



# NEGLECTING IN OUR OBLIGATIONS



*The era of procrastination, of half-measures,  
of soothing and baffling expedients,  
of delays, is coming to a close. In its place,  
we are entering a period of consequences...*

Winston Churchill, November 1936

Environmental  
Commissioner  
of Ontario



Commissaire à  
l'environnement  
de l'Ontario

Gord Miller, B.Sc., M.Sc.  
Commissioner

Gord Miller, B.Sc., M.Sc.  
Commissaire

October 2006

The Honourable Michael A. Brown  
Speaker of the Legislative Assembly of Ontario  
Room 180, Legislative Building  
Legislative Assembly  
Province of Ontario  
Queen's Park

Dear Speaker:

In accordance with Section 58 of the *Environmental Bill of Rights, 1993*, I am pleased to present the 2005/2006 annual report of the Environmental Commissioner of Ontario for your submission to the Legislative Assembly of Ontario.

Sincerely,

A handwritten signature in black ink, appearing to read 'G. Miller', written in a cursive style.

Gord Miller  
Environmental Commissioner of Ontario

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<b>Glossary: See the ECO Web site at <a href="http://www.eco.on.ca">www.eco.on.ca</a></b>	

# *A Message from the Environmental Commissioner of Ontario*

## *Neglecting Our Obligations*

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Our society is governed by its democratic legislatures, which make our laws. Those laws are considered to be the will of the people, and the nature of those laws is an expression of the nature of our society. In Ontario, we have many good laws that govern our use of natural resources and our relationship with the environment.

Three key pieces of Ontario's environmental legislation state as their purpose the protection and conservation of the environment. For example, our laws governing mining and aggregate extraction say they are intended to minimize the adverse impacts of these activities and to require the rehabilitation of the land. These are lofty purposes, reflective of a responsible and well-intentioned society. And when these purposes are expressed in law they create obligations – obligations to the people of Ontario, to Canadians at large, and to the international community that respects and lives by the rule of law. But most of all, these stated purposes create profound obligations to the generations yet to be born, who deserve to live in a natural landscape as healthy and bountiful as that which we enjoy.

Creating this annual report involves reviewing dozens of the decisions and actions of government ministries that impact on the environment. We know that we can never expect the machinery of government to run perfectly, and we realize that sometimes the government has little choice but to make decisions that may compromise the interests of the natural environment. And thus, we also know that we will have lots to report on and many recommendations to be made. This year, however, in considering hundreds of pages of analysis generated by my staff, a discouraging realization grew within me that there was just too much going wrong and just too much left undone in too many areas of environmental protection. What I have realized is that inspection and enforcement targets are not being met, essential environmental standards are not being updated, important timelines are not being met, necessary guidance documents are not being written, the problems of the Great Lakes are not being addressed, there is no strategy for climate change, information on the state of our landfills is years out of date, and our waste management program is on the edge of crisis.

This accumulation of problems, shortcomings and failures in so many areas can only be described as mismanagement or, more seriously, neglect. I have come to the conclusion that we are neglecting our obligations to protect and conserve the natural environment as we have promised.

But how can this be? Why is this neglect occurring? One thing I have also concluded with certainty, it is not the fault of the men and women in the public service who pursue

their obligations within the various ministries with commitment and dedication despite the constraints, frustrations and tribulations their situations impose.

A closer look at the failures and foibles revealed in this report points to a fundamental and systemic source of the neglect: the lack of capacity. For too many years the key Ministries of the Environment and Natural Resources have simply not been given the human and financial resources that are realistically required to meet the broad expectations imposed by their mandates.

The most critical problem is funding for the Ministry of the Environment. This ministry is charged with protecting us from the pollution of our air, water and soil and with minimizing damage to our ecosystems. MOE sets policy and oversees all aspects of our waste management concerns – from the Blue Box at the curb to the most hazardous waste our society produces. The ministry is supposed to monitor and inspect industry, commercial facilities, institutions, and municipal sewage plants and landfills. It is in charge of protecting our drinking water, including everything from setting standards, inspecting plants, and even licensing and regulating the drilling of all types of wells. The ministry is supposed to work with the other provinces and the federal government on national issues and engage our American neighbours on issues like trans-boundary air pollution and the clean up of the Great Lakes. In addition, the ministry is responsible for assuring that the environmental assessment process is properly applied to the thousands of undertakings initiated in the public sector each year. MOE staff are charged with overseeing brownfields, administering Drive Clean, encouraging Green Industry, running a complex environmental lab, and regulating pesticide use throughout the province. And this is not an exhaustive list of their responsibilities.

You would think that with all this responsibility affecting so many aspects of our natural environment, our society and our economy, that the Ministry of the Environment would figure prominently in the operating budget of the province. It is well reported that out of every operational dollar the province spends, more than 40 cents is spent by the health ministries. So what portion is allocated to the MOE? ... 5 cents, 10 cents, more? The reality is that the Ministry of the Environment struggles to meet its vast list of obligations on just over one-third of one cent of that government operational dollar. This is just too little money to get the job done.

Funding essential ministries at such low levels that they are bound to fail is a fundamental neglect of our obligations to the natural environment, to the people of Ontario, and to the generations yet to be born. The consequences of such decisions are grave and long lasting, as the Walkerton Inquiry clearly showed. We must find a way to meet our obligations. Spending a penny for the environment would be a good start.



Gord Miller  
Environmental Commissioner of Ontario



Part 1



# The *Environmental Bill of Rights*

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

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

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

## Statements of Environmental Values

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

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

## The Environmental Commissioner and the ECO Annual Report

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

In the annual reports to the Ontario Legislature, the Environmental Commissioner reviews and reports on the government's compliance with the *EBR*. The ECO and staff carefully review how ministers exercised discretion and carried out their responsibilities during the year in relation to the *EBR*, and whether ministry staff complied with the procedural and technical requirements of the law. The actions and decisions of provincial ministers are monitored to see whether they are consistent with the ministries' Statements of Environmental Values (see pages 188-189).

In Part 2, Significant Issues, the ECO highlights a number of important issues that have been the subject of recent applications under the *EBR* or are related to recent decisions posted on the Environmental Registry. In Part 3, Ministry Environmental Decisions, the Environmental Commissioner and ECO staff assess how ministries used public input to draft new environmental Acts, regulations and policies. In Part 4, Reviews and Investigations, the ECO reviews how ministries investigate alleged violations of Ontario's environmental laws and whether applications from the public requesting ministry action on environmental matters were handled appropriately. Part 5, Appeals, Lawsuits and Whistleblowers, deals with appeals and court actions under the *EBR*, as well as the use of *EBR* procedures to protect employees who experience reprisals for "whistleblowing." In Part 7 of the report, the ECO reviews the use of the Environmental Registry by prescribed ministries, evaluating the quality of the information ministries post on the Registry and whether the public's participation rights under the *EBR* have been respected. In Part 8, Ministry Progress, ECO staff follow up on the progress made by prescribed ministries in implementing recommendations made in previous annual reports.

## The Environmental Registry

The Environmental Registry is the main component of the public participation provisions of the *Environmental Bill of Rights*. The Registry is an Internet site where ministries are required to post notices of environmentally significant proposals. The public has the right to comment on the proposals before decisions are made, and ministries must consider these comments when they make their final decisions and explain how the comments affected their decisions. For complete information on the Environmental Registry and the ECO's evaluation of its use by the prescribed ministries, see Part 7, pages 168-183.

The Registry can be accessed at: [www.ene.gov.on.ca](http://www.ene.gov.on.ca)

## Ministries Prescribed Under the EBR\*

Agriculture, Food and Rural Affairs	(OMAFRA)
Culture	(MCL)
Economic Development and Trade	(MEDT)
Energy	(ENG)
Environment	(MOE)
Government Services	(MGS)
Health and Long-Term Care	(MOHLTC)
Labour	(MOL)
Municipal Affairs and Housing	(MAH)
Natural Resources	(MNR)
Northern Development and Mines	(MNDM)
Tourism	(TOUR)
Transportation	(MTO)

\*Two ministries under the EBR were reconfigured during 2005/2006. The Ministry of Consumer and Business Services was merged with Management Board Secretariat to recreate the Ministry of Government Services. In addition, a new ministry, Health Promotion, was created, and in late June 2006, the ECO made a formal request that it be prescribed under the EBR. The ECO's 2005/2006 annual report and Supplement use the new ministry names even though some of the decisions and actions described in the following report may have been taken by the former ministries as they were then named. It is expected that MOE will revise O.Reg. 73/94 to reflect the new ministry names in the fall of 2006.

## The ECO Recognition Award

Every year, the Environmental Commissioner of Ontario formally recognizes ministry programs and projects that best meet the goals of the *Environmental Bill of Rights* or that use the best internal *EBR* practices. The ECO invites ministries prescribed under

the *EBR* to submit programs and projects that meet either of these criteria. This past year, five ministries responded to our call for nominations, submitting a total of 16 projects for the ECO to consider. An arm's-length panel reviewed the list of submissions and provided advice to the ECO on the ministry project that has been selected for our 2005/2006 ECO Recognition Award.

The following two runner-up projects deserve honourable mention for their noteworthy contributions.

The ECO recognizes the efforts of the Ministry of Natural Resource in negotiating a strong Great Lakes Sustainable Water Resources Agreement. Key provisions in the final Agreement include water diversion bans, stronger water conservation requirements, and tougher standards for managing and regulating water uses within the Great Lakes Basin (see also pages 14-22).

The ECO also recognizes the efforts of the Ministry of the Environment to update the province's local air quality regulations through Ontario Regulation 419/05 – Local Air Quality. The new regulation includes a shift to more stringent, effects-based air standards, more accurate air dispersion models capable of providing realistic predictions of contaminant concentrations under a range of conditions, and more detailed emissions reporting requirements to demonstrate compliance (see also pages 89-96).

This year's ECO Recognition Award is being presented to staff of the Ministry of Natural Resources for their exemplary work in developing and implementing the Southern Ontario Land Resource Information System (SOLRIS). SOLRIS is a comprehensive regional electronic mapping program designed to accurately measure the nature and extent of southern Ontario's natural, rural and urban areas and to track changes in these landscapes over time. This is achieved by combining the most current data from both provincial and local resource data sources and supplementing this information with recent information acquired from satellite landscape images.

SOLRIS will prove to be a critically important tool for supporting effective implementation of a host of plans and initiatives in southern Ontario, including the Oak Ridges Moraine Conservation Plan, the Greenbelt Plan, the Niagara Escarpment Plan, and source water protection efforts. These initiatives all rely on up-to-date, detailed mapping in order to ensure that environmentally significant features and functions are identified and protected. Further, SOLRIS is available to other players, including Conservation Authorities and municipalities, which also require accurate, up-to-date information so that sustainable approaches to planning are pursued. The ECO applauds the efforts of the Ministry of Natural Resources in both developing and facilitating the implementation of this critical planning tool.

## Special Award

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Finally, the Environmental Commissioner is presenting a special award this year to staff from the Ministry of Municipal Affairs and Housing, along with staff from nine other ministries and the Niagara Escarpment Commission, for their contributions to the establishment of the Golden Horseshoe Greenbelt. The Greenbelt consists of a ribbon of 1.8 million acres of land running from Niagara Region to Peterborough, around one of the fastest growing regions in North America. The *Greenbelt Act* and Greenbelt Plan are designed to provide permanent protection to the agricultural lands surrounding the Greater Golden Horseshoe and enhanced protection for natural features and functions within the Greenbelt. The ECO recognizes and applauds the inter-ministerial efforts necessary to establish the Greenbelt and looks forward to seeing the benefits from the full implementation of the *Greenbelt Act* and Plan.

## Education

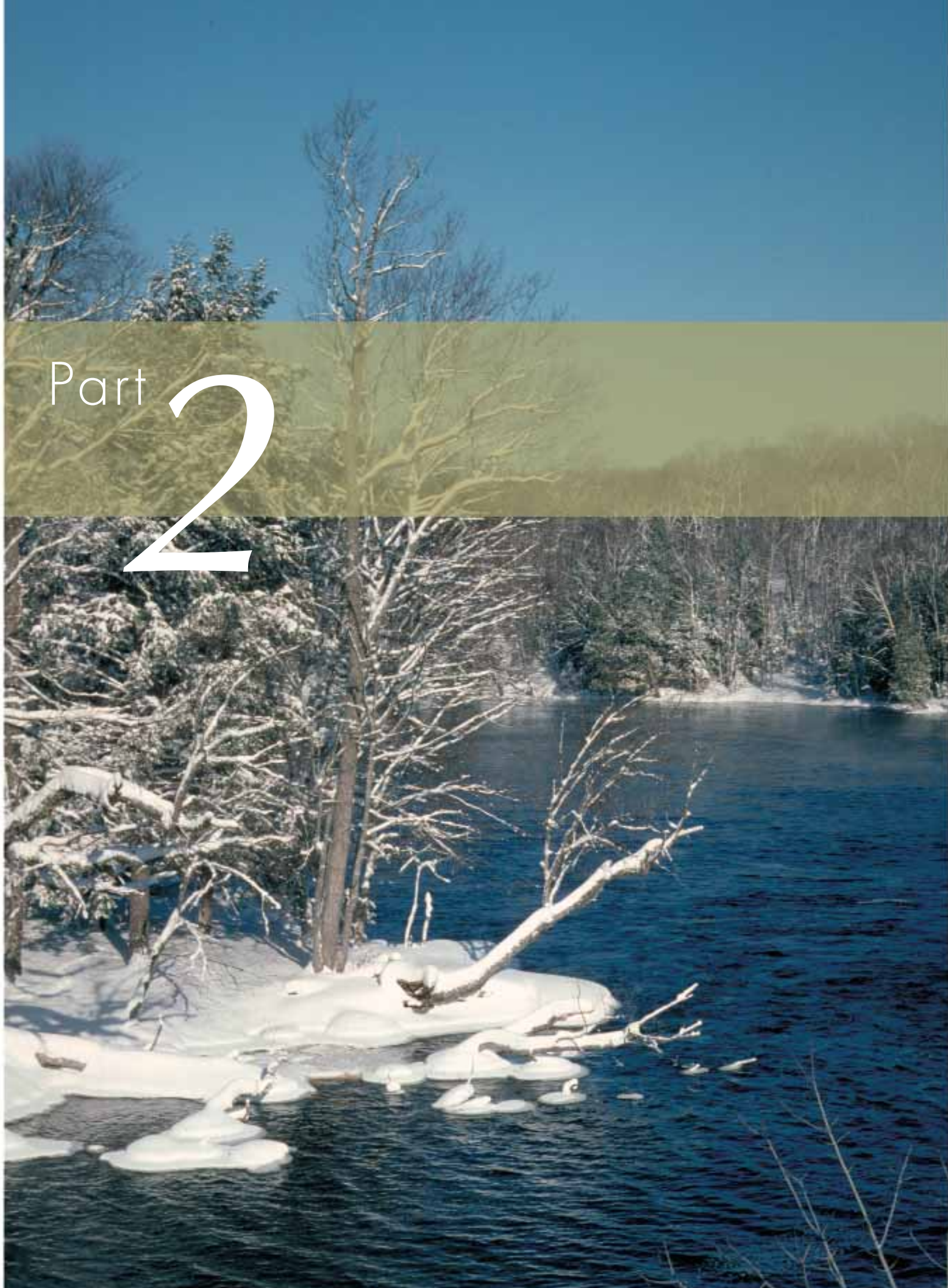
The ECO's educational mandate under the *Environmental Bill of Rights* is to ensure that Ontarians are able to participate in a meaningful way in the province's environmental decision-making process. There are three main components to the ECO's education program. The first component consists of our Information Officer, who last year handled over 1,600 direct inquiries to our office, received via telephone calls, faxes, letters and e-mails. This represents a 20 percent increase from the previous year. The full resources of the office of the ECO are used to ensure that members of the public are responded to efficiently and courteously so they will understand how they can use their environmental rights under the *EBR*.

The second component of our education program is the ECO's commitment to a multi-faceted outreach strategy, which includes staff participation in broad-based environmental events, in a concerted effort to reach all sectors of Ontario's population. This year the Environmental Commissioner made over 40 keynote presentations, while his staff made over 70 presentations throughout Ontario.

The final component of the ECO's education program is our Web site, which has a wide range of information aimed at helping Ontarians exercise their legislated environmental rights under the *EBR*. The ECO Web site had over 105,000 visits last year. To learn more, please visit our Web site at [www.eco.on.ca](http://www.eco.on.ca).

As always, we invite you to call us with your questions, comments, and requests for information. Presentations can be arranged for larger groups, subject to the availability of ECO staff. Our phone numbers are 416-325-3377 or, toll free, 1-800-701-6454.

Part  
2



# Significant Issues

Every year the Environmental Commissioner of Ontario focuses special attention on a number of environmental issues that we believe require prompt attention and improved handling. In this section we highlight the Ministry of the Environment's lack of progress in addressing pollution and ecological pressures facing the Great Lakes. We also examine whether MOE is able to deliver a coherent and effective strategy on diverting more solid waste from disposal. The ECO also looks at efforts by the Ministry of Natural Resources to revise laws on aggregate extraction, improve compliance with laws, and promote conservation of aggregate resources.

Updates in this section include MOE's progress in improving brownfields consultation, and MNR's work on Lake Trout Management and the Natural Spaces Land Acquisition program, a unique initiative that promotes protection of wildlife habitat in southern Ontario. We also highlight the troubling failure of several government ministries to develop a sound approach to the significant challenges posed by climate change.

## Managing Great Lakes Waters

On December 13, 2005, the governments of Ontario, Quebec and the eight U.S. states that border the Great Lakes signed the Great Lakes – St. Lawrence River Basin Sustainable Water Resources Agreement to strengthen protection of the waters of the Great Lakes Basin.

The Agreement establishes a decision-making standard for new or increased water takings and limits water diversions out of the Basin. The parties agree to ban most new or increased large-volume water diversions. Exceptions to the diversion ban are allowed in limited circumstances – for example, to supply water to a community near, but not entirely within, the Basin. Exception criteria (see Standards under the Agreement) are set out for determining when to approve the proposed diversions, and a process called “regional review” will ensure that all 10 parties are consulted before an exception is approved.

The Agreement’s listed objectives include joint protection and restoration of the waters of the Basin, collaborative arrangements for water management, and prevention of adverse impacts from water takings. The Agreement aims to ensure that the water management of the Basin’s state and provincial governments is retained. It also calls for improved scientific information and data exchange for water management, and promotes adaptive management to address uncertainties and evolving scientific knowledge.

## Standards under the Agreement

The **decision-making standard** states that a water withdrawal should:

1. Return the water to its source watershed, less an allowance for consumptive use.
2. Have no significant individual or cumulative impacts on water quality, quantity, or water-dependent natural resources.
3. Include “environmentally sound and economically feasible” water conservation.
4. Comply with all applicable laws and agreements (e.g., the Boundary Waters Treaty of 1909).
5. Be reasonable in terms of efficient water use and minimal waste; balancing economic, social and environmental considerations; sharing the resource; and minimizing impacts on the Basin environment and on other water uses. If hydrological restoration of the watershed is part of the water-taking proposal, that may be taken into account.

The **exception standard** criteria, for allowing exceptions to the ban on diversions, include:

- The exception can’t reasonably be avoided by efficient use of existing water supplies.
- Only as much water as is reasonable for the stated purpose will be diverted.
- All water withdrawn will be returned to the source watershed, less an allowance for consumptive use.
- No significant individual or cumulative impact to the quantity or quality of Great Lakes waters and related resources should result from the diversion itself, nor from the precedent it sets.
- Water conservation measures should be used to minimize the amount withdrawn or consumed.
- All applicable laws, agreements and treaties must be complied with.



The state and provincial signatories to the Agreement describe it as a “good-faith” agreement: provinces and states cannot themselves sign treaties across international boundaries. The eight Great Lakes states also signed a second, binding agreement, or “Compact,” which gives the states veto power over new water diversions on the U.S. side of the Basin. (For a more detailed review, see the Supplement to this report, pages 134-143.)

## History of the Great Lakes Charter Agreements

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In 1985, Ontario, Quebec and the Great Lakes states signed an agreement called the Great Lakes Charter, committing to notify and consult with one another about new or increased large-volume water takings from the Basin.

A number of Great Lakes water quantity issues came to a head in the late 1990s and early 2000s:

- In 1998, Ontario issued, then quickly revoked, a controversial Permit to Take Water for shipping Lake Superior water overseas. The incident highlighted anxieties about bulk water diversions from the Great Lakes – fears that a diversion might set legal precedents under international trade agreements, undermining government control over water.
- Both Ontario (in 1999) and Canada (in 2001) passed laws banning water diversions from the Great Lakes Basin.
- In 1999, the governments of Canada and the United States referred Great Lakes water consumption and diversion questions to the International Joint Commission (IJC), the bilateral body that monitors the Boundary Waters Treaty of 1909. The IJC recommended that states and provinces inform one another of major water taking proposals, and that approvals take into account practical alternatives, cumulative impacts, and water conservation. They called for a Basin-wide water conservation program, and improvements in water use data collection, Great Lakes science, groundwater monitoring, and climate change mitigation.
- By 2001, water levels in three of the five Lakes – Superior, Michigan and Huron – had been lower than normal for four years in a row.

In 2001, the 10 parties to the 1985 Charter added an Annex to it, to clarify criteria for approving large water takings. Principles of the Annex 2001 agreement included minimizing water loss, protecting water quantity and quality, and improving the waters and water-related resources. The parties committed to developing binding agreements that would lay out a decision-making standard for water taking proposals.



The signing of Annex 2001 was followed by three years of negotiations between the parties to develop implementing agreements. The Ministry of Natural Resources, along with the Ministry of Intergovernmental Affairs, represented Ontario in these negotiations. A draft Agreement and Compact released in July 2004 were widely criticized by Ontarians for not being protective enough. In November 2004, the Minister of Natural Resources responded by announcing that Ontario would not sign the draft Agreement. (For more on the 2004 proposal and the public response, see the ECO's 2004/2005 annual report and Supplement.)

Negotiations resumed, and the parties released new drafts in June 2005. Consensus was announced in November, and the Agreement and Compact were signed in December 2005.

## Implications of the Decision

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The Agreement strengthens the powers of the Basin provinces and states to protect Great Lakes Basin waters. It explicitly invokes concerns such as cumulative impacts, climate change, the need for water conservation, and the importance of improved science and information. It creates a Regional Body of the premiers and governors or their designates, which will regularly review and report on the parties' water management and water conservation programs, report as requested on whether parties are meeting their obligations under the Agreement, and make recommendations for improvement.

### *Notification and consultation*

A regional review process under the Agreement will allow all parties to raise concerns about proposals, in any party's jurisdiction, for water takings from the Basin. Provisions for public participation include notification, opportunity for comment, and consultation with First Nations. The Regional Body will then meet and issue a public – although non-binding – declaration of findings.

### *Out-of-Basin water diversions*

The parties agree to ban water diversions, with limited exceptions for communities that are close to, but not located fully within, the Basin. Such communities must meet a number of tests, including the "exception standard," to qualify for the exception (see Standards under the Agreement, page 14).

### *Intra-Basin diversions*

Proposed large water takings that divert water from one Great Lakes watershed to another must satisfy a number of tests; for the largest diversions (averaging over 19 million litres/day), all clauses of the exception standard apply and the proposal must undergo regional review.

### *Regulating water takings*

The parties agreed to establish programs for regulating water takings. As a backstop, if any party fails to establish a program within 10 years, the threshold for requiring a permit in that jurisdiction is to be set at 379,000 litres/day. This is not a minimum, merely a default; in February 2006, Michigan set its threshold for Great Lakes withdrawal permits at approximately 50 times that rate, or 19 million litres/day. This is only the first step in regulating Michigan's water use.

### *Water conservation*

The Regional Body is to develop Basin-wide water conservation objectives. Ontario and the other parties must develop water conservation programs and report annually to the public on their progress. Conservation programs need to adjust to new water demands, cumulative impacts and climate change. Every five years, all of the parties will provide an assessment of their conservation programs to the Regional Body, which will review the Basin-wide objectives.

## Public participation and the *EBR* process

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The 2004 round of public consultations on the draft Agreement included a 91-day Environmental Registry posting, and regional public meetings. When the parties returned to the negotiating table at the start of 2005, Ontario established an Annex Advisory Panel, with experts representing 55 different environmental, municipal, industrial, agricultural, First Nations and other groups, to assist the Ontario negotiators. In 2005 the new drafts were posted for a 60-day consultation, and regional meetings were held. Major concerns included preventing diversions, maintaining federal jurisdiction, protecting First Nations' interests, addressing existing as well as new water takings, obtaining veto power for Ontario over other parties' water-taking approvals, tightening water volume thresholds for triggering agreement provisions, and setting shorter implementation timelines.



On November 28, 2005, MNR posted an information notice on the Registry to announce the release of a revised draft Agreement. It stated that once a decision was made on the draft, a decision notice for the proposal would be posted. It added: "MNR anticipates this will occur in December 2005."

Although the Agreement was signed on December 13, 2005, it took MNR until March 24, 2006, to post a decision notice on the Registry.

