory five-year review period, and the current PPS, 2005 was issued less than two years ago, after public consultation consistent with the *EBR*. MNR also stated that there is little or no potential for harm to the environment if the requested review is not undertaken.

MNR said that it does not approve proposals for development and site alterations under the *Planning Act*, but it merely provides advice to the municipal approval authority for its consideration. Further, MNR said that its advice is consistent with the PPS. For example, MNR said that its advice to the County of Haliburton in the case of the Elephant Lake Wetlands was consistent with the PPS, in that the ministry reminded the County of the section 2.1.3 PPS provisions. MNR also defended its position that the small ponds in question at the Royel Paving Aggregate Site did not warrant further evaluation under the Ontario Wetlands Evaluation System. MNR also said that the proposed site plan amendment for Royel Paving did not require public consultation because it is on Crown land, and those aggregate permits are not prescribed under the *EBR* for posting on the Environmental Registry. The ECO confirms that MNR chose not to make aggregate permits subject to the posting requirements of the *EBR*.

**ECO Comment**

The ECO does not find MNR's rationales for denying this application persuasive. While the Provincial Policy Statement, 2005, was finalized less than five years ago, the applicants' main concern was with MNR's policies related to wetland evaluations that are used to implement the PPS. The OWES Manuals were last revised in 2002, without public consultation, and thus would not qualify for the "five-year rule". The ECO accepted MNR's rationale for not consulting on the manuals in 2002, because those changes were described as "administrative." But it is clear that the changes planned to the manual at this time are environmentally significant, and members of the public have been requesting full consultation on the proposed changes. The ECO advised MNR in December 2005 that "the OWES manuals meet the *EBR* definition of policy, and if changes are being contemplated these should be posted as proposal notices on the Registry for full public consultation at the earliest opportunity." MNR responded that the manuals are "not considered policy documents" and the ministry would inform the public about the revisions after they have been finalized.

MNR's contention that it does not approve proposals for development, but that it merely offers advice to municipalities, is misleading and an inappropriate rationale for denying the application. First, MNR does approve some proposals for development, for example permits and licences for pits and quarries, one of the types of development mentioned in the application. Second, and perhaps most importantly, MNR is solely responsible for identifying wetlands as provincially significant and thus protected by the PPS. This is set out in the PPS itself, and in MNR documents as well, which state, "Wetland evaluation is the basis for protection of wetlands in Ontario."

The main issue raised by the applicants is the concern that MNR is not providing the advice to municipalities that is required by the PPS – the identification of provincially significant wetlands. MNR failed to respond to that issue, even though it is clearly a problem. For example, the applicants stated that 99 per cent of the wetlands in Haliburton County are unevaluated, and the ECO has confirmed with MNR and Haliburton County that figure is accurate. County staff estimate that there are about 20,000 wetlands in the County, and only six have been evaluated. Of those, three have been identified as PSWs by MNR. MNR staff acknowledge that fewer than one per cent of the wetlands in Central Ontario have been evaluated, and that the vast majority of wetlands in the province, and particularly north and east of Peterborough, are unevaluated. MNR has conducted only 2,300 wetland evaluations in the past 25 years, and all but 150 or 200 of the evaluations were undertaken in the two most southern ecological districts of the Province.

MNR has been working with several partners on an "Enhanced Wetland Mapping and Evaluation Project" led by Ducks Unlimited, with the aim of delivering accurate wetland mapping to municipalities. The first pilot project in 2003 identified more than 31,000 ha of additional wetlands in the District Municipality of Muskoka. While not all of the additional wetlands qualify as PSWs, many would. Evaluated wetlands accounted for only six per cent of the wetlands mapped. The newly mapped wetlands have not been evaluated by MNR for their significance. The project was expanded to Haliburton County with similar results. Haliburton County is developing a planning strategy to address development applications adjacent or within wetlands identified with the enhanced mapping, however, the new wetlands still have to be identified by MNR before they will be protected under the PPS in planning decisions.

The ECO also disagrees with MNR's statement that there is no potential for environmental harm if a review is not undertaken. On the contrary, wetlands are ecologically important and highly threatened. Wetland losses have been severe in settled areas of the province, particularly southern Ontario. It is estimated that 70 per cent of wetlands have been destroyed in southern Ontario since European settlement, with as much as 95 per cent lost in some areas. Many of the remaining wetlands are small and fragmented, and these trends are likely to continue without the identification of PSWs and strict application of the PPS policies. Wetland loss has not been as drastic in central Ontario, where it is estimated that wetlands comprise approximately 20 per cent of the landscape. But recognizing that recent population growth is threatening wetlands in central Ontario the province extended the protection line for provincially significant wetlands north to include all of Ecoregion 5E in the 2005 PPS. Unfortunately, the change was not accompanied by the provision of updated wetlands information from MNR to municipalities. The ECO has raised concern about the provision of natural heritage information to municipalities in the past. For example, in our review of the PPS, 2005, the ECO raised concern that municipalities are not receiving up-to-date information about natural heritage features, a problem compounded by the "One Window" planning approach that limits the role of MNR in the planning system.

The ECO concludes that the applicants' concerns are well-founded. The PPS wetlands policies, as well as other provincial legislation and programs that aim to protect wetlands, are not being fully implemented because of MNR's failure to evaluate and identify wetlands (e.g., Conservation Land Tax Incentive Program, Conservation Authorities' regulations, Agricultural Drainage Infrastructure Program, various environmental assessment processes and other types of decisions). Decision-makers, such as municipalities, the Ontario Municipal Board, conservation authorities and other ministries are unlikely – and to some extent unable – to use tools that they have to protect wetlands unless MNR has carried out an evaluation and identification. In other situations, municipalities have been reluctant to designate wetlands in their official plans even after they have been identified by the province, therefore, the current system is not resulting in the level of protection for wetlands to which the government has committed. These issues are discussed further in the Annual Report on pages 35-43.

The ECO believes that MNR should have undertaken an *EBR* review of its wetlands policies, including the Ontario Wetlands Evaluation System and manuals. MNR is actually carrying out some elements of the requested review through a number of initiatives being conducted internally or in consultation with selected stakeholders. The ministry is currently reviewing the OWES Manuals, but has told the ECO and other interested members of the public that it does not consider them "policies" and does not intend to provide an opportunity for public involvement in their review. MNR has also drafted a Strategic Plan for Wetlands, but it has no status and has not been released publicly. The ministry is also a partner in projects led by Ducks Unlimited and Haliburton County to incorporate updated wetland mapping into municipal decision-making. The ministry did not mention any of these initiatives to the applicants, and did not suggest any means to resolve their concerns. An *EBR* review would be more transparent than an internal ministry review, because the ministry is required to meet certain timelines, and provide information about the review to the applicants and the ECO. MNR's internal reviews, in consultation with selected stakeholders but not the public, do not conform with the legal requirements of the *EBR*. The ECO encourages MNR to open up its review of the OWES manuals to the applicants and the public, and to release the draft MNR Strategy for Ontario Wetlands for public comment.

**Review of Applications R2006015, R2006016, R2006017, and R2006018**

**Measures to Conserve Woodland Caribou (*Rangifer tarandus caribou*) and its Habitat (Review Denied by MOE, MNDM, ENG; Review Accepted by MNR)**

**Background/Summary of Issues**

In October 2006, the Wildlands League submitted an application for review on the sufficiency of the measures that the Ontario government has in place to conserve woodland caribou (*Rangifer tarandus caribou*). The ECO forwarded this *EBR* application to the Ministry of Natural Resources (MNR), the Ministry of Northern Development and Mines (MNDM), the Ministry of the Environment (MOE), and the Ministry of Energy (ENG). The applicants assert that this review is warranted and in the public interest for the following reasons:

- "The activity of sustainable forest management, inclusive of managing for wildlife and wildlife habitat, occurs within public forests in Ontario;
- Widespread loss of caribou habitat in Ontario (including the majority of the area allocated to 'sustainable forest management') is well-documented, contributing to its status as a "threatened" species nationally;
- An important component of the mandate of the Ministry of Natural Resources, as expressed in their Statement of Environmental Values, is the stewardship obligation to the conservation of this forest species and its habitat;
- The linkages between habitat loss and the expansion of industrial forest harvesting are well established – guidelines provided to Sustainable Forest Licence holders by the Ministry of Natural Resources are a critical tool for implementing MNR's obligations in the forest;
- Without documented improvements in managing the impacts of industrial forestry upon caribou, further loss of habitat is predictable;
- Without this review it is unlikely that MNR will affect a timely review of its own, given the history of the subject guidance;
- Without this review, it is predictable that a further period of years will elapse in the name of "recovery planning", contributing to the current dire pressures on this species without any clearer direction being provided to harvesters operating around Caribou habitat; and,
- In more than one audit performed on operations in Ontario under the requirements of the *CFSA*, independent auditors of forest management units containing caribou have raised concerns about the implementation and/or likelihood of success of caribou guidance provided by MNR to forest management planners."

The Wildlands League is concerned that "while the government continues to delay actual (on the ground) implementation of a caribou recovery strategy, status quo industrial development continues... in critical caribou habitat." The applicants expressed concern that the existing guidance is only applicable to forestry operations on Crown land and that there is "no sound premise for assuming that the well-documented range recession of caribou in the face of industrial forest harvesting will be held in check." The Wildlands League states that these other forms of development include mining and mineral exploration activities, road building and hydroelectric development.

The applicants requested that the existing regulatory framework that guides the management of woodland caribou be reviewed. This regulatory framework includes MNR's Class Environmental Assessment Approval for Forest Management on Crown Lands in Ontario (Declaration Order MNR-71), the Provincial Wildlife Population Monitoring Program, the *Crown Forest Sustainability Act*, the Forest Management Guidelines for the Conservation of Woodland Caribou, the Natural Disturbance Emulation Guideline, the Forest Fire Management Strategy for Ontario, and the "draft" Recovery Strategy for Forest-dwelling Woodland Caribou (*Rangifer tarandus caribou*) in Ontario.

The Wildlands League stated that many components of this regulatory regime have been in place for a significant period of time, but that their effectiveness has not been comprehensively examined. For example, the Forest Management Guidelines for the Conservation of Woodland Caribou that apply to northwestern Ontario have been in place since 1994 and no assessment has ever been made public as to its actual effect on this species at risk. Further, the applicants state that a similar guideline for northeastern Ontario is "rumoured to exist," but that it has never been made public. The applicants expressed concern that this lack of a guideline for northeastern Ontario gives the appearance that this area is a "lower priority" despite the fact that it too has been identified as an area for the recovery of woodland caribou.

As recently as the late 19th century woodland caribou ranged as far south as central Ontario to approximately 46 degrees latitude around North Bay. It is estimated that 20,000 woodland caribou remain in Ontario, of which approximately one quarter inhabit the boreal forests and are described as the "forest-dwelling" population. MNR speculates that about 3,000 forest-dwelling woodland caribou remain in the area set aside for commercial forestry, south of roughly 51°N. The Canadian Council of Forest Ministers has recognized this species as an indicator of forest sustainability and its populations are declining across the country.

In Ontario, woodland caribou now are only found mainly north of 50°N, north of Hearst and Dryden, with isolated populations occurring along the north shore and some islands of Lake Superior. The northern extent of their range bisects the Hudson Plain at about 53°N latitude. Woodland caribou have disappeared from much of their southern historical range across Canada, with an estimated loss of half of their range in Ontario in the last century. The forest-dwelling population of woodland caribou is listed as a "threatened species" under the federal *Species at Risk Act* and has a similar status in provincial policy.

Independent scientific research concludes that woodland caribou have lost an average of almost 35,000 $km^2$ of range per decade in Ontario over the last century, an area approximately five times the size of Algonquin Provincial Park. This loss of range has effectively caused a northward recession of range of roughly 34 kilometres per decade. At this continued rate, and in the absence of substantive action, independent scientists have hypothesized that forest-dwelling woodland caribou will be extirpated in Ontario by the end of this century.

It is well recognized that the loss of woodland caribou habitat and range occupancy in Ontario is directly related to the historical northward expansion of commercial forestry and its associated impacts. The federal Committee on the Status of Endangered Wildlife in Canada (COSEWIC) states that "forest management practices and the spread of agriculture and mining have resulted in the loss, alteration and fragmentation of important caribou habitat." MNR's own Forest Management Guidelines for the Conservation of Woodland Caribou acknowledge these pressures in stating that there has been "local extirpation coincident with the expansion of forest harvesting" in Ontario. Timber harvesting also has been linked to a series of related threats to this species at risk including increased road access and forest fragmentation, changes to forest composition, increased forest fire suppression, elevated levels of predation, and greater inter-specific competition.

**Ministry Responses**

*Ministry of Natural Resources:*
In February 2007, the Ministry of Natural Resources determined that this *EBR* application warranted a self-described "scoped review" of the ministry's monitoring provisions related to woodland caribou and their habitat. The ministry's response was more than two months late, as the *EBR* requires that decisions on whether to conduct a review be made within 60 days.

MNR stated that its "existing, scheduled, and planned activities" address the majority of concerns raised by the applicants and there is no potential for harm to the environment (i.e., woodland caribou) in not undertaking the full review. On this basis, MNR stated a "comprehensive" review is unwarranted as:

- "MNR has already begun the Caribou Conservation Framework (CCF) initiative which will address the majority of the applicants' concerns related to MNR's areas of administration. The CCF, planned for completion in the fall of 2007, will include public consultation with a goal to provide comprehensive direction for appropriate caribou policy and the development of action plans in response to the provincial Recovery Strategy for Forest-Dwelling Woodland Caribou in Ontario."
- "The *Crown Forest Sustainability Act* (*CFSA*), the *Provincial Parks Act* (*PPA*), the *Environmental Assessment Act* (*EAA*) and related regulations, policies and guides, including the Forest Management Planning Manual, provide significant guidance for ongoing protection of woodland caribou. All of these were developed with full public review and consultation."
- "MNR is currently formulating new habitat guidance for woodland caribou through development of the forest Landscape Guide and Stand/Site Guide and is also undertaking a review of the provincial *Endangered Species Act*. Each of these initiatives have had extensive stakeholder and public involvement."

Forest management planning is conducted in accordance with the *Crown Forest Sustainability Act* and Declaration Order MNR-71 (replacing the Timber Management Class EA that applied between 1994 and 2003). The ministry states that in forest management units with populations of woodland caribou, objectives for woodland caribou management are established by planning teams and the provision of habitat is a priority. Additionally, MNR has been applying the Forest Management Guidelines for the Conservation of Woodland Caribou in northwestern Ontario since 1994.

The ministry also noted that it is in the process of consolidating its 34 forest management guidelines into five new guidelines. MNR states that these new guidelines will be finalized in 2007. As part of this consolidation, MNR will no longer be using its Forest Management Guidelines for the Conservation of Woodland Caribou. The new guidelines will provide "one approach to planning that is consistent for all woodland caribou range while recognizing differences in ecology and landscapes."

The conservation of this species has been an important factor in the establishment of several protected areas. MNR states that management plans for protected areas within woodland caribou range address objectives for the species. The ministry explains that the park planning process provides "existing opportunities for review, meeting the public interest for transparency and public consultation."

MNR states that it recently reviewed the sufficiency of its research and monitoring information on woodland caribou. Based on this review, MNR then "conducted an extensive survey of its staff as well as non-governmental individuals and organizations in Ontario to determine research priorities." The ministry also hosted a research workshop in the fall of 2006. MNR states that a summary report from the workshop was to be available by January 2007, but it was still not publicly released by the end of March 2007 despite requests by the ECO for a copy.

The ministry also stated that it was in the process of reviewing the *Endangered Species Act* (*ESA*). MNR states that the new legislation "will enhance the protection of endangered and threatened species (such as woodland caribou) and their habitats." The Minister of Natural Resources introduced Bill 184, the *Endangered Species Act, 2007*, in the Ontario Legislature for first reading on March 20, 2007.

*Ministry of the Environment:*
In May 2008, MOE denied this application review. The ministry's response was more than five months late. The ECO is concerned that MOE's failure to provide timely decisions on *EBR* applications may be a systemic problem on the part of the ministry. For example, with regard to a previous application on a related issue, MOE was approximately a year late in providing a decision to the applicants and the ECO. As noted in our 2005/2006 Annual Report, such "excessive delays frustrate the public interest and undermine the *EBR*."

MOE inferred that there was no potential harm to the environment if it did not undertake this review. The ministry stated that it administers a broad suite of legislation that already protects the environment, including numerous environmental assessment processes in northern Ontario. MOE also stated that the

Five Year EA Report, as required by Condition 52 of MNR's Declaration Order for commercial forestry, is sufficient for monitoring the effectiveness of existing guidelines.

MOE "has found that MNR has implemented the Provincial Wildlife Population Monitoring Program within the Area of Undertaking." However, the ministry acknowledged that woodland caribou were not chosen to be monitored as they were not "identified as a representative terrestrial vertebrate species." Despite this rationale, MOE then stated that MNR has now committed to monitoring woodland caribou and that this program will begin in 2008.

No assessment of the forestry guideline for woodland caribou has been completed by MNR, according to MOE's response to this application. MOE stated that MNR has been in the process of consolidating all of its 34 forestry guidelines, including the woodland caribou guidelines, into five new amalgamated guides since 2000. MOE stated that the new Landscape Guide and the Stand and Site Guide, to be released sometime in 2007, will "provide a consolidated approach to planning that is consistent for all caribou range while recognizing differences in ecology and landscapes."

MOE also stated that the new *Endangered Species Act, 2007* will enhance the protection of woodland caribou. Further, the ministry stated that MNR's yet-to-be released Caribou Conservation Framework "will provide comprehensive direction for appropriate caribou policy." MOE also referred to MNR's draft recovery strategy for woodland caribou and stated that "MNR anticipates completion of the Recovery Strategy in January 2007, and the ministry has indicated that it plans to post this document on the Environmental Registry." The ECO notes that, as of the end of May 2007 when it received MOE's response to this application, MNR had not posted a new iteration of the recovery strategy on the Environmental Registry.

The ministry stated the MNR staff has participated in the preparation of a federal National Recovery Strategy. MOE stated that "Ontario remains committed to the national process and this in turn is informing the provincial [recovery] strategy. This strategy is planned to be completed in 2007 and will be posted on the federal [Species at Risk Registry] and provincial Environmental Registry."

*Ministry of Northern Development and Mines:*
In December 2006, the Ministry of Northern Development and Mines denied this *EBR* application, stating that the public interest did not warrant a review. MNDM stated that mining projects are subject to approximately a dozen environmental assessment processes and pieces of legislation that are administered by the provincial and federal governments. The ministry states that Ontario's *Mining Act*, in conjunction with these other regulatory mechanisms, endeavours to mitigate the short-term effects and eliminate the long-term effects of mining on the environment; to ensure the continuing availability of mineral resources; and, to protect natural heritage and biological features of provincial significance.

MNDM states that "mining is a temporary land use" and that mine sites are rehabilitated to natural, recreational, or commercial land uses. The ministry states that prospecting rarely results in the establishment of a mine site and if a claim is deemed sufficient for development, then the proponent is required to submit a closure plan. However, the ECO notes that there are approximately 4,000 historical mine sites that have been abandoned in Ontario. According to the Auditor General of Ontario, 250 of these sites "might pose an environmental risk due to the potential for the leaching of minerals and other contaminants from mine tailings." MNDM spends approximately $10 million annually to rehabilitate abandoned mine sites, despite its own estimation of a total cost of $500 million.

MNDM did not mention to the applicants that the *Mining Act* was recently amended. Bill 151, the *Budget Measures Act, 2006* was given Royal Assent in December 2006. These amendments allow for new regulation making powers, specifically with regard to diamond mining. These new powers are largely administrative and financial in nature, but they were necessary as the Victor Diamond Mine is Ontario's first diamond mining operation and the *Mining Act* provided inadequate statutory coverage. The Minister of Finance introduced Bill 151 and, therefore, it was not posted on the Environmental Registry for public consultation.

*Ministry of Energy:*
In December 2006, the Ministry of Energy denied this *EBR* application, stating that it does not have any responsibility for policies on woodland caribou and their habitat. However, the ministry did state that it "is committed to ensuring that energy projects follow all applicable environmental requirements" of protecting wildlife. ENG states that proponents of electricity projects must follow the requirements of O. Reg. 116/01 under the *Environmental Assessment Act*. The ministry also stated that for electricity projects such as large hydroelectric stations or large transmission corridors, the EA process requires proponents to identify any potential negative impacts, including effects on wildlife and their habitat, and to outline any potential mitigating actions.

**ECO Comment**

*MNR's Responsibility:*
MNR did not deny this *EBR* application, but, rather, it chose to conduct what it describes as a "scoped review" of its monitoring provisions for woodland caribou and their habitat. The ministry asserted that the majority of concerns raised by the applicants would be addressed by "existing, scheduled, and planned activities." The ECO is pleased that MNR is re-focusing its attention to better its monitoring programs. MNR states that this review will be completed by February 2008. However, the delay is distressing given that this very issue was brought to the ministry's attention in our 2001/2002 Annual Report:

> "Determining the impacts of forestry operations on the boreal population of woodland caribou is dependent on effective monitoring. The ECO encourages MNR to conduct a rigorous scientific monitoring program of the boreal population of woodland caribou."

The ministry relied heavily on its yet-to-be released Caribou Conservation Framework to allay any possible concerns about the vulnerability of this species and its habitat. In essence, it is an admission that the current measures to conserve woodland caribou are insufficient, but that the public should have faith that the ministry is reviewing the issue. Indeed, MNR's main rationale for not conducting a full review was that it already has a suite of mechanisms in place to conserve woodland caribou, but this ignores the central point of the applicants' request to review the actual *effectiveness* of these existing measures. On these grounds, the ECO believes that MNR should have undertaken a review of all of the issues that were raised by the applicants.

MNR did note that the several protected areas in the north were established, in part, to aid in the conservation of woodland caribou. However, there is broad scientific consensus that even the largest protected areas in Ontario in which woodland caribou are present – Woodland Caribou Provincial Park and Wabakimi Provincial Park – are insufficient in themselves for maintaining this species at risk. The ECO notes that protected areas only cover 7.7 per cent of the northernmost 400,00 $km^2$ of Ontario, which includes the remaining intact section of the northern boreal forest. Protected areas serve a critical role in conserving this species as demonstrated by an increasing number of scientific studies conclude that woodland caribou avoid human-caused landscape disturbances, such as forestry cut-blocks, by 10 to 50 kilometres within 20 years of the activity occurring.

As stated in MNR's recovery strategy for woodland caribou released in July 2006, the species requires ranges in the order of thousands of square kilometres of little disturbed or undisturbed boreal forest. However, the ECO notes that this recovery strategy makes no mention of the need for additional protected areas to be established. Numerous independent scientific studies have concluded that a network of protected areas, including some areas that are at a minimum 9,000 to 13,000 $km^2$, are necessary to have a minimal prospect of maintaining viable herds of woodland caribou. The ECO believes that the conservation of woodland caribou should be a key component in a much-needed expansion of the protected areas system in northern Ontario.

It is MNR's policy "to ensure that no species declines on a provincial scale because of forest management activities." MNR stated in response to this *EBR* application that the existing regulatory regime for commercial forestry provides "sufficient guidance for ongoing protection of woodland caribou and their

habitat." To evaluate this assertion, the ECO conducted a review of relevant independent forest audits. Based on a review of all audits that were tabled in the Legislature by MNR in the last five years, the ECO concluded that woodland caribou and their habitat are progressively being lost due to current forestry policy. (For further information, refer to pages 75-81 in the Annual Report.) For example, the independent forest audit of the Caribou Forest notes:

> "The Audit Team is concerned that progressive weakening of the habitat targets may lead to excessive population reduction in the longer term…. Given the marked declines in caribou habitat, it is certainly reasonable to ask whether caribou will be maintained on the forest…. The fact that the planned future forest will be less hospitable for caribou and that it will provide considerably less habitat for most indicator species suggests that a re-examination of the desired age-class structure of the future forest may be in order… Management measures which will foster a more caribou-friendly future on the Caribou Forest may well involve trade-offs between wood supply and caribou habitat."

The applicants had requested that Ontario's Forest Fire Management Strategy be considered, but MNR did not specifically address it in their response. The ECO reviewed this fire strategy in our 2004/2005 Annual Report, stating "The forest-dwelling boreal population of woodland caribou depends upon fire as an ecological process to renew their habitat. It is not known how this policy choice – to replace naturally occurring fires with forest harvesting – will affect this species at risk." That Report also noted that the fire strategy contained "serious inconsistencies… based on giving priority to short-term wood supply over the ecological role of fire in some areas." MNR's focus on the maintenance of wood supply, together with its approach to fire suppression, could have serious long-term consequences for woodland caribou as illustrated in the following independent forest audit report:

> "Clearly, the Red Lake Forest is challenged in its future ability to maintain… wood supply targets while at the same time implementing the landscape objectives as they relate to woodland caribou and marten. There is no margin that allows for the potential risks of any future fire or catastrophic wind events without further worsening the wood supply outlook."

MNR implied in its response that many of the concerns raised by the applicants would be adequately addressed through the species at risk recovery planning process. Indeed, a similar statement regarding the conservation of this species was made by MNR in its Provincial Wildlife Population Monitoring Program. However, the ECO's review of the recovery strategy (see pages 160-161 of the Annual Report), has found that it sets very weak objectives and it fails to propose solutions to the most serious threats to this species at risk.

In denying the bulk of issues raised in the *EBR* application, MNR stated that it is required to achieve "a balancing of ecological, social and economic objectives." Citing its Statement of Environmental Values (SEV), MNR asserts that "the priority, or weight, given to the achievement of these outcomes will vary over time and geographical area. Accordingly, individual decisions regarding the mix of outcomes must be made in the context of provincial interests and local circumstances." The ECO believes that a threatened species such woodland caribou – that is at high risk of being forever lost from the province without concerted action – should be treated as a provincial interest and its protection should have a clear priority above other objectives.

*MOE's Responsbility:*
This *EBR* application also dealt with issues that are directly the responsibility of MOE. The applicants specifically requested a review of sections 30 and 31 of Declaration Order MNR-71 under the *Environmental Assessment Act*. This Declaration Order legally requires MNR "to implement a Provincial Wildlife Population Monitoring Program within the Area of the Undertaking" and "provide long-term trend data on representative terrestrial species." It also requires MNR to "maintain a program of scientific studies to assess the effectiveness of [forest management] Guides." A year after MOE issued

Declaration Order MNR-71, MNR released its Provincial Wildlife Population Monitoring Program. The 2004 monitoring plan reduces the number of species to be monitored, relative to the previous plan, from 92 to 43. Among the few mammals that MNR chose to monitor were chipmunks, mice, and voles. Alarmingly, woodland caribou were not one of the species that were chosen to be monitored by MNR despite the fact that they are one of the few species that have dedicated guidelines for their management. According to MOE, they were not chosen to be monitored as woodland caribou were not "identified as a representative terrestrial vertebrate species."

MNR's "scoped review" of its monitoring program can be viewed as an admission that the ministry is not fulfilling the intent of parts of Declaration Order MNR-71, specifically Conditions 30 and 31. It is MOE's responsibility that the *Environmental Assessment Act*, including the declaration order for forestry, is adhered to by all ministries. The ECO continues to have strong concerns with MOE's role in this process, as noted previously in our 2003/2004 Annual Report:

> "MOE's approval of this Declaration Order significantly weakens MOE's role in forest management. It does this by relaxing the terms and conditions, and by removing the requirement for MNR to re-seek approval. The public's ability to have MNR held accountable under environmental assessment rules has been lessened…. MOE has withdrawn from the role it was assigned in 1994 by the EA Board as watchdog over MNR's progress in implementing improvements in forest management…. The ECO reminds MOE that it is still important for the ministry to review MNR's Annual Reports and monitor MNR's compliance with the approval."

The issue of conserving woodland caribou and their habitat is inextricably linked to the need for comprehensive land use planning in northern Ontario. (For further information, refer to pages 51-74 of the Annual Report.) While MNR is the lead ministry for species at risk and wildlife in general, the policies of other ministries unquestionably have a direct, and often negative, impact on conservation measures. On this basis, the ECO believes that MOE, MNDM, and ENG should have undertaken this review under the lead of MNR.