## ECO Comment

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The Great Lakes are enormous. They hold nearly one-fifth of the fresh surface water on planet Earth. It is hard to imagine that the water could ever "run out." But these lakes are a legacy of the last Ice Age; less than 1 per cent of their water is renewed by rainfall each year, and if extraction rates exceed renewal rates, the seemingly inexhaustible Great Lakes will indeed shrink.

Already, Basin residents have seen several recent years of low water levels. Scientists are warning that we can expect climate change to result in lower water levels in the future and to create problems such as shallower shipping lanes, decreased drinking water source quality, loss of some wetlands, changes in ecosystem structure and function, and inadequate urban infrastructure (e.g., for stormwater management). Demands for increased water supply to serve a growing human population in the Basin – now over 40 million people – will only add to the challenge.

But for many observers, the greatest threat to sustaining the Lakes comes from outside the Basin, as population growth, water overuse, water pollution and a changing climate create growing pressure to divert Great Lakes water to water-short areas, such as the U.S. southwest. The significance of the Agreement and Compact is the power they give to the Great Lakes provinces and states to protect the resource. With an environmentally based standard for deciding which water taking proposals to approve, and clear rules for keeping water in the Basin, the Agreement decreases the risk that the Great Lakes could be drained to meet the appetites of an increasingly thirsty world.

The Agreement is groundbreaking in formally recognizing cumulative impacts, in invoking the threat of climate change, and in its precautionary language about taking environmental action in cases of uncertainty. Other notable elements of the Agreement are the commitment to setting water conservation goals, reporting publicly on progress in water conservation, and improving Great Lakes science.

The ECO congratulates all of the parties for their hard work and political courage in achieving consensus on important new protections for the Great Lakes waters.

In particular, MNR and supporting ministries are to be commended for their leadership, for the public consultation opportunities they provided, and for their responsiveness to public calls for stronger protections. The negotiators also shared sensitive information with their broad-based Annex Advisory Panel, and responded to panel feedback during the negotiation process. MNR credits this panel for promoting key environmental protections such as a ban on diversions, a commitment to setting Basin-wide conservation goals, and shortened implementation timeframes for the Agreement.

Not everyone was satisfied with the process: First Nations groups did not have the representation they wanted, some advocacy groups were excluded from the advisory panel, and the consultation period in the summer of 2005 was decried by some as too short. Nevertheless, the ECO recognizes this Agreement as an example of successful public consultation, through which a responsive government was able to develop better environmental decisions.

## From agreement to action

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The provisions of the new Agreement do not, in fact, satisfy the first directive of Annex 2001: to develop a Basin-wide binding agreement, through whatever arrangements are necessary. Instead, Ontario finds itself with a non-binding “good faith” Agreement. However, the Agreement is a significant and very welcome development.

Ontario was able to take a strong stand at the bargaining table in part because it is ahead of neighbouring jurisdictions in having well-established laws and policies to govern water takings and prevent water diversions.

Unfortunately, Ontario is in a much shakier position in terms of other very important commitments of this Agreement, such as Great Lakes science and water conservation. The vagueness of these commitments, which creates difficulties for tracking whether Ontario has lived up to its obligations, is also unfortunate. The ECO is very concerned that the Agreement become more than an on-paper success. Implementation is key.

While MNR was the lead ministry negotiating the Agreement much of the implementation will fall to the Ministry of the Environment. The ECO is troubled by MOE's limited capacity for Great Lakes monitoring, data sharing and environmental remediation. The province was proud to announce the signing of this Agreement, and rightly so. But without an announcement of any new capacity for implementation, the ECO questions how Ontario will live up to its Great Lakes obligations.

# Cleaning Up the Great Lakes: The Canada Ontario Agreement

The 2002 Canada Ontario Agreement Respecting the Great Lakes Basin Ecosystem (COA) is a five-year agreement between federal and provincial government agencies on restoring and protecting the Lakes, aimed at helping Canada to meet its obligations under the Great Lakes Water Quality Agreement with the U.S. (GLWQA). The provincial signatories are Ontario's Ministries of the Environment, Natural Resources, and Agriculture, Food and Rural Affairs.

In our 1999/2000 annual report, the ECO reviewed the province's performance under the previous COA, signed in 1994, and found that most targets established in the Agreement were not met. In 2002/2003, we reviewed the new COA and found many causes for concern. Among other things, the Agreement lacked firm ongoing commitment to funding and staffing, transparency or independent review of implementation, and a strategy to address non-native invasive species.

With the current COA scheduled to expire in March 2007, the ECO is concerned that the parties to this Agreement may again fail to meet their Great Lakes commitments.

## Great Lakes Water Quality Agreement

Unlike the COA, the Great Lakes Water Quality Agreement between Canada and the U.S. is not a time-limited agreement with an expiration date. It is a permanent agreement with provisions for periodic review every six years. Public consultations on the latest review of the GLWQA began in the summer of 2005.

The GLWQA was first signed in 1972. Its focus has expanded over the years, from municipal and industrial water pollution to a broader set of problems, including land-based pollution, toxic hot spots and other priority locations (called Areas of Concern), contaminated sediments, and persistent toxic chemicals. Since 1978, the GLWQA's stated goal has been "to restore and maintain the chemical, physical, and biological integrity of the waters of the Great Lakes Basin Ecosystem."

Many Great Lakes problems are not dealt with in the GLWQA, including climate change, drinking water source protection, invasive species, loss of biodiversity, and habitat protection and restoration. The 2005/2006 review of the GLWQA may lead to changes in the Agreement that will address such issues.

## Great Lakes, great problems

Human activities – and the chemical pollution, habitat destruction and water consumption they often entail – are growing sources of stress to the ecosystems of the Lakes. Some Great Lakes problems have been aggressively addressed, resulting in real and dramatic improvements; examples include decreased loadings of several persistent toxins (PCBs, DDTs, dioxins) and of phosphorus. However, other environmental issues persist, or have

become more serious: some beaches are closed because of bacterial contamination; toxic sediments have not been cleaned up; shoreline habitat has been lost to urbanization and cottage development; invasive species disrupt native ecosystems; and watersheds and airsheds around the Basin continue to load pollution from cities, farms and other industries into the Lakes. The 2002 COA sets out a framework for tackling many of these problems.

The 2002 COA contains four Annexes dealing with (1) Areas of Concern, or priority locations for clean-up, (2) pollution, (3) lakewide issues, and (4) monitoring the Lakes and managing information. Each Annex includes a few overarching goals and the results needed to meet the goals. The Agreement also lists 181 activities or deliverables, and notes which party is responsible for each. While a few of the results and deliverables are specific and time-bound (“an 85 per cent reduction in mercury releases compared to releases in 1988 by 2005”), many are far less quantifiable commitments – for example, to conduct research, provide opportunities for consultation, develop outreach and education materials, establish issue teams as needed, or provide technical support or (unspecified) funding.

## Transparency and public involvement

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A key public concern raised during consultations on the 2002 COA was the need for public involvement. The Agreement included the principle of ensuring public and stakeholder participation. Environment Canada assured the ECO in 2002/2003 that it was forming a stakeholder group, and the Environmental Registry decision notice posted by MOE announcing the COA stated that the parties would establish “a stakeholder advisory committee to ensure public involvement, transparency and accountability for activities under the Agreement.” While members of the public are engaged in many specific projects under the COA, no such stakeholder group was created. Instead, a Great Lakes Innovation Committee was set up, with invited academic, industry, municipal, environmental and other representatives, “to bring innovative approaches to overcoming barriers and take advantage of opportunities to make progress on the COA goals and results.” There does not appear to be any mechanism through this committee for ensuring transparency and involvement of the general public.

When the province announced \$51.5M to implement the five-year Agreement, it did not clarify to the public how that money was to be allocated, nor was there any public document indicating that provincial and federal funding commitments would be sufficient to meet the commitments of the Agreement. Most of the provincial allocation has by now been spent. It is not clear how much was invested in cleaning up polluted sediments, in funding actions by non-governmental partners, or in offsetting ministries’ own budget constraints to maintain their core programs on Great Lakes protection.

In June 2005, the parties released a COA update to the public, reporting on the 2002/2003 period. The report discussed high-level goals and results, giving examples of activities and anecdotes about successful projects, but it did not provide an accounting of which goals were on track for completion, nor of the 181 specific activities committed to under the Agreement. In contrast, an internal status report finalized in May 2005 – and not released to the public – indicated that the agencies do not expect to achieve some of COA's goals and results.

The ECO has in the past called for an independent review of COA progress and continues to be concerned about the lack of transparency.

## The Great Lakes remediation roller coaster

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Other major agreements on protecting the Great Lakes, such as the Canada-U.S. Great Lakes Water Quality Agreement and the state-provincial Great Lakes Charter Annex implementing agreements, are long-term agreements with specific timelines for meeting their commitments, and provisions for periodic review and possible renegotiation.

The COA model, in contrast, has led to a series of time-limited agreements, with gaps between the expiry of one and the signing and funding of the next. Already, during the fifth year of the Agreement, activity under the COA has been winding down: ministries planned fewer COA projects for 2006/2007; community partners were informed that there was no more funding to support collaborative projects such as wetlands research; and government Great Lakes scientists funded through COA were let go or advised to start looking for other work.

Staff in Great Lakes program areas have been reduced to a skeleton crew in many of the responsible ministries. In MOE, for example, not only restoration projects but also core functions such as Great Lakes science, long-term environmental monitoring, and coordination of community clean-up efforts have, due to lack of adequate core staff and funds, been relying heavily on COA resources.

Seventy-five per cent of the people of Ontario live and work in the Great Lakes Basin, and Ontarians have the right to expect their government to meet its Great Lakes clean-up commitments. The ECO is concerned by indications that Ontario is neglecting to meet its stewardship obligations to our Great Lakes.

(For ministry comments, see page(s) 211.)

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### Recommendation 1

The ECO recommends that MOE ensure transparency and a mechanism of public involvement and accountability in the new COA agreement.

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## Protecting Drinking Water Sources: The Clean Water Act

The idea sounds so simple: to assure the quality of drinking water, we must protect the watersheds and aquifers from which our water is drawn. Implementing this idea has proven to be far more complex, involving provincial and municipal levels of government, Conservation Authorities, and other groups. Six years after the May 2000 tainted water tragedy in Walkerton, and four years after the province committed to implementing the recommendations of the Walkerton Inquiry on watershed-based source protection, the roles, responsibilities, powers and funding arrangements for source protection are still being negotiated.

Watershed-based source protection was the topic of 22 out of Justice O'Connor's 93 recommendations in his Report of the Walkerton Inquiry (Part II), released in May 2002. Since that date, the Ministry of the Environment, the lead ministry to implement his recommendations, has literally reorganized itself around the need to develop and launch a province-wide drinking water source protection program. Three advisory committees, seven Environmental Registry notices, numerous working groups and countless meetings have focused on source protection. The province has also been providing money to Conservation Authorities and municipalities to conduct ground-water studies and hire staff for source protection planning. In November 2005, MOE announced \$67.5 million in spending on source protection – \$51 million on technical studies over five years, and \$16.5 million over one year to support Conservation Authorities in hiring staff and preparing for source protection.

In December 2005, MOE released its draft source protection law. Bill 43, the proposed Clean Water Act, 2005 (CWA), was introduced in the Legislature and posted as a proposal on the Environmental Registry. MOE also posted another proposal in December, sketching out some matters to be addressed in regulations under the proposed Act, and raising many questions for public comment. Second reading was completed and the proposed Clean Water Act, 2005, was referred to the Standing Committee on Social Policy. It is expected that the CWA will be passed, and draft regulations will be proposed, in the fall of 2006.

Some of the key elements of the proposed approach to source protection:

- *Source protection planning will be done locally, not provincially:* Bill 43 proposes to map out source protection areas on the basis of watersheds. Municipalities and Conservation Authorities will be charged with planning and implementation.

A “Source Protection Committee” will be established for each area, and will be in charge of identifying vulnerable areas in the watershed and threats to drinking water, as well as preparing a “source protection plan” to address the significant threats.

- *Municipalities will have new source protection powers:* New enforcement powers will be accompanied by a requirement that a municipality or its designate (e.g., the public health unit or Conservation Authority) appoint permit officials and inspectors. Their job will be to ensure the development and enforcement of risk management plans for significant drinking water threats, and to monitor building permits and other land use approvals for compliance with the source protection plan.
- *Source protection will trump other concerns:* The 2005 Provincial Policy Statement already calls for municipal planning to take source water protection into account, but uses terms such as “designated vulnerable areas,” which have little significance in the absence of legislation and planning in defining such areas (see pages 39-45 of the 2004/2005 ECO report). Under Bill 43, municipal land use plans and decisions under the *Planning Act* will all have to conform to a source protection plan. Where the source protection plan conflicts with other provincial plans (and where the Clean Water Act conflicts with other Acts and regulations), the plan that provides the most water protection will prevail. Instruments issued under a source protection plan will have primacy over requirements of the *Nutrient Management Act, 2002*.
- *Non-municipal wells are not protected:* The draft source protection framework does not include protection of private drinking water supply wells, although it allows a municipal council to pass a resolution designating non-municipal drinking water systems for protection. (For more on non-municipal systems, see articles on the Wells Regulation, pages 51-54, and on smaller drinking water systems, pages 107-111.)

The government has not yet committed to a course of action on a number of tough questions. Some issues to watch include:

- *Protecting waters beyond Conservation Authorities’ boundaries:* Bill 43 proposes to allow, but not require, the Minister of the Environment to make an agreement that municipalities prepare source protection plans for watersheds that do not have a Conservation Authority. For waters outside municipal as well as Conservation Authority boundaries, and for First Nations lands, it is not clear whether or how source protection planning will apply.
- *Protecting the Great Lakes:* With nearly three-quarters of all Ontarians living within the Great Lakes Basin, the Great Lakes are the source of drinking water for a majority of the province’s population. The Lakes are also the ultimate recipients of pollution from most of the populated watersheds in the province. Bill 43 proposes to allow,

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. (Ontario may also choose to implement stronger drinking water source protection under Great Lakes agreements the province is currently implementing, reviewing or renegotiating. (See pages 14-19 for more on the Great Lakes Charter, the Canada Ontario Agreement and the Great Lakes Water Quality Agreement.)

- *Appeals process:* The proposed approach to source protection planning requires public consultation, but limits rights to appeal. A likely area of controversy will be a Source Protection Committee's "Assessment Report," which will draw lines on the map demarcating vulnerable areas such as wellhead protection areas as well as rank threats and decide which ones are significant enough to merit mandatory action. People whose activities or property values are affected by such decisions may want to challenge the science on which decisions are based, but the proposed Clean Water Act, 2005 does not appear to allow for appeals of such decisions.
- *Farmers and land owners:* MOE has proposed allowing municipalities to impose site-specific permits on farm operations, based on scientific risk assessments, to protect vulnerable drinking water source areas while still allowing farming in those areas. Farmers' concerns include adequate representation of agriculture interests and other landowners and industries on local source protection committees, the interaction between source protection and nutrient management programs, and the potential restrictions on farmers' land use.
- *Interim protection from significant threats:* After the CWA is passed, the source protection process (involving committees, Terms of Reference, Assessment Reports, Source Protection Plans and plan implementation) is likely to take years. Activities or land uses identified as significant threats will need to be addressed in the interim. MOE proposed giving municipalities interim order powers (and related liability protection) during the time period between an Assessment Report and approval of a Source Protection Plan.
- *Planning from best available data:* Integrating accurate, up-to-date land use, hydrogeology and water quality information in a format that source protection planners can use will be another challenge for the province. MOE, other ministries, Conservation Authorities and municipalities all have a role in managing land use, permit and approvals information, and monitoring the state of the water and changes in the environment.
- *Existing threats and cumulative impacts:* The source protection framework focuses on municipal powers to limit new land uses and manage threats from some current

activities. It is not clear whether the framework will be sufficient to address potential damage from historical activities and land uses, or to protect watersheds and aquifers from gradual degradation through accumulated impacts of lower-concern activities.

- *The costs of implementation:* The government has allocated tens of millions of dollars to municipalities and Conservation Authorities to conduct studies and initiate planning, but has not yet committed funds for implementing source protection plans.

## ECO Comment

MOE's obligations are to protect the streams, lakes and aquifers of Ontario not only for drinking water supply, but because clean waters and healthy aquatic ecosystems are central environmental values. The ECO looks forward to an ongoing provincial commitment to source protection implementation, and will continue to monitor and report on developments in Ontario's watershed-based source protection program.

(For ministry comments, see page(s) 211-212.)

## 60% Waste Diversion by 2008 – Pipe Dream or Reality?



In June 2004, the Ministry of the Environment released "Ontario's 60% Waste Diversion Goal – A Discussion Paper," which described various options for achieving the goal of diverting 60 per cent of waste from disposal by the end of 2008. In the Paper, MOE proposed taking "a new comprehensive approach to waste diversion, one that will reduce the amount of waste generated, increase the rates of reuse and recycling, and reduce the amount of waste going to disposal." MOE noted that the goal of increasing the overall provincial diversion rate from 28 per cent in 2002 to 60 per cent in 2008 is ambitious, but that it was achievable if everyone, including the provincial government, is committed to finding solutions.

MOE's waste diversion goal applies to non-hazardous solid waste produced by the municipal sector, primarily residential waste such as Blue Box materials and leaf and yard waste. The goal also applies to non-hazardous solid waste produced by the construction and demolition (C&D) sector, and by the industrial, commercial and institutional (IC&I) sectors, which include restaurants, stores, offices, schools, hotels and manufacturers.

Waste diversion programs are based on the recognition that sending waste materials to landfill sites and incineration uses energy and resources and increases demand for virgin materials, which could have been fulfilled by recycling or by reusing these waste materials. The production of recycled materials usually results in fewer pollutants being released to the environment. Waste diversion programs also reduce the demand for landfill space, which can often be used for better purposes and which must be monitored for decades for contaminants that may migrate offsite.

In this year's annual report – more than two years after MOE announced its 60 per cent goal – the ECO is concerned about Ontario's lack of progress toward achieving this goal.

## Background

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During the 1980s and early 1990s, concerns about waste issues – such as opposition to landfill sites, lack of provincial leadership, inadequate public consultation, unclear processes, and lack of financing and markets for recyclable materials – spurred the Ontario government to establish a goal of diverting 50 per cent of residential and IC&I waste from landfill sites by the year 2000. In 1991, a set of regulations was proposed to encourage the 3Rs – reduction, reuse and recycling. A Waste Reduction Action Plan was prepared that included activities to support the development of markets for recyclable materials.

In 1992, the diversion rate was about 21 per cent. By 1995, the Blue Box Program had become the cornerstone of waste diversion programs; the 3Rs regulations requiring recycling by the municipal, IC&I and C&D sectors had been passed; and various reports on the technological and financial challenges associated with waste diversion had been prepared. However, waste management issues began to attract less attention after the Ontario government decided to withdraw from significant involvement in municipal waste approvals in the late 1990s, and the 3Rs regulations were soon ignored. By 2000, Ontario's diversion rate was only about 27 per cent. The goal of diverting 50 per cent of waste from landfill sites by the year 2000 had become a pipe dream.

In our 2000/2001 annual report, the ECO reviewed the implementation of the 3Rs regulations in the IC&I sector and raised concerns about non-compliance and the lack of enforcement, as well as the need for awareness of the 3Rs regulations. Three years later, the 2003/2004 ECO report raised a concern about the need for a provincial waste management strategy that addressed both disposal and diversion of waste.

By 2004, the state of affairs was reminiscent of the early 1990s. Reported waste diversion rates indicated that by 2002, municipalities were still diverting only about 27 per cent

of their waste, the IC&I sector about 20 per cent and the C&D sector about 12 per cent. (The Canadian Construction Association disagreed with the C&D figure and estimated that it had diverted about 26 per cent of its waste.) Once again, spurred by concerns similar to those expressed in the early 1990s, the Ontario government announced in 2004 another waste diversion goal – 60 per cent by the end of 2008.

At the time of the 2004 announcement, some positive steps had already been taken. In 2002, legislation to encourage the development of waste diversion programs, namely the *Waste Diversion Act (WDA)*, was enacted, and the first program under this Act, the Blue Box Program Plan (BBPP), was approved in 2004. (For a review of the *WDA*, refer to the 2002/2003 ECO report, pages 77-80.) Encouraged by the expectation of new funding provided under the BBPP and concerned over diminishing landfill space, some municipalities had been improving their diversion rates by expanding their organics programs to include food waste, encouraging diversion in multi-unit dwellings, and adopting user-pay systems. In 2003, municipalities diverted about 53 per cent of generated Blue Box wastes. The BBPP was amended in 2004 to make the Blue Box waste diversion target 60 per cent to make it consistent with the overall waste diversion goal. Also in 2004, MOE requested that a waste diversion program be developed for electronic and electrical equipment, and in April 2006, MOE announced that it plans to request a waste diversion program for household hazardous and special wastes.

(For an overview of provincial waste diversion initiatives, refer to the Supplement to this report, Section 10. For additional information on the BBPP, refer to the 2003/2004 ECO report, pages 78–85.)

## Key factors for achieving the goal of 60 per cent waste diversion

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In its June 2004 Discussion Paper, MOE suggested that five factors are key to achieving its goal of 60 per cent waste diversion. The five factors include: creating “a sense of public ownership of the need to manage our wastes differently”; convenience to users, such as residents in multi-unit dwellings, and removal of obstacles to waste diversion; creating sustainable markets for diverted waste, particularly organics; enforcing the 3Rs regulations, such as in the IC&I and C&D sectors and multi-unit dwellings, and timely environmental approvals of waste diversion initiatives; and developing a waste diversion strategy. MOE noted that increasing the diversion of organics is critical to achieving the 60 per cent goal.

### *Creating a sense of public ownership*

Under the Blue Box Program Plan, funding is provided to municipalities to promote Blue Box recycling to residents, particularly those living in multi-unit dwellings. The BBPP also improved the availability and reliability of municipal waste diversion statistics, since it requires that industry report how much Blue Box material they generate annually and that municipalities report how much Blue Box waste they collect and market. (However, under the 3Rs regulations, only the largest establishments in the IC&I and C&D sectors are required to collect waste diversion statistics, which must be reported to MOE on request.)

Building on the BBPP and the 3Rs regulations, MOE identified several potential actions in its 2004 Paper that could enhance the public's sense of ownership of waste diversion issues. They include assigning mandatory waste diversion targets to municipalities; requiring some businesses to report their waste diversion rates publicly; requiring all waste generators in the municipal and IC&I sectors and waste site operators to report waste diversion and disposal statistics as part of a province-wide waste monitoring system; and developing awareness and educational materials that promote the 3Rs.

### *Creating sustainable markets*

In the 2004 Paper, MOE stated that "part of the challenge is to construct an effective and efficient system that connects homes, offices, factories and schools to the industries that need and want waste materials to make new products." A sustainable market for recyclable materials requires a reliable supply of materials of acceptable quality. According to industry experts, sustainable markets are in place for some Blue Box wastes, such as aluminum, steel and paper. Sustainable markets could be established for some plastics and clear glass if the supply and quality are improved for these materials. Factors such as contamination and inadequate technology for processing these materials make this task more difficult. In its 2004 Paper, MOE suggested that providing financial incentives would encourage the development of new waste diversion technologies to address the technological obstacles.

A sustainable market has not been established for organics. According to MOE's 2004 Paper, recycling of organics into compost costs about \$100 per tonne, but revenues from the sale of compost are much lower at this point because contamination with plastic has resulted in low-quality compost at some composting facilities. In its paper, MOE pointed out that high-quality compost would produce not only significantly higher prices, but also better marketing opportunities.

### *Convenience to users and removal of obstacles to waste diversion*

MOE's 2004 Paper noted that if technological issues in multi-unit dwellings were not resolved, significant amounts of recyclable waste would not be diverted. Lack of convenience and technological obstacles have been cited as reasons for low diversion rates in multi-unit dwellings. For instance, garbage rooms may be too small to hold recycling bins or are not readily accessible by residents, and garbage chutes are not designed to handle recyclables or organics.

Another obstacle is the high cost of building or expanding recycling facilities and of operating waste diversion systems. Prices for Blue Box wastes, with the exception of aluminum, do not cover the cost of recycling them, and for some types of glass, recyclers may demand payment to take the material. Cash-strapped municipalities and businesses often find that disposal of waste in landfill sites, even in sites in the United States, is cheaper than recycling Blue Box wastes – even with the additional funding from industry.

Since organics comprise 38 per cent of municipal waste, MOE has suggested that if the 60 per cent goal is to be met, the number of backyard composters should be increased from 1.25 million to 2 million households, and the capacity of central composting facilities should be increased from 360,000 to 960,000 tonnes per year. These proposals are estimated to cost hundreds of millions of dollars to implement.

To cover the costs of expanding recycling capacity and to lessen the financial advantage of disposal, MOE suggested in its 2004 Paper that a financial strategy that identifies sources of funds such as user-pay systems, product stewardship and grants should be developed, and that the ministry may consider providing financial support.