*ENG's Responsibility:*
The ECO notes that projects related to energy generation and transmission can negatively affect species at risk such as woodland caribou. In denying this *EBR* application, ENG did not explain how woodland caribou are explicitly considered through regulatory mechanisms such as the Class EA for Minor Transmission Facilities. For example, the Victor Diamond Mine required the construction of approximately 100 kilometres of new transmission line from the Attawapiskat First Nation to the mine site. The environmental study report (ESR) for this transmission line states that "caribou are widespread throughout the area" and they are a regionally important species. It also states that the construction of the transmission line will potentially cause "disturbance to habitats" and will have a "continuous effect until rehabilitation [is] initiated." The ESR states that "disturbed habitats will self-restore at [the] closure" of the transmission line when the mine site is decommissioned. Additionally, the ESR notes that the transmission line, in conjunction with the adjacent winter road to the mine site, may increase hunting pressure on species such as woodland caribou due to increased accessibility.

*MNDM's Responsibility:*
The ECO also notes that mineral exploration and development can negatively affect woodland caribou, despite the fact that MNDM denied this *EBR* application. For example, the Comprehensive Study Report (CSR) for the Victor Diamond Mine "acknowledged that some level of disturbance is unavoidable" for woodland caribou. MNR, in their review of the project at its proposal stage, raised a number of points regarding woodland caribou, including that "the Proponent has discounted any significant negative potential to impact caribou (and other wildlife) on the basis of limited baseline and monitoring data." The CSR states that "adverse effects to ungulates from project-related activities could potentially occur" as a result of the following:

- General disturbance to habitats utilized by ungulates;

- General disturbance from site activities, including noise and air emissions;
- General disturbance related to site access from both aircraft and traffic along the winter road, most notably from noise;
- Increased vulnerability to hunting due to improved hunter access along the south winter road; and,
- Disturbance caused by baseline and/or monitoring studies.

The CSR states that "data from literature sources suggest that caribou are likely to avoid industrial sites and roadways, keeping up to one kilometre away from such facilities. Additional studies and anecdotal evidence… suggest that caribou are adaptable to disturbance, provided that they have sufficient adjacent areas for mobility. The Proponent has proposed a three kilometre zone around the Victor site development area, encompassing an area of 140 $km^2$, wherein some adverse effects to moose and caribou are considered possible or likely." The CSR also states that the "potential for cumulative impacts to caribou can be managed through a number of actions, as per the following: limit the project footprint to as small an area as practicable, as planned; develop policies of restricted hunting in the vicinity of project developments, including winter roads, with such policies to be developed jointly with the First Nations, and to involve compensation for lost harvesting opportunities; develop guidelines for vehicle and aircraft operation; and, conduct monitoring studies to determine and respond to any adverse effects to caribou, should these occur."

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**Review of Application R2006022**

**Review of the Regulatory Regime that Permits Logging in Algonquin Provincial Park (Review Denied by MNR)**

**Geographic Area:** Algonquin Provincial Park

**Background/Summary of Issues**

In November 2006, two applicants representing the Wildlands League branch of the Canadian Parks and Wilderness Society (CPAWS) submitted an application for review under the *EBR* requesting a "comprehensive public review of the regulatory regime that permits logging in the Park." The applicants explained that the regulatory regime doesn't adequately protect the environment and is inconsistent with the Ministry of Natural Resources' Statement of Environmental Values (SEV). In addition, they contended that the issue of logging in the Park has not been subject to public review since 1989. The regulatory regime including the public consultation requirements and the steps taken to mitigate potential harm to the environment, and the applicants' rationale for their request are described in more detail below.

*Background:*
In 1978, Cabinet approved a policy statement that banned major industrial activity, such as commercial logging, in provincial parks. Today, the sole exception to the commercial logging ban is Algonquin Provincial Park (the Park) where it is still allowed by a policy exception. At the time, Cabinet also recommended that the *Provincial Parks Act* (*PPA*) be updated to reflect the ban on major industrial activity and the exception for the Park but successive governments failed to take action. In June 2006, almost 30 years later, the policy ban and the exception were incorporated into the *Provincial Parks and Conservation Reserves Act* (*PPCRA*) that will replace the *PPA* when it comes into force.

*Forestry in Algonquin Provincial Park:*
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 it was limited to pine – the only commercially valuable wood at the time and an important source of future revenue for the Park. In

1900, *ANPA* was amended to allow loggers to also cut spruce, hemlock, birch, cedar, black ash, and tamarack as supplies of pine declined.

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 to give primacy to scenic values over timber rights. The policy, developed in the 1930s, 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. 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 conditions for heightened conflict with recreational users. In the early 1970s, more than a dozen companies held licences to cut timber in the Park. In 1974, after more than a decade of public pressure, MNR limited logging activities to a specific area (called the Recreation-Utilization zone) in the Park; created the Crown agency, Algonquin Forest Authority (AFA), under the *Algonquin Forestry Authority Act* (*AFAA*) for the purpose of managing forestry operations in the Park; and transferred the timber licences to the AFA. In return, MNR agreed to supply, through the AFA, companies with timber based on what the Park's forest could provide sustainably.

In 2002/2003, the AFA sold forest products worth $25.4 million; in fact, 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. Over 8,000 kilometres of road have been built using gravel excavated from within the Park to accommodate the heavy equipment used by the loggers. The remaining unlogged 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.

*Provincial Park Management – under the Provincial Parks Act:*
Since the *PPCRA* has not yet come into force, Ontario's parks are still being managed under the *PPA*. The *PPA* established Ontario Parks, a department within MNR, to administer the park system and requires parks to be managed for the "healthful enjoyment and education" of the public and to "be maintained for the benefit of future generations." The *PPA* is silent on the issue of major industrial uses, such as commercial logging, in a park and does not require parks to be managed to maintain or restore ecological integrity.

Under the *PPA*, parks are classified into one of six classes and are required, if requested by MNR, to have management plans. Algonquin Park is 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" and has had a park management plan (PMP) since 1974.

Along with the classification system, a zoning system was implemented that recognizes that areas within a park may have different objectives and permissible activities that are defined in park policies. Major industrial uses, such as commercial forestry operations, are generally prohibited in natural environment parks; however, such operations are permitted in the Recreation-Utilization zone of the Park.

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.

*Provincial Parks and Conservation Reserves Act:*
During the fall 2004, MNR used the Environmental Registry (Registry number: AB04E6001) to consult with the public on eight proposals that would subsequently become the basis for Bill 11, the *Provincial Parks and Conservation Reserves Act, 2006*. Proposal 6 was directly relevant to this application for review.

Proposal 6 recommended that the existing policy that bans major industrial uses in provincial parks be replaced with a statutory ban. This aspect of the proposal was widely supported by stakeholders and the public. The proposal also recommended that the existing exceptions to the policy ban be applied to the statutory ban and explained, "there is no proposal to change the policy related to logging in Algonquin Park." Despite the absence of any proposals to change existing policies, many commenters took the opportunity to express their opinions on the subject. Industry and business groups were worried that their operations and future opportunities would be negatively affected if existing policies were changed. Other groups, such as Sierra Legal Defence Fund, Wildlands League and Ontario Nature, advised the government that ecological integrity – the first priority of park management in Bill 11 – could not be achieved if it continued to allow commercial logging in the Park. Various groups urged the government to phase-out logging in the Park and to create buffer areas around parks to ensure that uses in these areas are compatible with park objectives.

In its response to the eight proposals, the Ontario Parks Board of Directors stated "protected areas cannot be all things to all people – their primary purpose must be protection of ecological integrity. The balance of Crown land is available for a wider range of uses, including resource extraction. Thus, it is appropriate that industrial land uses be prohibited in protected areas, with narrowly scoped exceptions." The Board also advised MNR in February 2005, that it did not believe that the consultation on the new park legislation, i.e., Bill 11, was the "proper context to address" the significant and complex environmental, economic and social issues associated with the Park. The Board recommended "an independent review" of the Park's "role in the protected areas network, the management and goals of the Park, and the Park's legislative and governance framework." In April 2005, the Minister of Natural Resources asked the Board to "provide advice about how to lighten the ecological footprint of logging" in the Park, and requested the Board to "recommend terms of reference for a possible public review of the management and governance of the park, including logging."

In October 2005, MNR updated Registry notice, AB04E6001, to advise the public that Bill 11 had received First Reading. MNR did not provide any opportunities for the public to comment on Bill 11 under the *EBR*. Instead, the public was advised that Bill 11 would be "subject to review and amendment by the Legislature through the prescribed legislative process." Bill 11 included a provision that bans major industrial uses in parks, i.e., proposal 6, fulfilling a promise made by the Minister of Natural Resources to several stakeholder groups that the new parks legislation would maintain the *status quo* regarding existing policies on major industrial uses.

Although Bill 11 did not include any provisions related to buffer areas, MNR did create a buffer area along the western boundary of the Park when it revised the Crown Land Use Atlas in 2005. The revision strengthened MNR's ability to prevent undesirable access and incompatible uses adjacent to the Park. (For additional information, refer to the Registry notice, PB05E2808.)

Although Bill 11 received Royal Assent on June 19, 2006, it has not come into force (as of June 2007.) In addition, the *PPCRA* has not yet been prescribed under the *EBR.*

*Forestry on Crown Lands – Crown Forest Sustainability Act (CFSA) and Declaration Order MNR-71:*
Forestry operations on Crown land are administered by the Forests Division of MNR and regulated under the *CFSA*. Established to protect the long-term health of Crown forests, the *CFSA* 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 section 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's 2003/2004 Annual Report, pages 94-99.)

*Forestry in Algonquin Provincial Park – Today:*
The AFA holds a Forest Resource Licence issued by MNR under section 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 (the 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 by the 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 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.

*Previous EBR Request Related to Logging in the Park:*
In October 2005, the Wildlands League used provisions in the *EBR* to request a review of the need to prescribe the *AFAA* under the *EBR*. The Wildlands League reasoned that the *AFAA* was environmentally significant since forestry operations have significant effects on the environment and expressed concern that the *AFAA* did not require a "periodic review of the impact of logging on the ecosystem integrity within the Park."

In its rationale for denying this previous request, MNR stated that the *AFAA* was "predominantly administrative" in nature, and that the environment was protected since forest operations must be conducted in compliance with the *PMP*, *PPA*, *CFSA*, and related policies and manuals that are subject to the public participation requirements of the *EBR*. The ECO disagreed with MNR's assessment of the *AFAA* as being "predominantly administrative" in nature and urged MNR to conduct a "comprehensive public review of its policy to allow logging in the Park and to consider how "ecological integrity" (the first priority for park management in *PPCRA*) would be achieved if this policy is allowed to continue." (For the full text of the ECO's review, refer to pages 128-131 of our 2005/2006 Annual Report.)

*Summary of Issues Raised in the Current EBR Request:*
The Wildlands League requested a comprehensive public review of logging in the Park on the basis that the regulatory regime does not adequately protect the environment and is inconsistent with the Ministry's Statement of Environmental Values (SEV). The Wildlands League stated, "industrial activity, no matter how carefully conducted, is inconsistent with the purpose of Ontario's parks" and the recently enacted *PPCRA*. The Wildlands League quoted from the ECO's 2005/2006 Annual Report in which the ECO noted that logging roads "are a corridor into the heart of the Park 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." The Wildlands League advised that, although most of Ontario's 635 protected areas were logged in the past, the Park is the only protected area in which logging is still allowed and cited a poll conducted in 2002 that concluded that 77 per cent of Ontarians oppose logging in parks.

*Commercial Logging in the Park is Inconsistent with the PPCRA and MNR's SEV:*
To support its contention that logging is inconsistent with the overall purpose, objective and the primary priority of the *PPCRA*, the Wildlands League cited three sections from the Act (not yet proclaimed), that are reproduced here:

> *s. 1 The purpose of this Act is to permanently protect a system of provincial parks and conservation reserves that includes ecosystems that are representative of all of Ontario's natural regions, protects provincially significant elements of Ontario's natural and cultural heritage, maintains biodiversity and provides opportunities for compatible, ecologically sustainable recreation.*
>
> *s. 2(1) The following are the objectives in establishing and managing provincial parks: 1. To permanently protect representative ecosystems, biodiversity and provincially significant elements of Ontario's natural and cultural heritage and to manage these areas to ensure that ecological integrity is maintained.*
>
> *s.3.1 Maintenance of ecological integrity shall be the first priority and the restoration of ecological integrity shall be considered.*

The Wildlands League also quoted from MNR's SEV that states its overarching goal is "to contribute to the environmental, social and economic well-being of Ontario through the sustainable development of natural resources", and one of its objectives is "to ensure the continuing availability of natural resources for the long-term benefit of the people of Ontario; that is, to leave future generations a legacy of the natural wealth that we still enjoy today." It noted that the objective is supported by the *PPCRA* provision that requires parks to be managed "to leave them unimpaired for future generations." The Wildlands League concluded that logging in the Park is inconsistent with MNR's SEV and that parks are to be "conserved rather than used for industrial development."

*Commercial Logging in the Park is Inconsistent with Sustainable Forest Management:*
The Wildlands League advised that the first two core indicators in the manual "Defining Sustainable Forest Management in Canada: Criteria and Indicators 2003" that MNR has adopted suggest that ecosystem diversity is measured for the allocated and protected forests separately. The Wildlands League has interpreted these indicators to mean harvesting will not occur in protected areas and advised that it is unaware of any independent sustainable forest management scheme that would permit logging in protected areas.

*Algonquin Park Forestry Agreement (APFA) is Inconsistent with Sustainable Forest Licence:*
The Wildlands League also disputed MNR's contention that the APFA is similar to a Sustainable Forest Licence (SFL). It noted that the APFA is not available for public viewing on MNR's website. In contrast, SFLs for all other forestry operations are. In addition, the Wildlands League is concerned that MNR is confusing the public when it states on its website that harvest operations are done under a Forest Resource Licence (FRL). Under the *CFSA*, FRLs are issued for only a five-year period and are renewable for only one year if certain conditions are met; whereas, SFLs and the APFA are issued for a 20-year period.

*Public Review of Logging in the Park:*
The Wildlands League contended that a public review of logging in the Park has not occurred since 1989 and indicated its support for the calls from the ECO in 2006 and the Ontario Parks Board of Directors in 2005 for a review.

The Wildlands League also referred to the information notice, XB03E3001, in which MNR advised the public of consultation opportunities regarding the MNR-approved Forest Management Plan for the Algonquin Park Forest Management Unit for the 20-year period of April 1, 2005 to March 31, 2025. Although MNR did not provide any opportunity to formally comment under the *EBR* – the plan is not a

prescribed instrument – other opportunities were provided under the direction of the Forest Management Planning Manual (FMPM).

In support of its request, the Wildlands League included copies of:

- the information notice, XB03E3001
- the summary of the above-mentioned Forest Management Plan
- "Ontario's Forests – Sustainability for Today & Tomorrow"
- Canadian Council of Forest Ministers' "Defining Sustainable Forest Management In Canada: Criteria and Indicators 2003"
- Ontario Parks Board of Directors' recommendations regarding Bill 11 as documented in "Fulfilling the Promise."

The ECO forwarded the application to MNR.

**Ministry Response**

MNR denied the Wildlands League's request for review on the basis that decisions about logging are subject to public review and that there is no potential for harm to the environment if the requested review was not undertaken.

MNR explained its rationale for the decision using the criteria outlined in the *EBR*. Under section 67 of the *EBR*, the minister may consider the ministry's SEV, potential for harm to the environment if the review is not undertaken, whether or not the matters to be reviewed are otherwise subject to periodic review and other factors. Under section 68 of the *EBR*, if a decision on the subject of the requested review has been made within the last five years that included public consultation according to the requirements of the *EBR*, there is no requirement to do the review. An exception is made if there is social, economic, scientific or other evidence that failure to review the decision could result in significant harm to the environment and the evidence was not taken into account when the decision was made.

*SEV (EBR, section 67(2)(a)):*
MNR explained that the decision to continue to permit logging in the Park is consistent with its SEV and advised that the desired outcomes described in its SEV include economic development, orderly planning and management of natural resources and protection of significant natural heritage features.

MNR also noted that individual decisions must be made in the "context of provincial interests and local circumstances." Furthermore, it advised that its SEV and legal requirements under the *PPA*, *CFSA* and the *EAA* require protection and consumption objectives be balanced and that this is achieved through the park and forest management planning processes – the Park Management Plan (PMP) protects the significant features and landscapes and the Forest Management Plan (FMP) must comply with the PMP.

*Potential for Harm to the Environment (EBR, section 67(2)(b)):*
MNR explained that there is no potential for harm to the environment if the review is not done since any potential for harm is "addressed through the steps and consideration involved in park management planning, forest management planning processes, and the processes that are in place for licensing, independent forest audits, compliance, certification, and scientific research." In addition, it noted that the *CFSA* applies to the Recreation-Utilization zone and requires that the resource be managed in a sustainable manner. MNR noted that harvesting activities occur on less than 1.5 per cent of the Park's forested area in any given year and that 95 per cent of the harvesting is "selection or uniform shelterwood which promote healthy forests and regeneration, and maintain forest cover on the land base at all times." (The ECO notes that the current approved Forest Management Plan indicates that 67,270 hectares will be harvested between 2005-2010, i.e., about 13 per cent of the 534,000 hectares that comprise the Recreation-Utilization zone.)

MNR explained that the FMP must be consistent with the PMP, *PPA* and associated policies, *CFSA* and associated policies and regulated manuals, *EAA* and in particular Declaration Order MNR-71 regarding MNR's Class Environmental Assessment Approval for Forest Management on Crown Lands in Ontario. The *CFSA* requires the sustainable management of the forests in the Park such that social, economic and environmental needs of present and future generations are met.

*Matters Otherwise Subject to Periodic Review (EBR, section 67(2)(c)):*
MNR explained that any time the regulatory and policy regimes, i.e., the *PPA* and the *CFSA*, regulations under these acts and relevant policies, are under development or review, there is a "comprehensive review to ensure consistency and cohesiveness with each other" during which the public and Aboriginal peoples, and public advisory groups are provided opportunities to provide input.

MNR explained that the issue of logging in the Park was subject to extensive public consultation when the *PPCRA* was developed, and before that, when the *PPA* and related policies that established the zones and permitted uses were decided. It also advised that the PMP (1998) was subject to comprehensive public reviews in 1979 and 1989. Similarly, the *CFSA*, associated policies and regulated manuals were subject to public consultation requirements of the *EBR*, and the FMP was subject to extensive public consultation as required by the FMPM. In addition, a Local Citizens Committee participates at all stages in the development of the FMP.

MNR advised that the Ontario Parks Board of Directors had endorsed the proposal to make logging in the Park a statutory exception and had been requested to "provide advice on how to lighten the ecological footprint of logging" in the Park.

*Social, Economic, Scientific or Other Evidence (EBR, section 67(2)(d)):*
MNR advised that the PMP was developed in accordance with the *PPA* and associated policies. The Park's goal is "to provide protection of natural and cultural features, continuing opportunities for a diversity of low-intensity recreational, wilderness, and natural environmental experiences; and within this provision continue and enhance the Park's contribution to the economic, social and cultural life of the region." Furthermore, the PMP includes an objective that enables commercial timber harvest.

MNR noted that logging in the Park is important to providing jobs and sustaining communities in eastern and central Ontario and has been allowed for more than a 100 years. MNR advised that 11 companies are the primary beneficiaries of the wood harvested in the Park. Seven mills receive at least 48 per cent of their wood supply from the Park and could shut down without this supply. Another five to ten mills also receive wood. Approximately 2,400 people are employed in the mills that receive wood from the Park and another approximately 420 people are employed by the woodland industry. MNR advised that many of the small communities in the area rely on the forest industry for employment.

MNR provided the following additional information as evidence of the sustainability of forest management in the Park and involvement of the public that support its decision to deny the application for review:

- AFA holds a five-year Forest Resource Licence.
- AFA's obligations are outlined in the 20-year *AFAA* and are reviewed every five years.
- AFA is subject to an Independent Forest Audit every five years during which opportunities for the public to raise issues and concerns are provided.
- AFA is required to monitor its operations and submit compliance reports.
- Park staff is required to have a compliance plan for forest operations and to conduct random compliance inspections.
- AFA has obtained ISO 14001 certification and is seeking certification from the Canadian Standards Association.
- Forest ecosystem, fisheries and wildlife research is incorporated into park and forest management planning operations on a continual basis.

Finally, MNR noted that a board of directors oversees the activities of the AFA and is accountable to MNR.

**ECO Comment**

MNR was not justified in denying this application for review. In its response, MNR provided a comprehensive rationale that included consideration of several factors, such as consistency with its SEV, potential for harm if the review was not undertaken, matters otherwise subject to public review and social and economic considerations, listed in the *EBR* for denying an application for review. For reasons outlined below, the ECO did not find MNR's rationale convincing.

Wildlands League had a straightforward request – a comprehensive public review of the regulatory regime that permits commercial logging to continue in Algonquin Provincial Park. Logging has been allowed since its designation as a park in 1893 despite decades of protest. In 2000, Wildlands League outlined how logging could be phased-out without significantly reducing jobs in communities adjacent to the Park.

The regulatory regime that directs park management and forest management within the Park is a series of inter-connected components that include the *PPA* and *CFSA* and related policies and manuals, the *EAA* and the Declaration Order, the *AFAA*, AFA's Forest Resource Licence, the Algonquin Park Forestry Agreement, contracts with the local forestry companies and the Crown Land Use Atlas. However at the core of the Wildlands League request is the exception that permits commercial logging in the Park.

*Consistent with SEV:*
The ECO does not believe that the decision to deny this application can be justified on the basis that the logging exception is or has ever been consistent with MNR's SEV.

Developed in 1995 and currently being rewritten, MNR's SEV identifies two values, economic development in the form of major industrial uses and protection of natural heritage as desired outcomes. These values are consistent with its broad mandate to support the economic growth of local communities through sustainable resource development on Crown lands and to protect significant natural heritage features and landscapes, such as those protected by our park system. MNR acknowledges in its SEV that balancing these values can be difficult, however, the SEV also states, "priority is given to identifying and protecting…provincially significant features and landscapes." The Cabinet decision that resulted in the phase-out of commercial logging in all of Ontario's parks except for Algonquin Park is strong evidence that the government believes that, in general, commercial logging is not an acceptable practice in our parks.

In a more recent statement of MNR's core values, the Ontario Biodiversity Strategy (OBS) identifies forestry as an activity that "can degrade, eliminate and/or fragment habitat." The OBS also observes that preserving existing biodiversity is at a critical point, and points to the important roles that parks and the prohibition of logging in the parks created under Living Legacy play in preserving biodiversity. In another recent decision, the *PPCRA* strengthens the policy ban on commercial logging in a park to a legislative ban. Although it will also strengthen the policy exception that allows logging to a legislative exception, the *PPCRA* does not require MNR to allow logging in the Park.

*Potential for Harm to the Environment:*
MNR provided numerous examples of how the regulatory and policy components that direct park and forest management mitigate any potential for harm to the environment. However it did not provide any evidence indicating that no harm had been done. The ECO agrees that many positive steps have been taken to mitigate harm. But the ECO also observes that there would be no potential harm to mitigate if logging operations were not allowed in the Park.

*Public Review of the Issue of Logging – pre-Bill 11:*
One of the most important criteria for MNR to consider while deciding to accept or deny this application is whether or not the requested issue has been subject to periodic review consistent with the intent and

purpose of the *EBR*. MNR provided no convincing evidence that a public review of the logging issue had occurred for many years.

In its response, MNR cited numerous examples of when the public is consulted on proposals related to the various documents that direct park and forest management. However, most of the examples related to how parks and forests should be managed – not if commercial logging should be allowed. MNR provided no evidence that the policy exception that allows logging had been subject to a public review since 1989. In addition, the *AFAA*, the law that directs the AFA to conduct its forest operations in compliance with the *CFSA*, and the Forest Resource Licence issued to the AFA are not subject to public review under the *EBR*. As explained in our review of last year's application for review requesting that the *AFAA* be designated under the *EBR*, the ECO does not agree with MNR's contention that the *AFAA* is "predominantly administrative" in nature and should not be subject to the public consultation requirements of the *EBR*. In addition, the PMP has not been reviewed since 1998.

*Relevant Decision Made Within the Last Five Years – Bill 11:*
The *EBR* allows MNR to deny an application for review if a relevant decision was made within the last five years and if that decision was made in a manner that is consistent with the intent and purpose of Part II. MNR advised the Wildlands League that "the issue of logging in Algonquin Park was recently openly reviewed in the development" of the *PPCRA*. However, in the first stage of that review, MNR asked the public to comment on an *EBR* proposal that asked only whether or not existing policy ban on commercial logging and the exception that allows logging in the Park should be incorporated into Bill 11. In fact, MNR specifically scoped the proposal to exclude any consideration of changes to the policy exception. As result, the ECO does not agree with MNR that the subject public consultation is evidence that the issue was recently reviewed.

When MNR introduced Bill 11 to the Legislature for First Reading, a new opportunity was created for the public to comment – this time on anything in the Bill including the proposed legislative exception that allows logging in the Park. However, MNR did not provide an opportunity to comment through the *EBR* or an equivalent process. Instead, the public were required to submit their comments to the Standing Committee on the Legislative Assembly. Furthermore, despite the appearance that all aspects of the Bill were under review, MNR had already assured some groups that the *PPCRA* would not change existing policies and policy exceptions and requested the Board to provide advice on how to carry out a separate public review on the issue. The ECO has concluded that the decision related to the issue of commercial logging in the Park was not made in a manner that meets either the intent or the purpose of Part II of the *EBR*.

*Social and Economic Considerations:*
The ECO agrees with MNR's observation that logging has made important social and economic contributions to the local economy for more than a century.

In conclusion, the ECO believes that MNR should have agreed to do this review. At the time that MNR responded to the Wildlands League, the issue of logging in Algonquin Park had not been subject to periodic public review. Plus, there was considerable evidence suggesting that MNR does not believe that commercial logging is an acceptable practice in our parks and is consistent with MNR's values. The ECO is pleased that on May 2, 2007, MNR posted the Board's recommendations on the Registry for public review and comment. One of the Board's recommendations is to reduce the size of the managed forest area from 56 per cent of the Park to 46 per cent, and to transfer some areas, such as lakes, wetlands and brook trout lakes in the Recreation/Utilization zone to one of the protection zones. The Board has also recommended that MNR and the AFA examine how the impacts of logging can be reduced. The ECO will continue to follow the discussions on this issue.

**Review of Application R2006025**

**Review of the Need for Regulatory Reform related to Mining Projects**
**(Review Denied by MNR)**

This application was reviewed in conjunction with R2006024 (MOE) and R2006026 (MNDM). Please see page 230 of the Supplement for ECO's full review of these applications.

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**Review of Application R2006027**

**Review of Allocation of Crown Timber**
**(Review Denied by MNR)**

**Geographic Area:** Central and Northern Ontario (Area of the Undertaking for forest management); Kenora Forest, Whiskey Jack Forest, Red Lake Forest, Trout Lake Forest, Dryden Forest, Wabigoon Forest.

**Background/Summary of Issues**

The applicants requested a review of extent and sufficiency of the current processes used by the Ministry of Natural Resources (MNR) for the allocation of Crown timber for commercial forestry. The applicants requested that MNR ensure that the process for allocating Crown timber is sufficient, transparent, and accountable in policy, reporting and practice. They argued that the closure of many mills in the province over the past couple of years has created an unprecedented situation.

The applicants stated that this review is necessary because of the significant volumes of Crown timber that are likely to be re-allocated in the near future from the extensive mill closures in the Province. The applicants estimated that if all the mills currently experiencing production shutdowns were permanently closed, it would affect one-third to one-half of the volume of all Crown timber currently harvested in the province. Their concerns include the licensing of both the demand and the supply side of wood flow in Ontario. The applicants stated that the ministry's decisions about a) how timber is allocated, and b) how mills are licensed, have high potential to impact the long-term health of Crown forests and their ability to provide benefits to all Ontarians.