### *Enforcement of 3Rs regulations and timely environmental approvals*

Although the 3Rs regulations have existed since 1994, MOE conducted only one major inspections sweep, and only in multi-unit dwellings, before it published its 2004 Discussion Paper. In the paper, MOE acknowledged that the ministry must “more consistently” enforce the 3Rs regulations in the IC&I sector, a key factor in achieving the 60 per cent diversion goal. In July 2006, MOE announced that it was taking steps to improve compliance with the 3Rs regulations.

MOE suggested that industry would be more likely to develop new waste diversion technology if the process to approve small-scale research and demonstration projects under the *Environmental Protection Act* were streamlined, and if the exemption for municipal research projects under Regulation 334, R.R.O. 1990, of the *Environmental Assessment Act*, were clarified. This exemption allows “research” projects – e.g., pilots



using emerging technology – to forego an environmental assessment. In a separate initiative, the Environmental Assessment Advisory Panel, appointed by MOE to make recommendations on how to improve Ontario’s environmental assessment process, made the same recommendation in March 2005.

Under the 3Rs regulations, municipalities are not required by law to provide residents with services to divert food wastes – for instance, Toronto’s Green Bin program – although these wastes comprise 25 per cent of a household’s waste stream. The IC&I sector, particularly restaurants and hotels, are also not required to divert food wastes. In the 2004 paper, MOE suggested that the regulations be revised to require the IC&I sector to divert organics, but did not suggest that they be revised to require municipalities to provide food waste diversion services to their residents. MOE also noted that the 3Rs regulations apply only to the largest generators of waste in some IC&I sectors and suggested that these regulations may need to be changed to reflect a “renewed commitment to waste diversion.” For instance, the regulations apply to only about 10 per cent of manufacturers. Although MOE did not explicitly suggest that the regulations be changed to include more IC&I establishments, there is an implication that this is being considered.

#### *Preparation of a waste diversion strategy*

MOE’s Discussion Paper pointed out that the development of a provincial waste diversion strategy is a key factor in meeting the ministry’s diversion goal, but did not elaborate any further as to when or how this strategy would be drafted.

## Public participation and the EBR process

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MOE’s 2004 Discussion Paper was posted on the Environmental Registry for a 60-day comment period. Six consultation sessions were held during the summer of 2004, and feedback from these sessions was summarized in a report that can be found on MOE’s Web site. As of July 2006, MOE had not posted a decision notice on the Registry. However, it had posted a new notice that proposed amendments to the *EPA* would eliminate the requirement for some ministry approvals to use organic wastes to produce ethanol and biodiesel as fuel.

## ECO Comment

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The 2004 Discussion Paper and the subsequent public consultation seemed to signal a new commitment by MOE to resolve waste diversion issues. MOE stated that “without taking action, Ontario will fall far short of its goal of reaching 60% diversion by the end of 2008.” However, MOE has not taken timely action. More than two years after



announcing the 60 per cent goal and publishing the 2004 Paper, MOE has finally posted a proposal on the Environmental Registry that addresses some of the suggestions in the Discussion Paper. Even if MOE acts promptly on the July 2006 proposals, the time required to implement regulatory changes, obtain approvals for new recycling facilities and emerging technologies, and then to build them is usually measured in years, not months. In addition, the IC&I sector and many municipalities have

multi-year contracts for their waste collection and diversion programs. Changes to their programs will be delayed until new contracts are signed.

Developing and implementing effective and efficient waste diversion programs can be challenging. The nature and quantity of materials entering the waste stream change as consumer preferences change and are often the result of product and packaging design decisions made in other parts of the world, well beyond MOE's control. Regardless, jurisdictions including Ontario have implemented programs that divert significant amounts of valuable materials from landfill sites and continue to seek ways of diverting more waste. The ECO also recognizes that the challenge increases with each percentage increase in the target for diverting waste and that at some point the benefits of diversion no longer outweigh the economical, social and environmental costs of disposal. Nevertheless, the ECO believes that there are still significant opportunities for waste diversion that can be pursued, including those outlined in MOE's 2004 Discussion Paper.

Public resistance to waste management initiatives, particularly to the use of emerging technologies and the siting of new operations, has often been warranted. A legacy of poorly managed sites, ineffective environmental monitoring, and inadequate resources for inspecting waste diversion and disposal sites has eroded the trust of many Ontarians that their rights to a healthy environment are being protected by the province. Strong and ongoing enforcement of environmental protection laws is required to regain the public's trust. The ECO is encouraged that MOE plans to increase its enforcement of the 3Rs regulations in the IC&I sector. Meaningful improvements in waste diversion rates will require new ways of handling waste, including the use of emerging technologies, but progress will be hampered unless the support of the public is obtained.

MOE's tardy follow-up to the 2004 Discussion paper will make very difficult for many municipalities and the IC&I sector to meet the 60 per cent goal. Most of the suggestions in the 2004 Paper relied on MOE – not municipalities nor the IC&I sector – to take the first step, which it did not take until two years later. The ECO continues to believe that a provincial waste management strategy that addresses both waste disposal and

waste diversion for all waste is urgently required. The delays thus far may have already rendered the 60 per cent goal a pipe dream.

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#### Recommendation 2

The ECO recommends that MOE develop a provincial solid waste management strategy that addresses the whole waste stream.

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## The Environmental Impacts of Ontario's Small and Aging Landfills – Who Is Keeping Track?

Ontario's landfills – whether closed, dormant, or active – are an ongoing source of public concern. Ontarians have made extensive use of the *Environmental Bill of Rights* since its enactment to raise concerns about landfills. This past year was no exception, with landfill concerns surfacing through applications for investigation, review, and leave to appeal. Meanwhile, many municipalities continue to struggle with waste management – they don't have any place in Ontario to send their waste and are forced to export to the United States. Consequently, increasing the total capacity or the daily fill rate of currently operational landfills is becoming a common response to dwindling landfill capacity in the province.

The combination of public concern and demand for landfill capacity has prompted the ECO to examine the adequacy of provincial frameworks for monitoring and regulating Ontario's landfills and for providing the public with information about these sites. Significant shortcomings have been identified in MOE's approach to landfills management, some of which are considered here and may be revisited by the ECO in future years.

### Signs of trouble – the Edwards Landfill site

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The Edwards Landfill, located in Haldimand-Norfolk County, illustrates the impacts of some of these shortcomings in MOE's approach to landfills. An effort is under way to transform this site from a rural community landfill with a fill rate of 10 tonnes per day to a site approved to accept up to 500 tonnes per day of institutional, commercial and industrial waste from across Ontario. MOE approved the amendment to the landfill's certificate of approval (C of A) in February 2005 (see the ECO 2004/2005 Supplement, page 66, for more details). Area residents sought and were granted leave to appeal MOE's decision, and as of June 2006, a preliminary hearing was under way. The ECO

also received an *EBR* application for review arising out of concerns related to the Edwards site (see the Supplement to this report, pages 192-197).

Shortcomings of the province's approach to landfills – and the associated impacts observed in the Edwards Landfill case:

*Lack of publicly accessible, up-to-date information on landfill sites* – The most recent version of MOE's Inventory of Waste Disposal Sites, published in June 1991, lists the Edwards Landfill as an active rural site posing the highest hazard to humans. No other details about the site are provided in the inventory.

*Lack of a comprehensive plan to update waste management Cs of A* – A site investigation and waste characterization study of the Edwards Landfill was conducted in 2001 – 10 years after the site was classified as posing a hazard to humans – and appears to have been undertaken because of the owner's desire to expand both the service area and daily fill rate at the site, and not as part of any MOE effort to update the requirements of the site's C of A.

Further, in 2002, MOE made what it described as an administrative amendment to the C of A to establish the site's total waste capacity, something that had never been done for the site. Administrative amendments do not have to be posted to the Registry for public comment and, thus, the public had no opportunity to comment on the establishment of the waste capacity of the Edwards site.

*Two-tiered system of standards* – Until recently, the Edwards Landfill was subject only to the basic landfill standards set out in s. 11 of Regulation 347 (General Waste Management), under the *Environmental Protection Act*, even though the landfill site was identified as posing the highest hazard to human health. (On a positive note, MOE has required the owner to satisfy the tougher 1998 landfill standards as a requirement prior to pursuing increases to the site's service area and daily fill rate.)

## Keeping track of Ontario's landfills

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The last inventory of waste disposal sites in Ontario was released by MOE in June 1991. Inventory information includes: site location, types and percentages of waste present, status of site (closed, dormant, active), and classification of a site based on whether it poses any risks to human health or the environment. No details are provided regarding site age, approved total waste capacity, presence of engineered site controls, frequency of site inspections, whether a site complies with applicable provincial standards, date when certificate of approval was issued, etc.

Given that the ministry's 1991 site inventory is 15 years out of date, the ECO made repeated requests to MOE in spring 2006 for current information on landfills, but

to no avail. Further, in response to a 2005 *EBR* application for review that included a request that the inventory of Ontario's landfill sites be updated and enhanced, MOE indicated that it lacks the staff and financial resources required to develop a new electronic inventory; obtain and input data; develop regulations to compel landfill owners to report information; operate, maintain, and continuously update the inventory; and continuously audit information provided by landowners. This is a startling admission and it suggests that MOE lacks the information necessary to monitor and regulate Ontario's landfill sites effectively. In stark contrast, jurisdictions elsewhere have developed publicly accessible information systems that not only provide extensive, up-to-date information, but also confirm that these jurisdictions are tracking compliance at their landfill sites. California's "SWIS" program, described below, is a very good example.

### California's Integrated Waste Management Board and the Solid Waste Information System (SWIS)

The State of California's Integrated Waste Management Board Website provides up-to-date information on the state's solid waste facilities, operations, and disposal sites via the Solid Waste Information System (SWIS). For each facility, SWIS provides information about location, type of facility, regulatory and operational status, waste types authorized for disposal, local enforcement agency and inspection and enforcement records. The website also identifies waste facilities that are in violation of the state's minimum standards. See [www.ciwmb.ca.gov/SWIS/](http://www.ciwmb.ca.gov/SWIS/).

## Standards for Ontario landfills

There are two sets of regulatory standards, MOE indicates, that "*may*" apply to municipal waste landfill sites in Ontario. All sites are required to comply with the 'Standards for Waste Disposal Sites' set out in s. 11 of Reg. 347. Key environmental protection requirements set out in s. 11 include:

- Prohibitions on the discharge into watercourses of drainage that may cause pollution.
- Waste placement sufficiently above or isolated from the maximum water table to prevent impairment of groundwater, and sufficient distance from potable water supplies so as to prevent water contamination – unless adequate provision is made for the collection and treatment of leachate.
- Construction of low permeability berms and dykes, where necessary, to prevent the migration of contaminants off-site.
- Sites with the potential to pollute water must be monitored and, if necessary, measures taken for the collection and treatment of contaminants and for the prevention of water pollution.

More stringent requirements were established in 1998 through O.Reg. 232/98 (Landfilling Sites). However, these stronger requirements apply only to:

1. Municipal waste landfill sites with a **capacity of > 40,000 m<sup>3</sup>** and that were established on or after August 1, 1998.
2. Every municipal waste landfill for which an alteration, enlargement or extension is proposed **on or after August 1, 1998** that involves an increase in the site's **total capacity to >40,000 m<sup>3</sup>**.

(For more information, see the ECO's 1998 annual report, page 147.)

These requirements include:

- Design specifications for groundwater protection, including a site specific design option and two generic design options.
- Mandatory air emissions control (landfill gas collection) for sites with a total waste capacity of > 3 million cubic metres.
- Assessment of ground and surface water conditions.
- Design requirements for buffer areas, final cover design, surface water and landfill gas control, and the preparation of a site design report.
- Operation and monitoring requirements for site preparation, groundwater and surface water monitoring, daily cover, record keeping and reporting
- Requirement for a leachate contingency plan.
- Site closure and post-closure care provisions.
- Financial assurance requirements for private sector landfills.

Therefore, a two-tiered system of landfill standards exists in Ontario – both the size and the age of a site determine whether it is subject to one or both sets of regulatory standards. And while MOE has failed to provide the ECO with the actual statistics, it is safe to say that the majority of Ontario's landfills are subject only to the more basic Reg. 347 s. 11 requirements.

## Protocol for Updating Certificates of Approval for Waste Management

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In 2005, MOE finalized a series of protocols for updating Cs of A for waste, air, sewage and water works. (For additional background see the Supplement to the ECO's 2004/2005 report, pages 81-84.) MOE's 2005 Protocol for Updating Certificates of Approval for Waste Management has the stated objective of making the requirements

of existing Cs of A more consistent with the requirements of newly issued Cs of A. However, the protocol contains no plan to systematically work through and upgrade the Cs of A for all existing landfill sites – especially those older sites not subject to the 1998 landfill standards. Further, the protocol is triggered only by MOE action, and the ministry’s potential action appears to be more focused on new or expanding sites rather than on old sites.

MOE “may” review an existing C of A when:

- An owner makes an application to MOE for a change to existing equipment, processes, production rates or for an expansion of plant capacity (excluding applications for minor changes and administrative amendments).
- Ministry staff, through the course of compliance, inspection or enforcement activities, identifies a facility that is appropriate for a more in-depth assessment.
- MOE targets specific sectors and/or types of facilities with more significant potential environmental or health impacts based on overall ministry and government environmental protection priorities.

The protocol also describes the public’s right, under the *EBR*, to make an application requesting the review of an existing landfill C of A as another route that can trigger a C of A update, but the ECO has documented only one case where such a review was granted – the Kitchener Street landfill in Orillia, which was reviewed in 2005 (see the Supplement to the ECO’s 2005/2006 report, pages 176-182).

## ECO Comment

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Gaps in the current provincial framework for monitoring and regulating Ontario landfills suggest that there is a critical need for MOE to implement a more rigorous system for tracking all aspects of landfill status. The ECO therefore urges MOE to update its landfill inventory and make it readily accessible to the public. MOE should consider developing and implementing an inventory system comparable to California’s SWIS system in order to track all aspects of a landfill’s status, including compliance with applicable provincial standards, and to make this information readily available to the public through on-line access.

The ECO believes MOE already has access to this information and that it should be made public. If MOE requires further authority, we urge that the ministry exercise its power, under s. 176(4) of the *Environmental Protection Act*, to develop regulations requiring landfill proponents to report on the status of their sites, including on compliance with provincial standards.

The ECO also urges MOE to develop a comprehensive plan to update the requirements/standards applied to aging, active landfill sites, both large and small, approved prior to August of 1998. This could be achieved by following through on the objective outlined in the Protocol for Updating Waste Management Certificates of Approval – by developing and implementing a comprehensive plan to revisit and update the Cs of A for these sites in order to incorporate, to the extent possible, the newer landfill standards. This would help MOE to shift to a more proactive approach for updating landfill requirements, rather than relying on triggers such as proponent applications for site modifications.

(For ministry comments, see page(s) 213.)

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### Recommendation 3

The ECO recommends that MOE update and enhance its landfill inventory and make it accessible to the public.

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## Ontario's Sand and Gravel Extraction Policy: Overdue for Review

In 1994, Ontario began a long period of rapid growth, consuming vast quantities of sand and gravel each year to build highways, roads, high-rises, subdivisions and other infrastructure. Our total consumption of sand, gravel and rock (collectively called aggregates) amounts to approximately 173 million tonnes per year – an astonishing 14 tonnes per person, per year. To meet this need, we have thousands of pits and quarries, especially close to southern Ontario's areas of intensive growth.

Aggregates are very heavy, but low-cost materials, so trucking costs are significant, and create pressure to extract aggregates as close to markets as possible. Since aggregates are a key ingredient for building public infrastructure, the provincial government also has a longstanding policy of encouraging aggregate extraction as close to markets as possible. As a general rule, municipal councils must give the aggregate industry access to local deposits of aggregate, regardless of local need for aggregate, or concern from local residents. Municipalities can find this situation frustrating, since they have very limited powers to deal with day-to-day compliance problems, yet must accept aggregate sites.

Ontario's geology dictates where the best deposits of high-quality aggregate can be found: the Niagara Escarpment, the Oak Ridges Moraine and the Carden Plain are all excellent sources for many specialty aggregate products. However, as the ECO has noted



in past annual reports, these are also regions with significant natural heritage, providing unique habitats and remnant green corridors in a landscape that is otherwise rapidly urbanizing. Aggregate operations remove virtually all vegetation, topsoil and subsoil to reach the sand, gravel or bedrock beneath. By necessity, extraction also removes all natural habitat, disrupts pre-existing stream flows, changes final grades on the land, and alters drainage patterns. While on the one hand, municipalities are directed by the Provincial Policy Statement to provide access to aggregates, the very same document also directs them to maintain “linkages and related functions among surface water features, ground water features, hydrologic functions and natural heritage features and areas.” So the siting or expansion of pits and quarries in southern Ontario is becoming increasingly controversial.

Pits and quarries are regulated by the Ministry of Natural Resources, under the authority of the *Aggregate Resources Act (ARA)*. MNR issues site-specific approvals to operators through licenses (on private lands) and permits (on Crown lands). A key part of the approval process is the drafting of a site plan by the operator. In approving the site plan, MNR sets out conditions on how operations at the sites are to be carried out, such as the allowable depth of excavation, allowable hours of operation, constraints on noise, locations of visual screens such as tree plantings or berms, and any required protection of wetlands, woodlots or other natural heritage areas.

The ECO has warned repeatedly in past annual reports that the environment is not adequately protected by the existing regulatory and policy framework for pits and quarries. Key shortcomings include erratic compliance, poor enforcement, unacceptably low rates of rehabilitation of disturbed lands, and a policy vacuum on resource conservation. As well, in northern Ontario, the *ARA* does not apply to most pits and quarries on private lands, so these operations have fewer environmental rules.



## Weak compliance system and poor enforcement

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Following regulatory reforms in the late 1990s, aggregate operators became responsible for assessing their own compliance with site plans, while MNR committed to field auditing 20 per cent of sites each year. But this arrangement has many weaknesses. MNR’s own evaluation in 2002 found that some industry operators were submitting reports deficient in important information such as excavation depth or rehabilitation

information (see the 2003/2004 ECO annual report, page 62). MNR began to target operators who submitted late or poor quality reports in 2002/2003. Due to a shortage of inspectors, MNR has never been able to meet its own target of field-auditing 20 per cent of sites; actual field audit rates hovered between 10 and 14 per cent between 2002-2004. This means that some sites are operating without independent site audits for seven years or longer, with increased risks that past or ongoing contraventions of the *ARA* are not detected or prosecuted. In 2005, MNR hired three additional inspectors, but it is doubtful that this will resolve all the problems. The ECO continues to hear complaints about aggregate operations from members of the public.

## No regulations for northern pits and quarries on private lands

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The *ARA* applies to Crown land throughout the province and to most private lands in southern Ontario. However, most private lands in northern Ontario are not designated under the *ARA*, so operators on such lands do not require approvals from MNR, and are not bound by the ministry's requirements for site plans, compliance reports, or site rehabilitation. Instead, such operations receive their approval (at a reduced level of scrutiny) from the local municipality, if there is one established.

In 1998, two applicants used their *EBR* review rights to highlight this problem, complaining that unregulated aggregate extraction in their northern Ontario municipality was causing environmental harm, including damage to neighbouring properties, erosion, the destruction of fish habitat and unremediated gravel pits. They asked that geographical coverage of the *ARA* be extended to their township to provide improved scrutiny. MNR turned down the request, but stated that "all significant aggregate resource areas of Ontario should be designated," and that new areas would be designated sequentially by region. However, MNR has not made much progress on this commitment since 1998, citing lack of resources.

This issue made the news in 2004, with the proposal to open a quarry on the north shore of Lake Superior in Michipicoten Harbour – an area of Ontario known for its natural beauty, but not subject to the rules of the *ARA* (see the ECO's 2004/2005 report, pages 89-91). In response to public concerns, MNR designated the quarry property, the Township of Michipicoten, and nearby lands under the *ARA*.

## Poor rehabilitation rates

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The *ARA* requires operators to rehabilitate pits and quarries to the satisfaction of MNR. The Act requires both "progressive" and "final" rehabilitation, meaning step-wise rehabilitation during extraction, and restoration of land either to its former use or

changed to another compatible use. There are also additional, stronger rehabilitation requirements for specially designated areas of the province, under the Niagara Escarpment Plan, the Oak Ridges Moraine Conservation Plan and the Greenbelt Plan. Unfortunately, these rehabilitation requirements are not being complied with by all operators, and many worked-out sites are being left in a disturbed state. MNR data indicate that over the past decade, an annual average of 1,056 hectares is newly disturbed by aggregate operations, while, on average, only 461 hectares are rehabilitated annually. Although these poor rehabilitation rates are an acknowledged concern for MNR, it does not appear that the ministry laid any charges for failures to rehabilitate sites during the six-year period between 2000-2005 (see also pages 141-145).

## No policy to conserve aggregates

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Assuming that Ontario's current population growth rates continue, and that our per capita use of aggregate remains steady, Ontario's demand for aggregate will continue to grow – perhaps by two million tonnes per year. Ontario's voracious appetite for sand and gravel has serious environmental consequences, especially combined with an explicit policy to encourage extraction as close to population centres as possible. The consequences include steadily increasing pressure to dig up southern Ontario's remnant areas of farmlands, natural heritage and greenspace. There are also disruptions for local streams and groundwater, conflicts about noise, dust, blasting impacts, interference with private wells and complaints about truck traffic.



The ECO first drew attention to the need to conserve aggregate in our 2002/2003 annual report, and suggested an increased focus on aggregate recycling opportunities, as well as a rethinking of aggregate specifications and design standards for highways, urban streets and subdivisions. For example, certain modest reductions in standards for pavement width might help reduce urban sprawl, improve stormwater infiltration, and also conserve aggregate. The ECO recommended that MNR and the Ministry of Transportation collaborate on a strategy for conserving Ontario's aggregate resources. In response, MNR did establish an inter-ministerial committee with this focus – the Aggregate Resources Conservation Strategy Committee. But the committee does not appear to have made much progress over the past two years. (See The ECO's Round Table on Aggregates, page 42.)

## The ECO's Round Table on Aggregates

The Environmental Commissioner of Ontario hosted a one-day meeting – *Aggregates Round Table: Toward a Long-Term Aggregate Strategy for Ontario* – on January 26, 2006. The Round Table allowed key stakeholders to discuss the need for, and possible components of, a long-term aggregate strategy for Ontario. The ECO wanted to focus the day's dialogue on a longer-term vision for the year 2020 and beyond, and to steer discussion away from debates about day-to-day approvals, compliance and enforcement issues.

The Round Table brought together over 30 stakeholders, representing a broad range of organizations involved in the aggregate sector, including industry, provincial and municipal government, and non-government organizations. The meeting was not intended to resolve long-standing issues, but rather to identify areas of common ground, as well as areas requiring further discussion. Over the course of the day, participants discussed:

- the need for aggregates
- challenges for close-to-market aggregate sources
- the need for an accurate, current inventory of reserves and consumption trends
- the potential for conservation of aggregates
- opportunities for alternate sources of aggregates
- options for transportation of aggregates ways forward.

Participants found a reasonable level of agreement on the following issues:

- The need for better up-to-date information on aggregate reserves and consumption trends, for agencies and the public.
- The value of examining design standards for roads, highways and other infrastructure to identify options to conserve aggregates.
- The need to increase licence fees and royalties to encourage conservation and to fund government oversight.
- The value of designating all of Ontario under the *Aggregate Resources Act*.
- The value of all parties working together toward a long-term strategy for aggregates by 2008.

The summary report for the Round Table is available on the ECO's Web site [www.eco.on.ca](http://www.eco.on.ca)

## Concerns raised through *EBR* applications

A number of Ontario public interest groups and individuals have tried over the past three years to use the *EBR* as a catalyst for reforms. Unfortunately, in a disturbing pattern, their applications under the *EBR* have been either stalled or dismissed by MNR.

- In November 2003, a citizen's group called Gravel Watch used the *EBR* to request a review of sections of the *ARA* dealing with rehabilitation requirements. The group pointed to the aggregate industry's poor record on rehabilitating old pits and quarries, requesting a review of s. 6.1 of the *ARA*, which sets out rules for an Aggregate Resources Trust. This trust oversees the spending of funds (collected on behalf of the public) on rehabilitation work, but the citizen's group argued that responsibility for the Trust has been inappropriately assigned to the aggregate industry itself,

without adequate public accountability. MNR agreed to undertake this review in January 2004, but 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 this annual report was going to press. The ECO will review the outcome of this application in the 2006/2007 annual report.

- In January 2005, two environmental organizations (the Pembina Institute and Ontario Nature) jointly submitted a wide-ranging *EBR* application for review, requesting reforms of many aspects of Ontario's policy for aggregate resources (see pages 141-145). The applicants described their concerns about rehabilitation requirements, an outdated fee structure, and other issues. MNR turned down this request, arguing that those concerns within MNR's mandate were already being considered under two separate initiatives: 1) the still ongoing review of the Gravel Watch application, and 2) the ongoing internal discussions within the Aggregate Resources Conservation Strategy Committee.
- In November 2005, two applicants requested a review of the geographic extent of the *ARA*, arguing that all of Ontario ought to be designated under the *ARA* (see the Supplement to this report, pages 225-229). MNR also turned down this request, and as a rationale, again pointed to the two internal initiatives still under way – the Gravel Watch review and the inter-ministerial committee on aggregate conservation. However, neither of these two ongoing internal reviews had been focusing on the the question of *ARA* coverage in northern Ontario; indeed, the Gravel Watch group had not even raised *ARA* coverage as a problem.

The ECO is troubled by MNR's rationale for turning down the last two applications. Under the *EBR*, ministers do have discretion to turn down applications, and may consider whether similar reviews are already under way. But the ECO is very concerned that these separate initiatives have been under way since 2003/2004, without any indications of progress and without any opportunity for public participation. Both the lengthy delays and the lack of transparency associated with these internal reviews run counter to the intentions of the *EBR*. The *EBR* requires ministers to conduct reviews "within a reasonable time," and also suggests that ministers consider the adequacy of public participation in policy development.

These recent *EBR* applications demonstrate a growing public concern with the inadequacies of the regulatory framework for aggregate resources, and the unreadiness of the ministry to show leadership on this issue. Another indication of public frustration is the level and broad scope of commentary that MNR received on the recently finalized Policies and Procedures Manual for the Administration of the *Aggregate Resources Act*. The ECO plans to review this ministry decision in our 2006/2007 annual report.

It is now well past time for MNR to engage the full range of stakeholders in an open discussion of the challenges and the options for policy reform. The environmental problems with aggregate extraction have been abundantly documented. The need for stronger environmental protection is clear. Measures for reform include more credible mechanisms for compliance, inspection and enforcement; rehabilitation rates that meet existing legal requirements; and a strategy of effective resource conservation measures. They should also include covering northern Ontario under the *ARA*; an updated fee structure to encourage conservation and to pay for rehabilitation; and transparency and a stronger voice for municipalities and the public.

The ECO urges the Ministry of Natural Resources to give this area of its mandate a high priority in the coming year.

(For ministry comments, see page(s) 213.)

## A Sustainable Transportation System for Ontario: MOE and MTO Remove One Roadblock, But Others Remain

Ontario's transportation sector has a substantial impact on the province's natural environment. The road network, including its demands for aggregates and salt, leaves a major footprint on the landscape, resulting in altered and degraded waterways and fragmented ecosystems. Vehicles on the road network contribute about a quarter of all greenhouse gases emitted in the province and a large amount of the emissions that lead to smog. Ontario's transportation system has been evolving in this unsustainable direction for decades, and yet the big decisions on transportation remain largely screened from public debate. The ECO feels that these points cannot be separated: the transportation network will not become more sustainable without more openness and public input in decision-making.

It's also clear that many Ontarians would like to see the transportation network become more environmentally sustainable. For example, two separate *EBR* applications were filed with the Environmental Commissioner of Ontario, one in 2003 and the other in 2004, requesting that the Ministry of Transportation become subject to more review under the *EBR* (see also pages 132-134). The ECO welcomes the response of the Ministry of the Environment on this issue – MOE has told the ECO that the ministry is planning to revise its *EBR* regulation to make MTO subject to *EBR* reviews.

The ECO has been pointing out for some time the need for greater public scrutiny of MTO decision-making. The ECO's 2000/2001 annual report highlighted the poor

transparency of long-term regional transportation planning exercises, as well as the *de facto* decision-making vacuum in which transportation planning is carried out for the Greater Toronto Area. In more recent annual reports, the ECO has commented on weak public consultation on individual highway projects, and on the excessive environmental damage caused by highway construction. The ECO has also written about the prodigious quantities of sand and gravel used in road construction, the environmental impacts of extracting those materials, and the need for improved management of road salt.



Ontario's transportation policy-making requires an informed public debate within a very broad context. An appropriate level of debate would allow the public to consider, for example, the implications of peak oil (the point at which world-wide oil production ceases to rise), the need to slash greenhouse gases and the smog-causing emissions of vehicles, as well as the need to adapt future infrastructure designs to meet the challenges of a changing climate.

The spending priorities and taxation policies of the province with respect to transportation deserve to be a key part of this debate. The Ministry of Finance implements government decisions large and small that have an impact on transportation in Ontario. In some cases, the ministry's decisions could have provided significantly greater environmental benefits had there been greater public input and more consideration of environmental perspectives when the decisions were being made. For example, since 1991 the Ministry of Finance has administered the Tax for Fuel Conservation (TFFC), often called the "gas guzzler tax" (see below for details), yet the program has never been subject to consultation through the Environmental Registry, because MOF has not been prescribed under the *EBR* since 1995. Critics of the program claim that the incentives and disincentives offered by TFFC's taxes and rebates are not strong enough to substantially alter consumer attitudes toward fuel-efficient vehicles.

MOF's decisions about the allocation of funds for highways and transit in the 2005 Ontario budget will have major consequences for Ontario's transportation system. The 2005/2006 planned gross capital investment in transportation initiatives was about 1 billion, 750 million dollars, of which about 500 million dollars will go to transit. But since MOF is not subject to the *EBR*'s many provisions that allow the public to take part in environmental decision-making, there were no *EBR* consultations, nor was there consideration of a ministry Statement of Environmental Values before or after this spending decision was made. And in fact, even if this funding flows to ministries

that are prescribed under the *EBR*, such as the Ministries of Transportation or Municipal Affairs and Housing, the funded projects might undergo at best only limited *EBR* scrutiny. The Ministry of Public Infrastructure Renewal is a key ministry that will be involved in transportation spending, but it too is not subject to the *EBR*. (MPIR has indicated a willingness to become *EBR*-prescribed, but is not yet, as of early 2006.)

## MOF Transportation Decisions

*MOF's Tax for Fuel Conservation.* TFFC applies to new passenger vehicles using 6.0 or more litres of fuel per 100 kilometres of highway driving, and sport utility vehicles using 8.0 or more litres – in effect, to most vehicles purchased in Ontario. Vehicle purchasers could be taxed as little as \$75 or as much as \$7,000 when buying a very fuel-inefficient vehicle. In reality, no vehicles were charged the highest brackets for the 2006 model year, while a wide array of vehicles were charged a modest amount, between \$75 and \$250.

*Dedicated Gas Tax to Transit.* Ontario became the first Canadian jurisdiction to implement a dedicated tax for public transit. The provincial government allocated 1 cent a litre of the provincial gas tax (as of October 2004) for public transit, which was increased to 1.5 cents in 2005, and to 2 cents in 2006. It is projected that by 2007, \$680 million will be raised for transit systems across the province.

*2005 Budget Spending on Transportation.* The 2005/2006 planned gross capital investment for transportation was about one and three-quarter billion dollars. This investment was broken down as follows: about half a billion dollars for transit; 1.1 billion dollars for highways; and about 100 million dollars for “other” transportation projects.

The Ontario government's decision to spend money on transit is positive, but the decision might have been stronger if both MOF and MPIR were prescribed under the *EBR* and subject to increased transparency and review by the ECO. As it is, there is no way for the ECO or the public to know if environmental perspectives, such as those that might come from the consideration of a ministry's Statement of Environmental Values, were taken into account when this decision was made.

Another recent (2004) and significant budgetary development relates to the dedication of a portion of the provincial gasoline tax revenue to public transit. Many public policy observers see this as a step in the direction of environmental sustainability – that is, charging a fee to a consumer of a private good (the automobile) that is generally more energy-, land- and pollution-intensive than transit, and using the revenues from the fee to support a public good (transit) that has the potential to be much less energy-, land- and pollution-intensive. The value of this measure over three years could be nearly \$700 million. This is an example of a decision for which the Ontario government might have received supportive responses from the public, but the decision was also never subject to consultation through the Environmental Registry.



Important MOF decisions do not receive any form of consultation under the *EBR* because MOF was relieved of its *EBR* obligations in 1995. That year, a regulation removed the requirement that MOF post policy proposals on the Environmental Registry if “implementation of the proposal would result in the elimination, reduction or realignment of an expenditure of the Government of Ontario.” At the time, the ECO issued a special report in which it expressed disappointment in the government’s action. Since that time, members of the public have applied to re-prescribe the Ministry of Finance, but to no avail. It is little wonder that residents of Ontario have felt frustrated in their attempts to advance more environmentally sustainable transportation practices in the province.

The ECO notes that in the early 1990s, there was an effort to make Ontario’s transportation system more diversified and environmentally sustainable. For example, at that time, MAH produced a 107-page document called “Transit-Supportive Land Use Planning Guidelines,” which was to be used to guide urban and suburban development. Also in 1994, an organization called the Ontario Round Table on Environment and Economy brought together a team of people knowledgeable about transportation from the private, public and not-for-profit sectors with the aim of devising a strategy to make Ontario’s transportation system less emission-intensive.

## ECO Comment

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The ECO looks forward to opportunities for residents to make formal applications under the *EBR* for reviews of the Ministry of Transportation’s policies, Acts and regulations. The ECO feels strongly that transportation impacts like air and road salt emissions, land and aggregate consumption, and ecosystem disruption deserve stricter environmental control.

The Ministry of Finance’s Tax for Fuel Conservation could become a useful program from an environmental perspective. The gas tax allotment for transit is also a sensible start, as is more provincial and federal spending on transit. But in order to ensure that these initiatives are effective and that the public is engaged in the undertakings, members of the public need to be consulted at the outset – when both large and small decisions are being made. Getting buy-in from the public helps to ensure program effectiveness. The ECO believes that the removal of a variety of lingering obstacles to public participation in transportation decision-making in Ontario would lead to more lasting and sustainable solutions. At the same time, incorporating environmental principles and perspectives into transportation decision-making would reduce this sector’s ecological footprint.

(For ministry comments, see page(s) 214.)

#### Recommendation 4

The ECO recommends that MTO take the lead with MAH 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 the strategy on the Environmental Registry.

## Update: Lake Trout Management



Ontario has over 200,000 inland lakes, but only about 1 per cent of them are inhabited by lake trout (*Salvelinus namaycush*). This species is adapted to the deep, cold, well-oxygenated lakes of the Canadian Shield. Lakes of this nature are considered geologically young and are known as “oligotrophic” lakes, characterized by being low in nutrients, deep and rocky. Oligotrophic lakes do not produce abundant biomass (plant and animal life). Lake trout, as the top predator in this aquatic environment, are very sensitive to

changes that affect the physical and chemical conditions upon which they depend for survival. They are slow to mature and sensitive to overexploitation. The fragile nature of the species speaks to the good state of the health of the aquatic ecosystem wherever naturally reproducing lake trout are found, and to the need to be extremely cautious in making any changes to the management of the species without adequate monitoring and study.

The sensitivity of lake trout has not been well recognized in past lake and fishery management approaches. As a result, the Ministry of Natural Resources reports, “there has been a decline in both the quality of the sport fishery for lake trout and in lake trout habitat in many lakes.” There is a wide variation in genetic strains of naturally reproducing lake trout, and approximately 5 per cent of the lake trout populations in Ontario have become extinct; 43 per cent of the extinct populations were from southeastern Ontario.

The 2001/2002 ECO annual report raised concerns about the status of management of Ontario’s lake trout and recommended that “the Ministry of Natural Resources develop a clear policy on the classification and protection of lake trout lakes.” In the 2005/2006

reporting period, MNR has begun to develop key policies responding to these concerns, described in two recent proposal notices on the Environmental Registry. First, the ministry posted an information notice on the Registry in October 2005, announcing the development of a multi-faceted strategy to protect lake trout populations in Ontario. Second, the ministry posted a policy proposal with a 45-day public comment period on the Registry in January of 2006 that would establish a dissolved oxygen criterion to be used for the determination of the capacity for shoreline development around lake trout lakes.

MNR's overall strategy has four major elements, as outlined in the October 2005 posting on the Registry:

- Consolidation of land management policies for Crown lands adjacent to lake trout lakes, with subsequent amendments to the relevant area-specific land use policies in the Crown Land Use Policy Atlas.
- Regulatory proposals for the management of the lake trout sport fishery.
- Confirmation and listing of lakes identified for lake trout management.
- A science-based, uniform approach to determining shoreline development capacity on lake trout lakes, using a standardized dissolved oxygen criterion.

Addressing the first point – on land management – it is MNR's intention to post a separate policy proposal on the Registry this year on changes to its land management policies and practices on Crown land adjacent to lake trout lakes. These policies will generally limit the sale and development of Crown land on lake trout lakes, reducing or removing future negative land use impacts on these highly sensitive lakes.

MNR staff have advised the ECO that they expect to post proposals for management of the lake trout fishery on the Environmental Registry for public comment in 2006. These proposals are expected to take the form of a "tool kit" of options, such as season openings, catch limits, size limits, etc., "based on existing science and current knowledge." MNR is also engaged in a major overhaul of the fishing regulations and the reduction and redefinition of fisheries management zone boundaries under a new Ecological Framework for Recreational Fisheries Management in Ontario. The ministry states that "the development of a standardized approach to managing lake trout in Ontario is also part of a provincial initiative to streamline Ontario's sport fishing regulations." The risk of a "one size fits all" approach, however, is that MNR will lose a critical level of detail on local ecosystem characteristics – knowledge that is essential for management of the resource.

Supporting its land and lake management policies, MNR has released a publication listing the 2,259 inland Ontario lakes (exclusive of the Great Lakes) that are currently designated for lake trout management. The lakes are also designated either as “Put-Grow-Take” lakes or as lakes with naturally reproducing populations. The designation of lake trout lakes is an important first step in their protection and allows immediate applicability of the proposed new dissolved oxygen standard and other policies for management. MNR did not post the lake trout lake listing on the Registry for public comment, but the ECO recognizes that it is largely comprised of existing data. The list can be found on MNR’s Web site at [www.mnr.gov.on.ca/MNR/EBR/lake\\_trout/lakes.pdf](http://www.mnr.gov.on.ca/MNR/EBR/lake_trout/lakes.pdf). The ECO encourages MNR to post future updates of this list on the Registry for public comment.

On the issue of shoreline development, MNR released the proposed dissolved oxygen criterion for lake trout lakes, posting a policy proposal for a 45-day public comment period on the Registry in January 2006. The criterion is 7 mg/L Mean Volume-Weighted Hypolimnetic Dissolved Oxygen. The ECO will be reviewing this criterion when MNR makes a decision on the proposal following the public review period.

When we last reported on this issue in 2001, a manual of assessment procedures for lakeshore capacity planning on lake trout lakes was under development by MNR and the Ministries of the Environment and Municipal Affairs and Housing. In April 2006, MOE advised the ECO that the draft manual was awaiting approval by the Minister of the Environment, and that a posting on the Registry for public comment was expected shortly. The publication is intended to provide guidance for municipal planners on assessment methods for evaluating development around lake trout lakes. Planning decisions on whether or not to allow new development, using the manual’s procedures, will evidently depend upon both an initial assessment of existing lake dissolved oxygen conditions under the new MNR criterion and predictions of the impact of phosphorus runoff from proposed development.

## ECO Comment

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The ECO is concerned that there is insufficient knowledge on the state of lake trout resources. Naturally reproducing lake trout are already recognized to be in decline in many areas. On a positive note, MNR has stated that province-wide State of Resource Reporting for lake trout will be developed under the new Ecological Framework for fisheries management, and some work has recently been done. However, until it can be demonstrated that the province has adequate data on sustainable harvest levels for naturally reproducing lake trout populations, the ECO recommends that MNR exercise a precautionary approach to streamlining fishing regulations for this species.

(For ministry comments, see page(s) 214.)

## Update: Neglecting Our Water Wells

Water wells in Ontario are regulated by the Ministry of the Environment under its Wells Regulation (Regulation 903, R.R.O. 1990, the *Ontario Water Resources Act*). MOE is responsible for licensing well contractors and technicians, managing the province's database of well records, and enforcing the law.

The Wells Regulation applies to all types of water wells, but is of particular significance to the many Ontarians who rely on private wells for their water supply. Small water supply wells are not covered by legislation on drinking water systems (see pages 107-111 of this report), nor will they be subject to mandatory protection under the province's proposed source protection framework (see pages 25-26).

Since revising the Wells Regulation in August 2003, MOE has faced a chorus of criticism over the regulation's inadequacies and the ministry's handling of the wells program from environmental groups, the regulated industries, and Conservation Authorities. MOE staff members have even pointed out substantive problems. The following problems are only a few examples.

### Disinfection

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The 2003 revisions to the Wells Regulation lowered chlorination levels for disinfecting new wells after construction, from 250 mg/litre of chlorine to "approximately 50" mg/litre. The change, introduced in the final revision, was not in the 2002 proposal posted to the Registry. Concerns with disinfection requirements were among the issues raised in a 2003 *EBR* application for review of the new regulation, which MOE denied in 2004 (see pages 110-113 of the ECO's 2003/2004 annual report).

Initially, the ministry defended the revised disinfection requirements by pointing to a wells disinfection standard from the respected American Water Works Association (AWWA). Critics responded that the AWWA standard was a detailed series of steps for cleaning and disinfecting parts, equipment and the well water, and testing for disinfection effectiveness; in Ontario's regulation, MOE lifted one step out of the procedure, introduced technical errors, and added the term "approximately."



The minister eventually referred the well disinfection question to MOE's Advisory Council on Drinking Water Quality and Testing Standards in June 2004. The Advisory

Council's response to the minister, in June 2005, described the existing disinfection standard as "inadequate" and recommended a far more detailed procedure. As of spring 2006, the Advisory Council's response had not been released to the public, nor had MOE acted on the recommendations to fix the inadequacy.

## Lack of guidance

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For three years, industry groups and regulated individuals have expressed frustration over MOE's lack of responsiveness on questions about what various provisions of the Wells Regulation mean and how to comply with them. The ministry tacitly recognizes that the regulation is difficult to interpret. In August 2003, MOE announced that it was "in the process of providing every licensed well contractor and technician in the province with a comprehensive guide to the amended regulation." MOE has reiterated that promise ever since, in response to criticism and questions, but has not followed through.

The ECO 2003/2004 annual report called on MOE to ensure that key provisions of the regulation are clear and enforceable, and to provide a plain language guide. MOE has repeatedly assured the ECO that a guidance manual is planned, but no such document had yet been issued as of May 2006. MOE also asserted that its Web site promotes a wells helpline and a list of licensed contractors. No such resources were evident on the ministry's Web site as of May 2006.

From an enforcement perspective, uncertainties in interpretation of the regulation and the long delay in providing a promised guidance manual to well contractors might make it difficult for MOE to successfully prosecute violations of the Wells Regulation.

## Enforcement

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Enforcement matters. If the regulation is not enforced, more people will be exposed to bad water from bad wells. The ministry appears to be severely lacking in trained staff capable of providing wells inspections and enforcement; MOE dismantled its team of regional water wells inspectors in the 1990s, and describes its current approach as complaint-driven. Moreover, many groups have pointed out that the Wells Regulation is so full of flaws it would be difficult to prosecute bad actors successfully, even if MOE had the capacity.

Whether due to lack of enforcement capacity or inadequacies in the regulation, it appears that MOE is doing little to enforce the Wells Regulation. While the ministry issued press releases on successful convictions and the fines imposed by judges for contraventions of the Wells Regulation prior to the 2003 amendments, it has reported no such enforcement action under the revised regulation.

## Environmental monitoring

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The *Ontario Water Resources Act* defines a well by its intended function: a well is any hole made in the ground to locate or obtain groundwater, or to test or obtain information about the groundwater or the aquifer. The Wells Regulation applies to wells serving a variety of purposes other than drinking water supply, whether assessing groundwater levels, monitoring for contamination, irrigating golf courses, dewatering construction sites, etc. Yet many Wells Regulation requirements appear to be designed with only those wells that supply drinking water in mind.

Environmental monitoring is among the activities affected by the revisions to the Wells Regulation. The industries involved in construction and use of environmental monitoring wells have expressed concern about the regulation's licensing requirements (insurance, training, and thousands of hours of field experience). Even MOE's own environmental monitoring has been affected. For example, Conservation Authorities are MOE's partners in groundwater monitoring, but most do not hold the well contractor and well technician licences that are required even for installing sampling equipment in monitoring wells.

The above examples are only a few concerns from a long list of shortcomings. They include the management of well records data and availability of information for source protection; construction standards for dug wells; mandatory abandonment provisions when well water is not potable; and the application of regulatory requirements to wells constructed before August 2003. Inspection and compliance activity by MOE should ensure that well owners maintain their wells and decommission unused or contaminated wells, as required in the regulation. Small-scale studies in Ontario consistently find that a high proportion of the private drinking water wells tested are contaminated with bacteria, nitrates or other dangerous substances.

## Promises without action

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The ECO has repeatedly raised concerns to MOE and received assurances, both in person and in writing, that processes are under way to address the issues.

In November 2005, the ECO was able to obtain a commitment from MOE, in writing, to undertake "technical amendments to the regulation to clarify the requirements and to eliminate conflicting requirements." MOE stated that amendments would be posted on the Registry in "fall/winter 2005" – that is, almost immediately – accompanied by technical bulletins to provide interpretation of the regulation. The ministry also asserted that it would propose new disinfection requirements and new classes of well technician licences.

However, as of spring 2006, the ECO has seen no action to fix a severely flawed regulation that endangers public health and impedes environmental protection in Ontario.

## ECO Comment

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Since the revised Wells Regulation came into effect in 2003, tens of thousands of wells have been constructed, repaired or abandoned under a regulation that is widely seen as inadequate, and with little enforcement or oversight from MOE. The ministry is neglecting its obligations to those whose drinking water comes from the most vulnerable of sources: small private wells. The regulation is also impeding groundwater monitoring at a time when Ontario most needs environmental monitoring to support source water protection.

Despite recent promises to amend the regulation and provide guidance to the industry, MOE continues to delay. The ECO is concerned that the ministry, having shed much of its water wells staff, now lacks the technical capacity and field experience to design a regulation that works for Ontario's many types of water wells.

The ECO is very disappointed that MOE has shown itself unable or unwilling to resolve widespread and well-founded concerns about a regulation that is so vital to Ontario's environmental protection and drinking water safety.

(For ministry comments, see page(s) 214.)

## Update: Acquiring Land/Saving Nature

Over the past decade, the Ministry of Natural Resources has been the principal ministry within the provincial government acquiring land in order to protect Ontario's natural heritage. In autumn 2005, ministry staff advised the ECO that the lead for land acquisition for natural heritage protection would be transferred from MNR to the Ontario Heritage Trust (OHT), an agency that is overseen by the Ministry of Culture. The last land acquisition program that MNR operated was called the Ecological Land Acquisition Program (ELAP). It was to expire at the end of March 2004, but MNR extended its life to the end of March 2005. MNR contends it will still be active in the field of land acquisition. The new program being run by the OHT is called the Natural Spaces Land Acquisition and Stewardship Program (NSLASP).

(For more discussion of the ECO's view on the province's handling of land acquisition programs, see Amending the *Ontario Heritage Act*, pages 76-79.)



The ECO supports acquisition of natural heritage lands by the province, regardless of the agency, provided that the acquisitions are made according to established ecologically based principles. In past annual reports, the ECO has focused attention on MNR's land acquisition programs and has recommended that the ministry review whether the level of funding is adequate for the major task at hand – that of protecting large amounts of privately owned habitat, mainly in southern Ontario, where land values are high.

The key concern the ECO has with the province's land acquisition efforts is that the budget has remained virtually frozen at approximately \$5-6 million per year for almost a decade (see Table 1). A flat budget leads to diminishing returns because its purchasing power declines over time as prices increase (see Figure 1).

The rise in land values in southern Ontario has further exacerbated this trend, since the price of land has risen dramatically in the past decade, faster than the rate of the Consumer Price Index, which is used to calculate changes in purchasing power. Consider the example of farmland, which is often the object of natural heritage acquisitions, since the farmland may contain wetlands or woodlots: Figure 2 shows that farmland in Ontario has doubled in value over the period 1995-2005.

Table 1: Principle Land Acquisition Programs and Budgets

Year	Program	Ave. Annual Budget
1998/99	NAPP	\$5 M
1999/00	NAPP	\$5 M
2000/01	NAPP	\$5 M
2001/02	NAPP	\$5 M
2002/03	ELAP	\$5 M
2003/04	ELAP	\$5 M
2004/05	ELAP (extended)	\$2.5 M
2005/06	OHT*	\$6 M

NAPP = Natural Area Protection Program  
 ELAP = Ecological Land Acquisition Program  
 OHT = Ontario Heritage Trust  
 \* expenditure period not known

Figure 1: Shows that a fixed budget is able to purchase less over time as prices increase.