The applicants specifically requested a review of the following documents:

- *Crown Forest Sustainability Act, 1994* (*CFSA*);
- Declaration Order MNR-71, issued by MOE June 25, 2003;
- Crown Timber Allocation Policies – all MNR policies, processes and/or protocols for the licensing of management units and wood processing facilities and for the allocation of Crown timber;
- Provincial Wood Supply Strategy, 2004;
- Mill Statistics, 1999-2003; and
- Forest Accord, 1999.

The applicants expressed concern about the computer modelling methods used to calculate allowable harvests. They used an analogy of the writing of cheques against a bank account with poor knowledge of the actual amount of money in the account. They stated that poor base inventory data, growth and yield information, and poor knowledge of the pre-industrial conditions have lead to overly optimistic views of the future forest condition.

The applicants stated that several Independent Forest Audits raise concerns about various allocation issues, and that the role of the audit findings in shaping improvements is not publicly apparent. Based on what they refer to as the "black-box" process used by the ministry to make timber allocation decisions, the applicants fear that without an *EBR* review, it is unlikely that MNR will undertake a timely or transparent review.

The applicants recommended a case study of the current re-allocation of timber from the closed Abitibi Kenora mill. They suggested that an investigation of the history and current processes at play in this area would illustrate the rationale for a broader review because the process used presumably represents a precedent for how MNR will go about re-allocating public resources from mill closures. The applicants listed a number of documents about the Wood Supply Competitive Process in the Kenora, Red Lake and Dryden Area, and the seven forest management units impacted that they thought should be reviewed as part of a case study. They included the Prospectus for MNR's competitive process issued in October 2006, and the annual reports, Independent Forest Audits, Sustainable Forest Licences (SFLs), Forest Resource Licences (FRLs), wood processing facility licences and the CPAWS Wildlands League report "Out of Balance" on the Whiskey Jack forest.

The applicants also posed a number of questions they hoped would be addressed in the review, related to transparency and accountability, increased pressure on area forests, and the Room to Grow process. The applicants described their frustration with the information provided by MNR, saying that various sources of ministry information are variable and difficult to reconcile with the actual wood volumes being tendered. They expressed concern that MNR is offering to re-allocate more wood than was previously allocated or used. They also raised concern about the environmental effects of the reallocation, particularly the potential for increasing impacts on Woodland Caribou, already practically extirpated from the Kenora, Whiskey Jack and Wabigoon units. The Red Lake and Trout Lake units are a key recovery zone for the species as identified in the Draft Caribou Recovery Strategy.

*Relevant Context: Ontario Forest Accord, 1999 and the Room to Grow Process:*
The Ontario Forest Accord was developed by representatives of the forest industry, selected environmental groups and MNR. The parties agreed to "develop a process for sharing permanent increases in wood supply between additional protected areas and increased forest supply." The parties also agreed that "the long term delivered wood costs and volumes available for industrial use will not be negatively affected by the Accord." The Ontario Forest Accord Advisory Board developed a proposed approach to the sharing commitment, called "Room to Grow," which was then incorporated by MNR into its Provincial Wood Supply Strategy, 2004. The Room to Grow policy states that whenever new wood supply is identified that is 10 per cent higher than the benchmark of past mill use set for a particular area, the area should be shared between industrial wood supply and new protected areas. The applicants pointed out that the Kenora prospectus states that there will not necessarily be new protected areas established and asked MNR to review how the ministry is implementing the Room to Grow obligations from mill closures.

**Ministry Response**

MNR determined that the public interest does not warrant a review of the processes for the allocation of Crown timber. MNR's primary rationale was that there is no potential for harm to the environment if the request to review the allocation processes is not undertaken. MNR stated that environmentally significant decisions such as the limits on the amount of forest resources that can be allocated or licensed, are determined through the forest management planning process, not in the allocation and licensing of timber. MNR said that allocation or licensing only determines who can harvest or use timber, not how much can be allocated. MNR stated that licensing and allocation processes and decisions on who receives an allocation do not directly impact the environment.

MNR implied that the "five-year rule" of the *EBR* applied to this application – that the Minister shall not review a decision made within the past five years if the decision was made with public participation, and no new evidence of environmental harm has been provided. MNR stated that the forest management plans for the Whiskey Jack Forest, Kenora Forest, Dryden Forest, Red Lake Forest, Trout Lake Forest,

Wabigoon Forest and the Crossroute Forest, which determine the available supply of timber available, have all been developed within the last five years and were subject to public and Aboriginal consultation. MNR said that the competitive process does not initiate or grant increased harvesting rights and will not alter the approved forest management plans. Further, MNR said it will not affect the environmental protection and ecological considerations, and other operational conditions of the forest management plans.

MNR stated that the Wood Supply Competitive Process in the Kenora, Red Lake and Dryden area was publicly announced, the prospectus was also made publicly available, and the results would be announced publicly. MNR said that a significant amount of information relevant to allocation processes and decisions is made available to the public. Public access or participation is, however, limited with respect to allocations and how much is allocated. MNR said that it would not be practical for the public to participate in the evaluation and allocation decision process, given the confidential nature of business proposals.

MNR also said that the following processes, decisions and information related to allocating forest resources that include public review and input and/or are publicly available:

- All forest management plans (public consultation requirements)
- Forest resource allocation mechanisms (described in the *CFSA*)
- Sustainable forest licences (available on the internet)
- Supply agreements (available upon request)
- The announcement to conduct a competitive process (public notice)
- Wood Supply Competitive Process Prospectus (available upon request)
- Forest operations compliance inspection reports, management unit annual reports, independent forest audits and subsequent actions plans (available on the internet or upon request)
- Proposals to issue forest resource processing facility licences for new mills (*EBR* posting for public comment)

MNR also said that the consideration of additional parks and protected areas (known as the Room to Grow process of the Ontario Forest Accord) is a requirement of the wood supply competitive process when Room to Grow provisions apply. In addition, MNR said that the allocation decisions encourage and support new industry investment, strengthen the forest products sector, community prosperity, economic development and job stability and increase Aboriginal opportunities in forestry.

MNR met the deadlines of the *EBR* applications process, and explained its decision in plain language and sufficient detail.

**ECO Comment**

The ECO does not agree with MNR's position that wood allocation and licensing decisions are not environmentally significant. The ECO understands that existing wood allocations have been determined by the ministry to be "sustainable" through the forest management planning processes. But the application put forward important new information and an unprecedented situation. First, the ministry knows that it is facing declining wood supply due to past practices. Second, mill demand is also declining due to a crisis in the forest industry. The reasons for the mill closures include a strong Canadian dollar, rising energy prices, declining lumber prices, and competition from overseas lumber producers. The applicants put forward new evidence that was not considered at the time that the existing policies were developed – that MNR has an opportunity because of mill closures, to reassess wood supply and forest health, and to consider reducing timber allocations to address the coming decline in wood supply identified in MNR's 2004 Provincial Wood Supply Strategy.

MNR described existing transparency and public access to key policies and decisions but did not address the applicants' concerns. MNR's forest management policies and procedures developed to implement the *CFSA* and its regulations, including those governing wood allocation and mill licensing, have never been subject to public consultation, and are not available to the public. These policies are environmentally significant because they determine the use and condition of Crown forests. The ECO commented on this previously, stating that MNR had finalized 15 new policies in 2001 related to forest resource processing facilities (e.g., mills). The ECO was concerned that MNR's overhaul of roughly 400 forest management policies had not received broad public consultation and urged MNR to consider most forest management policies as environmentally significant and to post any revocations, revisions and new policies on the Registry for public comment. Moreover, other MNR policies for allocation and licensing forest management units and resources have been approved since 2001 without public consultation or notification. The 2001 policies and procedures for licensing mills had a sunset date of March 2004, and the ECO does not know their current status.

Telling the applicants that SFLs are available on MNR's website and that supply agreements are available upon request (all after they are finalized) does not address the applicants' concerns. In fact, MNR states that SFLs will be amended as a result of the competitive process, and that consideration of Room to Grow and the potential creation of new parks will also be completed with the finalization of the supply agreement and amendments to SFLs, more reason that these types of decisions should be more transparent. The ECO has urged MNR several times to prescribe SFLs and other forestry instruments under the *EBR* so that they will be subject to public consultation. In 2003/2004, the ECO urged MNR to review its instrument classification regulation under section 20 of the *EBR* with regard to re-examining all potential instruments under the *CFSA*. In 2005/2006, the ECO recommended that Licences and Agreements related to forestry in Algonquin Park should be prescribed under the *EBR*.

MNR also implied that the five-year rule of the *EBR* provided a rationale for denying the application, but the five-year rule applies only to the individual forest management plans, not to any of the other policies, Acts, regulations that the applicants asked to be reviewed. MNR did not acknowledge or respond to the applicants' request that the *CFSA* and all MNR policies and procedures governing wood supply, allocation and licensing be reviewed. The ECO notes that the *CFSA* has not undergone a public review since it was passed in 1994. Similarly, neither the 1999 Forest Accord nor the Room to Grow policy would qualify for the five-year rule, because they were not subject to public consultation.

The ECO once again urges MNR to post any revoked, revised or new forest management policies and procedures on the Environmental Registry for public comment.

MNR also suggested that public input into allocation decisions is inappropriate because of the proprietary nature of business proposals. However, the ECO notes that the ministry is making decisions about allocating public resources, and should be able to consult on the allocation issues without jeopardizing legitimate business information.

MNR did not shed any additional light on how additional parks and protected areas would be considered during the wood supply competitive process. MNR states clearly in the prospectus that "Where a mill closes and wood supply reverts to the Crown, as it did in the case of the Abitibi pulp mill in Kenora, MNR is required to take Room to Grow opportunities into consideration. *This does not necessarily mean that there will be new parks or protected areas.* It does mean that we would work through the process taking into consideration social, economic and environmental factors." (emphasis added). MNR also said that consideration of Room to Grow would be completed as the supply agreement and SFL licence amendments are finalized.

MNR's primary rationale for turning down this review was that limits on how much wood is available from a forest management unit are decided in the forest management planning process, with substantial public consultation. But as the ECO pointed out in 2003/2004, MNR has itself connected mill demand and harvest levels. Planning teams now have to consider mill demand as a key input into the process to determine harvest levels.

MNR did not respond to the applicants' key concerns about the predicted decline in wood supply, problems with species conversion or the impact of past harvesting in these areas on the Woodland Caribou, a threatened species (see pages 75-81 of the Annual Report). The ECO reviewed MNR's Provincial Wood Supply Strategy (the Strategy), in the 2003/2004 ECO Annual Report. The ECO concluded in 2003/2004 that overall the Strategy gave too much weight to industrial demand at the expense of the long-term health and ecological viability of Ontario's Crown forests. There is increased emphasis in the Strategy on using mill demand information to set wood supply objectives (and potentially influence available harvest levels in forest management plans). This casts doubt on MNR's assurance that wood supply is determined by an assessment of what the forest can sustainably provide.

The closure of mills presents problems, but provides opportunities as well. Once the wood allocations from those mills revert back to the Crown, the ministry has an opportunity to step back and assess the forest, set new sustainable wood supply objectives – independent of historical mill demand – and consider the best use of its natural capital. The ECO notes that MNR's primary responsibility under both the *CFSA* and the *EBR* is to ensure the sustainability of Ontario's forests. MNR has an opportunity now to re-balance wood supply and demand, to consider increasing non-timber forest products, and to promote ecotourism, recreational hunting and fishing, and the protection of threatened species. The ministry should also consider the interests of the communities on the landscape, especially in light of the severe economic impacts they are experiencing. MNR has the capacity to make major decisions now that could result in a dramatically different future forest.

MNR must make its policies, procedures and decisions more transparent. Northern communities and other stakeholders have been asking for more transparency in ministry allocation decisions. They feel that the ministry is allowing large forestry companies to buy mills, close them and send the wood supply to mills in other communities or even out of province. These are legitimate questions and illustrate that MNR's licensing and allocation decisions have significant social, economic and environmental impacts. Given the declining ability of the forest to supply wood to mills, and the sudden change in economic conditions which make it likely that a significant amount of wood will revert to the province as mills close, MNR should have considered the applicants' request to review the wood allocation and licensing process.

The ECO urges MNR to review its policies regarding wood allocation and to provide more opportunities for public comment on both the policies and ministry decisions about allocations.

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**Review of Application R2006028**

**Review of Public Participation Provisions for Development Permits issued under the *Niagara Escarpment Planning and Development Act***

**(Review Denied by MNR)**

**Geographic Area:** Niagara Escarpment Plan area

**Background/Summary of Issues**

The applicants stated that there is inadequate public participation in decisions to issue development permits, which are instruments under the *Niagara Escarpment Planning and Development Act* (*NEPDA*). Development permits are required for most construction, site alteration and change of property use within the Niagara Escarpment Plan Area. The minister's authority to issue development permits has been delegated to the Niagara Escarpment Commission and to some upper-tier municipalities within urban areas. The applicants asked for a review to bring the *NEPDA* instruments in line with the provisions of the *EBR* to provide the public with notice and a meaningful opportunity to participate in the decision-making process.

The applicants requested a review of MNR's instrument classification regulation and asked MNR to classify development permits issued under sections 24(2) and 25(4) of *NEPDA*. Prescribing development permits as instruments under the *EBR* would make them subject to several provisions of the *EBR*, including public notice of proposals and decisions on the Environmental Registry, appeal rights and potentially applications for review and investigation. Section 21(2) of the *EBR* states that a minister shall from time to time review the regulations that classify proposals for instruments and shall prepare proposals to amend the regulations as the minister considers advisable.

The applicants pointed out that MNR's original decision not to classify development permits was made just over five years ago, so it is eligible for review. MNR stated at the time that it excluded some proposed instruments because they are "issued by bodies other than the ministry and ministry employees, such as … the Niagara Escarpment Commission, who are not subject to the requirements of the *EBR* and who therefore do not have obligations flowing from classification." The applicants challenged MNR's rationale, working through the *EBR* provisions related to instrument classification, implementation decisions and a minister's powers to delegate his or her authority and responsibilities. The applicants contended that section 22(2)(b) of the *EBR* was intended to capture development permits, regardless of whether ministry staff or the Niagara Escarpment Commission (NEC or "the Commission") make the decision.

The applicants also asked MNR to review the provisions of *NEPDA* that govern public notice of development permits. They specifically asked that anybody delegated the authority to issue development permits be required to provide broad public notice of development permit applications and an opportunity for comment before it makes its decision, and that MNR allow any member of the public to appeal the decision. The applicants stated that this would bring the development permit process into line with the public participation rights enshrined in the *EBR*. The applicants stated that they live within 120 metres of a possible development area and should have access to the rights embedded in the *EBR* – "today we would not receive notice until after the authority has decided the outcome of the application, which all takes place with no meaningful public consultation."

**Ministry Response**

MNR turned down the requested review of both MNR's instrument classification regulation and the *NEPDA* provisions, stating that the existing public consultation processes are adequate.

MNR pointed out several ways that a member of the public could find out about a development permit application under consideration by the NEC:

- any person may contact the NEC to ask about development permit applications;
- any person may search the NEC's web-based database of development permit applications; and
- the NEC asks applicants to post a notice on their property that says it is subject of an application.

The ministry also described opportunities for public participation once someone becomes aware of an application:

- any person may request more information on the proposed development from NEC staff;
- any person may provide comments to the NEC or NEC staff;
- any person may appear before the NEC at a regularly scheduled meeting on the day the Commission considers the application and makes a decision; and
- any person may request notice of the NEC decision.

In addition, MNR stated that every person who receives a Notice of Decision is entitled to appeal the decision.

In conclusion, the ministry said that "the opportunities for comment on *NEPDA* Development Permit applications overall are consistent with providing a meaningful opportunity for public participation in the

decision making process." MNR did not dispute that *NEPDA* does not require notice of a proposal, or provide an opportunity to the public to provide comments before the Commission makes a decision; but the ministry said that NEC administrative practices and legal requirements of the *NEPDA* combine to allow the public to become aware of a Development Permit application.

**Background**

The ECO met with MNR and the NEC in 1997 on the issue of classifying *NEPDA* instruments, recommending that the ministry include the permits in its regulation. MNR included *NEPDA* development permits in the 1997 proposal for the instrument classification regulation, although the ministry also proposed a large number of exceptions to reduce the number of permits that would be subject to the *EBR* requirements. When the instrument classification was finalized in 2001, the development permits had been removed entirely. MNR said in its Registry decision notice that it decided against classifying development permits because they were issued by the NEC, not the ministry. Perhaps because the applicants made a strong case against that rationale, MNR did not repeat that reason in its response to this application for review.

**ECO Comment**

MNR said that there was no need to prescribe these instruments because the existing opportunities for comment on *NEPDA* Development Permit applications are "consistent with providing a meaningful opportunity for public participation in the decision making process." The ECO does not agree with MNR's conclusion. MNR did not even try to claim that the existing opportunities are consistent with – or equivalent to – the rights provided by the *EBR*, which is what the applicants requested. In fact, the *NEPDA* process defended by MNR is the antithesis of the *EBR* model for public consultation, which promotes public notification and an opportunity to comment before decisions are made. *NEPDA* fails to meet the *EBR* standard in a number of ways:

**Comparison of public participation opportunities under *NEPDA* and the *EBR***

| **Elements of public participation** | ***NEPDA*** | ***EBR*** |
|---|---|---|
| Notice of a proposal | - no requirement, although NEC asks applicants to post a notice on their property | - notice of proposal on province-wide Registry |
| Opportunity for public comment | - no requirement | - minimum 30-day comment period |
| Decision maker to consider public comments | - no requirement | - decision maker to consider comments and describe the effect of comments on decision |
| Public notice of the decision | - notice of the decision must be sent to the Minister, applicant, persons who have requested notice of the decision, persons whom the decision maker considers may have an interest in the decision, and landowners within 120 metres | - notice of decision on Registry |
| Appeal rights | - recipients of the decision notice may appeal | - any party may request leave to appeal |

Enhancements to the NEC website that allow members of the public to search for development permit applications are a step in the right direction, but still fall far short of the *EBR* public notice and comment process. Under the *EBR*, a minister (or delegate) must post notice of a proposal on the Environmental Registry, provide a minimum 30-day comment period on the proposal, consider comments and post a

decision notice on the Environmental Registry explaining the effect of the comments on the decision, and instructions on how any one can request leave to appeal the decision.

The Task Force on the Environmental Bill of Rights (a committee which designed the *EBR*) wrote in 1992 that the Registry should provide the minimum amount of notice, and that existing notice provisions, for example direct mail to neighbours of a potential undertaking, would continue. The *EBR* would provide additional, broad notice to the general public, providing an opportunity to submit written comments. They expected that, "over time, existing environmental legislation would be brought into compliance with the provisions of the *EBR* respecting the issuance of regulations and instruments." The ECO notes that *NEPDA* has not been updated to provide for public participation in decisions on development permits. *NEPDA* was amended in 2006 to strengthen its enforcement provisions, adding new contravention sections relating to development permits. This adds even more reason to classify *NEPDA* instruments under the *EBR*, so that the public may submit applications for investigation of alleged contraventions of *NEPDA* permits.

This is the fourth application for review in the past few years that has requested MNR review its instrument classification and classify additional instruments. In all four cases MNR has turned down the request, and the ECO has taken the position that the reviews should have been done. The ECO is extremely disappointed with MNR's resistance to the added transparency measures contained in the *EBR*. The ECO urges MNR to review its instrument classification and amend it to include additional instruments under the *Niagara Escarpment Planning and Development Act* and *Crown Forest Sustainability Act* as requested by *EBR* applicants.

The *NEPDA* provisions regarding development permits pre-date the *EBR*, and do not provide for adequate public participation, compared to the *EBR* or *Planning Act* provisions. Further, while the Niagara Escarpment Plan is subject to a periodic review (currently a 10-year review cycle), *NEPDA* and the legal requirements related to development permits are not. The ECO also urges MNR to conduct a review of the public participation provisions of *NEPDA*, to include requirements for public notice of proposals and the right to comment on those proposals before the decision is made.

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**Review of Application R2006032**

**Processing Applications for Pits and Quarries under the *Aggregate Resources Act***
**(Review denied by MNR)**

**Background/Summary of Issues**

On February 26, 2007, an application for review was filed asking for a new mechanism for screening and evaluating applications for aggregate operations under the *Planning Act* and the *Aggregate Resources Act*. The applicants described their concerns with a proposed quarry in Flamborough, which is located in the Natural Heritage System of the Greenbelt Plan and contains several Provincially Significant Wetlands, significant woodlands and water resource features. The applicants believe that the proposal is incompatible with existing municipal plans and approved developments, including proximity to residential developments. They are also concerned about the potential impacts of the quarry on groundwater quality and quantity, since the site includes the recharge area for the Carlisle Municipal Wellheads and could affect wellhead protection areas.

The ECO forwarded the application to both MMAH and MNR.

**Ministry Response**

On May 3, 2007, MNR denied this application for review, stating that the *ARA* already provides due process for public notification and consultation, and for review of technical reports to protect the environment.

**ECO Comment**

See pages 44-49 of the Annual Report for discussion of some of the issues raised in this application. The ECO will review the handling of this application in the 2007/2008 Annual Report.

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## Ministry of Northern Development & Mines

### Review of Application R2006017

### Measures to Conserve Woodland Caribou (*Rangifer tarandus caribou*) and its Habitat (Review Denied by MNDM)

This application was reviewed in conjunction with R2006015 (MNR), R2006016 (MOE), and R2006018 (ENG). Please see page 204 of the Supplement for ECO's full review of these applications.

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### Review of Applications R2006024, R2006025, and R2006026

### Review of the Need for Regulatory Reform Related to Mining Projects (Review Denied by MNR and MNDM; No Response from MOE)

**Background/Summary of Issues**

In December 2006, Sierra Legal Defence Fund (SLDF) submitted an application for review on behalf of the Wildlands League and Mining Watch Canada. The applicants requested a review of the need for legislative, regulatory and policy reform related to the assessment of the environmental impacts of proposed mining projects under the *Mining Act* and the *Environmental Assessment Act* (*EAA*). This application for review was sent to the Ministry of Northern Development and Mines (MNDM), the Ministry of the Environment (MOE), and the Ministry of Natural Resources (MNR).

The applicants stated that the current situation with respect to the assessment of the potential environmental impacts of proposed mining projects is "uncoordinated" and "incomprehensive," resulting in exemptions and "piecemeal assessment" of potential environmental harm under the *EAA*. The applicants asserted that although mining projects may require a number of approvals for activities related to mining projects – such as approvals for energy generation, road construction and permits to take water – there is usually no individual environmental assessment (EA) conducted for the entire project. SLDF argued that MNDM, MOE and MNR should review this regulatory regime, with the broader intent to ensure that comprehensive land use planning legislation for the north is enacted and implemented. The applicants also asserted that it is necessary that EAs evaluate the ecological impact of mining projects in their entirety, from staking to reclamation and remediation, prior to any approvals.

Mining projects, generally being private projects, are not subject to the *EAA* (unless designated by MOE). The *EAA* does, on the other hand, require Crown agencies to complete individual EAs for all Crown dispositions – which would include the issuance of mining licenses by MNDM. However, MOE has issued a declaration order to MNDM that provides an exemption from this requirement. Declaration Order MNDM-3/3 (the "Dispositions DO") allows MNDM to dispose of Crown resources, such as issuing mining licences, and to administer the *Mining Act*, without requiring MNDM to conduct individual EAs.

SLDF expressed strong concerns with respect to the MNDM's Declaration Order for dispositions. It was originally approved as a one-year "interim" order in 2003, but has twice been extended, and now is set to expire in June of 2008. When initially granted, MOE stated that the interim order was granted in order to allow MNDM time to prepare "a strategy for long term EA coverage related to dispositions and other activities under the *Mining Act*." The Declaration Order was intended to be a short-term aid while MNDM prepared a Class EA, a streamlined approvals process, for mining activities. Yet, four years after the Declaration Order was granted, it appears that MNDM is still years away from finalizing this Class EA and obtaining MOE approval for it.

In addition, MNDM is currently seeking a second declaration order, Declaration Order MNDM-4 ("Site Rehabilitation DO"), which would exempt MNDM activities relating to mine hazard rehabilitation and reclamation activities from the requirements of the *EAA* while MNDM prepares the Class EA. SLDF expressed concerns with respect to this proposed exemption as well.

The applicants also argued that the structure and administration of the Declaration Order for dispositions requires review, specifically the discretion it provides to MNDM to assess whether a mining project will have potential environmental impacts. SLDF stated that "it is troubling that a decision maker in MNDM is assessing potential environmental impacts and determining whether MOE should be involved in the assessment. Mining projects are always going to alter the ecosystem in dramatic ways and should be fully assessed for the environmental impact by MOE."

To illustrate their concerns, SLDF stated that "the harm to the environment that will result from mining projects under the current regime is evident in the case study of the approved Victor Diamond Project." The applicants detailed their concerns regarding the Victor Diamond Project, based on information obtained from MNR and MNDM through the *Freedom of Information and Protection of Privacy Act* (*FIPPA*), as well as independent scientific information.

An EA was conducted for the Victor Diamond Project pursuant to the *Canadian Environmental Assessment Act* (*CEAA*). However, the applicants argue that the federal EA is not sufficient to compensate for the failings of the provincial approvals process. The applicants raised concerns that the approvals process for the Victor Diamond Mine failed to adequately consider the impacts of dewatering from the mine site. For example, SLDF states that MNR staff "were extremely concerned about the potential impact of the dewatering and the extent to which the dewatering would impact the muskeg-dominated ecosystem of the area." The applicants argued that the dewatering of the Victor Diamond Mine site will affect the natural environment in several ways, including:

- "At least 100,000 $m^3$ of salty water will be pumped out of the pit each day into the Attawapiskat River. This is equivalent to 40 Olympic-sized swimming pools per day or 14,600 pools per year. This figure may be vastly underestimated.
- The flow of the Nayshkatooyaow River will be decreased by at least 15 per cent. A 2.6 kilometre stretch of South Granny Creek will be "moved."
- 1.2 million $m^3$ of muskeg, including trees and other plants, will be removed.
- River crossings may lead to siltation of rivers and creeks and impact water quality.
- Fish populations such as lake sturgeon, brook trout, walleye and whitefish may be harmed by the changes in water flow and water quality.
- Dewatering of the muskeg will also release methyl mercury into the surrounding ecosystem. This aspect was not even studied in the EA."

SLDF also argued that the federal and provincial approvals processes for the Victor Diamond Mine inadequately addressed the impacts on the Attawapiskat karst. The applicants noted that MNR had assessed this karst formation as an Area of Natural and Scientific Interest (ANSI) with "national significance" based on its unique geology in the early 1980s. According to this assessment (which was prepared before diamonds had been discovered in this area), MNR "recommends that this area be established as a Provincial Park. A review of this area's geology with the Ministry of Northern Development and Mines suggests there is little or no economic potential for minerals, and therefore no concern with establishment of a provincial park." According to information from MNR obtained by SLDF, the Victor Diamond Mine is "dead centre" of the ANSI and the impacts of the project will be "intensive, extensive and long term."

The applicants were concerned that additional impacts will occur, beyond those affecting the karst formation. SLDF stated that these impacts include: 2.5 million tonnes of rock will be processed (piled, crushed and dumped) each year; 28.7 million tonnes of rock will be dug from the ground over the life of the mine and dumped in the surrounding area; the waste rock may leach chemicals, such as acids, into the surrounding water; and, the open pit, which itself was never assessed during the EA process, will be 220 metres deep and one-two kilometres wide.

SLDF asserted that the mineral development approvals process, as illustrated by the Victor Diamond Mine, inadequately addresses impacts on local wildlife. For example, the applicants noted that "after the mine closes and the site is re-vegetated, studies say that 'excellent habitat for moose' (shrubs and young forest) will be created, which also means that the habitat that previously supported caribou (older forest and bogs) will be diminished. This could result in the local extirpation of caribou, preceded by a sustained periods of population decline." SLDF also states that this federal EA process did not consider the project-related impacts on wolverines, which are a threatened species in Ontario.