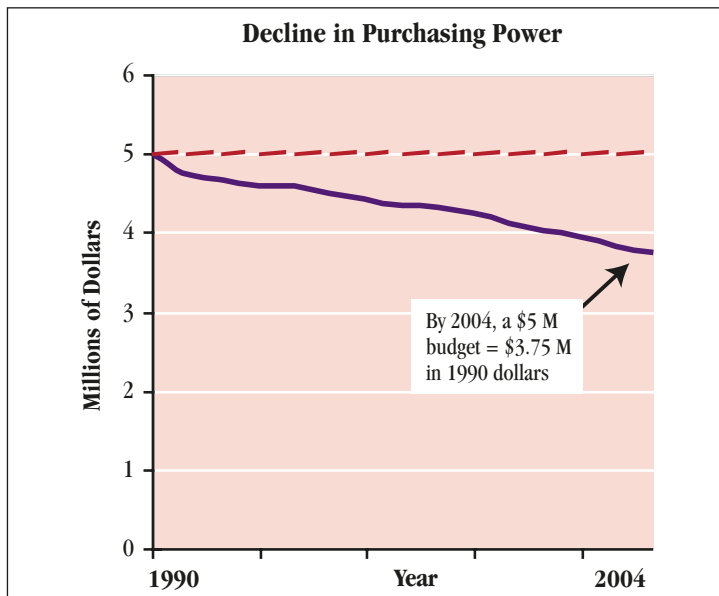
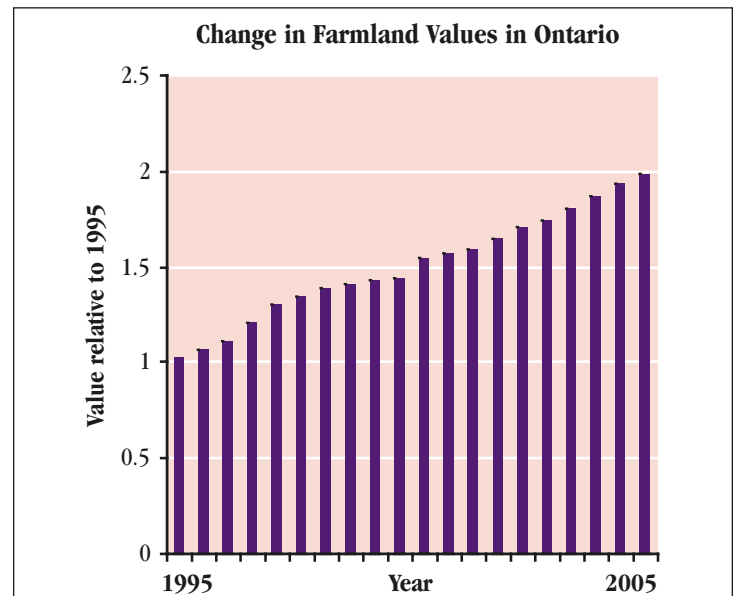


Figure 2: Shows that the value of farmland has doubled in Ontario over the period 1995-2005.



## Recent history of land acquisition programs in Ontario

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Prior to ELAP, the Ministry of Natural Resources had a four-year program called the Natural Areas Protection Program (NAPP), launched in April 1998. The program grew out of a previous program, the Niagara Escarpment Land Acquisition and Stewardship Program, which was dedicated to acquiring land on the Niagara Escarpment. Even though the Ontario government recognized at the time that a great deal of funding would be required to complete the Niagara Escarpment protection plan, NAPP expanded the area of eligibility to include lands near or adjoining Rouge Park and Lynde Marsh, both just east of the City of Toronto. However, as the government broadened the areas eligible for protection, it did not raise the total value of funding – which made the Niagara Escarpment plan even more difficult to achieve. Then, when MNR recreated NAPP as ELAP in 2002, the ministry broadened the eligible landbase still further, yet maintained the same level of funding. In addition, the ministry often did not spend its full budgeted allotment on land acquisitions under either NAPP or ELAP. Thus, less land was protected than could have been, in spite of the existence of properties that were of great interest to conservation groups.

Prior to and at the same time that NAPP existed, the province was participating in another suite of land acquisition programs, including the Community Conservancy Program, the Eastern Habitat Joint Venture and the Ontario Parks Legacy 2000. (For greater detail, see the ECO's 2000/2001 annual report.) And even though the province was participating in several programs, the total sum of money was never great. Collectively, these programs raised the provincial commitment to approximately six million dollars per year for certain years. The ECO notes that some U.S. states spend significantly higher amounts on acquiring natural spaces – for instance, neighbouring Michigan spent nearly \$30 million USD in this program area in 2005.

### ECO Comment

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The province has relied on various small budget, short-term programs to protect vulnerable natural heritage by acquiring land. This same trend appears to be continuing. Furthermore, the programs and their criteria and areas of eligibility have shifted every few years, which is not an effective way of setting and achieving long-term goals. Over the years, the province's land acquisition funding has been thinly spread and has not increased in order to keep up with the rise in land values. The ECO is disappointed to see this trend continue.

(For ministry comments, see page(s) 214-215.)

## Update: Brownfield Development Becomes More Transparent

In last year's annual report, the ECO reviewed O.Reg. 153/04, Records of Site Condition, which is part of the province's efforts to deal with facilitating the remediation and redevelopment of brownfield sites. This regulation replaces the Ministry of the Environment's 1996 Guidelines for Use at Contaminated Sites with rules for assessing a contaminated site, determining appropriate clean-up standards, and reporting on site cleanup. The information from the assessment is documented on a Record of Site Condition (RSC) report that is filed on MOE's publicly accessible Brownfields Environmental Site Registry ([www.ene.gov.on.ca/environet/BESR](http://www.ene.gov.on.ca/environet/BESR)).

Under O.Reg. 153/04, an MOE official appointed under the *Environmental Protection Act (EPA)* has the discretion to issue a Certificate of Property Use (CPU) for any brownfield property that requires a risk assessment because of not meeting the soil contamination standards set out in the regulation. The resulting assessment establishes acceptable site-specific standards. If a property does not meet O.Reg.153/04 site condition standards or standards established and accepted via a risk assessment process, then the site must be cleaned up to meet the necessary standards. The proponent must also undertake confirmable site sampling to verify that the site cleanup was successful.

By issuing a CPU, an MOE official can require certain actions, including remedial actions, or limit certain activities at a site. For instance, a CPU might impose certain site monitoring and reporting requirements, or it may preclude certain construction activities, like the erection of a building with a basement. Filing an RSC protects a property owner from future MOE orders because of historical contamination of a site, but violating terms or conditions set out in a CPU eliminates immunity from any future orders by MOE. The *EPA* requires that a CPU be registered on the title of a property. The MOE official issuing a CPU must also give formal notice to municipalities regarding its issuance, alteration, or revocation.

In June 2005, MOE posted a proposal on the Environmental Registry to amend O.Reg. 681/94 – Classification of Proposals for Instruments – in order to classify CPUs under the *Environmental Bill of Rights*. In October of 2005, the amendment to the regulation was passed, and a decision notice was posted on the Registry. CPUs are now classified as Class II Proposals under the *EBR*. This means that MOE is required to post a Notice of Proposal on the Environmental Registry whenever it wishes to issue, amend or revoke a CPU. A 30-day comment period must be provided to the public, and the public can seek leave to appeal MOE's final decision on a CPU approval,



amendment or revocation. Categorization of CPUs as Class II instruments also requires that MOE consider enhancing public notification and consultation on any CPU-related proposals. This could include a longer period for public comment, public meetings, mediation processes, and direct notification to affected parties.

The ECO welcomes the improved transparency of brownfield redevelopment, as well as more opportunities for consulting the public on these activities.

(For ministry comments, see page(s) 215.)

### What's Good for the Goose ... Should be Good for the Gander

While the Ministry of the Environment continues to take positive steps to facilitate the reuse of brownfields in Ontario, another ministry appears to be resorting to strategies on its own lands to avoid such efforts. In late 2005, the ECO was made aware of an unusual approach to brownfield management being used by the Ministry of Transportation. MTO owns a 2.12 hectare parcel of land at 4298 Mapleward Road in Thunder Bay. The property was formerly used by MTO as a storage yard. An environmental site assessment report prepared by consultants working on behalf of MTO confirmed that the site is contaminated with petroleum hydrocarbons from the widespread presence of waste asphalt, and with metals from metal debris on the property.

After the storage yard was closed, the parcel of land was rezoned by the City of Thunder Bay for future residential use. But the land is too contaminated for residential use. Rather than taking action to clean up the contamination it caused at the site, MTO chose to appeal to the Ontario Assessment Review Board, arguing that costs to clean up the site to residential standards were prohibitive, and that since the property had no value (due to MTO activity), property tax relief was warranted. MTO requested that the site's property assessed value be reduced from \$71,000 per year to \$0. In response, the representative from the Municipal Property Assessment Corporation stated at the appeal:

This is nothing short of abandoning their social responsibility to the people of the Province of Ontario by ignoring and "mothballing" contaminated provincial lands. This inaction is certainly not worthy of a reward in the form of a reduced assessment.

However, the Assessment Review Board ruled in favour of MTO, and in both 2004 and 2005, reduced the assessed value of the property from \$71,000 to \$1. MTO is currently appealing to the Assessment Review Board for a reduction as well in the 2006 assessed value for this site.

To date, MTO has given no indication that it plans to remove the contamination. Meanwhile, if a reduction in this property's assessed value is also granted for 2006, MTO will continue to enjoy substantial reductions in the dollar amounts of grants in lieu of property taxes it must pay to the municipality. By MTO's own admission, during its first Assessment Review Board hearing regarding this property, the cost to remediate the site to residential use standards ranges from \$365,000 to \$515,000. These figures were used by MTO to argue that site remediation was cost-prohibitive. In the meantime, MTO continues to save money both by fighting for lower property assessments and by taking no action to remediate this site.

The ECO finds MTO's approach to managing this brownfield site very disturbing. No one, especially a government ministry, should financially benefit from contaminating a site and then neglecting to clean it up. When it is clear who is responsible, that polluter must pay for degrading the land. The province should play a leadership role where brownfields are concerned and should require that all ministries remediate any brownfield sites in their control in a manner that reinforces provincial policy.

## Adapting to a Changing Climate: Neglecting our Basic Obligations?

In early 2005, the ECO contacted staff at several ministries to inquire about provincial efforts to reduce emissions of greenhouse gases (GHGs) – gases that have been linked to global climate change. Part of the impetus for this ECO project was that the Kyoto Protocol was scheduled to come into effect in February 2005. In our 2004/2005 annual report, the ECO described the efforts of the province, and particularly the Ministry of the Environment, to reduce GHG emissions – called climate change “mitigation” – as “rather low-key.”

In addition to mitigation, the other major approach necessary to deal with climate change is “adaptation.” An adaptation approach acknowledges that some degree of climate change is already under way and likely to continue, despite mitigation efforts. Ideally, governments should pursue both mitigation and adaptation approaches. Adaptation measures could help ensure that Ontario’s ecosystems and built environments are better able to withstand the pronounced shift in climate that has been projected and that will likely lead to increased occurrences of severe weather – for example, more intense precipitation events, ice storms, heat waves and droughts; reduced water levels in the Great Lakes; increased energy costs for cooling buildings; and threats to the health or survival of local plant and animal species. While the ECO believes that it is still critical to focus on mitigation, adaptation measures are also important, since atmospheric patterns and regional climates are changing and will continue to do so in this century as a consequence of the historical build-up and future emissions of greenhouse gases into the atmosphere.

The range of adaptation measures that could be implemented is broad, but examples could include revising standards, plans and codes affecting drainage systems or hydraulic structures such as dams, culverts, sewage treatment plants, water intake pipes and outflows. In future, such infrastructure may need to be able to withstand more intense precipitation events, or to function under lower river flows and lake levels, two phenomena that are forecast to occur in many parts of Canada under global climate change. An example of a structure designed with climate change in mind is the Confederation Bridge linking New Brunswick to Prince Edward Island, which was built a metre higher than currently necessary to accommodate the anticipated sea level rise of this century.



The Province of Quebec has supported a research consortium called Ouranos to advance the understanding of climate change adaptation issues and requirements. This research has led to actions such as identifying coastal infrastructure that is vulnerable to erosion and sea level rise. In conjunction with the provincial transportation ministry, new standards of design are being devised for roadway barrier walls and backfilling along the coast of the Gulf of St. Lawrence to take into account a changing climate. Road relocation is also being considered in some cases.

Adaptation measures should also be considered for Ontario's ecosystems. Some of these measures could be as simple as applying what we currently think of as best management practices, like leaving generous green buffer zones – and not just the minimum required – around waterways to protect against greater erosion and siltation from more intense precipitation events. Silt can have an adverse effect on many fish, plant and amphibian species. A fuller tree canopy over streams and rivers could also help shelter cool-water ecosystems from rising summer temperatures. Larger and better connected forested areas in southern Ontario could create plant and animal migration routes to deal with the possibility that a species range could shift as a changing climate exerts pressure on habitats. Seed and genetic studies could help determine whether southern Ontario plants species can adapt to central and northern Ontario soils and geology.

For all of these reasons, the ECO felt compelled to inquire about the degree of provincial planning for adaptation to a changing climate.

## Ontario's adaptation initiatives

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Before calling provincial ministries, the ECO first conducted a brief review of some water resource publications of both MOE and the Ministry of Natural Resources for references to revised standards or guidance about changes forecast in the climate – for instance, more intense precipitation events, lower snowfall and lower lake levels, and any implications. The ECO looked at documents about stormwater, water power planning and water taking, which are readily available on the ministries' Web sites.

The search revealed that such policy documents contain little or no mention of projected climate change impacts. For example, MOE's Stormwater Management Planning and Design Manual (2003) does not refer to the potential need to adapt infrastructure to accommodate a changing climate. MOE's Permit to Take Water Manual (2005) and Guide to Permit to Take Water Application Form (2006) make no mention of climate change, although both refer to provisions for dealing with low water conditions. (These 2003 and 2005 manuals were reviewed in previous ECO annual reports.) A water taking best practices document prepared for MOE in 2002 did contain two brief mentions of climate change. MNR's Water Management Planning Guidelines for Waterpower (2002) does not use the term "climate change." A limited scan of key provincial water resource publications, summarizing essential policies and procedures, revealed virtually no mention of the need for precautions in the face of climate change.



When we contacted MOE, staff told the ECO that the ministry does not have a formal written plan or strategy dealing with adaptation to climate change. The closest was a 2005 publication called the National Climate Change Adaptation Framework, a document prepared by the Intergovernmental Climate Change Impacts and Adaptation Working Group, a Canada-wide group of provincial and territorial ministry staff, mostly from natural resource and environment ministries. MOE is involved in some initiatives that advance an understanding of climate change impacts and adaptation. Foremost among these is the research network known as the Climate Change Impacts and Adaptation Research Network, or C-CIARN. This is a national group that generates climate change knowledge by bringing together researchers and decision-makers from industry, government, and non-government organizations. The Network has been funded predominately by a federal ministry, Natural Resources Canada, though MOE has also provided financial support for C-CIARN in the past – in its first year of operation and for occasional undertakings thereafter (for instance, for study-specific support and intern funding). In 2006, C-CIARN published a report "Adapting to Climate Change/An Introduction for Canadian Municipalities," which includes case studies of adaptation measures.

The ECO asked MOE for examples of ministry codes, standards, or guidance manuals that have been adjusted to deal with the forecasted changes in climate. MOE responded that it cooperates with the federal and other provincial governments, as in the initiatives described above, as well as with other Ontario ministries on adaptation initiatives. MOE cited examples of Ontario government initiatives that could help with climate change adaptation, including the requirement that cities prepare emergency response plans. Publications by the Ministry of Municipal Affairs and Housing, aimed at municipalities and partly funded by MOE, describe how better planning can help cities to improve air quality.

The ECO notes a distinct lack of leadership in the Ministry of the Environment. Although the ministry is supposed to lead other ministries in the coordination of Ontario's response to climate change, it was the Ministry of Natural Resources, instead, that created a two-page draft climate change strategy – including a seven-part list of elements that need to be fleshed out to create an adaptation strategy (see *Help Ontarians Adapt*, page 64.) This strategy was dated 2004 and remained in draft form as of April 2006.

### Could the Ontario Building Code Play a Bigger Role?

By strengthening Ontario's Building Code (OBC), the province could adopt measures that would help with both climate change mitigation and adaptation. For example, the OBC sets standards for insulation and energy efficiency in new homes – higher energy efficiency can reduce greenhouse gas emissions. The OBC could also advance building practices that could better deal with heat stress and drainage of precipitation. Such practices would constitute adaptation measures.

The OBC was under revision in 2006, but the Ministry of Municipal Affairs and Housing posted only that part of the regulation that is prescribed under the *EBR* (dealing with septic systems) as a proposal on the Registry. For the rest of the revisions, MAH undertook its own separate consultation, partly Web-based. This is confusing to the public and limits the review powers of the ECO regarding changes to the OBC. The OBC should be recognized as a key tool for climate mitigation and adaptation and should be prescribed for Registry notices and for *EBR* applications for review. Also, prescribing the OBC would allow members of the public to suggest better building practices on an ongoing basis, keeping the code responsive to the changing climate.



Staff at the Ministry of Natural Resources referred to several initiatives related to climate change adaptation. Ministry staff have authored, co-authored or contributed to many publications on climate change and climate change adaptation. MNR provided the ECO with a 21-page list of publications discussing climate change in relation to over two dozen topics – for instance, mammals, birds, and water. MNR staff also participate in C-CIARN research.



Photo: Geoff Carpenter

Both MNR and MOE staff referred to participation in a series of coastal adaptation workshops sponsored by C-CIARN, Natural Resources Canada, and MNR over 2004-2006 as a significant adaptation outreach measure. This series involved five community-based workshops conducted in urban centres on the Great Lakes coastline. The workshop organizers, which included Conservation Authorities, succeeded in getting participation from local decision-makers like councilors and reeves. The workshop organizers plan to write up a summary document, detailing certain climate change phenomena and their impacts on human activities and ecology – for example, warmer water temperatures in lakes and rivers could lead to a probable shift in aquatic species as well as less cooling capacity for industries that use water for cooling purposes. MNR also conducts, on its own initiative, public education on the effects and impacts of a changing climate.

The ECO also asked MNR for specific examples of changes to infrastructure design standards or resource management guidance documents that would enhance adaptation to a changing climate. In the area of forestry, MNR has conducted research on opportunities for intensive forest management and also projected changes in forest fire patterns and frequency under a changing climate. MNR staff are working on Canada's next national assessment report, due June 2006, for the United Nations' Framework Convention on Climate Change.

Finally, the ECO notes that some climate change publications offered on MNR and MOE Web sites are outdated and in need of revision or replacement. For example, Climate Change and Canadian Impacts: the Scientific Perspective, found on MOE's Web site, is dated 1991. MOE's Green Facts Sheet, Climate Change and Global Warming, was last updated in July 1997. MNR's Web site publications are somewhat more recent – a number of major reports were published in the period 1998-2003 – but more recent publications are also available, such as journal articles written by MNR staff on climate change and forestry.

## Help Ontarians Adapt

The strategy created by the Ministry of Natural Resources identifies the need to prepare for natural disasters and develop and implement adaptation strategies. Accordingly, MNR will work to:

- Sponsor strategic management of climate change issues
- Maintain and enhance an emergency response capability
- Develop and implement adaptation strategies for water management and wetlands
- Develop and implement adaptation strategies for human health
- Develop and implement adaptation strategies for ecosystem health, including biodiversity
- Develop and implement adaptation strategies for parks and protected areas for natural resource-related recreational opportunities and activities that are pursued outside parks and protected areas
- Develop and implement adaptation strategies for forested ecosystems.

*Adapted from MNR's "Climate Change and MNR: A [Draft] Strategy and Action Plan"*

## ECO Comment



The ECO's review found little evidence that provincial codes, policies and standards were being adjusted specifically to deal with forecast changes in temperature and precipitation as a consequence of global climate change – for example, revising provincial standards for drainage or hydraulic systems to deal with more intense precipitation events or lower stream and lake levels. However, MNR and MOE have been involved in

a substantial number of publications and outreach efforts on the topics of climate change and adaptation. Together, this might be characterized as a *study, then wait-and-see approach*. The ECO feels that a more active approach is required. The threats posed to the built and natural environments from climate change are reasons for acting now. Another reason is the long lasting nature of infrastructure and land use decisions – once made, many are hard to change.

One other reason that both MNR and MOE should be acting now and not waiting is the inclusion of the precautionary principle in the Statements of Environmental Values of both ministries. The precautionary principle is based on the notion that delaying action on an environmental threat in the face of scientific uncertainty is not a valid approach – decision-makers should act in favour of the environment. The ECO believes that incorporating some acknowledgment of a changing climate into these ministries' codes, standards and practices of today would be a prudent exercise of this principle.

(For ministry comments, see page(s) 215-216.)

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#### Recommendation 5

To increase transparency and accountability, the ECO recommends that MAH and MOE fully prescribe the *Building Code Act* and its regulations under the *EBR* for the purposes of commenting on proposals and applying for reviews.

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Part 3



# Ministry Environmental Decisions

Each year the Environmental Commissioner of Ontario reviews a sample of the environmentally significant decisions made by the provincial ministries prescribed under the *Environmental Bill of Rights*. During the 2005/2006 reporting year, 2,293 decision notices were posted on the Environmental Registry by Ontario ministries. Decision notices were posted for the following:

- 78 Policies
- 4 Acts
- 45 Regulations
- 2,166 Instruments

The extent to which the ECO reviews a ministry decision depends on its environmental significance and the public's interest in the decision. The ECO undertook detailed reviews of 15 decisions that appear in Section 4 of the Supplement to this annual report. The ECO has also summarized and highlighted 11 of these decisions in the following pages of this report. The highlighted decisions cover a wide range of topics, including biodiversity, reforms to hazardous waste laws, and recent changes to Ontario's approach to regulating air emissions.

# Conserving Ontario's Biodiversity: Moving Forward?

MNR: Royal  
Ontario Museum



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

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

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

Ontario's Biodiversity Strategy, 2005, is intended to be an "umbrella" strategy that aims at identifying, at a strategic level, a series of needed actions. Its 37 recommended actions are grouped into six theme areas: engage Ontarians, promote stewardship, work together, integrate biodiversity conservation into land use planning, practise prevention, and improve understanding. The strategy further prioritizes 10 of the recommended actions for implementation in 2005, with other actions, presumably, to follow in the years to come.

## Implications

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

its relative success or failure. Ontario's Biodiversity Strategy, 2005, states that two goals must be achieved for a "balanced and realistic approach":

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

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

## Ontario's Biodiversity Strategy, 2005: Recommended Actions

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### *Engage Ontarians*

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

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

### *Promote stewardship*

MNR's strategy recognizes that the support of private landowners is crucial to conserving biodiversity, particularly in southern Ontario, where the majority of species at risk inhabit privately owned lands. The ECO believes that the strategy's focus on improving incentive programs for private landowners is valuable, but, unfortunately, few details were provided aside from the mention of pre-existing programs. (For more on this issue, see the ECO's discussion of the Conservation Land Tax Incentive Program, pages 79-81.)

### *Work together*

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

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

The ECO does support the creation of the broad-based Ontario Biodiversity Council that is to guide implementation of the strategy. This council is composed of representatives from industry associations, environmental organizations, hunting organizations, Conservation Authorities, and First Nations, as well as having the Minister of Natural Resources as a member. The Council will evaluate progress and report on implementation annually, with emphasis on priorities for each year. Further, it will also lead a five-year review of the strategy and its implementation, and prepare an updated strategy for 2010-2015.

### *Integrate biodiversity conservation into land use planning*

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



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

*... Ontario's existing approaches to land use planning do not sufficiently address biodiversity concerns and are sometimes the root causes of threats to biodiversity ...*

### *Prevention*

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

### *Improve understanding*

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

### *Reviews of related legislation and policies*

Ontario's Biodiversity Strategy, 2005, commits to reviewing other relevant legislation, regulations, and policies in order to identify gaps and issues, including the need for potential changes in the legal framework for the conservation of biodiversity. The strategy does provide a list of possible items to review, such as land trust legislation and multi-ministry input into municipal planning. Indeed, in our 2001/2002 report, the ECO encouraged MNR to undertake a comprehensive assessment of its Acts, regulations, and policies to ensure the conservation of Ontario's biodiversity.

Based on MNR's strategy, the ECO believes that biodiversity concerns should be reflected in future amendments to a variety of legislation, such as the *Public Lands Act* and the *Mining Act*.

## ECO Comment

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

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

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

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

(For ministry comments, see page(s) 216.)

## Provincial Strategy for Wolves

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



According to MNR, this new strategy will provide a framework for decision-making about wolf conservation in Ontario. It includes the goal for wolf conservation, objectives, key strategies, and a set of guiding principles. The ministry's goal is “to ensure ecologically sustainable wolf populations and the ecosystems on which they rely for the continuous ecological, social, cultural and economic benefit of the people of Ontario.” The strategy's 13 recommended actions are built around the concepts of legislation and policy, population assessment, habitat management, information management, harvest mortality, and non-consumptive use.

### Legislation, policy and harvest mortality

Concurrent with the development of this strategy, MNR implemented one of the strategy's recommended actions, establishing, in March 2005, a closed hunting and trapping season for wolves in the northern half of Ontario. The closed season is in effect from April 1 to September 14 of each year in 67 different wildlife management units. In July 2005, the ministry then implemented mandatory reporting requirements for hunting and trapping. In our 2004/2005 annual report, the ECO described this closed season as a positive “initial step.”