The applicants stated that the mineral development approvals process inadequately addresses impacts on fish. SLDF cited several recent scientific studies that demonstrate that metal mine effluent, even at levels that are not lethal, may cause significant harm to fish. The applicants expressed concern that, "As mining moves north, an increased concern with respect to arctic and subarctic fishes has been noted, since these species are highly sensitive to contaminants in mine wastes and have a low capacity for recovery, making them particularly vulnerable."

The applicants also believed that the federal and provincial approvals processes for the Victor Diamond Mine did not consider the issue of methylmercury formation and mobilization resulting in increased levels of methylmercury in local fish. Methylmercury is toxic to mammals, including people, and causes a number of adverse health effects. SLDF asserts that approximately 260,000 ha of muskeg will likely be dewatered as a result of the Victor Diamond Mine, yet the potential mobilization and bioaccumulation of methylmercury "was never assessed as part of any EA." The consulting company acting on behalf of the community of Attawapiskat requested "a risk assessment of the potential for changes in mercury availability and uptake by biota related to changes in the hydrology of the study area and potential changes in methylation and uptake into biota." The response from the mining proponent's consultant was that a risk assessment is "unwarranted" and "that such discussion could be unnecessarily alarmist and would be out of balance with other project aspects."

SLDF asserted that the approvals process for the Victor Diamond Mine inadequately addressed regional impacts and the need for broader land use planning. The applicants state that these types of concerns were never dealt with through a provincial EA, as the province did not conduct an individual EA of the project, but rather focused on peripheral aspects of the project such as the energy generation, permit to take water, and other activities related to the mine project – each of which were assessed individually by the relevant authority. SLDF refered to internal MNR correspondence that reflects similar concerns with regard to this project: "We need a land use planning approach to this project – especially in an area of Ontario that is remote, sensitive to development, globally significant but has no LUP [land use planning] direction and is one of the last remaining wilderness areas in Ontario." The applicants also stressed the need for regional impact benefit agreements and an environment agreement to be completed with local First Nation communities prior to such large-scale construction.

SLDF stated that there is no mechanism by which the Ontario government assesses, evaluates and then determines which ecosystems and cultural values should be "off limits" prior to permitting staking or mineral exploration. The applicants believed that the existing regulatory structure treats public land as freely open to exploration and, consequently, the integrity of ecosystems is not a consideration at the staking and exploration stage of mining activities. SLDF argues that this system inadequately affords protection for habitat for species at risk, critical habitat to support Aboriginal harvesting rights, and areas deemed critical for protecting sources of water. The applicants assert that this approach is in conflict with the respective Statements of Environmental Values (SEV) for MNDM, MNR, and MOE.

The applicants requested that all approvals of mining projects, including staking and exploration, in northern Ontario should "be halted until such time as comprehensive land use planning legislation is enacted and implemented." SLDF believed that new land use planning legislation, such as a "Northern Planning Act," should be established that provides landscape level land use goals and enables community-led land use planning for the north, consistent with the landscape goals. The applicants believe that landscape level goals are required to ensure the northern boreal forest and wide-ranging species at risk are adequately protected. Under such a system, SLDF argued that all mining projects should be comprehensively assessed with respect to the ecological footprint for mining projects in their entirety prior to any approvals.

**Ministry Response**

*Ministry of Northern Development and Mines:*
MNDM was required to provide notice of its decision on whether to conduct a review to the applicants and to the ECO by February 22, 2007. On April 25, 2007, more than two months past the *EBR* deadline for a response, MNDM denied this application stating that the public interest does not warrant a review.

On February 21, 2007, MNDM wrote to the ECO and stated that there would be a one-week delay in providing a notice of decision for this *EBR* application. On March 5, 2007, MNDM again wrote to the ECO stating that the issues raised by the applicants were complex and that the ministry required additional time. The ministry requested a 35-day extension to respond with a new proposed deadline of April 10, 2007. The ECO informed MNDM that the *EBR* requires ministries to respond within 60 days and that "the ECO will comment negatively on this delay in its review of your ministry's handling of this application." On April 25, 2007, MNDM provided its decision.

MNDM implied that there is no potential harm to the environment if the review was not undertaken. The ministry states that mineral development projects currently are regulated by numerous provincial and federal agencies. Further, MNDM stated that the mineral development process is a "speculative enterprise" in which "less than one in 10,000 claims staked reach the mine development stage in Ontario."

The ministry stated that the existing regulatory regime, including its application of the *Mining Act*, ensures that short-term environmental effects are mitigated, long-term environmental effects are eliminated, and that natural heritage and biological features of provincial significance are protected. MNDM also maintained that mining is a temporary land use and that mine sites will be rehabilitated to natural, recreational, or commercial land uses.

MNDM stated that the existing regulatory regime provides for a "comprehensive and coordinated process for assessing the potential environmental impacts of proposed mining projects." In addition to its administration of the *Mining Act* and its Declaration Order for the Dispositions of Crown Resources, MNDM stated that mineral development projects also are regulated by:

- Environment Canada's administration of the federal *Canadian Environmental Assessment Act* (*CEAA*);
- MOE under the Electricity Projects Regulation under the *EAA* and through the permitting process under the *Environmental Protection Act* (*EPA*);

- MNR through its administration of the Class EA for Resource Stewardship and Facility Development Projects, the *Public Lands Act* (*PLA*), the *Lakes and Rivers Improvement Act* (*LRIA*), and the *Aggregate Resources Act* (*ARA*); and,
- The Department of Fisheries and Ocean's administration of the federal *Fisheries Act* (*FA*).

The ministry stated that it is developing a Class EA to replace its interim Declaration Order. MNDM states that it intends to finalize this new Class EA by the winter of 2009.

With regard to the Victor Diamond Mine, MNDM stated that it was involved in the review of the Comprehensive Study Environmental Assessment under the federal *CEAA*. The ministry stated that "coordination between provincial and federal governments during respective EA processes… has assured that the cumulative, direct and indirect effects on the Victor Diamond Mine Project had been considered in the determination of net environmental effects of the project." Further, MNDM stated that the scope of the assessment was developed in consultation with First Nations and the public.

MNDM also noted that three provincial Class EAs were applied with respect to the Victor Diamond Mine. MNR's Class EA for Resource Stewardship and Facility Development Projects was triggered with regard to the access road powerline, pit dewatering, water crossings and diversions, and impacts to wildlife and fisheries. Hydro One's Class EA for Minor Transmission Facilities assessed the twinning of an existing coastal transmission line from Otter Rapids to Attawapiskat and the construction of a new line from Attawapiskat to the mine site. MOE's environmental screening under the Electricity Projects Regulation also was triggered for the use of temporary diesel generators related to advanced exploration and construction of the mine site. In all three instances, the ministry notes that MOE received bump-up requests that it denied.

MNDM stated that all scientific comments made during the review of the project were considered. The ministry states that both the federal and provincial governments "focused a great deal of time and energy on the potential impacts of the mine including its dewatering, the effect on, for example, the Karst features, ANSI, mercury, surface waters, fish and wildlife and many other issues." MNDM stated that the methylmercury information that the applicants discussed was too recent to have been considered in the EA process, but the new information does not illustrate how the approvals process is flawed nor does it reach a conclusion related to the impact of the Victor Diamond Mine.

The ministry stated that it is committed to "initiating an inter-ministerial review of the regulatory permits and approvals process as related to new mine developments" as part of its broader Mineral Development Strategy. The purpose of this review is to streamline and harmonize the current approvals process. According to MNDM, an inter-ministerial team already has developed terms of reference for a one-window approach to permitting, it is initiating the development of an industry practitioner's guide, and the ministry is developing a risk management framework for permits and approvals. The key objective, according to the ministry, is "to balance environmental, social and economic interests while reducing overlap and duplication, and improving transparency and consistency."

*Ministry of the Environment:*
MOE was required to provide notice of its decision on whether to conduct a review to the applicants and to the ECO by March 4, 2007. On April 4, 2007, MOE wrote to the applicants and the ECO that it was "delayed in making a decision on this issue." The ECO is concerned that MOE's failure to provide timely decisions on a number of *EBR* applications in the past few years may be a systemic problem on the part of the ministry. For example, with regard to a previous application on a related issue, MOE was approximately a year late in providing a decision to the applicants and the ECO. As noted above and in our 2005/2006 Annual Report, such "excessive delays frustrate the public interest and undermine the *EBR*." The ECO commits to reporting fully on this application in a forthcoming Annual Report, following the legally required response by MOE.

*Ministry of Natural Resources:*
In February 2007, MNR determined that the public interest did not warrant a review of the issues raised by the applicants and denied this *EBR* application. The ministry stated that there was no potential harm

to the environment if a review was not undertaken. MNR stated that it utilizes a variety of policy and procedural documents when implementing legislation such as the *Environmental Assessment Act* and the *Public Lands Act*. With regard to the Victor Diamond Mine, the ministry stated that the existing EA approvals and permitting processes are sufficient to address, mitigate and minimize environmental harm.

MNR stated that in making resource allocation decisions, its disposition policies and EA obligations require the consideration of all available information. While only responsible for a limited number of approvals, the ministry states that its consideration of "all types of information was particularly evident in the Victor Diamond Project." MNR stated that it used information from land use planning documents, scientific studies by the ministry and the proponent, as well as traditional knowledge from local First Nation communities.

The ministry noted that the Responsible Authorities – the Department of Fisheries and Oceans, Natural Resources Canada, Human Resources and Skills Development Canada, and Transport Canada – for the Comprehensive Study for the Victor Diamond Mine (conducted under the federal *CEAA*) determined that the project "would not likely result in significant adverse environmental effects." In addition to the Comprehensive Study under *CEAA*, MNR states that the project was also subject to three provincial Class EAs.

MNR did state that it is involved in an "ongoing exercise to explore potential approaches for land use planning in Ontario's far north." The ministry has committed resources to work with other ministries (MNDM, ENG, MOE, and the Ontario Secretariat for Aboriginal Affairs), First Nations, and other stakeholders. Begun in 2005, MNR states that "this exercise is continuing."

**ECO Comment**

The ECO has serious concerns with the manner in which MNDM and MOE dealt with this *EBR* application. MNDM was more than two months late in providing a response. As of May 2007, MOE had not provided a decision. These actions undermine the core purposes of transparency and accountability that underpin the *Environmental Bill of Rights*. The public cannot have faith that their legal rights are being upheld if prescribed ministries do no not respond to the *EBR* applications within the prescribed timelines. Further, the ECO cannot effectively fulfil its duties to report to the Ontario Legislature and to the public if prescribed ministries do not follow their legal obligations.

The applicants raised many valid concerns in their application. Currently, there are a variety of laws, regulations and processes that govern mineral development in Ontario. These measures include the *Mining Act*, various Class EAs, and numerous permitting processes under statutes such as the *Ontario Water Resources Act*. However, the central argument of this *EBR* application is that this system is "uncoordinated," and results in a "piecemeal assessment" of potential environmental harm.

The ECO believes that MNDM should not have denied this *EBR* application. Although the ministry already is in the process of an inter-ministerial review of the permitting and approvals process for mineral development, this review appears to be behind closed doors and does not appear to address the broader issues that were raised by the applicants. According to the ministry, one of the purposes of this review is "aimed at streamlining and harmonizing" the existing regulatory regime, including the establishment of a one-window approach to approvals. On this basis, MNDM should not have denied this review as many of the concerns of the applicants have a direct bearing on the issues that the ministry is currently examining. The ECO urges MNDM to fully engage the public on this review, beginning with a notice on the Environmental Registry.

The ECO believes that reforms of the *Mining Act* and its associated legal mechanisms are needed. For example, recent case law states that MNDM has a duty to undertake meaningful and reasonable consultation with First Nations when granting mining claims and leases that may impact their rights. The ECO believes that the *Mining Act* should reflect these obligations and that they should not be left to the discretion of policy.

The existing regulatory structure treats public land as freely open to mineral exploration. The consideration of other interests, such as the protection of ecological values, is only dealt with in the later stages of the approvals process. The ECO believes that this system is reactionary and fails to determine upfront where mineral development may be inappropriate. Instead, it assumes that mineral development is appropriate almost everywhere and that it is the "best" use of Crown land in almost all circumstances. This century-old system continues to rely on principles that do not reflect modern land use planning nor does it adequately safeguard environmental values.

The ECO believes that Ontario's *Mining Act* and its assumption of free entry for mineral development impedes comprehensive land use planning.

The ECO believes that significant ecological values deserve protection and they should be proactively identified by MNR. Further, lands with significant ecological values should be withdrawn from eligibility for prospecting and staking by MNDM. This approach would give greater certainty to the mining industry, afford better protection for ecological values, and reduce the complexity of the development approvals process.

As noted in a recent legal review by West Coast Environmental Law: "Once mine exploration has occurred, and there is a desire to build a mine, industry pressure is such that it is virtually impossible to prohibit this development in order to respect other land uses and objectives." For example, a Class EA approval related to the Victor Diamond Mine described that the construction of the transmission line will potentially cause "disturbance to habitats" and have a "continuous effect until rehabilitation [is] initiated" on woodland caribou, and that "disturbed habitats will self-restore at closure." In essence, until the mine is closed and the transmission line is taken down, this species at risk likely will be displaced from this area.

Under a more enlightened approach, ecological values should not only be identified, but they should also form the core basis of comprehensive land use planning that possesses legal authority. However, without legal weight, the system would remain ineffective. For example, in the early 1980s, the Attawapiskat karst was identified as an Area of Natural and Scientific Interest and the Attawapiskat River was identified as a candidate waterway class provincial park by MNR as part of "extensive strategic land use planning to develop land use direction for Crown lands." However, neither of these areas was withdrawn from staking. As a result, approximately 33 kilometres of the river adjacent to the Victor Diamond Mine was extensively staked and it will no longer be considered as a candidate for protection. Further, despite identifying this river as a candidate for protection, more than two decades have passed without any legal measures being taken to regulate it.

The existing regulatory structure for mining does not adequately assess the cumulative impacts of development. The various existing approvals processes, such as Class EAs or permits under other legislation, are highly compartmentalized. The ECO expressed a similar concern in our 2003/2004 Annual Report with regard to mineral development, stating, "Each of the ministries followed their formal approvals processes. However, the system's current checks and balances did not prevent a result with potentially distressing environmental consequences."

In addition, the ECO is concerned that MOE has repeatedly extended MNDM's "interim" Declaration Order based on MNDM's failure to prepare a Class EA. When initially granted in 2003, MOE specifically issued the Declaration Order for just one year, recognizing the fact that more comprehensive EA coverage was needed. The ECO does not believe that MOE should be rewarding MNDM's failure to complete the Class EA in a timely manner by repeatedly extending this exemption. Based on MNDM's assertion that a new Class EA will be completed by the winter of 2009, the existing Declaration Order will have to be extended a third-time beyond its current expiry in 2008.

The ECO concurs with MNR not undertaking this *EBR* application. Many of the concerns raised by the applicants about the existing regulatory structure are the direct responsibility of MNDM and MOE. However, MNR has a critical role to play with regard to any inter-ministerial review

of the approvals process for mineral development as its mandate is "to manage our natural resources in an ecologically sustainable way to ensure that they are available for the enjoyment and use of future generations. The ministry is committed to conserving biodiversity and using natural resources in a sustainable manner."

# SECTION 6

## ECO REVIEWS OF APPLICATIONS FOR INVESTIGATION

# SECTION 6: ECO REVIEWS OF APPLICATIONS FOR INVESTIGATION

## Ministry of the Environment

### Review of Application I2005008

### Alleged *ARA* Contravention – Jamieson Pit, Horton Township (Investigation Denied by MOE)

**Geographic Area:** Horton Township

**Background/Summary of Issues**

The applicants alleged that the operators of the Jamieson aggregate pit in Horton Township, contravened the *Aggregate Resources Act* (*ARA*) and the *Ontario Water Resources Act* (*OWRA*). The application was sent in March 2006, to both the Ministry of Natural Resources (MNR) and the Ministry of the Environment (MOE). MOE was asked to investigate allegations that the company was contravening the provisions of its Permit to Take Water (PTTW) by not properly recycling the stone wash water.

The applicants have been raising concerns about this gravel pit and asphalt plant with the ministries since 1998, and with the ECO since 2000. MOE carried out an *EBR* investigation in 2002 and 2003, and found that the operation of the asphalt plant was in violation of the *EPA*. MOE charged the company and issued an order requiring substantial changes to the operation to bring it into compliance with Ontario's air emission standards, (see the ECO 2004/2005 Annual Report Supplement, pages 276-282). In 2002, the ministry also responded to the applicants' complaints about excessive water taking, as described below.

**Ministry Response**

MOE decided not to conduct an *EBR* investigation because it had carried out an inspection in November 2005 and determined that the company was in compliance with its PTTW.

MOE described the history of complaints and ministry action regarding water-taking at the Jamieson Pit. MOE stated that in response to complaints in 2002 about excessive water taking, the ministry inspected the site in May 2002. MOE found that the company was taking far more than the 50,000 litres/day threshold which triggers legal requirements for a PTTW. MOE ticketed the company and issued a Provincial Officer's Order. MOE issued a PTTW in June 2002, and reissued the permit in September 2002 to reduce the amount of water taken.

MOE carried out a compliance inspection in June 2004 and determined the company was in compliance with the PTTW. MOE conducted another compliance inspection of the site in November 2005, in response to complaints from the applicants. The site inspection included a review of all water-taking records provided by the company to ensure the amounts, rates, duration and uses of water-taking were as approved in the PTTW. The inspection concluded that the site was operating in compliance with the PTTW and did not reveal any adverse impacts to water quality.

**ECO Comment**

MOE's decision not to carry out an *EBR* investigation was reasonable, since the ministry had carried out a compliance inspection just a few months earlier in response to complaints from the applicants. The ministry's decision notice provided an adequate summary of the inspection results, however, the ministry missed the *EBR* deadline for responding to the applicants.

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**Review of Application I2006001**

**Alleged Contravention of the *Environmental Protection Act* by an Auto Body Shop in Windsor (Denied by MOE)**

**Background/Summary of Issues**

In June 2006, the applicants filed an application for investigation with the Ministry of the Environment (MOE) alleging contraventions of the *Environmental Protection Act* (*EPA*). The applicants were concerned that an auto body shop in close proximity to their residence in Windsor, Ontario was illegally discharging airborne chemicals and causing excessive noise. The applicants were concerned about potential health impacts, as well as claiming that they suffered the loss of enjoyment of their property.

The applicants included a wide array of evidence supporting their allegations. Photos, maps, tape recordings of the noise emissions, and a daily log relating to the activities at the site in question were provided to MOE. The applicants also provided a detailed accounting of what was likely causing the noise emissions (e.g., sanders, impact guns, cutting saws, grinders, etc.) and the odour emissions (e.g., toluene, xylene, ketone, glycol ethers, etc.) from the auto body shop.

The applicants stated that the auto body shop had been in operation for approximately twenty years, but that it had undergone a change in ownership and the volume of business had dramatically increased in the last two years. According to MOE, the auto body shop operated a garage with six bays and employed between six and twenty people, depending on the timing and volume of work.

**Ministry Response**

In October 2006, MOE denied this *EBR* application as "it has already investigated the allegations of environmental impact from the paint spray booth operation and has taken abatement action to the correct the problem." Despite officially denying this *EBR* application, MOE had already undertaken a series of actions that effectively constitute it having undertaken this investigation.

During the first week of May 2006, prior to the filing of this *EBR* application, the applicants contacted the Senior Environmental Officer at MOE's Windsor Area Office. The Environmental Officer visited the auto body shop and advised the applicants that the facility did not have a Certificate of Approval (C of A) for air emissions. According to MOE, since the air emission equipment was reported to have been installed between 1972 and 1988, operating without an approval was not considered to be a contravention of the *EPA*. Facilities and equipment installed prior to 1988, which have not been changed or modified, do not automatically require a C of A.

The applicants contacted the Environmental Officer several more times during May 2006, repeatedly expressing concern about air quality. On May 25, 2006, MOE again visited the auto body shop. On this visit, the Environmental Officer "detected paint fume odours which, based upon evidence at the site, appeared to have originated from" the auto body shop. On June 29, 2006, MOE issued a Provincial Officer's Order to the company operating the paint spray booth and the landlord of the property to address "adverse effects off-site from either paint fumes or noise."

This Provincial Officer's Order required the facility and the landlord to retain the services of a qualified consultant to prepare a report on the odour and noise emissions from the auto body shop. MOE stipulated that the report must include recommendations on control measures "to prevent off-site adverse impacts from noise and odour," as well as a description of the measures that will be taken to reduce emissions. The Provincial Officer's Order also required that the auto body shop apply for a C of A for the paint spray booth and for any other emissions as a result of the operation. The consultant's report was required to be submitted to MOE by August 8, 2006, and the auto body shop was required to apply for a C of A by September 11, 2006. In reply to an earlier letter, the Minister of the Environment wrote to the applicants on September 1, 2006, personally reiterating these details to the applicants. These compliance dates were not adhered to, according to MOE.

On September 22, 2006, the applicants wrote a letter to the Area Supervisor at MOE's Windsor Area Office. The applicants were concerned that the consultant's report had not been submitted to MOE nor had the C of A been applied for as required by the Provincial Officer's Order. The applicants also expressed dissatisfaction with how the local Environmental Officer had addressed their concerns, including how the Provincial Officer's Order would be enforced by MOE. Subsequently, the applicants reported to the ECO that the business continued to operate and that vehicles continued to be painted on site. In a separate letter, the applicants wrote to MOE stating that they wished to be notified if the auto body shop applied for a C of A.

On October 23, 2006, MOE issued a second Provincial Officer's Order. This order required the owners of the property to register on the property's title that the paint spray booth was located on the site and that it requires a C of A if it is to be operated. According to MOE, this action was taken as the owners had expressed an interest in selling the property. The owners were required to make the necessary changes to the property's title by November 27, 2006.

In mid-November 2006, MOE reported to the ECO that the auto body shop had not submitted the consultant's report on noise and odour emissions as required by the first Provincial Officer's Order. Instead, according to MOE, the facility chose to not operate the paint spray booth and, therefore, it would not be applying for a C of A. As the noise assessment was not completed, MOE reported that it had referred the issue to its Investigations and Enforcement Branch for investigation. MOE also told the applicants that any concerns about noise should now be addressed by their municipality. On November 20, 2006, the applicants again wrote directly to the Minister of the Environment requesting her assistance that the Provincial Officer's Orders be enforced by MOE.

On November 28, 2006, MOE allegedly informed the applicants that the auto body shop was now going to be applying for a C of A for its operations. The applicants expressed frustration to the ECO that MOE might grant a C of A despite the fact that the auto body shop was under investigation by the ministry for contravening the first Provincial Officer's Order. In December 2007, the applicants filed a second application for investigation under the *EBR* (I2006007) seeking, in part, the enforcement of the Provincial Officer's Orders.

In March 2007, a numbered company – not named in either the original *EBR* application or in MOE's Provincial Officer's Orders – applied for a C of A to operate a paintspray booth at the site in question. The proposal notice on the Environmental Registry provided few details, other than stating that an application had been submitted "to operate one (1) automotive paint spray booth, equipped with dry-type exhaust filters for overspray control, for the application of solvent-based refinish coatings to repair auto body components and complete vehicles. The spray booth discharges solvent vapours to the atmosphere through one (1) roof-mounted exhaust stack."

**ECO Comment**

The ECO believes that it was unreasonable for MOE to initially deny the *EBR* application on the basis that the applicants had 'unofficially' shared their concerns with the ministry just a few weeks prior to formally filing their application for investigation. As a result of these concerns, MOE proceeded to take a series of actions based on the allegations of the applicants. MOE issued two separate Provincial Officer's Orders

requiring a consultant's report on noise and odour emissions, that the facility apply for a C of A, and that the requirement for a C of A for the paint spray booth be registered on the property's title. Further, but for the dogged perseverance of the applicants, the ECO believes that many of the actions taken by MOE would not have occurred.

The ECO has concerns with how MOE handled this investigation and dealt with the applicants. The applicants were frustrated that the ministry changed its position several times regarding to if and when the auto body shop required a C of A. MOE also changed its position with regard to noise emissions, alternating between it being an issue under the *Environmental Protection Act* or an issue to be dealt with under local municipal bylaws.

The applicants became further frustrated in attempting to receive an answer from MOE as to how it would enforce its own Provincial Officer's Orders. As a result, the applicants subsequently filed a second application for investigation under the *EBR* relating, in part, to the enforcement of MOE's Provincial Officer's Orders. In April 2007, MOE denied this second *EBR* application. As of May 2007, MOE had not yet made a decision on issuing a certificate of approval for the paintspray booth at the auto body shop.

The ECO believes that MOE should take a more proactive approach in responding to concerns raised by members of the public. This *EBR* application illustrates how individual residents can make a positive contribution to environmental protection. However, it is incumbent upon MOE to support such efforts and to respond to the concerns of residents in a timely, clear, and rationale manner.

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**Review of Application I2006002:**

**Alleged *EPA* Contravention by City of Niagara Falls**
**(Investigation Denied by MOE)**

**Geographic Area:** Niagara Region, City of Niagara Falls

**Background/Summary of Issues**

The applicants filed an application for investigation July 13, 2006, stating that a property located within the western section of the City of Niagara Falls, and owned by the City, has historically been used for the dumping of hazardous materials. The property is approximately 100 acres in size and lies north of Lundy's Lane and west of Garner Road, abutting Canadian National Railway tracks along its southern limit. The applicants allege that in selling and providing subsequent planning approvals for land which had received wastes, the City is in violation of section 14(1) of the *Environmental Protection Act (EPA)*. Section 14(1) of the *EPA* prohibits any person from discharging, or causing or permitting the discharge of a contaminant into the natural environment, where it may cause adverse effect.

The applicants provided two main pieces of evidence to support the claim that wastes were historically deposited on the site. First, they stated that a neighbour (since deceased) told one of the applicants that they saw an employee of a large chemical company constructing a road through the forested part of the site, at some unspecified time in the 1970s, presumably during the period that preliminary site work was occurring on the site. Second, the applicants provided a video and audio record of a City of Niagara Falls council meeting (February 4, 2002) during which Mayor Wayne Caldwell referred to site aspects, including use of the term "hazardous waste land". This remark was made during a portion of council meeting to authorize the sale of the site, and the mayor was referring to elements of the property appraisal.

The property boundaries encompass much of the regional high point of bedrock, and in addition to being a subsurface mineral resource, this physiography significantly influences groundwater storage and the

recharge of base streamflow to Beaverdams Creek, which lies just to the northeast. There is a significant stand of mature forest on the property, and a small creek, which is a tributary of Beaverdams Creek. The applicants note that Beaverdams Creek and its tributaries in this area provide important spawning habitat for northern pike.

The Niagara Falls Chamber of Commerce Business and Industrial Growth Committee originally purchased an option to buy the property in 1972, and following several years of planning and concept development for the property as a large distribution centre with road and rail access, it secured a draft plan of subdivision approval from the Regional Municipality of Niagara (the "Region") and selected a developer. Only some very superficial site preparation appears to have taken place in 1976, and during that year it appears that the project came to a halt with the developer failing to raise adequate financing.

The property was acquired by the City in 1980 and was held until 1982, under the original concept of a regional transportation centre. In 2002, the property was sold to a developer who has since been pursuing approval for a housing development known as the Fernwood subdivision. In 2004, the City prepared amendments to the Official Plan and Zoning By-law and developed conditions of draft approval to re-designate the property from "Industrial" to "Residential and Environmental Protection Area". The Regional Municipality of Niagara appealed the rezoning to the Ontario Municipal Board (OMB) because of unresolved issues regarding the preservation of the existing woodlot on the property. OMB hearings took place in November 2006, and one of the *EBR* applicants obtained party status at the hearings. The OMB decision in December 2006 indicated that the parties had arrived at a settlement of outstanding issues, including transfer of woodlot areas to the City of Niagara Falls for future protection.