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

Instead, a wolf conservation strategy should be focused on the survival of these species and limiting human threats to them. The ECO warns that an allocation system that would



set aside X-number of wolves for consumptive purposes – for instance hunting or trapping, and Y-number of wolves for non-consumptive purposes – for nature appreciation or tourism – would not be ecologically defensible by the ministry, even though it might satisfy the goals of certain stakeholders. In our 2002/2003 annual report, the ECO wrote that “history and science have revealed that keystone species such as wolves should not be managed on the premise that they be harvested on a sustained yield basis. Wolves have evolved to fulfil an ecological niche different from that of prey species such as moose and deer, and require a different approach to their management.”

## Population assessment

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

## Habitat management and information management

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

## Non-consumptive use

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The strategy states that MNR will “maintain and, where appropriate, increase opportunities for people to experience wolves in the wild” by promoting initiatives such as public wolf howls in provincial parks and promoting partnerships with the tourism sector. The strategy also states that the ministry will increase public awareness and understanding of wolves, their prey, and their habitat through a variety of means.

The ECO fully supports these aspects of the strategy, including the enhancement of Ontario Parks' interpretive program. For example, Algonquin Provincial Park is world-renowned for its wolf population, and it is reassuring that MNR is finally recognizing the value of managing this population on an ecological basis.

## ECO Comment

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

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

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

Gray wolves and eastern wolves are keystone species in the dynamics of ecosystems, and protected areas are among the few areas where they could live relatively undisturbed. However, both species – one of which is a species at risk – are allowed to be hunted and trapped in protected areas. MNR's wolf strategy does not address this problem. The ECO believes that allowing the hunting and trapping of these species in provincial parks is directly counter to the purpose of these protected areas. It is also in direct

conflict with the stated purpose and principles of Bill 11, the proposed new legislation governing Ontario's protected areas, that would make the "maintenance of ecological integrity" the first priority of provincial parks.

(For ministry comments, see page(s) 216.)

## Amending the *Ontario Heritage Act*

In 2005, the Ministry of Culture posted a decision on Bill 60, an Act to amend the *Ontario Heritage Act*. The *OHA*, which had not been comprehensively amended since it was passed in 1975, is the principal law governing the conservation of Ontario's heritage, covering special features of the built, cultural and natural environments.

The changes to the *Ontario Heritage Act* give enhanced and additional powers to the province and municipalities to protect the heritage of Ontario – for example, the power to prohibit demolition of designated heritage buildings. Bill 60 also allows the province to establish better standards and guidelines to identify and protect provincially owned heritage properties, such as significant marine heritage sites and archaeological sites. The Act deals extensively with the conservation of built structures, usually historic, and the administration of cultural preservation; however, the ECO focused our review of this legislation on its natural heritage elements.

Most important for the ECO, Bill 60 revises and updates the mandate of Ontario's principal heritage agency, the Ontario Heritage Trust. The Trust, which is overseen by the Ministry of Culture, is the province's lead heritage agency and is dedicated to identifying, protecting and promoting Ontario's heritage. The Trust holds for the people of Ontario a portfolio of more than 130 natural heritage properties, including over 90 properties that are part of the Bruce Trail. Protected land includes the habitats of endangered species, rare Carolinian forests, wetlands, sensitive features of the Oak Ridges Moraine, nature reserves on the Canadian Shield and properties on the Niagara Escarpment. The amendments to the *OHA* now formally recognize the role of the Trust in conserving the natural environment. Before the Bill 60 amendments, the *Ontario Heritage Act* referred to the Trust's conservation role as limited only to "aesthetic and scenic environments." These references now read "aesthetic, *natural* and scenic interest."

While the *Ontario Heritage Act* was being amended, advocates for preserving trees attempted to have a provision introduced into Bill 60 that would permit a heritage designation for certain outstanding individual trees – for instance, because of a tree's size, age, genetics or location. While this specific approach did not appear as a provision in the 2005 *OHA* amendments under Bill 60, actions by the ministry suggest that MCL is interested in encouraging municipalities to promote tree designation – municipalities

may choose to designate a property that includes a certain tree or trees in order to protect the trees. To do so, municipalities would need to pass a bylaw that would draw upon criteria specified by MCL for determining whether a property is of "cultural heritage value or interest." (As of June 2006, the criteria were still a proposal on the Environmental Registry.) MCL has also helped to fund the development of a heritage trees protection toolkit by the Ontario Heritage Tree Alliance, which has members from the Ontario Urban Forest Council and Community Heritage Ontario.



## Public participation and the EBR process

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There were three comments on the proposal for amending the *OHA*, all agreeing with the direction of the legislation and encouraging MCL to hasten the process of passing the legislation. For its part, MCL compared Bill 60 to its Statement of Environmental Values, noting consistencies between building preservation and environmental protection:

The protection of cultural heritage is directly linked to the protection of the natural environment. Conservation of cultural heritage resources contributes to reducing urban sprawl, intensifying development, rehabilitation of brown-fields, and reducing construction waste that may otherwise go to landfill.

The adaptive re-use of heritage buildings keeps greenfield land available for wildlife, requires less energy for the manufacture of new materials, uses less landfill space, and their predominately inner city location reduce commuting and consequent greenhouse gas emissions.

## ECO Comment

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The ECO hopes that the Ministry of Culture and the Ontario Heritage Trust will play strong leadership roles in protecting Ontario's natural heritage. The ECO believes it is appropriate that the legislation now acknowledges the natural heritage functions being carried out by the Trust. This acknowledgement is long overdue. The Trust's predecessor, the Ontario Heritage Foundation, was a forerunner in Ontario of establishing conservation easements, used to protect natural spaces through a designation on a property title and avoiding the costlier route of outright purchase of the land. Some of the pioneering work of the Foundation was in the Niagara Escarpment Plan Area, where conservation easements helped create continuous greenspace corridors for wildlife, trails and habitat protection.



In autumn 2005, representatives of the Ministry of Natural Resources told the ECO that the province's key program for acquiring land in order to protect natural heritage, the Ecological Land Acquisition Program, was being reinvented within the Ontario Heritage Trust under the Natural Spaces Land Acquisition and Stewardship Program (NSLASP). The ECO has some concern that a program with a primary ecological focus is being transferred to an agency whose primary focus is protecting properties for their cultural values. This could lead to a shift in the program over time in which properties that have cultural values – for example, a recreational property or one of historic importance in addition to some ecological value – are favoured over properties that have purely ecological value, for instance, a property with rare vegetation. MNR contends that it will continue to play a strategic leadership role in securing ecologically significant lands in Ontario.

The ECO will continue to monitor conservation land acquisition developments, as we have in the past, now that the Ontario Heritage Trust will be the province's primary agent in this capacity. (For more on the financing of the province's land acquisition programs, see pages 54-56.) In that regard, the ECO was disappointed to note in February 2006 that the Ontario Heritage Trust proceeded to post elements of its new land acquisition program on its Web site without first posting the program as a proposal on the Environmental Registry. In effect, the Trust has begun to roll out the program without first consulting members of the public, who have a strong interest in how the funding for acquiring land is allocated. This is problematic. For many conservation groups in Ontario, acquiring significant lands, habitats and ecosystems for their preservation is a core reason for their existence and a goal to which their members are dedicated. Land acquisition projects are long term, and they require both volunteer and real financial resources to carry out. Even when government funding is achieved for certain projects, the responsibility to protect the land or habitat on an ongoing basis rests with a conservation group, which is often volunteer-based.

For all of these reasons, conservation groups and the Ontario public have a strong interest in being able to comment on any proposed provincial land acquisition programs – no matter which ministry or agency happens to be operating the program. Accordingly, the ECO wrote to the Ministry of Culture in 2006 advising that the ministry should



have considered posting the details of the NSLASP program as a proposal on the Environmental Registry. Furthermore, the ECO wrote that MCL should pursue making the Ontario Heritage Trust subject to Ontario's *Environmental Bill of Rights*.

(For more detail on this issue, see the Supplement to this report, pages 293-294. For ministry comments, see page(s) 216.)

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#### Recommendation 6

The ECO recommends to the Ministry of Culture that the Ontario Heritage Trust become an *EBR*-prescribed agency.

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## Conservation Land Tax Incentive Program

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

In the period 1998-2000, the Ministry of Natural Resources decided that one of the program's categories of eligible land – Community Conservation Lands (CCL) – needed tighter definition. After two proposal notices were posted on the Environmental Registry, and after a lengthy policy development process, 11 eligibility criteria for the Community Conservation Lands category were finalized in 2005. The category is restricted to non-profit charitable conservation organizations and Conservation Authorities.

The CCL category stipulates that, to be eligible, the land must meet one of 11 eligibility criteria – for example, land that is habitat for species of special concern, as designated by the Ministry of Natural Resources. Another criterion is land designated as an Escarpment Protection Area in the Niagara Escarpment Plan under the *Niagara Escarpment Planning and Development Act*. (For a complete listing of the criteria and more details on the process of amending the CLTIP program, see the Supplement to this report, pages 58-63.)

## Public participation and the *EBR* process

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CLTIP was the subject of two proposal processes and comment periods, the first in 2000 and the second in 2002. The process of finalizing the CCL category criteria took nearly seven years. During this lengthy process, MNR's approach to revamping the CCL category went from including criteria that made many areas, habitats, and natural features eligible as Community Conservation Lands to excluding many of these criteria in the second proposal. The final outcome fell somewhere in between. The ECO believes that the changing makeup of these criteria reflects efforts by MNR to accommodate the competing interests of different stakeholders. On one hand, conservationists would like to see a broad and inclusive set of eligibility criteria to ensure that local areas of interest are eligible for protection. On the other hand, some municipal/finance/taxpayer interests felt that if the eligibility criteria were too broad, then many properties would receive tax-free status and municipal property taxes would need to be raised on other lands to make up the revenue lost on protected conservation lands.

### ECO Comment

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The ECO believes that natural spaces deserve protection, first and foremost for the protection of natural heritage and ecological functions. Parcels of land should not be viewed solely from the perspective of the development value they might have. Nor should land that is being conserved be unduly characterized as a tax burden, given the numerous real benefits they provide, some of which can be quantified in economic terms. The mechanism of tax relief for conservation lands is one that the ECO regards as sensible. As such, CLTIP is one of the most important environment stewardship programs for private, municipal and non-Crown lands in Ontario. The program is critically important to southern Ontario where there is a great deal of biodiversity at risk, a lot of private land and little Crown land. Further, the ECO believes that the property tax incentive program can be a cost-effective approach to conserving important land and ecosystems in southern Ontario.

The CLTIP initiative has been in a state of flux for a number of years, and the resolution of the divisive issues regarding the eligibility criteria for the Community Conservation Land category is a positive development. We note that MNR did respond to stakeholder concerns about the 2002 proposal. We are pleased that MNR adopted specific recommendations for criteria from commenters, including the recommendation that Conservation Authorities be eligible to participate in CLTIP.

The ECO now encourages the parties involved – the Ministries of Natural Resources and Finance, the Municipal Property Assessment Corporation, and municipalities – to

honour the commitments implicit in the program's objectives and meet the expectations of participating land conservation organizations. As of autumn 2005, many conservation organizations seemed content with the outcome of this policy development process – that is, that the 11 criteria are reasonably broad and less exclusive than the seven criteria proposed earlier, and that the program should provide enough certainty for organizations to continue land acquisition operations. These are positive changes, but it will require a number of years of fair and equitable assessment practices to reassure these organizations and the ECO that the program is operating properly again.

The ECO believes the revised CLTIP is a positive initiative and will support conservation in Ontario. Attention may need to be paid, on occasion, to certain municipalities with small populations and therefore smaller tax bases, but which also have extensive eligible conservation lands. The province may need to assist in these circumstances. Aside from this point, CLTIP's tax exemption mechanism for conservation lands is a sensible and principled means of carrying out natural heritage protection in Ontario.

(For a more detailed review of the process of amending CLTIP, see the Supplement to this report, pages 58-63. For ministry comments, see page(s) 217.)

## Environmental Protection Requirements for Highway Projects: The Oak Ridges Moraine

In July 2005 the Ministry of Transportation finalized its Environmental Protection Requirements for Transportation Planning and Highway Design, Construction, Operation and Maintenance – Oak Ridges Moraine Component (EPR-ORM). It provides MTO's interpretation of how legislation protecting the Oak Ridges Moraine applies to provincial highway projects, including new and modified highways and related structures such as interchanges, bridges, access roads, and drainage works.



This policy is part of a larger MTO Environmental Standards Project launched in 2002. (An update on this project can be found on pages 202-203.) MTO says it plans to finalize all the related documents by the end of summer 2006.

The *Oak Ridges Moraine Conservation Act (ORMCA)* was passed in 2001 and the Oak Ridges Moraine Conservation Plan (ORMCP) in 2002. The Plan area map is divided into four land use designations. Highways and other transportation projects are one of the few new land uses permitted in Natural Core Areas and Natural Linkage Areas, the most protective land use designations, but only if "the need for the project has

been demonstrated and there is no reasonable alternative.” Applicants must also demonstrate that a number of additional requirements will be satisfied.

The Plan also describes protections for *key natural heritage features* (e.g., wetlands) and *hydrologically sensitive features* (e.g., kettle lakes). These features are not included on Plan maps, but must be identified during project planning, using criteria in draft technical guidance documents prepared by the Ministries of Natural Resources and Environment (for more detail see Provincial Guidance .... page 85). Most development is prohibited in and around these features, but, again, highways may be permitted to cross them “if the applicant demonstrates that the need for the project has been demonstrated and there is no reasonable alternative.” Applicants must also demonstrate that a number of ecological protection requirements will be satisfied.

## Content of the EPR-ORM

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MTO has translated the ORMCP provisions into 28 Environmental Protection Requirements. MTO has determined that the ORMCP requirement to demonstrate need and the lack of a reasonable alternative when planning highways in Natural Linkage Areas and Natural Core Areas will be demonstrated through federal and provincial environmental assessment (EA) processes.

MTO has included in the EPR-ORM several ORMCP requirements for special design and construction: keeping right-of-way widths, associated construction disturbance and the number of corridors to a minimum; facilitating wildlife movement; and minimizing adverse effects on the ecological integrity of the Plan Area.

MTO has also clearly incorporated into the EPR-ORM a number of prohibitions, such as the prohibition on the disposal of stormwater into kettle lakes.

Other ORMCP restrictions have been incorporated with qualifiers added by MTO, since transportation projects are not considered “development” or “site alteration” under the current provincial planning legislation. For example, some water quality protection measures are prefaced with: “To the extent that is technically, physically, and economically practical...”

## Implications of the decision

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While the consolidation of ORM requirements into one document, along with other federal and provincial regulations, is helpful for MTO and its consultants and contractors, it does not introduce any new environmental protections that are not already law in the ORMCP. Nor does it provide any additional technical guidance to flesh out provisions

open to interpretation. Because key requirements of the ORMCP are not presented in MTO's document as conditions that have to be met before approval can be granted, there is a risk that these conditions will not be met.

MTO is still developing other policies to provide further direction to MTO consultants and contractors carrying out highway planning and construction. For example, MTO's 2002 Environmental Reference for Highway Design, which gives specific guidance for highway construction projects, is being updated. MTO proposes to include a section that describes the higher standard set in the Niagara Escarpment, Oak Ridges Moraine and the Greenbelt Plan areas:

While highway projects are permitted through the Plan areas, the environmental assessment must demonstrate that the highway project is needed and that there is no reasonable alternative to that being proposed. Project design and construction activities will be expected to be put through a higher environmental test . . .

The draft text of the updated Environmental Reference for Highway Design says that the consultant shall address the requirements of the ORM plan "as detailed in the Environmental Protection Requirements." An appendix, which was still under development when the draft posted to the Environmental Registry for comment, will provide a list of considerations and requirements for an environmental impact study and environmental protection/mitigation in the Oak Ridges Moraine.

## Public participation and the *EBR* process

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Two major environmental groups submitted one comment jointly on the EPR-ORM when it was posted on the Environmental Registry. They take the position that there must be a moratorium on the planning and construction of 400-series highways and municipal roads of equivalent size throughout southern Ontario until the province has completed a comprehensive, transit-first transportation master plan for the entire area. They pointed out that a north-south highway system that crosses the Oak Ridges Moraine will inevitably affect either a Natural Core or Natural Linkage Area. Their primary concern was the shift in focus from the *explicit* nature of "shall not be approved," as stated in the ORMCP, to the *implicit* "approval" included in the MTO policy.

## ECO Comment

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In the review of the *ORMCA* and *ORMCP* in the 2001/2002 ECO annual report, the ECO pointed out that allowing transportation and utilities in the entire Plan area seemed contrary to its objectives. The ECO has continued to raise concerns about



broad-scale exemptions for transportation and utilities in land use planning – for example, in our reviews of the revised Provincial Policy Statement and of MTO's Environmental Protection Standards in our 2004/2005 annual report.

MTO has done a reasonable job of incorporating most of the requirements of the ORMCP into its Environmental Protection Requirements. One major oversight is MTO's failure to incorporate the ORMCP requirement to demonstrate need and meet other conditions before crossing *key natural heritage features* and *hydrologically sensitive features*.

The wording of the ORMCP implies that transportation projects will not be approved unless applicants demonstrate that they have met the tests in the Plan. The introduction to the Plan states that only very restricted new transportation uses are

permitted within the most protected areas and that "they shall also have to meet stringent review and approval standards." In practice, however, provincial and municipal road projects are planned and constructed under environmental assessment processes that are usually self-directed and assessed by the proponent, with no "applications" or "approval" by any agency that could consider whether the project meets the tests set out in the ORMCP. The ECO remains concerned about relying on EA processes to demonstrate compliance with the ORMCP, particularly since there are indications that the Ministry of the Environment is considering further streamlining of the EA approvals processes for transportation projects in response to recent requests by proponents and advisory committees.

If MTO's Environmental Protection Requirements were all the guidance provided for highway construction projects in the Oak Ridges Moraine, the province would probably not deliver the protections the public is expecting of the ORMCP. MTO says, however, that technical guidance in the form of best practices and tools is still to come in a forthcoming appendix to the Environmental Reference For Highway Design and various Environmental Guides. The ECO will monitor the development of the technical guidance and the implementation of the Environmental Standards Project.

There is still a need for guidance for regional and local roads as well as for provincial highways. The Ministries of Transportation and Municipal Affairs and Housing advised the ECO in 2004 that MTO was first preparing standards for provincial highways, and then for regional and local roads at a later date. As of March 2006, however, MTO is

no longer planning to prepare guidance documents for regional or local roads, due to time and budget constraints. Given the significant growth pressures in the area of the Oak Ridges Moraine, the ECO encourages the provincial ministries to develop technical guidance in a timely manner for municipal roads in the ORM Plan area.

(For a more detailed discussion of this issue, see the Supplement to this report, pages 63-69. For ministry comments, see page(s) 217.)

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### Recommendation 7

The ECO recommends that MAH, MTO, MNR and MOE collaborate to develop technical guidance regarding municipal roads in the ORM Plan area and finalize their draft guidance to municipalities regarding natural heritage and water protection.

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## Implementing the Oak Ridges Moraine Conservation Plan: Provincial Guidance Needed

In our review of the new *ORMCA* and *ORMCP* in the 2001/2002 ECO annual report, the ECO expressed concern about implementation of the Plan and highlighted the need for the province to develop technical guidance, prescribe the Act and instruments under the *EBR* and develop the promised monitoring program as soon as possible. None of these important provincial implementation responsibilities have been fulfilled to date.

In 2003, MAH posted a proposed regulation to prescribe the *ORMCA* under the *EBR*, and another regulation to classify *ORMCA* instruments under the *EBR*. Neither has been finalized.

The implementation document released with the *ORMCP* in 2002 said that the provincial government would develop technical guidelines to help users of the Plan to understand, interpret and implement the provisions of the Plan. In March 2004, the Ministry of Municipal Affairs and Housing, as lead ministry, posted a first series of proposed technical guidance documents on the Environmental Registry for public comment. The Ministry of Natural Resources had prepared the eight technical papers in this first series to assist in implementation of policies that relate to natural heritage, wildlife habitat, connectivity, landform conservation, Areas of Natural and Scientific Interest, protection of species at risk, significant woodlands, and natural heritage evaluations. In June 2005 MAH posted nine more draft policies, this time written by the Ministry of the Environment, relating to developing watershed plans, and preparing water budgets, water conservation plans, hydrological evaluations for hydrologically sensitive features, sub-watersheds, wellhead protection, sewage and water system plans and stormwater management plans. MAH has not posted decision notices on the Registry for any of these 17 proposed policies. As a result, development is proceeding without the promised technical guidance needed to identify key wetlands and woodlands and prepare watershed plans.

(For further information on the implementation of the *ORMCP*, see page 192.)

## Pretreatment of Hazardous Waste

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

*... Ontario's new land disposal restrictions represent the most significant reform of the province's waste management regulation in decades, addressing past concerns raised by the ECO and stakeholders that hazardous wastes were being imported to Ontario to avoid tougher U.S. requirements ...*

The pretreatment requirements apply to all hazardous waste landfills, including both commercial sites and those owned and operated by companies exclusively for their own wastes. In addition to landfills, other forms of land disposal are also captured by the regulation, including deep well disposal and landfarms, which are primarily used by the petrochemical industry to dispose of sludges produced during the refining process.

Most of the treatment standards are "contaminant-based" standards, consisting of numeric concentration limits. The remainder are "technology-based" standards, prescribing the use of particular technologies. Alternate treatment standards apply to hazardous waste debris and contaminated soils. MOE included less stringent standards for contaminated soils to avoid discouraging site remediation of brownfields. In addition, MOE introduced new registration, notification and reporting requirements for waste generators that will track on-site processing of hazardous wastes destined for land disposal.

### Implications

Ontario's new land disposal restrictions represent the most significant reform of the province's waste management regulation in decades, addressing past concerns raised by the ECO and stakeholders that hazardous wastes were being imported to Ontario to avoid tougher U.S. requirements. In 2000, MOE adopted the U.S. *definition* of hazardous waste, resulting in an increase in the volume of wastes classified as hazardous. The ECO



concluded in our 2000/2001 annual report that there was still an urgent need for Ontario to harmonize the *management* of hazardous waste in the two jurisdictions, by adopting the U.S. land disposal restrictions. This has now been accomplished.

The newly amended regulation lessens the risk of groundwater and other contamination by requiring treatment to change wastes physically or chemically in order to limit the potential for future impacts to soil, groundwater and air. The LDR program should also provide an incentive for industry to reduce the generation of hazardous waste. However, one negative impact anticipated from additional incineration is an increase in the emissions of toxic contaminants and greenhouse gases to the atmosphere.

## Public participation and the *EBR* process

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The Ministry of the Environment consulted the public on this program on and off for nearly four and a half years. MOE received 50 submissions on the draft regulation from a wide range of stakeholders, including industry associations, environmental groups, waste management companies, waste generators, individual citizens, consultants and U.S. agencies.

Environmental groups expressed strong support for the program overall, but raised a number of concerns, including the length of the phase-in period and exemptions for small-quantity producers and household hazardous waste. Concern was also expressed that the regulation does not address the disposal of hazardous wastes into sewer systems.

In addition, environmental groups were opposed to treatment standards mandating specific technologies, particularly incineration. Many commenters raised concerns about the environmental risks associated with increased incineration and asked for more rigorous operating and emissions standards for facilities burning hazardous wastes.

Industrial stakeholders were generally opposed to the program because they said the benefits were not clear and that financial and capacity issues still needed to be addressed. Many questioned the environmental benefit, stating that Ontario landfills are well-engineered systems that rely on liners and leachate collection and treatment systems to capture and treat any contaminants that leach from the wastes.

Despite opposition from affected industries, MOE decided to retain the requirement for the pretreatment of hazardous wastes before they can be disposed of in a landfarm. MOE said it made this decision to be consistent with the U.S. EPA and to minimize



emissions of smog-causing and odourous chemicals to air and build-up of metal concentrations in soil.

Many industry commenters asked that specific variances, exclusions and exemptions be included in the regulation. MOE responded that the program would include these in future amendments to the regulation and through certificates of approval or written approvals on a case-by-case basis. MOE decided to extend the phase-in time for some aspects of the regulation in response to concerns from industry. The ministry said that although sufficient capacity exists North America-wide, the extension would provide time for treatment facilities to be built in Ontario, as well as opportunities for waste generators to develop ways to reduce waste and recycle.

Several commenters, including members of the U.S. House and Senate, asked Ontario to reconsider the alternate treatment standard for mercury, which allows mercury to be treated by microencapsulation and placed in landfills. MOE retained the proposed alternate treatment standard for mercury debris in the regulation, but said it would pursue this issue further with the U.S. EPA and other stakeholders to determine whether specific changes should be made to the regulation in the future.