**Ministry Response**

The ministry responded to the applicants in November 2006, stating that following a preliminary investigation, they had determined that further investigation was not warranted. The response letter stated that section 14 of the *EPA* does not apply in this case, as the applicants supplied no evidence to support the allegation that the City's actions resulted in a discharge of a contaminant into the natural environment. The ministry apparently gave no weight to the applicants' information concerning the reported account of the since-deceased neighbour, apparently discounting it because of the time lapse and the inability of anyone to verify the information.

Regarding the statement by the Mayor of the City of Niagara Falls in the February 2002, council meeting that the lands were “hazardous waste lands”, MOE took the position that: 1) there is no accepted definition of the term, "hazardous waste lands", and made reference to the terms "hazardous lands" and "hazardous sites" as defined in the Provincial Policy Statement, 2005 (PPS), and 2) a copy of the City's property appraisal documentation that contained the descriptions referred to by the mayor, could be obtained, but that this action was not being taken because the property was examined by MOE staff directly.

MOE also followed up with discussions with planning staff from the Region and "confirmed that contamination of the property through deposition of waste was not raised as an issue by either the City or the Region."

As part of its preliminary investigation, MOE also stated that the ministry performed due diligence by carrying out a site visit of the property. Field staff visited the site on July 25, 2006, and reported that there were no visible signs of recent human activity or soil disturbance at the site, other than several piles of wood chips from recent tree cutting by the present owner.

**ECO Comment**

In most cases, civil law covers real property transactions involving contaminated sites. Under O. Reg. 153/04 the requirements for carrying out Environmental Site Assessments (ESAs) are stipulated. In the case of the subject lands of this application, the only land use on record was agricultural. Had the lands

been used for industrial or commercial purposes, a switch to residential land use would require that an ESA be carried out under this regulation. As apparently neither party carried out a Phase 1 (preliminary) environmental site assessment prior to the property transfer, a grey area exists: given that the future property use will be residential, the consequences of failing to assess the site, if it was in fact historically used as an illegal hazardous waste dump, would be potentially significant.

The ECO believes that MOE's denial of an investigation was a reasonable decision. There were no reasonable grounds provided by the applicants to indicate that a contravention of applicable legislation occurred. MOE's decision was provided approximately three weeks late, and applicants were not advised that there would be a delay.

MOE did not attempt to track down the source of the mayor's comment on "hazardous waste land". In its review of the February 4, 2002, council meeting video, the ECO determined that the mayor clearly used this term to describe the property. MOE's response is weak on this point. Although the subject of hazardous waste on the site has never been raised subsequently by the Region or the City of Niagara Falls. It would have been desirable and appropriate for MOE to obtain the relevant property appraisal documents to resolve this issue.

While it is commendable that MOE chose to perform due diligence by conducting a site visit in July 2006, MOE's report lacked specifics and details, and the description of the property in MOE's report seems inconsistent with what is visible on readily available satellite imagery examined by the ECO. There appear to be several areas of historic road building and lot grading, and these are not mentioned in the MOE staff report. MOE could have contacted the applicant who lives near the property for further information; the collection of such information is normal and generally useful when carrying out even a cursory environmental site assessment.

In reviewing the handling of this file, ECO has determined that further site investigation was carried out by MOE in May 2007. Through subsequent contact with MOE, it was determined that the ministry was contacted by the applicants following denial of the original application. New information led the ministry to carry out a further site visit and sampling. MOE informed the ECO and the applicants that soil samples met all brownfield regulation residential land use criteria.

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**Review of Application I2006003**

**Alleged *EPA* and *OWRA* Contraventions by the City of Kawartha Lakes**
**(Investigation Denied by MOE)**

**Geographic Area:** County of Victoria, City of Kawartha Lakes, Town of Lindsay, Scugog River

**Background/Summary of Issues**

In July 2006, the ECO received an application for investigation alleging that the City of Kawartha Lakes (the City) has permitted or caused through lack of diligence:

- the discharge of approximately 75 per cent of the leachate generated from the closed North Lindsay Landfill site (LLFS) into the natural environment causing or potentially causing adverse effects to the health and well being of users of the waterways; and
- the discharge of toxic material into the Scugog River, the groundwater and a provincially significant wetland.

The applicants alleged that the City has contravened section 14(1) of the *Environmental Protection Act* (*EPA*), which states "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," and section 30(1) of the *Ontario Water Resources Act* (*OWRA*), which states "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."

According to the applicants, these contraventions have been ongoing since 1992 and have resulted in significant harm to public resources, including the water quality in the Scugog River, the riverbed, aquatic organisms, fish and wildlife in the river and Sturgeon Lake, and degradation or contamination of the ecological functions of the river and lake. The applicants also alleged that the City failed to reduce the volume of toxic leachate and ignored the recommendation of Golder Associates in 2003 that a more efficient leachate collection system should be constructed. The applicants attached copies of several water quality and hydrogeology studies, which are described below, to support these allegations.

The applicants relied heavily on information obtained from the Hydrogeologic Investigation and Surface Water Impact Assessment Report (the Report) prepared for the County of Victoria in 2000. The Report notes that the LLFS, which is located within the Town of Lindsay, includes a wetland along its southeast boundary and borders the Scugog River that flows northward, past a nearby provincially significant wetland and into the lower end of Sturgeon Lake. The provincially significant wetland and probably the wetland within the LLFS is part of the Sturgeon Lake #27 wetland. The Report notes that there are no water well users down gradient of the site.

According to the Report, approximately 200,000 tonnes of residential, commercial, construction and demolition, and solid non-hazardous waste from the Town of Lindsay (which is now part of the City) were deposited at the LLFS between 1960 and 1978 under the authority of a Certificate of Approval. Empty and partially full containers of pesticides were buried at the site during the 1970s under the direction of the Ministry of the Environment (MOE). Trees and grass now cover the site and a walking trail was built through the wetland section of the site.

The Report also explains that a collection system was installed in 1980 to capture leachate from approximately 70 per cent of the fill area and that the volume and quality of the leachate have been monitored since 1980. The leachate is not captured from the remaining 30 per cent of the fill area. As part of the 2000 study, hydrogeologists estimated that the leachate collection system was capturing approximately 25 to 40 per cent of the leachate generated annually by the 70 per cent of the LLFS and that the overall collection efficiency was approximately 20 to 30 per cent. Based on hydrogeological modeling exercises done in 1995, leachate from the LLFS could travel downwards to the bedrock aquifer in six months to 25 years, and then across to the river in less than 10 years. Based on groundwater chemical sampling done in the late 1990s, the Report's authors concluded that the leachate has reached the bedrock aquifer, where it is having a negative impact, and has probably reached the Scugog River.

The Report included findings from a number of environmental studies that were conducted on the LLFS prior to 2000 on behalf of the Town of Lindsay. In 1993 and 1994, Hydroterra Limited concluded that the Scugog River had not been significantly impacted by a reddish-brown seepage found in the site's wetland in 1992 and that remediation beyond covering the seepage with sand was not required. Additional field inspections were done and, when seepages (leachate outbreaks) were found, they were covered with sand. According to the Report's authors, groundwater levels, which have been measured since 1996, indicated that the water table extends into the fill layer of the LLFS and may have caused the leachate outbreaks first observed in 1992. In 1995, Site Investigation Services Limited concluded that there was no evidence of significant methane migration from the site.

The Report also described various monitoring studies that were done for the Town of Lindsay on the site prior to 2000 including the following studies:

- Surface water quality sampling upgradient and downgradient of the LLFS has been done since 1997. Of the parameters measured, only chlorides were found to be significantly higher

downgradient of the LLFS. The Report's authors concluded that elevated chloride levels were probably the result of runoff from salted roads rather than leachate from the LLFS.

- Chemical analysis conducted in the late 1990s of leachate samples obtained from one monitor within the refuse pile found that concentrations of a number of parameters including lead, vanadium, benzene, cadmium and two organochlorine pesticides were elevated in comparison to the Provincial Water Quality Objectives (PWQO.) The Report's authors assessed the overall strength of the leachate, 22 years (at the time of the 2000 study) after closure of the site, as moderate and expected that it would remain at that level for another 20 to 50 years before beginning to drop. Since the leachate quality results mirrored those found in the collection system, the Report's authors concluded that some of the leachate from the refuse pile had reached the collection system.

In the Report, the authors observed that the overall water quality of the Scugog River both upgradient and downgradient of the LLFS was relatively poor. Phosphorus, phenols, aluminium, cobalt, copper and silver exceeded the PWQO. Pesticide testing was not done. The authors concluded that there was no evidence that the LLFS was having any significant impact on the river with the exception of chlorides, which may be from runoff from roads, and that remediation measures were not required. The authors did recommend additional monitoring of surface and groundwater quality.

The applicants attached an MOE report that included findings from studies that it had conducted in 1986, 1994, 1998 and 1999. MOE had found PCBs in the river sediments at numerous sites downstream of the Town of Lindsay and in the flood plain next to the LLFS. The report also noted that a 1995 Environment Canada study had found high levels of PCBs in the sediment at the lower end of Sturgeon Lake. Based on findings from its 1998 and 1999 sediment study of the Scugog River, MOE concluded that the LLFS was not the source of elevated PCBs in the sediments of the Scugog River.

In the summer of 2003, Golder Associates advised the City that although ongoing monitoring studies had found no measurable impact on the Scugog River, it should construct a more efficient perimeter leachate collection system at LLFS to ensure long-term protection of water quality.

The applicants attached two water quality reports that described the water quality monitoring activities of the Kawartha Lake Stewards Association on Sturgeon Lake. Phosphorus readings in 2003 and 2005 were below the level defined by the PWQO at which algal growth accelerates, except for one location. In 2005, the readings at Snug Harbour, which is near the entry point of the Scugog River, were five times higher than any other part of the lake. Additional studies are being done to identify the source of the phosphorus, e.g., agriculture, sewage treatment, etc. Water clarity readings for Sturgeon Lake were consistently below the desired four metres for recreational use.

The applicants noted that in 2003/2004, MOE issued fish consumption advisories for three species of fish in the Scugog River downstream of the LLFS and in Sturgeon Lake. In 2005/2006, the number of advisories increased to ten species of fish.

The applicants also made the following comments:

- The applicants believe that the LLFS should be mined in order to remove the containers of pesticides.
- The amount of reddish-brown seepage found in 1992 was a clear sign that an "additional leachate collection system was necessary." However, despite Golder's recommendation in 2003 to construct another leachate collection system, the money that the City put aside for 2004 to construct the new leachate collection system was spent elsewhere. As of July 2006, it still had not been built.
- The conclusion in the 1993 Hydroterra report that leachate wasn't having a measurable effect on the Scugog River is questionable. The level of pollution has increased; water quality has deteriorated and the number of fish consumption advisories has increased.
- Approximately 10 to 17 tonnes of chlorides and 2.5 million gallons of leachate may be escaping/bypassing annually from the leachate collection system and entering the Scugog River.

- Since high phosphorus levels reduce water clarity, recreational quality and property values may be affected.
- No closing certificate has been found for the LLFS and no long-range plan for managing the site has been prepared.
- The LLFS accepted waste from Viskase, a company located upstream and the source of PCBs that have been the subject of a major cleanup exercise. The PCBs at the LLFS may be identical to the PCBs found upstream and will eventually leach. The LLFS should be mined to remove the subject waste.
- The Trent Canal Authority and Parks Canada are not planning to improve the Trent Canal due to concerns that construction would disturb the bed of the Scugog River sending pollutants into the canal via Sturgeon Lake. The Town of Bobcaygeon obtains its drinking water from Sturgeon Lake.

The applicants concluded that due to the number of potential sources of pollutants along the Scugog River, it is necessary to continue to eliminate each possibility. They noted that unless the water is clean and safe, tourism, which is very important to the local economy, will continue to decline.

**Ministry Response**

MOE provided a response in September 2006, explaining that it was denying the application for investigation on the basis that an investigation had already been done and corrective actions were being taken that would address the applicants' concerns. MOE advised that it had reviewed the evidence provided by the applicants, relevant policy, legislation and regulations, current work, its files including the technical reports provided by the City, and inspection and incident reports. MOE also sought the advice of its staff, including the Eastern Region Technical Support staff. MOE explained that it has been working on this issue with the City since 2001, and was already aware of the information provided by the applicants.

Based on its review of the 2001 Annual Status Report for the LLFS prepared by the City, MOE's Technical Support staff concluded in June 2003, that the leachate collection system "may not be sufficient to ensure the proper collection of leachate migrating towards the Scugog River." The City agreed to undertake a study of the various options to improve the efficiency of the leachate collection system and subsequently decided to expand the existing leachate collection system.

MOE also explained that the City did follow the advice that its consultant provided in 2003, with MOE's concurrence, when it prepared the report "Conceptual Evaluation of Alternative Leachate Control Measures, Lindsay St. North – Closed Landfill Site" in July 2003. MOE received the report in January 2005. Based on its review of this report and the 2004 Annual Report for the LLFS, MOE concluded that "there may be an impact to the Scugog River as a result of leachate being discharged" from the LLFS. Ionized ammonia, aluminium and phosphorus levels downstream of the LLFS were found to be slightly higher than the PWQO.

MOE advised that in January 2006, the City submitted an application to extend the leachate collection system at the LLFS, and that the City had met all of the technical requirements. At the time that MOE responded to the applicants, MOE's Environmental Assessment and Approvals Branch was finishing its review of the application. MOE stated that it is doing a detailed engineering assessment of the proposed system to ensure that it will be effective, and noted that the City is monitoring surface water quality and is testing for various pesticides and PCBs. MOE plans to include ongoing ground and surface water monitoring requirements, and sampling for pesticides and PCBs in the Cs of A for the site. In addition, MOE committed to taking action if "potential adverse impacts to the Scugog River persist or increase." MOE noted that the City is planning to do the work in the fall of 2006, if it receives the required approvals.

Lastly, MOE advised the applicants that the fish consumption advisories were unrelated to the LLFS. According to its Environmental Monitoring and Reporting Branch, changes in the fish consumption advisories for the Scugog River and Sturgeon Lake between 2003 and 2005 were the result of Health Canada making their guidelines more stringent.

In a letter to the Lindsay Daily Post in October 2006, one of the applicants expressed disappointment in MOE's decision to deny the application and urged the Environmental Commissioner to review why it took from 2001, when MOE asked the City to correct the problem, until 2006, when the approvals were finally granted, to get action.

In April 2007, MOE advised the ECO that it had issued the required approvals and had included ongoing monitoring requirements "for the natural environment adjacent to the site, the site itself, the leachate produced by the system and the leachate collection system itself." MOE also advised the ECO that work began on the upgrades to the leachate collection system in the fall of 2006, and was completed on January 6, 2007. MOE noted that it visited the site during construction and will continue to visit the site regularly in the coming years to ensure that the new leachate collection system is operating as expected.

**ECO Comment**

The applicants are justifiably concerned about the potential negative effects that leachate from the LLFS may have on the groundwater, Scugog River and the provincially significant Sturgeon Lake wetland. Indisputable evidence was obtained in 2000 that a significant proportion of leachate has eluded the existing collection system and is entering the bedrock aquifer. Although the studies provided to the ECO have not definitely confirmed that significant harm has or will be done to the natural environment, it is worrying that such large volumes have been allowed to escape and that the planned upgrade to the leachate collection system will still collect leachate from only 70 per cent of the LLFS. Although MOE has indicated that it would ensure that corrective actions are taken if potential adverse impacts persist or increase, the ECO is concerned that MOE is not acting proactively and is not convinced that the planned upgrade is sufficient to prevent leachate from continuing to enter the groundwater or the Scugog River.

In its response, MOE explained that it had been working with the City since 2001 on corrective actions and refuted the applicants' contention that the City did not act on the advice of its consultant in 2003 to expand the leachate collection system. MOE's response lacked detail about the monitoring requirements that it plans to impose and failed to respond to a number of matters of particular concern, including:

- removal of the pesticide containers and PCBs from the LLFS before they begin leaching; and,
- lack of a closure C of A and long-range plan for managing the site.

MOE also failed to respond to most of the applicants' allegations about leachate causing significant harm to the groundwater, Scugog River and/or the provincially significant wetland. In response to the application R2002001 described in the Supplement to our 2004/2005 Annual Report that also raised concerns about landfill leachate, MOE committed to a one-year sampling program and had expected to complete its analysis and interpretation in 2006. The ECO urges MOE to release the findings of this sampling program.

After MOE denied their request for an investigation, the applicants urged the Environmental Commissioner to investigate the matter. Under the *EBR*, the ECO is not authorized to initiate an investigation into the actions of the City. However, the ECO can make a special report on a matter that should not be delayed until the Annual Report is released. In April 2007, the Environmental Commissioner outlined his concerns in a Special Report to the Legislative Assembly about the lack of capacity at MOE, noting that it was contributing to long approval times, inadequate inspections and a lack of monitoring. (A copy of the April 2007, Special Report is available at www.eco.on.ca.)

Over the years, the ECO has received numerous complaints and a number of applications from the public concerned that landfill leachate was not being properly managed. In 2005, the ECO reviewed MOE's oversight of aging landfill sites and urged MOE to take a more proactive approach to managing aging landfill sites that included requirements for site closure and post-closure care provisions (a request also made by the applicants) and to not rely on proponents to trigger action.

**Review of Application I2006004**

**Alleged *EPA* Contraventions by Champion Auto Recyclers**
**(Investigation Denied by MOE)**

**Geographic Area:** City of Greater Sudbury

**Background/Summary of Issues**

From the mid-1960s until 2005, Champion Auto Recyclers (Champion) operated an automobile recycling business in Sudbury. According to the owner of the business, all fluids were drained from vehicles in an enclosed garage that had a concrete floor and then reused or recycled, and all batteries were removed and recycled. In 1991, the Ministry of the Environment (MOE) issued a certificate of approval (C of A) for a waste disposal site to permit the burial of 600 cubic metres of tires and storage of up to 300 cubic metres of tires on site. Champion has reported that approximately 300 cubic metres of tires were buried on the site. Champion stopped accepting automobiles for recycling in 2005 and there are currently no vehicles remaining on the site.

In August 2006, two applicants submitted an application for investigation to MOE under the *EBR*. The applicants alleged that many complaints had been filed with MOE while Champion was still operating, but that the owner had done little to address adverse effects of the operation on the environment and surrounding neighbours. The complaints cited by the applicants included: damage to the quality of the natural environment; damage to plant and animal life; loss of enjoyment and normal use of neighbouring properties by nearby agricultural land owners; interference with the normal flow of water in Whitson Creek during spring run off due to waste and debris; leaks of Freon, a refrigerant once commonly used in car and truck air conditioners, to the atmosphere; and damage to local groundwater wells owned by land owners and farmers caused by spills of gasoline, battery acid and other spills over the years. The applicants alleged that Champion had contravened sections 14(1), 27(1), 58, 86 and 93.1 of the *Environmental Protection Act* (*EPA*).

The applicants also claimed that because Champion's owner did not restore the former site of the automobile recycling business to its natural state and agricultural potential, it has become an illegal waste disposal site. The applicants stated that although the business has been closed for many years, the yard of the former auto wrecking operation remains littered with debris such as metal, barrels of oil, and containers of gas and other fluids that may constitute hazardous waste and continue to discharge into the soil and water.

According to the applicants, an MOE official in the Sudbury regional office informed them that MOE had conducted a previous investigation in response to concerns expressed about the storage of old tires but had not found evidence of a major infraction, spills or staining of the ground. A Provincial Officer's Order (POO) was subsequently issued to Champion by MOE for "failing to contain" a hazardous material, and to cease processing antifreeze fluids. MOE further advised the applicants that the ministry had no reason to believe that the problems identified in the POO were not addressed but could not confirm this. MOE staff also told the applicants that soil and water testing was not done on the Champion property during the previous inspection because MOE did not observe a major infraction. The applicants were concerned that although MOE ordered the owner to address the disposal of hazardous waste and to stop processing antifreeze fluid, MOE had not conducted a follow-up visit to ensure compliance.

In their application for investigation, the applicants requested that MOE immediately conduct a site visit and complete an investigation, conduct soil and water testing on the property and order a restoration plan of action. The applicants specifically requested that MOE address the following concerns: the presence of an illegal waste disposal site under section 27(1) of the *EPA*; littering under section 86 of the *EPA*;

contamination causing adverse effects under section 14(1) of the *EPA*; storage and wrongful disposal of ozone depleting substances under section 58 of the *EPA*; and any other contraventions under the *EPA* and other environmental acts and regulations.

**Ministry Response**

On October 20, 2006, MOE wrote to advise the applicants that it had determined that an investigation was not required because the site had recently been inspected and the information provided in the *EBR* application had been taken into consideration by MOE staff at the time of the inspection.

In its decision summary provided to the applicants, MOE described two site inspections its staff had carried out in 2003 and 2006. The first inspection, on October 1, 2003, revealed that Champion had been: using a waste-derived fuel burner that had not been approved; and removing and processing waste antifreeze and selling it without a certificate of approval. In addition, Champion had allowed an uncertified employee to repair air conditioning systems in cars and trucks in contravention of regulations enacted under the *EPA*. During its 2003 inspection, MOE officials did not note any evidence of contaminated land or groundwater during this inspection. MOE stated that a Provincial Officer's Order was issued under *EPA* section 157.1 at that time and that Champion did comply with it. Although these violations were noted, MOE found no indication of the potential for human health impacts or environmental impairment during its inspection.

The second inspection occurred on July 14, 2006, after two local residents made further complaints to the local MOE office about the site. These complaints were made prior to the filing of the *EBR* application for investigation. In response to the complaints, an MOE official inspected the site with the site owner. The official reported that he observed approximately 200 tires on the site, as well as scrap metal and empty vehicle gas tanks, but did not note evidence of offsite impacts or visible stains on the ground. The company had approval to store the 200 tires. During the July 2006 inspection, Champion's representative noted that the recycling business had closed in 2005. He went on to claim that when the recycling business was operating, batteries were recycled, vehicle fluids were drained indoors (on concrete floors) and all fluids were recycled or reused. During its inspection in July 2006, MOE staff found that "the field where the vehicle carcasses had been stored was empty and there was no soil staining visible in the area. In addition, some of the vegetation has started to grow back, mainly grasses and saplings." While walking the length of the creek at the back of the property, the ministry inspector noted there was no soil staining observed in the area and the creek was dry.

With respect to specific contraventions alleged by the applicants, MOE found:

- no evidence of continued discharge of contaminants contrary to section 14(1) of the *EPA*;
- that a certificate of approval had been issued for the waste disposal site under section 27(1) of the *EPA*;
- that refrigerants were no longer being processed or spilled at the site contrary to section 58 of the *EPA*, and that Champion hired a certified refrigerant technician to remove refrigerants from cars after the October 2003 inspection;
- that neither site inspection had observed any litter off site in violation of section 86 of the *EPA*; and
- that neither inspection had noted evidence of prior spills or discharges likely to affect the environment under section 93(1) of the *EPA*.

MOE concluded that the prior two inspections of Champion's site had not revealed evidence indicating ongoing violations at the site, and that this application for investigation disclosed no new information it had not already considered. As a result, MOE determined that the request for investigation should be denied on the basis of section 77(3) of the *EBR*, which states that the minister is not required to duplicate an ongoing or completed investigation.

In August 2007, MOE provided additional commentary to the ECO on tire burial at the site. MOE advised that the burial of 600 cubic metres of tires on the Champion Auto Recyclers site was done in accordance

with a Certificate of Approval. MOE also advised that in processing applications for site approval, local environmental conditions are evaluated to ensure suitability of the site for the purpose of burying tires (e.g., risk of adverse off-site impact is low). Conditions requiring appropriate environmental protection measures to be taken are incorporated into the approval.

**Other Information**

It is noteworthy that MOE allowed the burial of 600 cubic metres of tires on the site in 1991 and that these tires remain buried on the site. We note that more than 33,000 scrap tires were buried in January 1991, by Max Karge, the owner of a farm in Grey County. In February 1998, Karl and Vicki Braeker, owners of a farm in Grey County, commenced legal proceedings against Karge and the Ontario government in relation to the tire burial site on Karge's land and the matter was still ongoing as of May 2007. In part, the plaintiffs are relying on the Harm to Public Resource provisions (section 84) of the *EBR* to frame their lawsuit. The Braekers allege that the tire dump on Karge's property has contaminated the subsoil, groundwater, and surface water in the surrounding vicinity, including their well water. MOE testing in 1994 revealed that the contaminants from the tires are toxic to fish and other aquatic life and an MOE groundwater specialist recommended that the tires be removed. Further testing done in 1997 found water and groundwater at the site was contaminated with chemicals in concentrations which greatly exceeded levels permitted under the Provincial Water Quality Objectives (PWQOs). In March 1998, the Minister of the Environment agreed to start removing the tires at the farm adjacent to the Braekers' land. Most of the tires and associated contaminated soils were removed in 1998 and 1999.

**ECO Comment**

The ministry's reasons for denying the application appear to be valid. Given that MOE had conducted an inspection of the site in question as recently as July 2006, it was reasonable for the ministry to rely on section 77(3) of the *EBR* in deciding not to duplicate a completed investigation. The July 2006, inspection was carried out in response to local complaints that had been made, and there appeared to be no ongoing violations or new information raised in the August 2006 application.

MOE specifically responded to each of the alleged contraventions noted in the application for investigation. MOE's reasons were written in plain language and could be easily understood, and although brief, provided sufficient detail.

The ministry did not commit to any follow-up actions, but did inform the applicants that it had notified the City of Greater Sudbury of its concerns relating to the maintenance of a fence which was a municipal responsibility. In its response, MOE also noted that the municipality would be improving the drainage in the area and excavating the ditch running through the Champion property, and MOE committed to respond appropriately if the excavation uncovered any concerns.

The ECO is troubled by the fact that MOE allowed the burial of 600 cubic metres of tires on the site in 1991 and that these tires remained buried. This appears to have been a common practice in some parts of the province in the early 1990s immediately following the Hagersville Tire Fire in February 1990. In view of the problems identified in the Braeker case, prudence would suggest that MOE identify all known sites where tire burial took place, with or without MOE approval, and consider site remediation and/or removal of the tires and contaminated soils in those cases where buried tires and related contamination may pose a long-term threat to groundwater protection.

**Review of Application I2006005**

**A Gasoline Spill Causing an Alleged Contravention of the *EPA, OWRA* and *Gasoline Handling Act* (Investigation Denied by MOE and TSSA)**

**Geographic Area:** Kitchener

**Background/Summary of Issues**

In November 2006, the ECO received an application regarding a gasoline spill in a residential area in Kitchener. The applicants submitted reports from emergency response units and engineering consultants detailing the spill and its consequences. The spill, estimated at between four to nine litres, occurred in the walkway between two homes on July 17, 2006. An initial attempt was made to dilute or flush the spill area with water, which carried the gasoline into the soil, and into the weeping tiles of the foundation. The reports noted that gasoline vapours were then drawn into the basement sump chamber at the home of the applicants, causing gasoline odours within the house, and especially the basement. The children of the applicants experienced dizziness, headaches and asthma after the event.

Responding agencies included the Kitchener Fire Department, the Region of Waterloo Environmental Enforcement, Region of Waterloo Public Health Department, insurance companies and environmental consultants. The clean-up work was extensive, including pumping large volumes of contaminated water for off-site disposal by a licensed hauler, and excavation and disposal of 26 tonnes of "hydrocarbon impacted soil" between the homes. The applicants were evacuated from their home and did not return until late October, after being advised by a consultant in occupational and environmental medicine that benzene levels in the home were at acceptable levels. The consultant also advised that the children should avoid using the basement until the remediation process was completed. Since gasoline contains between one and two per cent benzene, benzene was used as a surrogate parameter to evaluate risk.

The applicants alleged that the individual who spilled the gasoline had contravened the *Environmental Protection Act*, the *Ontario Water Resources Act* and the *Gasoline Handling Act*. Accordingly, the ECO forwarded this application to the Ministry of the Environment (MOE) and also to the Technical Standards and Safety Authority (TSSA) in relation to the *Gasoline Handling Act*.