## ECO Comment

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The ECO supports MOE's land disposal restrictions program. It should improve Ontario's reputation by finally matching the standards in place in the U.S. since 1984. It removes the incentive for U.S.-based waste generators to export wastes to landfills



in Ontario because it costs less than meeting U.S. requirements for treatment. It will also reduce the risk of soil and groundwater contamination and encourage waste reduction and recycling.

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

And while it is commendable that MOE consulted thoroughly on the proposed program, the process took a very long time, from the first call for the reforms in 1998 to full implementation at the end of 2009.

While MOE did not respond directly to the concerns about emissions from increased incineration, other recent MOE initiatives have introduced more stringent standards for certain substances emitted by such facilities. Canada-Wide Standards for dioxins, furans and mercury have been adopted by Ontario, and all hazardous waste incinerators

should meet the new standards by the end of 2006. In addition, the phase-in of O.Reg. 419/05 will gradually tighten air standards for other contaminants of concern and require better emissions modeling and reporting by facilities (see also pages 89-96 of this report). Existing hazardous waste incinerators are expected to comply with these new rules by 2013, and new facilities must comply now. The ECO will monitor the roll-out of these new rules in future years.

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

(A more detailed review of MOE's Land Disposal Restrictions program can be found on pages 70-75 of the Supplement to this report. For ministry comments, see page(s) 217.)

## Updating Ontario's Regulatory Framework for Local Air Quality

In August 2005, the Ministry of the Environment finalized significant reforms to its regulatory framework for industrial air emissions. Since the mid-1970s, facilities with air emissions have been required to comply with Regulation 346 (RRO 1990) under the *Environmental Protection Act (EPA)*.

Regulation 346 required facility owners to assess (for each contaminant) how diluted the emissions from their facilities will be once they reach either an off-site location or the nearest human receptor, using a mathematical model called an air dispersion model. Facility owners then compare the modelled concentration against the list of air standards in the regulation and guidelines.



This regulatory framework for industrial air emissions had many weaknesses. Chiefly, the framework has relied on outdated air standards and on seriously outdated dispersion models that were poor assessments of how emissions behave in real life situations. Depending on conditions, these old models could under-predict concentrations of contaminants by 2 to 20 times. Reliance on such models meant that the environment was not always adequately protected. Another weakness is that facility approvals have not been subject to automatic periodic reviews or updates, allowing some older facilities to operate under very outdated requirements.

## Key features of the new rules

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MOE has struggled since 1987 to update the rules. The new approach, finalized as O.Reg. 419/05, features some marked improvements. They include a move to “effects-based” air standards, some of which are up to 100 times more stringent than previous standards; more accurate dispersion models that can more realistically assess the concentrations of contaminants under a range of conditions; and more detailed emissions reporting to demonstrate compliance.

Regulation 346 was revoked and replaced with Regulation 419. The old provisions will gradually be phased out, while the new, tougher regulatory approach will be phased in over a decade or more. Facilities not able to achieve compliance within the phase-in period can apply for case-by-case regulatory relief, termed “site-specific alternative standards.”

### *New “effects-based” air standards*

MOE’s new approach relies on “effects-based” air standards, which are developed by weighing only the health and environmental effects of the pollutant in question; economic or technical difficulties of reducing emissions are not considered until a later “risk management” phase, carried out case-by-case, if individual facilities find they cannot meet the standards by the specified date. In August 2005, MOE also introduced 40 new or updated air standards into the regulation.

### *New dispersion models*

Dispersion models are used to assess how a contaminant is diluted as it moves through the atmosphere. MOE will phase out a set of outdated dispersion models and replace them with more accurate dispersion models developed by the U.S. Environmental Protection Agency.

### *Emission Summaries will be required more widely*

Since 1998, MOE has required facilities to prepare Emission Summary and Dispersion Modelling (ESDM) reports when applying for approvals for air emissions. Now the requirement to prepare an ESDM report will gradually be broadened to apply to more types of existing facilities, and the rules on how to prepare an ESDM report have become more detailed and more prescriptive.

### *How the alternative standard option works*

MOE has invested a great deal of planning and consultation effort in the design of the alternative standard process. This process is available if a facility owner discovers,

after applying the new rules, that the facility will be out of compliance for one or more contaminants. In such a case, as long as the exceedences are not greater than a defined "Upper Risk Threshold," the facility can apply for an alternative standard, but must meet detailed and prescriptive requirements.

### *Which emissions require "timely action"?*

Regardless of the five-to-15-year phase-in provisions of these rules, MOE can require some facilities to take "timely action." For example, if an exceedence of an Upper Risk Threshold is suspected through either monitoring or modelling, then MOE must be immediately notified in writing. This approach is softer than MOE's earlier proposals, which had envisaged that facilities exceeding Upper Risk Thresholds would have to submit an action plan "forthwith," and might have to cut back production. MOE also has some discretion to speed up, on a case-by-case basis, the application of new models, new air standards and ESDM reporting requirements to individual facilities.

## Public participation and the EBR process

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MOE carried out exemplary public consultation over the multi-year course of this regulatory overhaul, soliciting comments on detailed discussion documents through numerous public information sessions, through the Registry, and through focused meetings with key stakeholders. MOE's internal ruminations from 2001-2004 were also supported by a pilot project involving five large industrial facilities, the Ministry of Health and Long Term Care, public health groups, and one environmental organization. Project members met regularly over one year, and used data from the individual facilities to test how the new rules might apply. The pilot project evidently helped the ministry resolve a number of policy and logistical questions, and some commenters have since asked that the results of the pilot project be made public.



The ministry received approximately 40 written comments responding to each of three policy proposals released in June 2004. Industries, other levels of government, and environmental and public health organizations submitted the bulk of the comments, although some individuals also contributed. Comments showed that MOE's overall approach was well understood, despite its complexity, and was broadly supported.

The ministry's decision notices provided useful, succinct summaries of comments and changes made. Notably, MOE's changes included: providing additional years to the phase-in periods; doubling certain notice periods from 15 to 30 days; and rethinking odour management in response to industry concerns. MOE also agreed to ease certain standards, based on scientific arguments – e.g., isocyanates – and softened its abatement

approach for facilities emitting contaminants suspected to be above an Upper Risk Threshold. MOE decided not to incorporate background concentrations of contaminants from other sources or for persistent or bioaccumulative contaminants at this time, and also decided against providing intervenor funding to public health units. MOE also decided against tightening the Upper Risk Threshold for carcinogens. The ministry did commit, however, to developing a protocol between MOE and public health units to allow information sharing.

## Implications of the decision

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Over the next five to 15 years, Ontario facilities will need to compile more accurate summaries of their emissions and demonstrate they meet tougher limits for a number of air contaminants. Where facilities cannot show compliance, they will have to use pollution prevention approaches, install pollution controls or let their neighbours know that they plan to apply for an alternative standard. Through O.Reg. 419/05, MOE has been able to achieve some of the reforms that were originally proposed under the 1987 Clean Air Program, such as the introduction of updated dispersion modelling; the orderly phasing in of tighter standards for existing facilities; and public participation in standard-setting and certificate of approval processes. Overall, Ontarians can expect to see individual facilities gradually improve emissions between 2010 and 2020. Some facilities might shut down rather than upgrade.

### *Some key air standards still missing*

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

Nickel is an illustrative case in point. Over 300 tonnes of nickel were emitted into Ontario air in the year 2000, with contributions from 146 facilities. Several nickel compounds are known to give rise to respiratory cancers. Ontario's existing air standard for nickel, which is based on damage to vegetation, dates back to 1974. It is acknowledged to be out of date, and may be several orders of magnitude too lenient.

### *Improvements will be slow in coming*

In response to concerns from industry that the proposed phase-in periods were too short, MOE extended the introduction of some revised air standards from three to

five years. The deadline to apply for an alternative standard was also extended. Many industrial sectors (in practice, representing most small to medium-sized facilities) will not need to use the newer, more accurate dispersion models until 2020. Beyond the regulated phase-in dates, facilities that are issued an alternative standard can have extensions of up to five to 10 years in extenuating circumstances. In such cases, local residents will at least be made aware of the emissions, and will have a chance to comment, which is an improvement over current MOE practices.

There is another reason to expect slow progress. A ministry auditing program has revealed that many facilities are not meeting even the existing more lenient air standards or guidelines, even when the outdated dispersion models are used, and suggests that non-compliance with existing limits is widespread. Moreover, the ministry's efforts to bring such facilities into compliance can take many years.

### *Regulatory capacity at MOE*

The success of this regulatory reform will depend on a significant beefing up of MOE's inspection, compliance and enforcement capacity – not only to achieve the intended environmental benefits, but also to provide a level playing field for law-abiding facilities. The ministry's current resources allow inspections of only about 1-2 per cent of facilities with any kind (air, waste, water, etc.) of environmental approvals per year, and some facilities have never had an inspector on-site. Moreover, it is estimated that up to 40 per cent of facilities may be operating without required permits.

MOE's capacity to process approvals may also be challenged by this initiative, once submissions begin for alternative standards. The ministry already receives about 8,000 applications for certificates of approval of all types each year, and the backlog is growing by about 1,000 a year. Industry stakeholders have longstanding concerns about the delays in processing of such approvals. But MOE is not planning to add new resources, only to re-align some existing resources.

Another point of caution is that the ministry is working to streamline its approvals processes at the same time as it is phasing in the new air emissions regulation. The ministry has in recent years been encouraging a shift to facility-wide Cs of A that cover all emission points, equipment and processes. Other changes, still on the drawing board, contemplate a shift to third-party or non-ministry certification and inspection of lower-risk facilities, or sector-based regulatory approaches for small and medium-sized facilities. The ministry will need to explain to the public how these changes will dovetail with O.Reg. 419/05, and how they will affect the environment, as well as public consultation and leave to appeal rights under the *EBR*.

## Public consultation implications

MOE's chosen approach strengthens transparency and public consultation opportunities in several ways. The public can comment on the development of new province-wide air standards, with the support of detailed background technical information. Members of the public will also be able to access the executive summaries of ESDM reports for all facilities required to prepare them. And in cases where facilities are requesting alternative standards, there will have to be up-front consultation (including a meeting) with local residents. A major caveat, however, is that these consultation opportunities will require significant additional expertise and response capacity from local residents, environmental groups and local public health units. The option of hiring expertise to interpret the highly technical information is largely out of the question for such groups, and several commenters urged that they be provided with resources or intervenor funding to allow them to participate effectively. The ministry responded that it lacked the means to provide such funding.

### What's missing from the new rules for air emissions?

#### *No control over annual loadings of contaminants*

For some types of persistent contaminants that accumulate in the environment, such as lead or mercury or certain organic toxic substances, the annual load to the environment is critical. However, the ministry is not directly controlling annual loadings of contaminants – it is only setting limits on concentrations, measured over minutes or hours. This can be adequate for substances that break down quickly in the air, but it doesn't address substances that can build up to toxic concentrations over years or decades in local soils or plant and animal life.

#### *Doesn't address mixes of contaminants*

The new set of rules does not address the impacts that mixes of various contaminants may have on the environment or health.

#### *Limited control over local hot spots*

The new rules have only a limited ability to deal with local "hot spots," such as neighbourhoods where several types of heavy industry are clustered together. MOE acknowledges that more work is required in these areas. The new rules do allow MOE to treat adjacent properties as though they are single properties for the purposes of preparing ESDM reports, but it is too soon to say if this approach will work.

#### *Effectiveness monitoring not planned*

The Minister of the Environment has said that "these changes will mean cleaner, healthier air, healthier communities and healthier Ontarians all across the province." But the ministry has not laid out plans to track, quantify or even estimate the hoped-for reductions in loadings of air pollutants. Environmental groups also asked for periodic audits and progress reports on how well facilities are complying with the new rules, but the ministry has not made any commitments to do this.



MOE has embarked on an ambitious overhaul of its approach to control industrial air emissions. There was consensus that the old system under Regulation 346 needed reform. The groundwork for this overhaul has taken many years to prepare, and has benefitted from strong public consultation and careful listening on the part of the ministry. The new framework is built on some laudable principles, especially the intention to base air standards on environment and health effects, rather than socio-economic factors. As a result, MOE should be able to tighten up more air standards, with more speed. The new framework is also strengthened by transparency features, such as the ability of the public to access the Executive Summaries of ESDM reports, and the requirement to consult neighbours when facilities seek alternative site-specific standards.

It would be premature, though, to pronounce this reform to be a success, since the roll-out of the reforms is only just beginning, and the capacity of the ministry to manage the implementation phase is uncertain. MOE's track record on nudging problem air emission sources into compliance has been weak under the old rules. Under the new regulatory framework, thousands of facilities across many industry sectors are expected to examine their own emissions profiles and work toward reductions, supposedly under the watchful eye of the ministry. To provide a fair and level playing field, and, of course, to harvest the intended environmental gains, MOE will need to demonstrate a strong presence in approvals, inspections, abatement and enforcement operations.

Above all, the ministry needs to move swiftly on updating its air standards, since they are key triggers to improve emissions. MOE had planned to set tougher standards 10 years ago for a special group of "high priority" contaminants, but this remains a work in progress. MOE should get back on track by publishing a revised list and schedule for substances needing new standards.

Local public health agencies and public interest groups have noted that they will find it challenging to engage in the expected level of site-specific public consultations on highly technical matters. The ministry should find ways for such agencies and groups to access technical expertise, and should consider the option of participant funding.

MOE has acknowledged that O.Reg. 419/05 does not adequately address background concentrations, cumulative or synergistic effects, nor does it address persistent or bioaccumulative contaminants. These are thorny policy issues as well as complex science challenges, but they cannot be ignored if the ministry's goal is truly as stated, "cleaner, healthier air, healthier communities and healthier Ontarians." A number of commenters,



including Environment Canada, have noted that MOE will never be able to assess or control cumulative loadings effectively until the ministry replaces the point of impingement approach – i.e., relying on concentration estimates at a facility’s property line.

Performance standards for specific sectors or specific facilities may provide a way forward on this issue. For example, MOE already applies sector-specific emission control requirements to municipal waste incinerators, through Guideline A-7. This guideline sets emission limits measured at the stack (not at the property line) for certain persistent contaminants like cadmium, lead and mercury, and also requires that stack emissions be tested annually. With good data on stack concentrations, annual loadings for such contaminants can be calculated. Environment Canada urged the ministry to develop more sector or facility-specific performance standards, to set emission limits on sources, and to factor in background concentrations in modelling. This seems good advice.

Finally, to assess the effectiveness of its regulatory reforms over time, MOE should track trends and quantify changes in loadings and ecosystem accumulations of air-borne toxic contaminants. The ministry should also be able to issue periodic progress reports on the implementation of O.Reg. 419/05 and related changes, including the extent of compliance with the new regulatory structure.

(For a detailed review of this issue, see the Supplement to this report, pages 75-87. For ministry comments, see page(s) 217-218.)

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#### Recommendation 8

The ECO recommends that MOE support the roll-out of Regulation 419/05 by strengthening its inspection, compliance and enforcement capacity, and by monitoring and reporting on the effectiveness of these reforms over time.

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# Ontario's Industry Emissions Trading System for Nitrogen Oxides and Sulphur Dioxide

Ontario's industrial sector is the source of an estimated 17 per cent of the nitrogen oxides (NO<sub>x</sub>) emissions and 65 per cent of the sulphur dioxide (SO<sub>2</sub>) emissions generated in the province. NO<sub>x</sub> is a greenhouse gas that contributes to the formation of ground level ozone, and both NO<sub>x</sub> and SO<sub>2</sub> contribute to the formation of particulate matter. Ground level ozone and particulate matter have a host of human health impacts, ranging from respiratory complications to cardiac disease. NO<sub>x</sub> and SO<sub>2</sub> also cause acid rain.

In 2001, the Ministry of the Environment launched an initiative to reduce industry NO<sub>x</sub> and SO<sub>2</sub> emissions. This generated a 2002 discussion paper, posted on the Environmental Registry, exploring the establishment of emission limits for NO<sub>x</sub> and SO<sub>2</sub> and the use of emissions trading to achieve these limits. By this point, MOE had already established NO<sub>x</sub>/SO<sub>2</sub> caps and a trading system for Ontario's electricity generators through O.Reg. 397/01 (see the ECO's 2001/2002 annual report). In June 2004, MOE moved to broaden the trading approach and released a proposal for an industry NO<sub>x</sub> and SO<sub>2</sub> emissions regulation for public comment, followed by a draft regulation in February 2005. MOE's Ontario Emissions Trading Code guides the expanded electricity and industry trading system.

In May 2005, the proposed regulation was finalized. Ontario Regulation 194/05, Industry Emissions – Nitrogen Oxides and Sulphur Dioxide, passed under the *Environmental Protection Act (EPA)*, puts a cap on NO<sub>x</sub> and SO<sub>2</sub> emissions from the following major industrial sectors: petroleum, iron and steel, pulp and paper, flat glass, cement, carbon black, and non-ferrous smelting. The regulation also establishes rules to guide the participation of these capped industries in the province's emissions trading system.

O.Reg. 194/05 establishes sector-specific limits or "caps" that decrease emissions, by varying amounts, in phases from 2006 through 2015 and beyond (see the following Table). It also establishes a budget of "new source set aside" (NSSA) allowances for new or expanding facilities. Within each sector, individual facilities are given annual allocations of emission allowances; at year's end, emissions should not exceed allowances. After five consecutive years of decreased production or closure, allowances for capped facilities will be transferred to the NSSA budget and can then be acquired by new or expanding facilities.

Table 1 – NO<sub>x</sub> & SO<sub>2</sub> Sector Annual Emission Allowance Budgets & NSSA Budgets (Tonnes)

**NO<sub>x</sub> Emission Allowances – Sector Budgets (tonnes)**

Sector	2006	2007	2008	2009	2010–2014	2015+
<b>Cement</b>	19,872	19,136	19,136	19,136	17,835	14,875
<b>Flat Glass</b>	2,100	1,953	1,953	1,953	1,805	1,805
<b>Pulp &amp; Paper</b>	7,170	6,836	6,836	6,836	6,558	6,558
<b>Iron &amp; Steel</b>	10,974	10,352	10,352	10,352	9,855	9,855
<b>Petroleum</b>	12,213	12,163	10,579	9,715	9,665	9,665
<b>NSSA NO<sub>x</sub> allocation or all sectors</b>	2,200	2,200	3,000	3,100	3,100	3,100

**SO<sub>2</sub> Emission Allowances – Sector Budgets (tonnes)**

Sector	2006	2007	2008	2009	2010–2014	2015+
<b>Cement</b>	22,339	21,820	21,820	21,820	20,773	16,139
<b>Iron &amp; Steel</b>	18,623	18,710	18,710	18,710	19,384	19,384
<b>Pulp &amp; Paper</b>	10,337	9,269	9,269	9,269	8,339	8,339
<b>Petroleum</b>	49,387	49,387	39,024	28,750	28,750	28,750
<b>Carbon Black</b>	11,100	10,850	10,850	10,850	10,700	10,700
<b>Chemical</b>	7,000	7,100	7,100	7,100	7,100	7,100
<b>Base Metal Smelting</b>	331,000	241,000	241,000	241,000	241,000	91,000
<b>NSSA SO<sub>2</sub> allocation for all sectors</b>	9,800	10,100	10,100	10,100	10,100	10,100

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

MOE indicates that by 2015, O.Reg. 194/05 will have ratcheted down industry NO<sub>x</sub> emission caps to 21 per cent below 1990 levels and SO<sub>2</sub> emission caps to 46 per cent below 1994 levels.

## Evolution of Ontario's emissions trading system

Emissions trading relies on market forces to reduce pollution. The theory is that emission trading achieves pollution reductions in a far more cost-effective manner than a conventional regulatory measure that stipulates all facilities must reduce their discharges by a certain date: under trading rules, those able to reduce emissions at the lowest cost have an economic incentive to do so while those unable to reduce emissions can purchase excess allowances in order to reach compliance.

The province's trading system is a hybrid system. It allows capped electricity and industrial emitters to purchase excess allowances from other capped emitters or to purchase emission reduction credits (ERCs) from uncapped emitters that earn the ERCs by voluntarily reducing their emissions, which can then be sold within the trading system. Both regulations restrict capped emitters from exceeding their caps by more than 33 per cent for NO<sub>x</sub> and 10 per cent for SO<sub>2</sub> through the purchase of ERCs. Should a facility buy and use the maximum allowable amount of ERCs, its emission levels could stay at or even exceed 2004 levels by 2015. However, it should be noted that this is the most extreme scenario; it is unlikely that some sectors would be able to secure the significant quantities of ERCs that would be required to reach the 10 per cent or 33 per cent maximums.



## Public participation and the EBR process

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MOE received 50 comments on the 2002 discussion paper, 31 comments on the Registry proposal for a regulation, and 23 comments on the draft regulation. Commenters included industry, government, and public health and environmental non-governmental organizations. A host of concerns were raised. They included: dissatisfaction with the hybrid nature of the trading system; a desire for either more or less aggressive emission caps; fear about trading-induced local pollution hotspots; and uncertainty regarding the fate of coal-fired power plant NO<sub>x</sub>/SO<sub>2</sub> allowance allocations as these plants are shut down.

## Implications of the decision

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O.Reg. 194/05 expands Ontario's hybrid emissions trading system by imposing caps and trading rules on certain industrial sectors. Meanwhile, the system continues to allow uncapped emitters to earn ERCs and sell them to capped emitters, and does not prevent the uncapped emitters from generating new sources of NO<sub>x</sub>/SO<sub>2</sub> emissions. This approach creates the potential for NO<sub>x</sub>/SO<sub>2</sub> emissions to increase over time.

Non-industry stakeholders argue NO<sub>x</sub> and SO<sub>2</sub> caps are too weak in both O.Reg. 397/01 and O.Reg. 194/05. Some believe weak caps will lead to Ontario's failure to meet other pollution reduction obligations, including commitments to Canada-Wide Standards on reducing ground level ozone and particulate matter established by the Canadian Council of Ministers of the Environment to ensure consistent environmental measures across Canada. Weak caps also create the illusion of action where, in fact, minimal or no effort may be necessary for industry emitters to meet their obligations. In the case of the iron and steel sector, SO<sub>2</sub> caps actually increase over time. Further, the most

significant cap decreases apply to the base metal smelting sector, which was already required to decrease emissions through an MOE order. MOE has admitted there remains a yet-to-be-addressed gap in its efforts to achieve adequate provincial NO<sub>x</sub>/SO<sub>2</sub> emission reductions.

In some American and European trading systems, safeguards are included to ensure that trading does not result in geographic concentrations of facilities that choose to acquire ERCs and increase rather than reduce emissions. Under such systems, emitters are required to demonstrate that their trade will not lead to unacceptable increases in ambient air levels of a pollutant prior to approval of a trade. O.Reg. 194/05 lacks any provisions to prevent the emergence of trading-generated local pollution hotspots. Current provincial air quality regulations are also unlikely to prevent this problem, since these regulations fail to consider cumulative impacts of multiple sources of air emissions (see also pages 92-96).

Many emissions trading systems in other jurisdictions include penalties designed to discourage capped emitters from failing to balance emissions and credits at the end of a trading year. These include imposing substantial fines or docking future allowance allocations for failure to comply with the regulation. O.Reg. 194/05 contains no such penalties, although general *EPA* provisions and air quality standards set out in provincial air quality regulations still apply.

## ECO Comment

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While the ECO lauds MOE's decision to expand the provincial emissions trading system to include major industrial emitters of SO<sub>2</sub> and NO<sub>x</sub>, concerns remain regarding the many unaddressed shortcomings of this system.

The ECO worries that allowing uncapped emitters to participate in the trading system limits MOE's ability to ensure that any significant emission reductions actually occur within capped industrial sectors. Further, it is very troubling that the system does not prevent uncapped emitters from increasing their own overall emissions of NO<sub>x</sub>/SO<sub>2</sub>. The ECO believes the system would be a far more effective tool for NO<sub>x</sub> and SO<sub>2</sub> emission reductions if trading were permitted between capped emitters only.

The ECO is also concerned that emission caps for many industry sectors remain close to current levels or may increase over the next 10+ years. Given the negative environmental impacts of NO<sub>x</sub> and SO<sub>2</sub>, more aggressive steps must be taken to reduce NO<sub>x</sub>/SO<sub>2</sub> emissions from industry.

The potential for the trading system to contribute to the creation of local hotspots is also of concern to the ECO. MOE has indicated to the ECO that another regulation, O.Reg. 419/05, will prevent this problem, but O.Reg. 419/05 does not address issues related to cumulative or synergistic impacts, leaving the ECO confused as to how the ministry will prevent the emergence of trading-related hotspots.

A failure to pull NO<sub>x</sub>/SO<sub>2</sub> allowances out of the trading system when remaining coal-fired plants close may mean that other new sources could acquire their allowances and contribute equivalent amounts of pollutants. MOE has informed the ECO that the allowances allocated to the Lakeview Generating Station, operated by Ontario Power Generation, were completely retired when the plant closed. But the fate of allowances from remaining coal-fired plants remains unclear. The ECO encourages MOE to retire allowances immediately from remaining coal-fired plants as these facilities close.