**MOE Response**

MOE responded to the applicants in January 2007, and determined that an investigation under the *EBR* was not warranted, because the ministry was already carrying out an equivalent investigation. MOE stated that its staff would review the reports the applicants had submitted with their *EBR* application, and also committed to advising the applicants of the outcome of the investigation. The ministry noted that it does not administer the *Gasoline Handling Act.*

The ministry outlined three areas of applicable legislation:

Section 14(1) of the *Environmental Protection Act (EPA)* prohibits any person from discharging, or causing or permitting the discharge of a contaminant into the natural environment, where it may cause adverse effect.

Section 93 of the *EPA* requires the owner and the person having control of a pollutant that is spilled to do everything practicable to prevent, eliminate and ameliorate the adverse effect and to restore the natural environment. Moreover, amendments to the *EPA* contained in Bill 133 passed in June 2005 increase the liability for clean-up costs on those who cause spills (see ECO Annual Report Supplement, 2005/2006, pages 102-115).

Section 30(1) of the *Ontario Water Resources Act* prohibits any person from discharging or permitting the discharge of any material of any kind into or in any water or on any shore or bank thereof or into or in any place that may impair the quality of the water of any waters.

The ministry also explained that in this instance, the person responsible for the spill had hired a company to clean up the spill, and that there was no evidence to suggest that the owner had failed to comply with section 93 of the *EPA.*

**Response of the TSSA**

In December 2006, the TSSA turned down this request for an investigation. The TSSA cited section 77(3) of the *EBR*, and noted that it would not be duplicating an ongoing investigation by MOE. The TSSA also noted that the *Gasoline Handling Act* has been superseded by the *Technical Standards and Safety Act, 2000*, and that the pertinent legal basis for fuel handling is now found in Ontario Regulation 217/01 (Liquid Fuels).

The TSSA also clarified that O. Reg. 217/01 would not apply to this case, since the regulation only applies to "facilities", defined as "a permanent or mobile retail outlet, bulk plant, marina, cardlock/keylock, private outlet or farm where gasoline or an associated product is handled other than in portable containers."

**ECO Comment**

MOE acted reasonably in turning down this application, since the ministry had an equivalent investigation already ongoing. Section 77(3) of the *EBR* states that "nothing in this section requires a minister to duplicate an ongoing or completed investigation." The ministry also made several positive commitments: to review the reports submitted by the applicants; to determine if further cleanup is required; and to inform the applicants of the outcome of the investigation. As a further helpful gesture, the ministry also could have provided the applicants with an estimated completion date for the investigation.

TSSA acted reasonably in turning down this application, since MOE had an equivalent investigation already ongoing. Section 77(3) of the *EBR* states that "nothing in this section requires a minister to duplicate an ongoing or completed investigation." TSSA also clarified that while it administers a regulation (O. Reg. 271/01) for handling liquid fuels, the regulation is not applicable in residential situations, such as this incident in Kitchener.

Spills and contamination by hydrocarbons are reoccurring themes in applications received by the ECO. Two past examples can be found in our 2003/2004 Supplement, page 299, and also in the 2005/2006 Supplement, page 245. As this application illustrates once again, even very small spills of fuels and solvents can become clean-up nightmares, costing many thousands of dollars and causing months of upheaval and stress. Spills can happen around the home or on the job; in 2004, approximately 3,900 spills were reported to MOE, but only 27 per cent of them occurred in industrial settings. Anticipating and preventing spills is by far the best insurance policy, and is easy to do. Some tips include:

- know the materials you are working with;
- while using solvents, keep the container inside a larger spill bucket;
- have neutral absorbent materials close at hand, in case of a spill (e.g., rags or kitty litter);
- never hose down spills of oil or gasoline; and
- take hazardous wastes to a household hazardous waste depot.

**Review of Application I2006007**

**Alleged Contravention of the *Environmental Protection Act* by an Auto Body Shop in Windsor (Denied by MOE)**

**Background/Summary of Issues**

On December 8, 2006, an application for investigation was filed that alleged the contravention of section 14 of the *Environmental Protection Act* (*EPA*) by an auto body shop in Windsor, Ontario. The applicants also alleged the contravention of the Ministry of the Environment's (MOE) Guideline D-1, Land Use Compatibility and Guideline D-6, Compatibility Between Industrial Facilities and Sensitive Land Uses. The applicants further stated that the auto body shop was operating without a certificate of approval as required by section 9 of the *EPA*.

This *EBR* application is directly related to a previous application for investigation (I2006001).

**Ministry Response**

On April 5, 2007, MOE denied this application for investigation.

**ECO Comment**

The ECO will review the handling of this application in the 2007/2008 Annual Report.

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**Review of Application I2006008:**

**Alleged *EPA* Contraventions by Canadian Hydro Developers Inc. (Investigation Denied by MOE)**

**Geographic Area:** County of Dufferin, Township of Amaranth, Township of Melancthon

**Background/Summary of Issues**

In December 2006, two applicants requested an investigation of alleged contraventions of sections 9 and 14(1) of the *Environmental Protection Act* (*EPA*), and of the noise guideline, NPC-232 – Sound Level Limits for Stationary Sources in Class 3 Areas (Rural). The applicants explained that Canadian Hydro Developers Inc. (CHD), the proponent of the Melancthon Wind Project, is in contravention of section 14(1) of the *EPA* by allowing the discharge of noise from its transformer in excess of the noise limit (40 $L_{eq}$ dBA) defined in NPC-232. The applicants also alleged that CHD is operating the transformer without a certificate of approval (C of A), a violation of section 9 of the *EPA*.

*Background:*
On March 4, 2006, Phase I of the Melancthon Wind Project became operational. Capable of generating 67.5 megawatts of electricity to service approximately 20,000 homes, Phase I consisted of the installation of 45 wind turbines and a transformer. In Phase II, CHD plans to install another 88 wind turbines capable of generating 132 megawatts of electricity to service approximately 50,000 homes.

Under section 9 of the *EPA*, proponents are required to obtain a C of A (noise) for wind turbines and transformers, although some types of residential and agricultural wind turbines are exempted under section 9(3) of the *EPA* and by the Certificate of Approval Exemption regulation, O. Reg. 524/98. If the project will generate two or more megawatts, the proponent is also subject to the *Environmental*

*Assessment Act* by the Electricity Projects regulation, O. Reg. 116/01, which requires that the proponent prepare a noise assessment as part of an Environmental Screening Report.

The noise study prepared for the Melancthon Wind Project that was included in the Environmental Screening Report dated February 10, 2005, concluded that projected noise emissions from the wind turbines to be installed during Phase I would comply with the Ministry of the Environment's (MOE) noise guidelines. MOE concurred with the results.

Under section 14 of the *EPA*, no person is allowed to discharge a contaminant, which includes noise, or cause or permit the discharge of a contaminant into the natural environment that causes or is likely to cause an adverse effect. The definition of adverse effect in the *EPA* includes: harm or material discomfort to any person, an adverse effect on the health of any person, loss of enjoyment of normal use of property, and interference with the normal conduct of business.

Sound levels are often reported in decibels (dBs). While individual humans vary in their ability to detect sound, measuring devices can be configured to measure sound in a manner that reflects the average person's perception of loudness. Called A-weighting, readings are reported as dBA. A typical conversation is about 60 dBA. Average street traffic is about 85 dBA and a pneumatic hammer used in road repairs is about 100 dBA. Each increase of 10 decibels represents a doubling of loudness. Sound levels from stationary sources can also be averaged over time and reported as either the One Hour Equivalent Sound Level ($L_{eq}$) or the Logarithmic Mean Impulse Sound Level ($L_{LM}$). MOE's noise guidelines do not consider noise levels from transformers at receptors more than 1000 metres away to be significant.

*Summary of Issues:*
According to the applicants, a "loud humming noise," which exceeds the noise limit in NPC-232, has been coming from the transformer since it was put into operation. The applicants explained that visitors to their yard have asked about the noise and, on several occasions, people speaking inside the house when the doors and windows are closed have had to raise their voices in order to hold a conversation. One of the applicants, who works at home, noted that, while wearing ear protection with a noise reduction rating of 27 decibels, the transformer could still be heard and, on at least one occasion, "chased" him off his property. The applicants noted that, when the neighbours had raised concerns about the siting of the transformer in their area, CHD had assured them that the noise would be minimal.

The applicants attached copies of seven letters (including a letter from each applicant) sent to the Township in August 2006, complaining about the noise. At least one complainant lived two kilometres away. Several people complained that the noise was disturbing their sleep and preventing them from enjoying their yards. Some also noted that they have been unable to escape the noise by going inside their homes. The applicants also attached a copy of a letter to the Township dated May 3, 2006, and signed by 14 people. The letter raised concerns about the noise and urged the Township to force CHD to take immediate steps to abate the noise. In the letter, they suggested that mature evergreen trees be planted along three sides of the site and that fencing used to mitigate traffic noises be erected. According to the applicants, many of the neighbours have made reports about unacceptable noise levels to MOE's Spills Action Centre.

According to the applicants, the transformer has a nameplate noise rating of an average of 83 dBA and is connected to 45 wind turbines that are located 6.6 kilometres to the north in the Township of Melancthon. The applicants noted that half of the neighbourhood homes are located closer to the transformer than the home of the owner of the property on which the transformer is located. The applicants believe that the transformer is humming loudly since it is not fully loaded and should not have been located so close to neighbouring homes.

The applicants are also concerned that, in the case of a spill, there is no berm or wall to contain the 35,000 kilograms of cooling liquid in the transformer.

The applicants attached two pages from the Melancthon 1 Wind Plant – Transformer Noise Impact Study, which was done in August and September of 2006, i.e., after the wind farm became operational. Aercoustics Engineering Limited on behalf of CHD conducted this independent study and concluded that noise from the transformer exceeded 40 dBA, the noise limit in NPC-232. Aercoustics indicated that a four metre high partial enclosure around three sides of the transformer and a two metre high earthern berm were required to achieve predicted noise levels of 40 dBA or less at all receptor points.

In a separate application, the applicants requested a review of the noise criteria in NPC-232 and requested that the guideline be made a regulation. For additional information about this application, refer to pages 174-176 of this Supplement.

The ECO forwarded the application to MOE for review.

**Ministry Response**

MOE explained that it was denying the application for investigation on the basis that an investigation was already in progress. MOE advised the applicants that a C of A had been issued on July 15, 2005, for the Phase I wind turbines; however, the subject transformer had not been included in the application for the C of A. MOE advised the applicants that it started to receive complaints about noise soon after the transformer became operational and has also received letters about Phase II of the project. A consultant hired by CHD confirmed that noise from the transformer was exceeding the ministry's noise limit of 40 dBA specified in NPC-232.

MOE confirmed that CHD had violated section 9 of the *EPA* when it failed to apply for a C of A for the transformer. CHD, when advised of the requirement, applied for the C of A. MOE also confirmed that CHD had violated section 14 of the *EPA* when the transformer emitted noise in excess of the limit specified in NPC-232. CHD agreed to construct a noise barrier. MOE advised the applicants that it continued to receive noise complaints after construction of the barrier was completed in December 2006, and that it may require CHD to implement additional noise mitigation measures. MOE indicated that it was still reviewing the application for the C of A and would include a condition in the C of A requiring that CHD comply with NPC-232 and arrange for an acoustical audit to be conducted by an independent consultant to confirm compliance with NPC-232. If the audit determines that CHD is still not in compliance, MOE will require additional noise mitigation measures be taken.

**ECO Comment**

MOE was justified in denying this application for an investigation since it was already investigating noise complaints from the subject transformer. However, MOE failed to respond to the concern about the lack of a berm to contain potential spills from the transformer. Such spills have the potential to cause significant environmental damage. The ECO urges MOE to ensure that CHD is required to implement appropriate measures that prevent and/or reduce the risk of a spill.

The ECO believes that it is important that Cs of A require proponents to undertake post-construction and periodic noise monitoring to ensure that actual noise emissions comply with NPC-232 and ongoing maintenance is done to ensure that they remain in compliance, and to report non-compliance to MOE as soon as it is detected.

## Ministry of Natural Resources

### Review of Application I2005009

### Alleged *ARA* Contravention – Jamieson Pit, Horton Township (Investigation Denied by MNR)

**Geographic Area:** Horton Township

**Background/Summary of Issues**

The applicants alleged that the operators of the Jamieson aggregate pit in Horton Township contravened the *Aggregate Resources Act* (*ARA*) and the *Ontario Water Resources Act* (*OWRA*). The application was sent in March 2006 to both the Ministry of Natural Resources and the Ministry of the Environment. MNR was asked to investigate alleged operations in reserve areas, lack of dust control, failure to plant trees and seed berms as required by the site plan, improper location of fencing, use of cement as fill, possible contaminated soils and the potential operation of an idle asphalt plant.

The applicants have been raising concerns about this aggregate operation with the ministries since 1998, and with the ECO since 2000. MOE conducted an *EBR* investigation previously requested by the applicants (see the ECO 2004/2005 Annual Report Supplement, pages 276-282).

**Ministry Response**

MNR informed the applicants in May 2006 that it would not be conducting an investigation. The ministry said it determined that "the alleged contraventions are not contraventions, are not serious enough to warrant an investigation, or are not likely to cause harm to the environment." MNR did not specify which alleged contraventions were covered by each of the rationales, but did provide the following explanation for each of the concerns raised by the applicants:

- Dust: on internal roads within the licensed pit, MNR is satisfied that the company uses approved dust suppression methods.
- Tree planting: trees have been planted and replanted to determine a species suitable to the site.
- Fencing: the fence location in the bush on the west side conforms to the approved site plan.
- Extraction: the area mentioned by the applicants is under licence and provisions for this activity are provided for under the approved site plan.
- Berm construction material: material used in constructing a berm located along the South site adjacent to Whitton Road was approved by MNR. Inspections found no indication of contaminated material.
- Berm seeding: the naturalized vegetation is maintaining the slope and there has been no erosion as a result.
- Asphalt plant operation: the asphalt plant has not been operational for some time.
- Contaminated soil with fuel: MNR understands that MOE site inspections did not identify any fuel contamination of soil.

The applicants informed the ECO and MNR in May 2006 that they were not satisfied with MNR's decision not to investigate, because they still believed the operation was out of compliance. Later in May 2006, and again in November 2006, MNR carried out what it described to the ECO as "routine" inspections of the site, concluding that the site was in compliance. In response to further complaints by the applicants, MNR staff held a meeting with the applicants in December 2006 to discuss their concerns regarding compliance of the pit to the *ARA*. An Assistant Deputy Minister at MNR then wrote the applicants to reiterate that the ministry maintains that the pit is in compliance with the *ARA* and will take no further action in response to their complaints: "MNR now considers that this file is closed and is not prepared to

revisit your previous concerns with the operation of the facility." The applicants were also informed that any future concerns should be expressed in writing to the District Manager.

**ECO Comment**

MNR first rejected this request for an investigation under the *EBR*, and then carried out two site inspections in the following months, and also met with the applicants. It appears that MNR in effect carried out an investigation, but avoided the legislative provisions of the *EBR*. This is unfortunate, because an *EBR* investigation would have provided greater transparency to the applicants and the ECO. The ECO has commented in past Annual Reports that ministries should conduct requested reviews and investigations within the framework of the *EBR* to allow for a formal, transparent process.

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## Technical Standards and Safety Authority

### Review of Application: I2006006

### Alleged Contravention of *Gasoline Handling Act* (Investigation Denied by TSSA)

This investigation was reviewed in conjunction with I2006005 (MOE). Please see pages 250-252 of this Supplement for ECO's full review of this investigation

# SECTION 7

## *EBR* LEAVE TO APPEAL APPLICATIONS

# SECTION 7: *EBR* LEAVE TO APPEAL APPLICATIONS

**April 1, 2006 to March 31, 2007**
**Status as of August 21, 2007**

**Parties and Date of Leave Application**

**Registry #:** IA01E1063
**Applicants:** Trent Talbot River Property Owners Association (TTRPOA); Marchand Lamarre And Jodi McIntosh; and Sandra Southwell
**Proponent:** Stan McCarthy
**Ministry:** MOE
**Instrument:** Permit to Take Water (PTTW), section 34, *OWRA*
**Date Application Received by ECO:** November 8, 2002

**Description of Grounds for Leave to Appeal**

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.

**Decision on Leave Application and Decision Date**
**Date of Leave Decision:** January 8, 2003

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

This hearing was held concurrently with the related sewage works C of A hearing (see Registry # IA03E0893). 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 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. Regarding water quality impacts of the PTTW, 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 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 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, ERT issued an amended approval.

**Status/Final Outcome**

**Appeal to the Minister**

In early 2006, Marchand Lamarre and Jodi McIntosh as well as the Trent Talbot River Property Owners Association appealed the issuance of the PTTW to the Minister of the Environment. In August 2007, the Minister allowed the appeal of Lamarre/McIntosh and revoked the PTTW. The minister also made comments about the fractured rock setting and indicated that if she had not allowed the appeal of Lamarre/McIntosh she "would have added a condition to further strengthen the PTTW's ability to deal with any unanticipated consequences of the quarry, and to further acknowledge the difficulties inherent with a fractured rock setting. This condition would have required that the site's hydrogeological model be recalibrated in specified circumstances, and that additional testing be considered if the model could not be recalibrated."

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**Parties and Date of Leave Application**

**Registry #:** IA04E0887
**Applicant:** Anne Vallentin on behalf of Haldimand Against Landfill Transfers (HALT)
**Additional Applicant:** Six Nations of the Grand River
**Proponent:** Haldimand-Norfolk Sanitary Landfill Inc.
**Ministry:** MOE
**Instrument:** C of A, section 27, *OWRA*
**Date Application received by ECO:** March 1, 2005

**Description of Grounds for Leave to Appeal**

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.

**Decision on Leave Application and Decision Date**
**Date of Leave Decision:** June 21, 2005

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 section 41 leave test in the *EBR*; and the Director's decision could result in significant harm to the environment.

**Status/Final Outcome**

The appeal by Six Nations was withdrawn shortly after the Leave to Appeal Decision. At a preliminary hearing, the ERT granted part of a motion filed by the appellant requesting that the hearing not proceed until the Divisional Court issued its decision on the judicial review of the Director's decisions. The court dismissed the application and the parties reached a settlement agreement. In light of these factors, the appellant withdrew her appeal at a Settlement Hearing. The ERT accepted the settlement agreement and dismissed the appeal.

The settlement agreement set out the necessary remedial work in terms of road improvements that is necessary to allow for the undertaking to take place. It also set out the nature and location of the improvements and required that the proponent will provide a letter of credit and a liability insurance policy. The provisional C of A A110302 was amended with respect to documentation, waste fill rate and traffic control.

The other Parties also expressed their satisfaction with the proposed settlement.

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**Parties and Date of Leave Application**

**Registry #:** IA04E0715
**Applicant:** Corporation of the County of Grey
**Additional Applicants:** Town of the Blue Mountains, Corporation of the Municipality of Grey Highlands
**Proponent:** Gibraltar Springs
**Ministry:** MOE
**Instrument:** Permit to Take Water (PTTW), section 34, *OWRA*
**Date Application received by ECO:** October 4, 2005

**Description of Grounds for Leave to Appeal**

The applicant sought leave to appeal the decision of the Director to renew and amend a Permit to Take Water (PTTW) under section 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 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 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.

**Decision on Leave Application and Decision Date**
**Date of Leave decision:** December 30, 2005

The Environmental Review Tribunal granted 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.

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. 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 section 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 section 41.

**Status/Final Outcome**
**Date of Final Decision:** October 4, 2006

On October 3, 2006, the Appellants withdrew their appeal. The Preliminary Hearing and the Hearing was cancelled. The ERT determined it no longer had jurisdiction in this matter and closed its file.

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**Parties and Date of Leave Application**

**Registry #:** IA05E0080
**Applicants:** Wayne & Joanne Simpson
**Additional Applicant:** Brenda Johnson - Environment Hamilton
**Proponent:** BIOX Canada Limited
**Ministry:** MOE
**Instrument:** C of A, section 9, *EPA*
**Date Application received by ECO:** October 7, 2005

**Description of Grounds for Leave to Appeal**

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 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.

**Decision on Leave Application and Decision Date**
**Date of leave decision:** November 9, 2005

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

The ERT refused leave to appeal on the other grounds raised by the applicants.

**Status/Final Outcome**

In late November 2005, the parties agreed to settle. As part of the terms of settlement, BIOX agreed to the following:

1) The company agreed to stack-testing by a firm chosen by Environment Hamilton and local residents.

2) BIOX said it would not burn any bio-diesel fuel on site to reduce the potential for releasing dangerous substances in the airshed.

3) BIOX will provide a hotline for residents to report any problems to a company employee who will address their concerns.

In July 2007, MOE asked BIOX to submit an action plan to eliminate odours from the plant after receiving complaints from local residents.

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**Parties and Date of Leave Application**

**Registry #:** IA03E1278
**Applicant:** Michael Cassidy
**Proponent:** OMYA (Canada) Inc.
**Ministry:** MOE
**Instrument:** C of A, section 27, *EPA*
**Date Application received by ECO:** April 12, 2006

**Description of Grounds for Leave to Appeal**

The applicant is seeking leave to appeal the decision of the Director to grant C of A (sewage works) No. 29565R9UHF to OMYA (Canada) Inc. for the discharge of water from the Tatlock Quarry.

The applicant is seeking leave to appeal the decision on the following grounds:

1) There are discrepancies between the permit and the supporting material filed by OMYA with respect to the proposed maximum discharge rate.

2) While the proponent must report problems and overall operation of the sewage works to the MOE District Manager, there are no provisions to allow for public scrutiny of these reports.

3) The approval does not appear to specify the allowable levels of various elements and contaminants that are analyzed using samples from the effluent nor is it clear whether and how these readings are to be reported to MOE, except for the requirement that OMYA maintain its monitoring records for a minimum of three years from the date of their creation. The frequency of testing and test monitoring or reporting is also unclear.

4) Requirements for visual inspections of open ditches/ piping culvert and the berms and baffles in the treatment pond should be increased from annual to quarterly inspections and at least monthly inspections outside of the winter months.

5) It appears that a natural watercourse exists between the quarry discharge point and Murray Lake, creating the potential need to require buffers in order to protect this watercourse from eroding banks and sediment run-off from surrounding lands.

6) No reference is made in the C of A or in the attachment to the addendum filed with the C of A, to any requirements of the Department of Fisheries and Oceans (DFO), or whether any application was in fact made to DFO because of the possible impact on aquatic life in the watercourse that connects the quarry's treatment ponds to Murray Lake.

**Decision on Leave Application and Decision Date**
**Date of Leave Decision:** June 9, 2006

The applicant, Michael Cassidy, withdrew his appeal. The ERT accepted the withdrawal of the appeal in a decision.

The applicant, OMYA and the MOE had reached an agreement through private all-party discussions. The parties advised the ERT that, with respect to the applicant's second ground for appeal (i.e., no public access to the annual reports on the operation of OMYA's industrial sewage works), OMYA agreed to make its Annual Report available to the applicant on request.

The ERT refused the motion by OMYA to dismiss the Leave to Appeal proceeding on the grounds that the applicant had failed to serve OMYA with a copy of the leave application as per the requirements of Environmental Review Tribunal Rule No. 40. The ERT ordered the applicant to serve and file additional materials in support of his application and allowed additional time for OMYA and the MOE Director to serve and file a response.

**Status/Final Outcome**

Application was dismissed.

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**Parties and Date of Leave Application**

**Registry #:** IA04E1179
**Applicant:** Jessie Davidson
**Proponent:** Aquafarms 93/ Ice River Springs Water Company Ltd.
**Ministry:** MOE
**Instrument:** Permit to Take Water (PTTW), section 34, *OWRA*
**Date Application received by ECO:** June 13, 2006

**Description of Grounds for Leave to Appeal**

The applicant is appealing the Director's decision to renew permit to take water (PTTW) No. 8480-69HSU2 to Aquafarms 93/ Ice River Springs Water Company Limited for its bottled water facility.

The applicant is seeking leave to appeal on the following grounds:

1) The volumes permitted in the PTTW have not been demonstrated to be sustainable in light of previous groundwater uses in the sub-watershed and the cumulative impacts of commercial water bottling wells in the area.

2) There is now preliminary, but concrete data that establishes the scale of the environmental impacts of this water taking. MOE has overlooked this data and issued a 10-year permit even though a study required by an ERT Settlement Agreement reached in 2004 has not been completed by consultants for the proponent (see *EBR* Registry No. IA02E1174). The applicant believes that MOE, as a signatory to the Settlement Agreement, has an obligation to consider the final study findings prior to issuing the new PTTW.

3) The PTTW was posted to the Environmental Registry without an expiry date. Upon questioning, MOE provided a revised permit with a May 15, 2016 expiry date. Given that MOE has only awarded two-year permits to Aquafarms 93/ Ice River Springs since their conversion from non-consumptive fish farming to consumptive water bottling uses, and given the growing controversy over inadequate data supporting the permit, it is irresponsible at this time to issue an open permit, as it initially appeared, or a 10-year permit as later confirmed by MOE.

**Decision on Leave Application and Decision Date**
**Date of Leave Decision:** September 1, 2006

On the following three grounds, the Environmental Review Tribunal (ERT) concluded that the applicant satisfied the test for the granting of Leave to Appeal:

- the uncertainty of monitoring data upon which MOE relied in granting the PTTW, including whether water taking has resulted in a reduction in water flow from a regional bedrock spring;
- the issuance of a 10-year instead of a two-year PTTW; and
- the issuance of the PTTW prior to the release of the final hydrogeological report.

The Tribunal added that Leave to Appeal is granted to appeal the decision in whole to issue the PTTW, and is not limited to the three grounds on which the application has been granted.

**Status/Final Outcome**
**Date of Final Decision:** June 12, 2007

Prior to the hearing of this appeal, the appellant, the proponent, and the MOE Director participated in a three-day mediation, from which the parties agreed to amend certain provisions of the Permit to Take Water (PTTW) and the appellant agreed to withdraw her appeal.

The settlement agreement provided that the Director would amend the PTTW to:

- reduce the term for the PTTW from 10 to five years;
- ensure that the “test wells” referred to in the PTTW were more accurately described as monitoring wells;
- provide for the installation of additional monitoring wells and stream gauges; and
- require Aquafarms to submit an interim semi-annual draft data report to the Director (in addition to the annual monitoring report requirement).

The ERT found that the settlement agreement was consistent with the purpose and provisions of the relevant legislation and that it is in the public interest. Accordingly, the ERT accepted the Minutes of Settlement dated May 17, 2007. The PTTW shall be amended in accordance with paragraph 2 of the Minutes of Settlement. The ERT accepted the appellant’s withdrawal of the appeal filed on September 15, 2006, and dismissed the appeal.

**Parties and Date of Leave Application**

**Registry #:** IA06E1038
**Applicant:** Ken McRae
**Proponent:** Findlay Creek Properties Ltd. and 1374537 Ontario Ltd.
**Ministry:** MOE
**Instrument:** Permit to Take Water (PTTW), section 34, *OWRA*
**Date Application received by ECO:** October 16, 2006

**Description of Grounds for Leave to Appeal**

The applicant sought leave to appeal the decision of the Director to issue Permit to Take Water #0428-6TJPKH to Findlay Creek Properties Ltd. and 1374537 Ontario Ltd. for construction of a trunk sewer and a storm water management pond for its Findlay Creek Village subdivision.

The applicant sought leave to appeal the decision on the following grounds:

1) The water taking related to the Findlay Creek Village subdivision development may cause significant harm to the Provincially Significant Leitrim Wetland and to the Findlay Creek trout stream.

2) The monitoring conditions in the PTTW are grossly deficient. In particular, Condition 4.1 of the PTTW requires that the Permit Holder keep a record of all water takings. This condition fails to require that a detailed description of the water taking locations be included in the records.

3) Condition 4.3 requires the Permit Holder to review the results of the "Leitrim Wetland Monitoring Program" biweekly during construction and to implement appropriate contingency measures as warranted by the monitoring data. The Leitrim Wetland Monitoring Program, found in the "Update to Environmental Management Plan Leitrim External Storm System" (EMP), is dated September 22, 2006, the same day that the PTTW was issued. The Director could not have properly evaluated this document before issuing the PTTW.

4) That EMP has a number of deficiencies that should have been addressed before the PTTW was issued:

    - The EMP fails to consider the possibility of water levels within the Provincially Significant Leitrim Wetland becoming too high. This deficiency has resulted in significant flooding in the wetland, which in turn, has resulted in the destruction of many plants.
    - The EMP does not require any flow or water level monitoring in Findlay Creek. The PTTW facilitates the construction of storm water management ponds that may result in lower water levels in a part of the creek where trout may be negatively impacted.
    - The EMP does not include conditions addressing sedimentation and erosion control issues resulting from the water taking.

**Decision on Leave Application and Decision Date**
**Date of Leave Decision:** November 22, 2006

The applicant withdrew his application for leave to appeal the Director's decision. The Environmental Review Tribunal (ERT) accepted the withdrawal in a decision dated November 22, 2006.

The applicant, Findlay Creek and the Director reached a settlement agreement through private discussions that took place before the ERT adjudicated the leave to appeal application. The parties agreed to the inclusion of additional terms to the Permit to Take Water, including:

1) The condition requiring monitoring of the water takings was amended to require the Permit Holder to keep a detailed record of the time and source of all water takings.

2) To prevent flooding of the nearby Leitrim Wetland, a condition was added to prohibit certain discharges of water when water levels are too high.

3) Conditions were added to require the Permit Holder to protect the receiving waters from erosion and sedimentation problems and to require the Permit Holder to undertake daily inspections of the discharge locations to ensure that this requirement is being met.

**Status/Final Outcome**

Settlement Agreement was accepted. Application for Leave to Appeal was dismissed.

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**Parties and Date of Leave Application**

**Registry #:** IA06E0324
**Applicant:** Ken Robins
**Proponent:** Jancal Power Limited
**Ministry:** MOE
**Instrument:** Permit to Take Water (PTTW), section 34, *OWRA*
**Date Application received by ECO:** October 30, 2006

**Description of Grounds for Leave to Appeal**

The applicant is appealing the Director's decision to grant Permit to Take Water (PTTW) No. 8350-6PNJLX to Jancal Power Limited for its hydroelectric dam on the Rocky Saugeen River.

The applicant is seeking leave to appeal on the following grounds:

1) The Director indicated to the applicant that the Rocky Saugeen River below the Jancal dam was "at risk" and that he would issue a PTTW for one or two years only in order to facilitate further study to clearly identify the effect of the dam on the river. No scientific data or any other data has been collected that would suggest that the river below the dam is no longer at risk. Therefore, it was unreasonable for the Director to issue a PTTW that has a duration of 10 years.

2) The Director was notified, on several occasions, that a detailed water temperature study was being undertaken in the lower Rocky Saugeen River in order to determine the impact of both the operation of the Jancal dam and the Water Management Plan (WMP) for that dam issued by the Ministry of Natural Resources (MNR). The final report was delivered to MOE one week after this PTTW was granted. It is unreasonable that the Director would issue the PTTW without waiting for the results of this detailed water temperature study.

3) The Director did not have any scientific data that showed that the MNR's WMP would work to ensure that the river's coldwater nature and, therefore, the coldwater fishery, would be maintained below the Jancal dam. However, he was provided with data during the summer of 2006 that indicated that the WMP "was not working." The detailed temperature study done in the summer of 2006 indicated that the operation of the Jancal dam in accordance with the MNR"s WMP was keeping the water temperatures below the dam too warm to sustain a healthy population of brook trout. Catch rates recorded below the dam have indicated a serious decline of adult brook trout in the past 10 years. It was therefore unreasonable for the Director to take his position in issuing the PTTW.

**Decision on Leave Application and Decision Date**
**Date of Leave Decision:** March 1, 2007

The Environmental Review Tribunal granted the applicants leave to appeal the Director's decision on all of the grounds asserted by the applicants in their applications.

The Tribunal found that there appears to be good reason to believe that no reasonable person could have made the decision to the issue the PTTW because:

- The PTTW allows pulsing of the river, which creates potential risk of harm to the river's aquatic wildlife and habitat;
- The PTTW does not provide minimum temperature specifications for the discharged water, which has the potential to harm downstream river habitat;
- The decision fails to impose requirements on the PTTW holder to address concerns raised by MNR and others who have consulted on this water taking;
- The decision was based on the assumption that MNR had sole jurisdictional control over the dam, and the Director did not fully discharge his responsibility to independently consider the matters required under O. Reg. 387/04;
- The Director failed to consider the Water Temperature Study, which was available and relevant;
- The decision did not adopt a precautionary approach, nor exercise caution in favour of the environment; and
- The decision to grant the PTTW for 10 years appears unreasonable given the unresolved concerns regarding the potential risk to river habitat and the important information gaps in the Water Management Plan.

**Status/Final Outcome**

Applications for Leave to Appeal were granted. Teleconference scheduled for October 2, 2007.

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**Parties and Date of Leave Application**

**Registry #:** IA06E0346
**Applicant:** Sandra Bogan
**Additional Applicants:** Scott K. Plante, Rocco Matricardi, Yury Churkin, Louis & Erin Laforest, Gilles Chasles, Martin & Annick Guibert, Martin & Kristy Krumins, Harold Moore, Carla Miner, and Vincent Lavoie (on behalf of the Richardson Corridor Community Association, the Stittsville Village Association, NoDump.ca, and Ottawa Landfill Watch)
**Proponent:** Waste Management of Canada Corp.
**Ministry:** MOE
**Instrument:** C of A, section 9, *EPA*
**Date Application received by ECO:** December 7, 2006

**Description of Grounds for Leave to Appeal**

The applicant is seeking leave to appeal the decision of the Director to approve an amendment to Certificate of Approval (Air) No. 8-4076-99-006 in order to add a second landfill gas flare, a temporary flare, and an expanded well field to collect landfill gas at the proponent's Carp Road landfill.

The applicant is seeking leave to appeal on the following grounds:

1) The proponent has neither managed nor resolved the increasing and serious odour problems at the Carp Road landfill; the odour is worse than ever before.

2) Approval to operate the second flare should only be given on a provisional basis in order to allow for the determination, to the satisfaction of the community, that the flare is effective at controlling odour.

3) The Certificate of Approval should include a defined timeline for effective resolution of the odour problems at the landfill, to the satisfaction of the community.

4) The Certificate of Approval also includes air emissions related to the bioremediation of petroleum contaminated soils and the operation of a landfill gas-to-energy facility, but these should be considered independent of the landfill gas flares.

**Decision on Leave Application and Decision Date**
**Date of Leave Decision:** February 23, 2007

The ERT granted leave to appeal to all of the applicants except Yury Churkin and Martin and Kristy Krumins as these applicants did not substantiate the grounds for their leave to appeal. Leave was granted on two grounds, but not all applicants granted leave rights were granted the right to appeal on both grounds.

Leave was granted to the following applicants on the following grounds:

*1)* All approved applicants were granted leave to appeal the Director's decision not to address adverse odour effects in the landfill C of A. The ERT observed that the Director's mandate in issuing a C of A is to achieve the standards set out in the *Environmental Protection Act* and O. Reg. 419/05 and therefore, no reasonable person could have decided to issue the C of A without considering measures to prevent the landfill from causing adverse effects from odour.

2) Carla J. Miner was also granted leave to appeal on the ground that predicted landfill emissions for benzene were not assessed in a manner consistent with the MOE's designation for benzene in O. Reg. 419/05. The ERT concluded that the Ambient Air Quality Criteria (AAQC) does not give discretion to assess whether benzene Point of Impingement (POI) concentrations are acceptable, therefore, failure to abide by the AAQC must result in a conclusion that the decision could result in significant harm to the environment.

**Status/Final Outcome**

Applications for Leave to Appeal were granted.

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**Parties and Date of Leave Application**

**Registry #:** IA06E0834
**Applicant:** NorthWatch
**Proponent:** Enquest Power Corporation
**Ministry:** MOE
**Instrument:** C of A, section 9, *EPA*
**Date Application received by ECO:** December 19, 2006

**Description of Grounds for Leave to Appeal**

The applicant is seeking leave to appeal the Director's decision to issue a Certificate of Approval (Air) to Enquest Power Corporation ("Enquest") for a 12-month pilot study of a waste gasification plant. The applicant argues that information provided to the Ministry by Enquest does not provide a reasonable basis

for decision-making as the assumptions about discharges to air are based on unreliable or variable experimental results.

**Decision on Leave Application and Decision Date**
**Date of Leave Decision:** January 19, 2007

The applicant advised the Tribunal that they have withdrawn their application for Leave to Appeal the Certificate of Approval (Air) issued to Enquest Power Corporation. Pursuant to Rule 179 of the Environmental Tribunal's Rules of Practice and Practice Directions, the Tribunal has dismissed the proceedings and closed its files on this matter.

The applicant informed the Tribunal that their concerns regarding these approvals remain unchanged. They provided the following reasons for having to withdraw their Leave to Appeal application:

1) They explained that they have not yet received copies of the instruments issued by the Director, which are the subject of the applications, despite having requested these documents on December 20, 2006, as per the direction of the Ministry of Environment Approvals Branch staff.

2) They also had not yet received a response to an Access to Information Request through which they hope to obtain information they feel is required to support their Application for Leave to Appeal.

3) The information provided by the proponent for their review was extremely limited.

4) The applicant explains that they were not provided with the information noted immediately above, but rather, were provided with an opportunity to view the information at the North Bay office of the Ministry of Environment, with an explicit prohibition on either copying or transcribing any of the material.

5) In a letter to the applicant, dated December 21, 2006, the Tribunal requested that the applicant provide eight items of information in support of the Application for Leave to Appeal, by January 5, 2007, a date which was later extended to January 15, 2007.

6) For the reasons noted above, the applicant indicates that they are unable to provide several of the requested information pieces.

**Status/Final Outcome**

Application for Leave to Appeal was withdrawn.

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**Parties and Date of Leave Application**

**Registry #:** IA06E0835
**Applicant:** NorthWatch
**Proponent:** Enquest Power Corporation
**Ministry:** MOE
**Instrument:** C of A, section 27, *EPA*
**Date Application received by ECO:** December 19, 2006

**Description of Grounds for Leave to Appeal**

The applicant is seeking leave to appeal the Director's decision to issue a Certificate of Approval (Waste Disposal Site) to Enquest Power Corporation ("Enquest") for a 12-month pilot study of a waste gasification plant. The applicant is seeking leave to appeal on the following grounds:

1) The applicant believes that information provided by the proponent to support their application for a Certificate of Approval (Waste Disposal Site) was incomplete and provided inadequate and at times inconsistent and/or unclear information. Additional information has been requested from the Ministry and the applicant has indicated that a supplementary submission will be made when these details are provided.

2) The applicant argues that, while the proponent indicates that the pilot process will require quantities of water, but there is no estimate of water quantities or effluent volume nor is there any characterization of the liquid effluent that will be generated by the process – information that is necessary to evaluate whether the impact of the pilot project on the environment will be acceptable.

**Decision on Leave Application and Decision Date**
**Date of Leave Decision:** January 19, 2007

The applicant advised the Tribunal that they have withdrawn their application for Leave to Appeal the Certificate of Approval (Waste Management Site) issued to Enquest Power Corporation. Pursuant to Rule 179 of the Environmental Tribunal's Rules of Practice and Practice Directions, the Tribunal has dismissed the proceedings and closed its files on this matter.

The applicant informed the Tribunal that their concerns regarding these approvals remain unchanged. They provided the following reasons for having to withdraw their Leave to Appeal application:

1) They explain that they have not yet received copies of the instruments issued by the Director, which are the subject of the applications, despite having requested these documents on December 20, 2006, as per the direction of the Ministry of Environment Approvals Branch staff.

2) They have not yet received a response to an Access to Information Request through which they hope to obtain information they feel is required to support their Application for Leave to Appeal.

3) The information provided by the proponent for their review was extremely limited.

4) The applicant explains that they were not provided with the information noted immediately above, but rather, were provided with an opportunity to view the information at the North Bay office of the Ministry of Environment, with an explicit prohibition on either copying or transcribing any of the material.

5) In a letter to the applicant, dated December 21, 2006, the Tribunal requested that the applicant provide eight items of information in support of the Application for Leave to Appeal, by January 5, 2007, a date which was later extended to January 15, 2007.

6) For the reasons noted above, the applicant indicates that they are unable to provide several of the requested information pieces.

**Status/Final Outcome**

Application for Leave to Appeal was withdrawn.

**Parties and Date of Leave Application**

**Registry #:** IA04E0464
**Applicants:** Hugh and Claire Jenney
**Additional Applicants:** Diane and Chris Dawber; Sandra Willard; J. Sulzenko; Mark Stratford; Jamie Stratford; Loyalist Environmental Coalition; Lake Ontario Waterkeeper; Gordon Downie; Gordon Sinclair; Robert Baker; Paul Langlois; John Fay; Clean Air Bath; and Janelle Tulloch.
Proponent: Lafarge Canada Inc.
**Ministry:** MOE
**Instrument:** C of A, section 9, *EPA*
**Date Application received by ECO:** January 4, 2007

**Description of Grounds for Leave to Appeal**

The applicants are seeking leave to appeal the decision of the Director to issue Certificate of Approval (Air) No. 3479-6RKVHX to Lafarge Canada Inc., which includes approval to use solid non-hazardous waste materials (such as tires, animal meal, plastics, shredded tires, solid shredded materials, and pelletized municipal waste) as an alternative fuel in the manufacturing of cement at Lafarge's Bath plant.

The grounds for the applicants seeking leave to appeal are as follows:

1) The Director's decision to approve the burning of tires in a cement kiln is contrary to warnings that burning tires releases dioxins that are dangerous to the public is unreasonable.

2) MOE could obtain the needed information about tire burning from a similar project at Lafarge's plant in Quebec.

The main grounds for seeking leave to appeal by the additional applicants are as follows:

1) The release of substances from the burning of alternative fuels has the potential to have adverse effects on the environment and human health. Even without the burning of alternative fuels, the Lafarge facility already emits a number of contaminants harmful to humans. The proposed tire-burning activities pose the potential for increased offsite emissions affecting neighbouring landowners and for significant transboundary environmental impacts.

2) It was unreasonable for the Director to issue the approval given that MOE has not obtained information on local air quality, such as baseline air quality data and information on the potential impact of the emissions on the environment and health.

3) The terms and conditions of the approval do not appear to be adequate to prevent significant environmental harm. Specifically, the approval lacks requirements to consider cumulative effects of exposure to the contaminants emitted from the facility; it lacks sufficient continuous emission monitoring requirements; the emission testing, monitoring and reporting requirements fail to cover the complete list of contaminants; it fails to adequately address the potentially large amounts of fugitive dust, gases and particulate matter that may be generated by the project; it lacks adequate conditions to monitor and control odour emissions; and it fails to require routine testing of the alternative fuel materials to ensure that these do not stray outside the approved parameters.

4) It appears that MOE has not included conditions that would assist MOE in obtaining answers to the very questions it purports to seek through this test-project, making this decision unreasonable. MOE does not have the baseline air quality data needed to determine the impacts of the pilot test project on the health of the local community.

5) Permitting the tire-burning at Lafarge's plant, while prohibiting it elsewhere in the province is inherently contradictory, disregards the government's own policy on tire-burning, and is unfair to the community of Bath. This decision is particularly unreasonable given MOE's admission that it "lacks experience monitoring the environmental performance of facilities that incinerate tires".

6) The decision to issue the approval took place behind closed-doors and violated the government's obligations for accountability and transparency.

7) In issuing the approval, the Director failed to properly take into account the ecosystem approach, promote resource conservation, and apply the precautionary principle, as required by MOE's Statement of Environmental Values.

**Decision on Leave Application and Decision Date**
**Decision Date:** April 4, 2007

The Tribunal grants to the Applicants Susan Quinton on behalf of Clean Air Bath; Martin Hauschild and William Kelley Hineman on behalf of Loyalist Environmental Coalition; Lake Ontario Waterkeeper and Gordon Downie; and Gordon Sinclair, Robert Baker, Gordon Downie, Paul Langlois and John Fay, Leave to Appeal the decisions to issue Amended Certificate of Approval (Air) No. 3479-6RKVHX pursuant to section 41 of the *Environmental Bill of Rights 1993* and Rule 50 of the Tribunal's Rules of Practice.

The Applicants may appeal the decisions in their entirety; the scope of the Appeal shall not be limited to the Grounds on which the Applications have been granted or to the issues raised by the Applicants in their Applications for Leave to Appeal, unless the Tribunal orders otherwise.

Diane and Chris Dawber, Hugh and Claire Jenney, Mark Stratford, Jamie Stratford, J. Sulzenko, Janelle Tulloch and Sandra Willard) had applied for leave to appeal the related Certificate of Approval (Air) issued to Lafarge, but did not specifically request leave to appeal this C of A (Waste Disposal Site) in their leave to appeal notices. Nonetheless, the Environmental Review Tribunal considered their request for leave to appeal both of the related Cs of A. The Tribunal denied leave to appeal to these nine applicants of both Cs of A on the grounds that they did not establish that their concerns "have a real foundation sufficient to give them the right to pursue them through the appeal process," and thus they did not meet the section 41 leave to appeal test.

**Status/Final Outcome**

Preliminary Hearing scheduled for September 11, 2007.

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**Parties and Date of Leave Application**

**Registry #:** IA03E1902
**Applicant:** Clean Air Bath
**Additional Applicants:** Loyalist Environmental Coalition; Lake Ontario Waterkeeper; Gordon Downie; Gordon Sinclair; Robert Baker; Paul Langlois; and John Fay
**Proponent:** Lafarge Canada Inc.
**Ministry:** MOE
**Instrument:** C of A, section 27, *EPA*
**Date Application received by ECO:** January 4, 2007

**Description of Grounds for Leave to Appeal**

The applicant is seeking leave to appeal the decision of the Director to issue Certificate of Approval (waste) No. 8901-R8HYF to Lafarge Canada Inc. to operate a waste disposal site at its Bath cement manufacturing plant to allow the acceptance, processing and incineration of non-hazardous solid waste at a rate of less than 100 tonnes per day.

The main grounds for seeking leave to appeal the decision by the applicants are as follows:

1) The landfill on the Lafarge property already generates large amounts of leachate that discharges into the Bath Creek. The disposal of alternative fuel waste and cement kiln dust at Lafarge's landfill may result in additional loadings of landfill leachate into the already impaired groundwater and sourcewater resources.

2) It was unreasonable for the Director to issue the approval given that MOE has not obtained information on local watershed conditions, such as the extent of surface water and groundwater contamination.

3) The terms and conditions of the approval do not appear to be adequate to prevent significant environmental harm. Specifically, there is not a sufficiently clear prohibition of the types of waste that can be collected; and there are not sufficient conditions requiring sampling and disposal of the resulting cement kiln dust and landfill leachate.

4) The Design and Operation Manual referred to in the approval was produced and supplied to MOE well after the close of the *EBR* comment period and just before the approval was issued. Moreover, the manual does not include sufficiently detailed requirements.

5) The large volume of alternative fuel waste being permitted in the approval goes far beyond what is reasonable for a limited pilot project.

6) In issuing the approval, the Director failed to properly take into account the ecosystem approach, promote resource conservation, and apply the precautionary principle, as required by MOE's Statement of Environmental Values.

**Decision on Leave Application and Decision Date**
**Date of Leave Decision:** April 4, 2007

The Environmental Review Tribunal granted leave to appeal to the following applicants: the Loyalist Environmental Coalition; Lake Ontario Waterkeeper; Gordon Downie; Gordon Sinclair; Robert Baker; Paul Langlois; John Fay; Clean Air Bath. The Tribunal concluded that these applicants satisfied the test for the granting of leave to appeal with respect to this Certificate of Approval (Waste Disposal Site) under section 39 of the *Environmental Protection Act* (the "C of A").

The Tribunal found that these applicants met the first branch of the leave to appeal test on the grounds that it appears that there is good reason to believe that no reasonable person could have made the decision to issue the C of A under the following circumstances:

- The Director did not assess the potential cumulative ecological consequences of approving the C of A application. The Tribunal noted that the mere fact that the C of A complies with O. Reg. 419/05 is not sufficient to establish that the decision to issue the C of A is reasonable, or to establish that MOE has taken an ecosystem approach in making its decision, as required by MOE's SEV.
- The Director did not follow the direction in MOE's SEV to apply a precautionary approach. The Tribunal noted that the Cs of A were approved in the face of uncertainty by MOE about the environmental risk of the permitted activity (as evidenced by MOE's Notice of Proposal for a Regulation to ban the incineration of tires).

- The Director did not turn its mind to the potential effect of the decision on the common law rights of local landowners.
- The Director's decision exposes the residents of Bath to the effects of an activity (i.e., the incineration of tires) that the MOE is proposing to ban in the rest of the province, without considering whether such a decision could produce inconsistent environmental effects between communities.

The Tribunal also found that the applicants provided sufficient information to establish that the Director's decision to issue the C of A could result in significant harm to the environment. The Tribunal noted that, despite the fact that MOE has concluded that the facility is able to operate in accordance with O. Reg. 419/05, MOE regulations do not incorporate consideration of cumulative effects, total ecosystem loading, synergistic effects, bioaccumulation or complete standards for high priority contaminants. In addition, the information supporting the C of A application did not include baseline information for air and water quality.

The Tribunal stated that the applicants may appeal the decision in its entirety; they are not limited to the grounds listed in the leave to appeal application.

**Status/Final Outcome**

Preliminary Hearing scheduled for September 11, 2007.

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**Parties and Date of Leave Application**

**Registry #:** IA02E0463
**Applicant:** Mike Cushman
**Proponent:** Cytec Canada Inc.
**Ministry:** MOE
**Instrument:** Certificate of Property Use
**Date Application received by ECO:** January 23, 2007

**Description of Grounds for Leave to Appeal**

The applicant is appealed the decision to issue a Certificate of Property Use (CPU) for a portion of the property located at 4001 4th Avenue and 4200 Stanley Avenue in the City of Niagara Falls.

The applicant is seeking leave to appeal on the following grounds:

1) There has not been adequate testing of the air, soil and water at the site or off-site;

2) There has been no information provided to support the conclusion that the soils across the entire site are medium fine textured;

3) The risk assessment uses an incorrect approach to arsenic levels. The assessment should have used the arsenic value for the most sensitive human receptor; and

4) The Certificate of Property Use does not contain a requirement for a Soil Management Plan.

**Decision on Leave Application and Decision Date**
**Date of Final Decision:** April 10, 2007

The ERT denied the application for leave to appeal by Mike Cushman ("the applicant") related to the Director's decision to issue a Certificate of Property Use (CPU) for a portion of the property located at 4001 4th Avenue and 4200 Stanley Avenue in the City of Niagara Falls. The ERT noted that the applicant failed to present convincing evidence that the decision of the Director was unreasonable.

With respect to the applicant's argument that the MOE had failed to implement adequate testing of the air, soil and water at the site or off-site, the ERT concluded that the applicant did not provide adequate evidence about the inadequacies and deficiencies in the CPU. No evidence was provided as to what environmental testing should have been conducted at the site compared to what is required under the legislative and regulatory scheme under the *Environmental Protection Act* and its regulations, "or more generally as to what is required to appropriately protect the environment."

With respect to the applicant's argument that the CPU did not contain a soil management plan (SMP) and would not protect workers and the community during the remediation process, the ERT agreed with the MOE Director and with Cytec that there are such provisions within the CPU, and that additional reviews or approvals are required by the Director with respect to soil management. The ERT went on to note that it "cannot, at this stage, determine the appropriateness or adequacy of those provisions other than to note the fact that they speak to the issues at hand." The ERT also noted that the provisions "require reports to be drafted that are to address the issues in question, and it is up to the Director whether or not to approve those plans." Since the CPU did contain a SMP, the applicant should have focused on challenging the details of the SMP rather than arguing that the CPU did not contain a SMP. The onus was on the applicant to identify how the SMP provisions were "sufficiently problematic" to meet the *EBR* test for Leave to Appeal but the ERT concluded "no evidence to that effect has been presented."

The ERT also noted that the concerns raised by the applicants with respect to the risk assessment were not valid grounds since leave to appeal is only available with respect to the CPU itself.

The ERT concluded its decision by noting that there was no need to discuss the second branch of the *EBR* leave to appeal test pertaining to whether it appears that the Director's decision could result in significant harm to the environment because the first branch of the *EBR* test, on the reasonableness of the Director's decision, had not been satisfied.

**Status/Final Outcome**

Application for Leave to Appeal was dismissed.

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**Parties and Date of Leave Application**

**Registry #:** IA02E0463
**Applicant:** North Aldershot Preservation Association
**Proponent:** 1350195 Ontario Limited
**Ministry:** MOE
**Instrument:** C of A, section 9, *EPA*
**Date Application received by ECO:** March 27, 2007

**Description of Grounds for Leave to Appeal**

The applicant is seeking leave to appeal the Director's decision to issue a Certificate of Approval (Air) to 1350195 Ontario Limited, a company operating a crematorium ("the proponent"). In 2002, the proponent sought a new C of A for modifications to an existing cremator. The changes would replace the original oil-fired burners, one in each of the primary and secondary chambers, with natural gas-fired burners. Exhaust gases from the cremator are vented through a duct and an existing external booster fan prior to their release to the atmosphere through an existing stone chimney.

**Grounds for Seeking Leave to Appeal:**

1) The applicant argues that the proponent's performance history, as outlined in files maintained by MOE's local office and the Region of Halton, indicates that there has already been significant harm to the natural environment and human health and there is no evidence that changing the fuel source from oil to natural gas will lessen impacts on the environment.

2) The applicant further argues that no reasonable person could have made the decision to grant the C of A based on the following factors: a) a large number of complaints made to MOE and incident reports filed by MOE staff; b) the proximity of the adjacent sensitive land uses (within 60 metres of the proponent's stack); and c) evidence of the proponent operating its equipment in a bad state of repair even after being told of the resulting emissions from the unit by an MOE inspector. In addition, the applicant notes that the C of A as granted does not require scrubbers or devices to capture mercury vapour from the crematorium operation.

3) The applicant contends to have an interest in this matter because: a) it has filed Freedom of Information (FOI) requests to MOE and the Region of Halton; and b) it is concerned about the protection of residents who live in the vicinity of the crematorium. The applicant alleges that the files provided in response to their FOI requests reveal numerous complaints about black and brown smoke being discharged by the facility since December 2000. The applicant further claims that the proponent was ordered by MOE in December 2001 to obtain a new C of A because it had converted its equipment from oil to gas burners between 1998 and 2001. The applicant also notes that residential homes are located less than 70 metres from the proponent's stack, and that the minimum setback requirement for Class II Industrial Facilities in MOE Guideline D-6 is 70 metres.

**Decision on Leave Application and Decision Date**
**Date of Leave Decision:** May 15, 2007

Since the application for Leave to Appeal was filed outside of the 15-day period prescribed by section 40 of the *EBR*, and since the requirements for officially induced error have not been established, the requirements of section 40 of the EBR have not been met. Therefore, the Tribunal does not have jurisdiction to consider the application, and, pursuant to Rule 106 of its Rules of Procedure, the Tribunal dismisses the application for Leave to Appeal.

**Status/Final Outcome**

Application for Leave to Appeal was dismissed.

# SECTION 8

## *EBR* COURT ACTIONS

# SECTION 8: *EBR* COURT ACTIONS

**April 1, 2006 to March 31, 2007**
**Status as of July 23, 2007**

**Parties to the Action and Type of Action**

**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

**Registry #:** CQ8E0001

**Date Statement of Claim Issued:** July 27, 1998

**Type of Action:** Harm to a public resource action, section 84, *EBR*

**Court Location:** Superior Court of Justice, Grey County (West Region)

**Description of Grounds for Claim**

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.

**Status/Final Outcome**

Action pending.

Notice was approved by the court and placed on the Registry on December 23, 1999.

As of July 2007, this matter is still going through various pre-trial procedures and has not been listed for trial at this point.

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**Parties to the Action and Type of Action**

**Plaintiff:** Wilfred Robert Pearson (and others)

**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

**Registry #:** CQ01E0001

**Date Statement of Claim Issued:** March 26, 2001

**Type of Action:** Public nuisance action, section 103, *EBR*

**Court Location:** Superior Court of Justice, Welland

**Description of Grounds for Claim**

The plaintiff in this class proceeding maintains that the defendant has and does emit and discharge hazardous contaminants into the natural environment, including the air, water and soil of Port Colborne. The contaminants include oxidic, sulphuric 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 section 103 of the *EBR*; trespass; discharging contaminants with adverse effects under section 14 of the *EPA*; and the doctrine of strict liability in *Rylands v. Fletcher*. The plaintiff claims punitive and exemplary damages in the amount of $150 million, and compensatory damages in the amount of $600 million.

**Status/Final Outcome**

The certification motion was heard in June 2002. In a judgment dated July 15, 2002, the Ontario Superior Court of Justice dismissed the plaintiff's certification motion on the following grounds: the plaintiff failed to disclose a reasonable cause of action against the Region, the City or the Crown; there was no identifiable class; and a class proceeding is not the preferable procedure for resolving the issues found to be common among the class members. 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 (OCA) 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 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 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, allowing the Pearson case to proceed to trial.

The parties are now preparing for trial, and examinations for discovery were supposed to begin in the summer of 2007. The ECO will report on the progress of this case in a future report.

# SECTION 9

## STATUS OF ECO AND PUBLIC REQUESTS TO PRESCRIBE NEW OR EXISTING MINISTRIES FOR LAWS, REGULATIONS OR PROCESSES UNDER THE *EBR*

# SECTION 9: STATUS OF ECO AND PUBLIC 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.

There are four main factors that make it necessary to update the *EBR* regulations to include new ministries, programs and laws. First, the Ontario government constantly enacts and implements new environmental legislation. Indeed, a large number of innovative environmentally significant laws and regulations have been passed in the past 10 years, as regular readers of our Annual Reports will know.

Second, the Ontario government may decide to re-organize one ministry or redistribute portfolios between several ministries. For example, 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.

Third, members of the public may file an application for review requesting that a certain ministry that is not currently prescribed, such as Education or Finance, be prescribed under the *EBR*, or that O. Reg. 73/94 under the *EBR* be amended to require a currently prescribed ministry to accept applications for review or investigation. The ECO has received nine applications of this nature since February 1995. In addition, the ECO sometimes recommends that a ministry, agency or process be prescribed under the *EBR*.

A fourth scenario arises when the Ontario government decides to revamp a program, and in doing so, alters the rights of Ontario residents under the *EBR*. For example, when the *EBR* was proclaimed in 1994 the federal *Fisheries Act* was prescribed for investigations of alleged contraventions of sections 35(2) and 36(3). As described in the ECO's 2001/2002 Annual Report, the Ministries of Natural Resources (MNR) and Environment gradually have gradually withdrawn from enforcement of these *Fisheries Act* provisions. (For further discussion, see the update on this issue in ministry Progress, pages 179-180 of this year's Annual Report.) Other laws and related programs that have been affected by similar changes made in the late 1990s and are that are no longer subject to the full suite of *EBR* rights include the *Planning Act* and the *Conservation Authorities Act*, administered by MMAH and MNR respectively.

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, new stand-alone laws such as the *Ontario Heritage Act* have 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 (BSLAA)* 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 three years. In some cases, the process can take much longer. For example, *Oak Ridges Moraine Conservation Act, 2001* was not prescribed until June 2007, even though the ECO raised this issue with MMAH in late 2001 and the ministry posted proposals for regulations related to prescribing the *ORMCA* under the *EBR* in 2003.

To illustrate the current status of various recent Acts and regulations, the ECO has updated its summary in Table 1. This table is 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 2006/07 reporting period the ECO observed very little progress in expanding *EBR* coverage despite a range of ministry commitments to the ECO as reflected below and a number of ECO recommendations in our 2005/2006 Annual Report. In March 2007, MOE advised the ECO that a proposal for regulatory amendments to O. Reg. 73/94 which will address some of the issues described below would be posted on the Registry in the spring of 2007. In June 2007, MMAH and MOE completed work on prescribing the *ORMCA* and the *Greenbelt Act* as outlined in Table 1 below; however, most of the needed updates and changes described below remain unaddressed as of September 1, 2007.

In our 2005/2006 Annual Report we recommended that MMAH and MOE fully prescribe the *Building Code Act* under the *EBR* for regulation-making and instrument proposal notices and applications for reviews. In March 2007, MMAH and MOE advised the ECO that MMAH has no plan to implement the ECO recommendation on prescribing the *Building Code Act*. This is an unfortunate decision and it means that transparency and accountability for MMAH policy- and law-making on green building materials and energy technologies will be reduced. The ECO urges MMAH to reconsider its approach given the growing public concern about environmental issues such as climate change.

In March 2007 MMAH reported that it is committed to prescribing the *Greenbelt Act, 2005* under the *EBR*, and "is taking the necessary steps to achieve this." In June 2007, this Act was prescribed, more than two years after it took effect.

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. In our 2005/2006 Annual Report we reported that the ministries appeared to be more receptive to requests for review submitted by members of the public under the *EBR* to prescribe Acts and ministries. The ECO applauded this new receptivity. This year we note that no progress has been made, as of September 1, 2007, on any of the issues described in Table 2.

In early 2004, the 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 and were advised that work was ongoing. In March 2007, MOE advised the ECO that a package containing amendments to O. Reg. 73/94 which will make MPIR subject to the *EBR* would be posted on the Registry in the spring of 2007. As of September 1, 2007, no notice had been posted. 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, with clear environmental significance.

**Table 1 - Status of ECO Requests to Prescribe New Laws, Regulations and Instruments under the *EBR* as of August 2007**

| ***Act, Regulation or Instrument (Ministry)*** | **ECO Request to Prescribe** | **Status as of August 2007 and ECO Comment** |
|---|---|---|
| *Building Code Act* (MMAH) | In October 2006, the ECO's 2005/2006 Annual Report recommended that MMAH and MOE fully prescribe the *Building Code Act* under the *EBR* for regulation-making and instrument proposal notices and applications for reviews. | In March 2007, MMAH and MOE advised the ECO that MMAH has no plan to implement the ECO recommendation on prescribing the *Building Code Act*.<br><br>This is an unfortunate decision and it means that transparency and accountability for MMAH policy- and law-making on green building materials and energy technologies will be reduced. The ECO urges MMAH to reconsider its approach given the growing public concern about environmental issues such as climate change. |
| *Greenbelt Act, 2005* (MMAH) | The ECO wrote to MMAH 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, MMAH informed the ECO it will begin to work on the amendments required to prescribe the *Greenbelt Act* under the *EBR*.<br><br>In March 2007, MMAH 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.<br>MMAH provided a summary of initiatives already underway to ensure the implementation of the Greenbelt Plan.<br><br>The *Greenbelt Act* was prescribed for regulation proposal notices (but not for instruments) and applications for review by O. Reg. 217/07 passed in June 2007. |
| *Kawartha Highlands Signature Site Parks Act, 2003* (MNR) | The 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 |

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| | | boundaries are regulated.<br><br>The *KHSSPA* came into effect on June 15, 2007.<br><br>The ECO urges MNR and MOE to immediately begin work on prescribing the *KHSSPA* under the *EBR*. |
| *Lakes and Rivers Improvement Act (LRIA),* Water Management Plans (WMPs) issued under section 23.1<br>(MNR) | The *Reliable Energy and Consumer Protection Act* (AB02E6001) received Royal Assent in June 2002, and created section 23.1 of the *LRIA*, which replaced section 23 of the Act.<br><br>In our 2002/2003 Annual Report, the ECO encouraged MNR to amend O. Reg. 681/94 to include WMPs issued under section 23.1 as prescribed instruments. | 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.<br><br>MNR posted information notices for four (4) WMPs during the reporting period. These notices should have been subject to public notice and comment under the *EBR*.<br><br>In March 2006, MNR advised the ECO that it is not proceeding with the classification of WMPs as instruments under the *EBR* because its Water Management Planning Guidelines for Waterpower "establishes a comprehensive approach to public engagement." MNR also noted that the majority of WMPs are complete or close to completion. The ECO finds this decision very disappointing. |
| *Nutrient Management Act* (OMAF and MOE)<br><br>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. |

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|---|---|---|
| *Oak Ridges Moraine Conservation Act, 2001* (MMAH) | The ECO wrote to MMAH 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 MMAH staff briefed ECO staff on its plan to use information notices for official plan amendments (OPAs) related to *ORMCA* implementation rather than regular instruments.<br><br>In March 2006, MMAH informed the ECO that it was working on the amendments to O. Reg. 73/94 that are required to prescribe the *ORMCA* under the *EBR*. | In March 2007, MMAH reported that it is committed to prescribing the *ORMCA, 2001* 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.<br><br>MMAH posted 13 information notices for OPAs and zoning orders related to the *ORMCA* during the reporting period. These notices should have been subject to public notice and comment under the *EBR*.<br><br>The *ORMCA* was prescribed for instrument proposal notices by O. Reg. 216/07 passed in June 2007. The ECO commends MMAH and MOE for making this overdue regulatory change. |
| *Ontario Heritage Act (OHA)* (MCL) | 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). For further detail on the amendments to the *OHA* and the OHT, see the ECO 2005/2006 Annual Report at pages 76-79.<br><br>In June 2005, ECO wrote to MCL requesting that it prescribe the *OHA* for regulation proposal notices and for applications for review under the *EBR*. ECO and MCL staff also discussed this issue at an August 2007 meeting about prescribing the OHT. | In July 2005, MCL wrote to the ECO and stated that it was aware of the ECO's interest in seeing the Act prescribed as soon as possible.<br><br>MCL went on to note that it would be responding to the ECO's request once it had reviewed the matter thoroughly and briefed the minister. However, no timeline was provided regarding when this review would be completed.<br><br>As of August 2007, this review work is ongoing. |
| *Safe Drinking Water Act, 2002* (MOE) | In January 2003, 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 at numerous meetings between the ECO and the Environmental Bill of Rights Office of the MOE in 2003 and 2004. | 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.<br><br>MOE also insists that it is not appropriate to prescribe *SDWA* instruments under the *EBR* because most *SDWA* approvals are exempted under the Municipal Class |

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| | 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. | 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, the ECO wrote to MOE requesting that it prescribe the *WDA* for regulation proposal notices and for applications for review and investigation under the *EBR*.<br><br>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)<br><br>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 August 2007**

| ***Ministry or Process*** | **ECO or Ontario Resident Request to Prescribe** | **Status as of August 2007 and ECO Comment** |
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| *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 | 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 the 2005/2006 ECO Annual Report Supplement. |

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| | 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 March 2007, MTO and MOE advised the ECO that a package of regulatory changes containing amendments to O. Reg. 73/94 which will make MTO subject to *EBR* reviews would be posted on the Registry in the spring of 2007.<br><br>As of September 1, 2007 no notice had been posted. |
| *Making the Ministry of Education Subject to the EBR*<br>(EDU and MOE) | In May 2004, two applicants requested that the 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*. In July 2004, MOE advised the ECO that it was reviewing the request and would require six 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 EDU 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 123-7 of the ECO 2005/2006 Annual Report.<br><br>In November 2005, MOE posted a proposal notice for a regulation to amend O. Reg. 73/94. As of June 2007, MOE had not posted a decision notice on the proposal.<br><br>In March 2007, EDU announced that Ontario's Curriculum Council would review how environmental education is taught in elementary and secondary schools. A working group, led by astronaut and scientist Dr. Roberta Bondar, is currently reviewing public submissions and a report to the minister is expected by summer 2007. |
| *Making the Ministry of Health Promotion Subject to the EBR*<br>(MHP and MOE) | The Ministry of Health Promotion (MHP) was established by the Ontario government in July 2005 with a mandate to promote the health and well being of Ontarians.<br><br>In June 2006, the ECO wrote to MHP requesting that the ministry be prescribed for SEV consideration, | The ECO spoke with staff at MHP in the summer of 2006. As of May 2007, work on these matters was ongoing at MHP. MOE advised the ECO in March 2007 that MHP was reviewing options for going forward.<br><br>The ECO urges MOE and MHP to ensure that the ministry is prescribed |

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| | Registry notice and comment, regulation proposal notices and for applications for review under the *EBR.* | under the *EBR* before the end of 2007. |
| *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*).<br><br>In early 2004, the 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.*<br><br>Although the *PGA* requires that notices of a proposed growth plan be posted on the Registry MPIR is currently unable to post these notices as regular policy proposals because it is not a prescribed ministry. Since July 2004, MPIR has posted six information notices about its work and proposed growth plans on the Registry. | The ECO met MPIR staff in early 2006.<br><br>In March 2007, MOE advised the ECO that a package containing amendments to O. Reg. 73/94 which will make MPIR subject to the *EBR* would be posted on the Registry in the spring of 2007.<br><br>As of September 1, 2007 no notice had been posted.<br><br>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, with clear environmental significance. |
| *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 recognize 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 | 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*.<br><br>In October 2006, the ECO's 2005/2006 Annual Report (page 79) recommended that the OHT become an *EBR*-prescribed agency. |

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| | 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 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.<br><br>In March 2006, 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. | In March 2007, MCL advised the ECO that it was considering the ECO's recommendation and would like to meet.<br><br>In August 2007, ECO and MCL staff met and MCL indicated that it was not planning to implement the ECO recommendation because OHT is not a policy-making agency.<br><br>All policies and programs related to the work of OHT are developed by MCL and MNR; the OHT merely implements those programs. MCL further noted that MNR would ensure that future changes to the NSLASP would be posted on the Registry by MNR.<br>MCL also stated that it continues to study whether it will prescribe the *OHA* for the purposes of posting *OHA* regulations and instruments issued by the Minister and her delegated staff on the Registry.<br><br>The ECO is very disappointed by MCL's approach to prescribing the OHT and feels that the current funding, policy-making and reporting relations and functions are confused and lack transparency because they are fragmented between MNR, MCL and the OHT.<br><br>The ECO notes that the Minister of Culture retains important decision-making powers and functions related to the work of OHT, including decisions on the funding of the OHT. The ECO intends to follow-up on these issues in the 2007/2008 Annual Report.<br><br>For further detail on the amendments to the *OHA* and the OHT, see the ECO 2005/2006 Annual Report at pages 76-79. |

# SECTION 10

## FLOODING HAZARDS: PREVENT AND MITIGATE, OR COMPENSATE AND REHABILITATE?

# SECTION 10: FLOODING HAZARDS: PREVENT AND MITIGATE, OR COMPENSATE AND REHABILITATE?

## Introduction

The 2005 Provincial Policy Statement (PPS) states "Ontario's long-term prosperity, environmental health and social well-being depend on reducing the potential for public cost or risk to Ontario's residents" from natural hazards. One such natural hazard is flooding. Millions of dollars have been spent on measures that prevent or mitigate the effects of flooding on the environment and reduce the risk to public health and safety. However, flooding events are still common, compensation costs continue to escalate and environmental damage is often significant.

An ECO review of some of the current flood prevention and mitigation measures that are currently employed by the Ministries of Municipal Affairs and Housing, Natural Resources, Environment, and Agriculture, Food and Rural Affairs suggests that strong development controls and well-designed stormwater management systems can significantly reduce the risk of flooding. However, exceptions to development controls, aging and/or inadequate stormwater management systems and flood control structures, lack of support for innovative technologies and funding for flood management activities are increasing the risk that future flooding events will overwhelm existing flood prevention and mitigation measures. As evidence mounts that storms are becoming more severe due to climate change, the ECO believes that these ministries need to take bold pro-active steps to reduce significant flooding risks with potentially disastrous consequences to life, property and the environment.

## Historical Flooding Events Shape Ontario's Flood Management Policies

All lakes and rivers flood. In Ontario, flooding along rivers and inland lakes is common and is usually caused by heavy rainfall, snowmelt and/or ice jams. Some prominent historical examples include:

- In 1954, Hurricane Hazel swept through the Greater Toronto Area, destroying 20 bridges, leaving 1868 families homeless, washing away buildings and crops in Holland Marsh, and killing 81 people. About 210 mm (8.3 in.) of rain fell in 12 hours on already soaked ground.
- In 1961, heavy rains caused a small creek in Timmins (the Timmins Storm) to overflow its banks destroying roads and homes, and undercutting foundations. Five people died. About 193 mm (7.6 in.) of rain fell in 12 hours.
- In 1986, the entire Village of Winisk in northern Ontario was swept away by rising waters due to snowmelt and ice jams. Two people died.

Along the shorelines of the Great Lakes, precipitation and/or winds can cause flooding and high waves resulting in heavy property damage in low-lying areas. Flooding can have significant long-term economic consequences. According to the U.S. Federal Emergency Management Agency, more than 43 per cent of small businesses never reopen and almost 29 per cent will close within two years of experiencing a natural disaster.

Flooding can also cause extensive environmental damage. Floodwaters are often highly polluted with chemicals from flooded industries and households, sewage from overflowing septic systems and sewage treatment plants, and sediment from fields. Rushing floodwaters can erode stream banks and scour streambeds. Fish and other aquatic organisms are killed and their habitats are destroyed.

Flood management responsibilities are distributed across all three levels of government (federal, provincial and municipal) and the Conservation Authorities (CAs). A core responsibility – defining and updating the regulations, policies and guidelines on which municipalities, CAs, engineers, developers and the public rely to protect life, property and the environment from the effects of floods – is distributed across several provincial ministries. These ministries must balance the costs of prevention and mitigation

against the potential for loss of life and the costs to repair and rebuild homes, businesses and infrastructure, and rehabilitate streams and habitats.

**What is a 100-year flood?**
A 100-year flood has a one chance in one hundred of occurring or being exceeded in any particular year, i.e., it has a return period of 100 years.

**Some Effective Measures that Reduce the Flooding Hazard**

*Ministry of Municipal Affairs and Housing (MMAH) - Provincial Policy Statement (PPS):*
One of the most effective ways of preventing flood damage is to prohibit development and site alteration in areas subject to the flooding hazard. Development includes creation of a new lot, a change in land use, or the construction of buildings and structures, requiring approval under the *Planning Act*. Site alteration includes grading, placement of fill and excavation. Under the 2005 PPS, municipalities "shall generally" direct development away from the following flooding hazard areas, i.e.:

- areas adjacent to the shorelines of the Great Lakes – St. Lawrence River systems and large inland lakes that would be inundated in a 100-year flood.
- areas, called flood plains, adjacent to the rivers, streams and small inland lakes that would be flooded by the greatest of:
    - rainfall actually experienced by a storm such as Hurricane Hazel or the Timmins Storm in a specific watershed; or
    - a 100-year flood; and an actual flood caused by ice jams.

Municipalities are also required to direct development and site alteration away from provincially significant wetlands in ecoregions 5E, 6E, and 7E (as defined in the 2005 PPS), which includes Sault Ste. Marie, Sudbury, North Bay and all areas farther south. Since wetlands can absorb large amounts of water, protecting them is an effective way of reducing flooding.

*Conservation Authorities – Regulations Prohibit Development near Waterbodies and Wetlands:*
Conservation Authorities are also able to prevent and/or limit development, if, in their opinion, it interferes with the control of flooding. Development, under the *Conservation Authorities Act* (*CAA*), includes increasing the size of a building, grading, excavation and the placement of fill. Each CA, in its 'development' regulation, has identified the rivers, streams, lakes, wetlands, valleys and shorelines including the flooding hazard areas identified under the PPS where development is prohibited unless the CA has approved it.

*Ministry of the Environment (MOE) – Urban Stormwater Management:*
Effective management of urban runoff can substantially reduce the flooding risk. MOE's Stormwater Management Planning & Design Manual (SWMP, 2003) states that runoff from post-development sites must not exceed pre-development levels for storms with return periods ranging from 2 to 100 years." According to SWMP, new development projects can manage runoff from storms using a variety of methods, such as directing runoff onto lawns, backyard swales and road gutters or down streets, to large storm sewers, storage ponds and other structures before being discharged to a waterbody.

**Opportunities to Reduce the Flooding Hazard**

*Development and Site Alteration in Flood Fringe Areas:*
The flood fringe is the area within the flooding hazard area where the water depth and velocity are lower than elsewhere in the area. Despite the planning policies that direct development and site alteration away from flooding hazard areas, the 2005 PPS allows some types of development, e.g., new residential housing, and site alteration in the flood fringes, if safety and flood proofing measures that protect life and property are used. However, these measures do not guarantee that these areas are safe from being flooded. For example, a family home that had been raised four feet off the ground after experiencing an

earlier flood was again flooded five years later. Although the home remained dry, the family's septic tank flooded and water well became polluted.

When municipalities refuse to approve development and/or site alteration in the flood fringe, they often face considerable opposition because of economic interests or prior development in the area. When CAs refuse to approve development projects on the grounds that they would increase the risk of flooding, they too, are often subject to considerable criticism.

Since many older communities in Ontario previously allowed homes and businesses to be sited in flooding hazard areas, the 2005 PPS allows municipalities to designate these areas as Special Policy Areas (SPAs) subject to provincial approval and allows some development and site alteration to ensure their continued viability. SPAs provide municipalities with a way of controlling the nature and extent of development and site alteration activities to reduce the risk that changes will increase the flooding risk in the area.

*Developing Wetlands:*
Since the arrival of the first European settlers, approximately 70 per cent of wetlands in southern Ontario have been destroyed. Prior to 2005, the PPS permitted development in provincially significant wetlands throughout the Canadian Shield. Although the 2005 PPS increased protection for these wetlands, development and site alteration is still allowed if the wetland won't be negatively impacted. The vast majority of wetlands across Ontario remain unprotected since they haven't been evaluated and designated as significant by MNR. (For further discussion about wetlands, see this year's Annual Report on pages 35-43.)

Most wetlands in northern Ontario are in unorganized areas and outside the jurisdiction of any CA. As a result, they are not protected by *CAA* 'development' regulations. Where CAs exist, wetlands still won't be protected unless they are first evaluated to verify that they meet specific criteria. According to some complaints that the ECO has received from the public, unless the municipality in which the wetland is located agrees, the CA will not regulate the wetland. Since municipal politicians now make up approximately 75 per cent of the representatives on CA boards, concerns have been raised about their ability to resist local pressures to allow development in wetlands and flooding hazard areas.

*Managing Runoff and Unrestrained Use of Impervious Materials:*
Managing runoff in older parts of cities is often very difficult using conventional methods. Many of the homes and businesses have little or no pervious area, e.g., lawn or garden. Streets are often too flat to handle runoff or have low spots resulting in local flooding. In addition, developers are not required to design stormwater systems to handle large rainfall events. When such events occur, considerable flooding due to runoff will result.

More precipitation can infiltrate natural areas and agricultural lands than urban areas. Precipitation falling on roofs, parking lots and roads built of impervious materials, such as asphalt, concrete, metal, brick and/or stone, becomes runoff that must be managed. A 2006 study prepared for the Toronto & Region Conservation Authority estimated that replacing agricultural lands with high-density commercial uses increased surface runoff by 250 per cent and peak stream flows by 200 - 500 per cent. Although the SWMP encourages lot-level controls, it does not encourage the use of porous materials for parking lots, walkways, etc., and other innovative methods of handling runoff locally.

*Ministry of Agriculture, Food and Rural Affairs (OMAFRA) – Agricultural Drainage:*
For over a hundred years, agricultural drains have been installed under the *Drainage Act* and predecessor legislation to regulate drainage from agricultural lands for the purpose of increasing crop production. However, agricultural drains are increasingly being used to manage runoff from residential and/or industrial lands even though their design flow standards are much less stringent than the urban runoff guidelines in SWMP. Two years ago the ECO raised concerns about the consequences of relying on agricultural drains to handle the increase in volume of runoff that occurs when agricultural lands are converted to residential and industrial lands. (For additional information, refer to pages 290-295 in the Supplement to the 2004/2005 Annual Report.)

*Aging Flood Control Structures and Inadequate Stormwater Systems:*
About one-quarter of Ontario's 2,400 dams are more than 50 years old and in need of maintenance and repair. In response to concerns raised in the late 1990s that dam failures could result in major flooding of downstream communities and agricultural lands, MNR is planning to introduce dam safety legislation that will require dam owners to review the safety of all dams over a specified size.

Ruptures in older stormwater systems resulting in local flooding and street cave-ins are increasingly common. One-fifth of Toronto's storm sewer system is more than 80 years old and some stormwater systems, such as is found in parts of Peterborough, were not designed to handle more than a one to two year return storm - more severe storms would result in potentially severe flooding.

*Funding of Flood Management Initiatives Cut in the 1990s:*
Between the 1950s and early 1990s, the federal and/or provincial governments funded various flood management initiatives including the building, maintenance and operation of dams, and purchase of privately owned lands in flooding hazard areas. During the 1980s, the federal and provincial governments paid 90 per cent of the costs of preparing flood plain maps, which are used by municipalities to identify the flooding hazard areas where development should be prohibited.

Provincial transfer payments to the CAs for mandated flood management services, such as operating and maintaining dams and flood forecasting and warning, were cut by 87 per cent from $58.9 million in 1992 to $7.6 million in 2000 and have remained flat. Conservation Ontario calculated that the provincial transfer payment in 2002 should have been $16.7 million, not $7.6 million per year, according to its funding agreement with MNR. Funding for enforcement of *CAA* regulations and reviewing municipal plans was withdrawn by MNR in 1997. Conservation Ontario contends that these activities are integral components of flood control programs and their funding should be restored. Previously shared, provinces now provide only 11 per cent of CA funding; whereas, municipalities now provide 40 per cent. Conservation Ontario also noted that many flood plain maps are out-of-date, and aren't available for many rural areas, in part, because of the expense of preparing them.

*Adapting to Climate Change:*
Flood management, including flood plain mapping, dams, stormwater systems, and municipal plans, are based on historical storm events, such as the 100-year flood, Hurricane Hazel and the Timmins Storm. However, under the climate change scenario, historical events may be poor predictors of future events. More frequent and intense precipitation events in Ontario are expected and anecdotal evidence suggests that municipalities have already experienced such events.

- Since 1996, three 100-year storms have hit Carp and the Ottawa area.
- In 2002, the 49$^{th}$ Parallel storm in northwestern Ontario exceeded the rainfall depth of the Timmins Storm by a factor of at least two.
- In 2002, Peterborough experienced a 100-year storm, and just two years later, a 290-year storm in 2004.
- In 2004, Hurricane Frances dumped up to 150 mm of rain in 12 hours on eastern Ontario.
- On August 19, 2005, a 100-year storm dumped almost 175 mm of rain in less than one hour across the northern sections of the City of Toronto and York Region.

By 2090, Environment Canada estimates that the 100-year storm will be experienced every 50 years, based on a projected 15 per cent increase in rainfall across Ontario. Infrastructure with long service lives, such as dams, combined sewer systems and stormwater systems, are at risk of experiencing storms that exceed their capacity to handle the floodwaters. A recent climate change study included a recommendation that designers of future stormwater structures should assume a storm that is 15 per cent larger than now.

Ontario's growing population means that more people are living, working and playing in the paths of potentially severe floods. Ontario's growing affluence means that compensation costs are higher. Urbanization and the unrestrained use of impervious materials mean that the volume of runoff has

increased. The expectation that climate change will result in more frequent and intense floods has led an increasing number of experts to question the appropriateness of planning policies that allow development and site alteration in flood prone areas, and to raise concerns about aging infrastructure. Some are also questioning the appropriateness of relying solely on historical storm events to design infrastructure. Regulations, policies, and guidelines have not been updated. Meanwhile major infrastructure decisions are being made based on historical data, and municipalities and CAs are struggling to prohibit development and site alteration in flood prone areas.

# SECTION 11

## UNDECIDED PROPOSALS

## SECTION 11: UNDECIDED PROPOSALS

As required by section 58 of the *EBR*, the ECO is required is produce a list of all proposal notices posted on the Environmental Registry between April 1, 2006 and March 31, 2007 that were not decided by March 31, 2007. Prescribed ministries posted 5 Acts, 37 regulations, 68 policies, and 1,294 instruments. A detailed list is available from the ECO by special request.

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