### If the coal plants don't close ...

On June 13, 2006, the Ontario government announced further delays to the planned closure of its coal-fired power plants, in the face of concerns about power supply shortages. For the foreseeable future, Ontario coal plants will continue to emit not only NO<sub>x</sub> and SO<sub>2</sub>, but a host of other problem contaminants, such as mercury. Regulators had been counting on the coal phase-out to address these other contaminants – an imprudent approach that the ECO warned against in our 2003/2004 annual report: “The ECO believes that MOE needs to take firm action on mercury emissions from coal-fired power plants, especially if the Ontario government decides to extend the lifespan of existing facilities beyond 2007. The ecological and human health impacts of mercury are well-documented, and coal plants are known to be a significant source of emissions.”

The ECO reiterates its view that MOE and the Ministry of Energy will now have to develop a plan to address emissions from the coal-fired plants.

#### Recommendation 9

The ECO recommends that MOE and ENG develop a plan to reduce air emissions, especially emissions of mercury, from Ontario's coal-fired power plants.

The ECO will continue to track MOE's efforts to reduce NO<sub>x</sub> and SO<sub>2</sub> emissions from the industrial sectors caught by this regulation. Meanwhile, the ECO encourages MOE to pursue reduction initiatives for other significant NO<sub>x</sub>/SO<sub>2</sub> emitters. For instance, off-road vehicles such as construction equipment and all-terrain vehicles are responsible for 30 per cent of Ontario's NO<sub>x</sub> emissions to air.

The ECO also encourages MOE to re-examine initiatives that were dropped without decisions during consultations that led to O.Reg. 194/05. These include the original proposal by MOE to review the existing regulations governing sulphur in fuel oil and coal; its proposal to accelerate the implementation of industry codes of practice for reducing emissions of volatile organic compounds; and the proposal to fast-track the target date for overall reductions of provincial NOx and SO2 emissions from 2015 to 2010.

Finally, the ECO is very concerned that the lack of penalties in O.Reg. 194/05 for non-compliance may create challenges to successful implementation of the regulation.

(For a more detailed review of this issue, see pages 88-101 of the Supplement to this report. For ministry comments, see page(s) 218.)

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#### Recommendation 10

The ECO recommends that MOE expand the range of capped emitters and restrict emissions trading to within that group only.

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## Bill 133: Putting the Lid on Spills



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

The *EESLAA* is part of an evolution of environmental law in Ontario and expands the Ministry of the Environment's powers to deal with industrial polluters in a number of important ways. In addition, the *EESLAA* addresses some of the concerns and issues that were raised by the Industrial Pollution Action Team (IPAT) in its July 2004 report to the Minister of the Environment. IPAT was created by MOE in April 2004 after several spills occurred along the St. Clair River that angered local communities in both Ontario and Michigan which were required to shut down their water treatment systems, but not always adequately informed of the risks. IPAT based its analysis and recommendations on the belief that "affected communities must be fully and meaningfully involved in



all decisions that affect their environment and their health.” On July 30, 2004, IPAT released its findings regarding the causes of industrial spills and dangerous air emissions and its recommendations on preventive measures that industry and others could undertake. IPAT found that Ontario’s environmental management framework was “largely reactive, not preventive” and that there were no regulatory requirements for pollution and spill prevention plans, although MOE had attempted to develop pollution prevention plans with several industry sectors in the 1990s.

In a May 2005 presentation on Bill 133, the Minister of the Environment indicated that there was one key objective for the bill – to reduce the number of spills in Ontario by “encouraging companies to do more to prevent spills and to ensure fast, effective cleanup when mishaps do occur.” The minister noted that despite the threat of prosecution, some companies had not taken the steps needed to prevent spills. In 2004, approximately 3,900 spills were reported to MOE, of which industrial facilities accounted for 1,062 spills, or 27 per cent.

Many key sections of the *EESLAA* were proclaimed on June 13, 2005. One of them has expanded on the provisions in the *Environmental Protection Act (EPA)* that require directors and officers of corporations to take “all reasonable care” to prevent the corporation from causing or permitting the discharge of a contaminant into the natural environment in contravention of the *EPA* or its regulations. For instance, one of their additional duties is to notify MOE of discharges of contaminants in contravention of the *EPA*, its regulations or an approval under the *EPA*. Similar amendments were also made to the *Ontario Water Resources Act (OWRA)*.

The *EESLAA* also included numerous other amendments that have come into force such as lowering the threshold in the *EPA* – e.g., from “likely” to “may” – for certain provisions to be applicable, expanding on the criteria for determining if water is impaired under the *OWRA*, increasing the maximum daily penalties for offences under the *EPA* and *OWRA*, and shifting the burden of proof obligations from MOE to the polluters. There are also amendments that provide additional direction to the courts regarding sentencing.

Many sections of the *EESLAA* have not been proclaimed as of May 2006. Under the new law, MOE can impose financial penalties, called environmental penalties (EPs), on regulated persons for contraventions related to the *EPA* and/or the *OWRA*. EPs replace the administrative penalty provisions in the *EPA* and the *OWRA*, which were never proclaimed. The *EESLAA* includes provisions that identify the types of contraventions for which EPs can be imposed, the maximum daily amounts of EPs that can be imposed, and the appeal rights and burden-of-proof obligations related to EPs. But as of May 2006, none of the EP provisions had come into force.

## Public participation and the *EBR* process

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Bill 133 was introduced in the Ontario Legislature on October 27, 2004, and MOE provided an initial 30-day Registry comment period. MOE had provided an earlier period of policy consultation between April and September of 2004 related to work of the IPAT. After requests from the ECO and other stakeholders in mid-November 2004, MOE increased the comment period to 71 days. (For additional comments, see pages 170-171, Adequate time to comment on proposed Acts.)

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

Commenters were either strongly for Bill 133 or strongly against it. Supporters included environmental groups, such as the Canadian Environmental Law Association (CELA), the Sierra Legal Defence Fund, the Lake Ontario Waterkeeper and the Wallaceburg Advisory Team for a Cleaner Habitat. In contrast, dozens of mining, forestry and petrochemical companies and industry associations, such as the Ontario Mining Association and the Canadian Petroleum Producers Association, had numerous concerns about Bill 133.

Most environmental groups supported the use of environmental penalties, and noted that EPs have been used effectively in other jurisdictions in Canada and the U.S. However, CELA cautioned that EPs should not be considered as a replacement for prosecutions, noting that legal commentators who have examined the role of prosecutions as a regulatory tool have concluded that an emphasis on prosecutions has served as a powerful catalyst in promoting regulatory compliance.

Commenters who supported Bill 133 also urged the government to require agreements to settle disputes about EPs (or reduce or even cancel them) to be made public, to require that companies prepare pollution and spill prevention plans, and that the ministry produce annual reports on the use of EPs, investigations and prosecutions. In addition, supporters agreed with MOE's plans that the Bill 133 requirements should apply only to Municipal-Industrial Strategy for Abatement (MISA) facilities initially and then to other sectors based on their spill records. They also praised the proposed amendments that reduced the threshold for prosecutions from "likely to cause" to "may cause" under the *EPA*, observing that these amendments would make the threshold

under the *EPA* consistent with the existing threshold in the *OWRA*. They also supported the proposed definition of “deemed impaired,” citing the problems encountered by MOE prosecutors in proving impairment of water since *R. v. Inco* was decided by the Ontario Court of Appeal in 2001.

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

The lack of a due diligence defence for EPs attracted criticism from many companies, industry associations and the Ontario Bar Association (OBA). In its comments on the Registry proposal, the OBA said that “ ... it is our strong view that there should be a defence of due diligence available to both individuals and corporations with respect to EPs. Some minimum requirement of fault would strike a better balance between fairness and the compelling need to protect our environment.” Thus, they recommended that MOE reconsider its proposal.

## ECO Comment

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The *EESLAA* responds to a number of concerns that the ECO and other stakeholders have raised with MOE, and the ministry should be commended for its work on Bill 133. However, the effectiveness of the legislation is compromised by the lack of resources for compliance staff to work with companies on compliance issues and to enforce the statute, especially because the ECO anticipates that the number of reported spills to increase now that all spills, even those that do not result in adverse effects, must be reported unless exempted by regulation. The ECO also expects that MOE will impose more preventive orders that include requirements to develop plans to reduce the number of spills and discharges to the natural environment and to decrease the adverse effects of spills.

... the changes in the Environmental Enforcement Statute Law Amendment Act are positive because they emphasize the importance of forcing industry and regulators to focus their attention on spills and their adverse effects ...

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

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

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

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

In response to requests from environmental groups, MOE agreed to publish on the Registry every agreement made to reduce or cancel an EP. The provisions to publish

settlement agreements and an annual report and to conduct a five-year review of the program will ensure that MOE's implementation of environmental penalties is transparent. It isn't clear whether MOE intends to post the agreements as regular notices subject to s. 15(1) of the *EBR* or as information notices under s. 6 of the *EBR*. Since the EP regulation is still under development, the ECO will reserve further comment until the regulation is passed.

When ministries post notices of environmentally significant proposals for Acts on the Registry, they must also post notices of their decisions on those proposals, along with explanations of the effect of public comment on their final decisions. In this case MOE failed to post a decision notice promptly. As of May 2006, MOE still had not posted a decision notice for Bill 133, nearly one year after the bill had been passed into law. Moreover, MOE also failed to provide comments submitted through the Registry consultation process to the ECO until early May 2006. (For further discussion, see Ministry Cooperation, pages 203-205.)

In conclusion, the *Environmental Enforcement Statute Law Amendment Act* represents an important shift in the Ministry of the Environment's approach to regulating industrial polluters. The ECO will carefully monitor how the new environmental penalties and other facets of the law are administered and will provide updates in future annual reports.

(For a more detailed review of this issue, see the Supplement to this report, pages 102-115. For ministry comments, see page(s) 218.)

## Smaller Drinking Water Systems: An Interim Solution

In the spring of 2005, a new drinking water regulation was proposed and quickly passed into law, simplifying rules and reducing requirements for 18,000 small and rural drinking water systems across Ontario. O.Reg. 252/05 (Non-Residential and Non-Municipal Seasonal Residential Systems That Do Not Serve Designated Facilities) under the *Safe Drinking Water Act (SDWA)* lowers the requirements for licensing and approvals, operator training, water treatment, water quality testing, and reporting.

This decision creates a three-tiered system for protecting drinking water supplies. Most residential systems will continue to be regulated by the Ministry of the Environment under the *SDWA* and O.Reg. 170/03 (the Drinking Water Systems Regulation). Very small systems – private wells – remain outside the scope of the *SDWA*, governed by the limited requirements of the Wells Regulation (see pages 51-54 of this report). In between these two tiers are the systems governed by the new regulation.

## Systems Subject to O.Reg. 252/05

O.Reg. 252/05 applies to five of the eight classes of systems formerly subject to the Drinking Water Systems Regulation, O.Reg. 170/03:

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

The water systems for “designated facilities” – retirement homes, nurseries, children’s camps, hospitals and other facilities serving higher-risk populations – remain under O.Reg. 170/03, along with year-round residential systems.

Owners of non-municipal year-round residential systems (e.g., year-round apartment complexes or mobile home parks) also remain governed by O.Reg. 170/03, and were required to have an engineer-inspected treatment system and a certified operator in place by July 1, 2006.

(See the Supplement to the 2005/2006 ECO annual report for details.)

## Looming deadline and an interim solution

Faced with a June 1, 2005, deadline under O.Reg. 170/03 for some small systems to begin expensive water testing, the Ministry of the Environment quickly passed O.Reg. 252/05, allowing only an abbreviated comment period on the proposal on the Environmental Registry. MOE presented the regulation as an interim arrangement while a new regulatory approach was under development. The proposed new approach, posted for consultation on the Registry in May 2005, would transfer agency responsibility for most non-residential or seasonal systems subject to O.Reg. 252/05 from MOE to the Ministry of Health and Long-Term Care under the *Health Protection and Promotion Act (HPPA)*. Local public health inspectors would set individual treatment and testing requirements for these systems, based on risk assessments.

The government announced that consultations on this proposal would begin in fall 2005 and that the transfer to MOHLTC would occur as early as fall 2006. However, as of June 2006, a public consultation process had not occurred and no decision notice had been posted. O.Reg. 252/05 and its minimal standards may therefore be in effect for longer than was intended.

O.Reg. 252/05 was designed to accommodate concerns over the high cost of compliance with O.Reg. 170/03. O.Reg. 252/05 was intended to be in place until the new risk-based, system-specific approach under MOHLTC and public health units could be established. Under O.Reg. 252/05, many systems are not required to provide water quality testing

or treatment (warning signs may be posted instead), certified operators, raw water quality monitoring, or annual reports to MOE. Bacterial testing will target fewer parameters, and sampling frequencies are reduced for distribution system bacteria and chlorine residual.

## Implications of the decision

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For tens of thousands of non-residential or seasonal drinking water systems – presumably, where the public has less exposure to contaminants because of only occasional use – the new regulation lowers many requirements designed to ensure water safety.

Both the current and the previous governments have repeatedly and publicly committed to implementing all of Justice O'Connor's recommendations from the Walkerton Inquiry. MOE will continue to be the lead ministry for development of drinking water policy and standards even when the new approach to small drinking water systems is adopted under MOHLTC and public health units.

## Public participation and the *EBR* process

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Consultation on Ontario's drinking water regulations has been extensive, including numerous Environmental Registry notices, consultations with affected groups, and broad public consultation through an Advisory Council on Drinking Water Quality and Testing Standards appointed by the Minister of the Environment.

The Council's report on small drinking water systems called for public health inspectors to conduct risk assessments and inspections, but recommended that a new regulation for these systems remain under the *SDWA* and MOE authority. Instead, the government decided to pursue wholesale transfer of regulatory power to MOHLTC. The Council also recommended that existing testing requirements remain in place until a new approach is implemented. MOE instead chose to proceed with lowered testing requirements in O.Reg. 252/05, pending development of a new approach. As of June 2006, the province does not appear to have implemented many of the Council's other recommendations on small systems, such as providing assistance to bring non-municipal year-round residential systems up to the performance level of municipal systems, providing alternative test methods for systems located far from water testing labs, pre-approving treatment equipment options, and regularly reporting on progress in implementing the recommendations.

Many commenters complained about the short posting period and the last-minute nature of changes to requirements. Commenters were also concerned that trailer parks and other small year-round systems continue to face treatment and testing costs of

O.Reg. 170/03. Laboratory costs led many to call for public MOHLTC labs to provide the testing. Other commenters said rules for water wells remain unclear, and that reduced requirements will increase the risks for the affected drinking water systems.

MOE's decision notice on the Registry did not accurately reflect the public's concerns. It suggested that comments were either generally supportive of the proposal or were based on misunderstandings.

## ECO Comment

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In our 2003/2004 report, the ECO pointed out that the cost and complexity of requirements under O.Reg. 170/03 might create difficulties for the owners of smaller drinking water systems. Many of the owners of such drinking water systems were clearly in agreement and conveyed their views to the Ontario government in strong terms. O.Reg. 252/05 is a compromise response, intended to protect public health while recognizing the financial limitations faced by rural businesses, community centres, and other small water systems.

MOE made a sincere attempt to consult with drinking water system owners and to find creative solutions for Ontario's highly diverse drinking water systems. The ministry is to be commended for its willingness to accept feedback and to revise the applicable laws, as it attempts to develop a drinking water protection framework of unprecedented sophistication.

However, MOE's pattern of making last-minute changes to drinking water regulations and compliance deadlines also creates difficulties. It undermines MOE's credibility and rewards those system owners who delay their compliance. MOE repeatedly put off making a decision on how to address the resistance from small-system owners to O.Reg. 170/03, then rushed to pass the amending regulation, O.Reg. 252/05, without respecting *EBR* requirements for a minimum 30-day Registry posting. The Registry posting appears to have been merely a token show of consultation and not a true opportunity for public input. MOE's decision notice stated that it made no changes between proposing and finalizing the new regulation because most commenters were supportive of the regulation as proposed. In fact, the ECO's review determined that commenters raised many concerns with the proposal.

The *Health Protection and Promotion Act* is currently not a prescribed Act under the *EBR*. Transferring much of MOE's drinking water responsibility to the *HPPA* would therefore remove many of the public's *EBR* rights. The ECO urges MOE to work with MOHLTC to prescribe appropriate portions of the *HPPA* under the *EBR*, including all regulations of environmental significance under the Act.



Drinking water systems under O.Reg. 252/05 are governed on an interim basis by only very cursory requirements for testing, treatment and reporting. From the risk-averse framework of mandatory protections under O.Reg. 170/03, the pendulum has swung in the opposite direction, to a cost-averse framework of minimal requirements. The ECO recognizes that these facilities are not primary drinking water sources for most users, so exposures are limited. However, these are drinking water systems that serve the public, and the ECO encourages MOE and MOHLTC to expeditiously develop a framework for a more balanced approach, one that takes into account both the costs of compliance and the risks and costs of tainted water.

The success of the proposed shift to site-specific risk assessments by public health inspectors will hinge on whether there is capacity enough to implement the program. The health units will need inspections staff, inspection protocols, training and technical expertise, and information management systems. Moreover, transferring responsibilities from MOE to public health inspectors will not automatically lead to safer drinking water: water quality is an expression of overall environmental quality, and drinking water problems are best addressed at the level of source protection, not only at the treatment system level.

The ECO notes with concern that by detaching the Ministry of the Environment from responsibility for smaller drinking water systems, this decision may isolate the ministry from valuable sources of information on the state of the environment.

(For ministry comments, see page(s) 218.)

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#### Recommendation 11

The ECO recommends that MOH and MOE prescribe under the *EBR* portions of the *Health Protection and Promotion Act* pertaining to small drinking water systems, to ensure the appropriate level of transparency and public consultation.

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## Amending the Nutrient Management Regulation

On September 29, 2005, the Ontario government finalized O.Reg 511/05, which amends O.Reg. 267/03 under the *Nutrient Management Act (NMA)*, which sets out requirements for the management of nutrients. Nutrients are defined as materials such as manure and biosolids (e.g., sewage sludge) that are applied to land for the purpose of improving crop growth. Although a few of the requirements apply to all farm types, livestock

operations and municipal sewage treatment plants are the primary regulated entities. The original regulation came into force on September 30, 2003, and was amended for the first time in late 2003. (For the ECO's review of the original regulation and the first amendments, refer to the 2003/2004 annual report, pages 74-78.)

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

Nutrients are classified as either agricultural source materials (ASMs) that are generated by livestock operations, such as manure, or as non-agricultural source materials (NASMs), such as biosolids, that are generated by municipal sewage treatment plants.

## Livestock operations phased-in under O.Reg. 267/03, as amended by O.Reg. 511/05

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Under O.Reg. 267/03, new livestock farms that generate over 5 NU and existing livestock farms expanding to 300 NU or more were required to complete a nutrient management strategy (NMS). As amended by O.Reg. 511/05, the regulation now also requires an NMS from livestock operations that are involved in certain activities, such as building a manure storage facility (see

Table 1, page 113, for details). The NMS includes a description and sketch of the farm, a list of the types and quantities of nutrients produced and the storage facilities, and states to whom the nutrients are distributed. Livestock operations may also be required to prepare a Nutrient Management Plan (NMP) if they apply nutrients to their land. The NMP includes information about the farm and its fields: an analysis of the nutrients to be applied, how much will be applied and at what rate; setbacks from sensitive features, such as wells; and how the nutrients will be stored. Livestock operations that are not subject to O.Reg. 267/03 may be subject to municipal bylaws where they exist.

As described in Table 1 below, O.Reg. 511/05 made some significant changes to which livestock operations would be required to prepare NMSs and NMPs, and which NMSs and NMPs had to be approved by the Ministry of Agriculture, Food and Rural Affairs. It also amended the scenarios under which NMSs and NMPs were to be renewed – which were originally to be updated and possibly re-approved every five years.

O.Reg. 511/05 added several new requirements. First, livestock operators must now review and update their NMSs and NMPs annually, and must keep records of the review and update. Second, livestock operators who are not required to obtain OMAFRA approval of their NMSs are now required to register their operations with OMAFRA. Third, to address certain higher-risk operations, livestock operators who operate within 100 metres of a municipal well or build permanent earthen nutrient storage facilities must get approval of their NMPs and NMSs from OMAFRA. Although O.Reg 511/5 retained the requirement that livestock operators keep copies of their NMSs and NMPs, it revoked the requirement to keep records with respect to their day-to-day implementation.

Table 1: Preparation and Approval Requirements for NMSs and NMPs Before and After O.Reg. 511/05.

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

\*Livestock operations that generate less than 300 NUs and receive NASMs under a valid Certificate of Approval for Organic Soil Conditioning Sites are exempt from the NMP requirements until January 1, 2007, unless they are located within 100 metres of a municipal well. In addition, livestock operations that require an NMS but do not receive NASMs and are not located within 100 metres of a municipal well are not required to prepare an NMP.

NMAN refers to a software application and workbook that was developed by OMAFRA for the purpose of preparing NMSs and NMPs. It includes information about Ontario soil types, typical nutrient results for various types of manure, and crop nutrient requirements. NMAN provides a means for livestock operators to enter data regarding their operations, such as the type and number of livestock, results of soil and nutrient analyses, and field descriptions and crop practices, and it automates the calculations (e.g., nutrient application rates) and the preparation of their NMSs and NMPs. NMAN alerts livestock operators of potential problems, such as excessive application rates and insufficient manure storage capacity.

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

## Amendments to the protocols

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O.Reg. 267/03 makes reference to two protocols – Nutrient Management and Sampling and Analysis – that provide additional information and are legally enforceable. Both of these protocols were revised in September 2005, along with the regulation. The Nutrient Management Protocol contains technical and scientific details and standards relevant to the regulation. However, information about record-keeping was deleted from the protocol. The Sampling and Analysis Protocol describes the techniques to be



used for sampling and analyzing soil and nutrient materials. But, the revised regulation no longer makes reference to a third protocol – Construction and Siting – that described the requirements for nutrient storage facilities, or to another protocol – Local Advisory Committee – that outlined the procedures to be used by such a committee.

## Implications of the decision

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According to OMAFRA, the September 2005 amendments to the regulation protect the environment without placing an “unbearable burden on livestock operators” and retain “priority standards that have a strong effect in risk reduction and moves a number of other standards from the regulation to recommended voluntary best practices.” With these amendments, some livestock operators who were previously exempt are now required to have an NMS and possibly an NMP. According to OMAFRA, these amendments accelerate the phase-in of livestock operations under *NMA*.

Prior to the coming into force of these amendments in September 2005, OMAFRA had approved 777 NMSs. Based on statistics provided to the ECO by OMAFRA in February 2006, the vast majority of the approximately 53,000 livestock operations in Ontario will remain subject to municipal bylaws where they exist. OMAFRA estimated that about 750 livestock operations generate 300 or more NUs and will be/have been phased-in and that fewer than 25 livestock operations that generate 300 or more NUs will need to be registered. Between 100 and 200 livestock operations will be required to prepare NMSs annually, the ministry said, due to the new requirement that livestock operations that generate over 5 NUs and construct livestock housing or a nutrient storage facility have an approved NMS. About 500 livestock operations will apply NASMs and will require approved NMPs in 2007.

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

## Public participation and the *EBR* process

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OMAFRA received 33 comments on the proposed amendments. In general, farm organizations supported registration of NMSs instead of requiring OMAFRA approval, elimination of the requirement that most NMPs be approved by OMAFRA, and allowing the use of alternatives to NMAN. However, other commenters expressed concern that many NMSs and NMPs would no longer be approved by OMAFRA. In general, the environmental non-government organizations recommended that all livestock operations generating or receiving nutrients be required to prepare NMPs, and that NMPs and NMSs for existing large livestock operations – i.e., livestock operations that generate 300 or more NUs annually – be approved by OMAFRA. Several commenters were concerned that the requirement to keep records had been replaced with only a recommendation to keep records.

## ECO Comment

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The ECO is supportive of a risk-based approach to nutrient management that ensures that the largest livestock operations are subject to the most stringent requirements and the smallest operations to less stringent requirements. However, the ECO is concerned that changes to several of the requirements for large livestock operations have weakened accountability and assurance of compliance with O.Reg. 267/03. With these amendments, OMAFRA approval for many renewed nutrient management strategies is no longer required. The ECO believes that unless these strategies for

all large livestock operations, regardless of their proximity to municipal wells, are approved by OMAFRA at least every five years, they may become stale or may no longer reflect current conditions on the farm.

Since environmental risks related to land application of nutrients are addressed in nutrient management plans, the ECO is concerned about some of the weakened requirements related to their preparation and approval. Although OMAFRA has strongly recommended the use of NMAN software to prepare NMPs, the ECO does not believe that the requirement to use it should have been deleted from the regulation. In addition, the ECO believes that all NMPs and renewed NMPs, including NMPs for large livestock operations that do not receive non-agricultural source materials, should be approved by OMAFRA.

Despite OMAFRA's contention that livestock operations are required to keep records throughout the year that demonstrate compliance with their MNSs and NMP, the ECO notes that this requirement was deleted. As a result, it will be much more difficult for OMAFRA or the Ministry of the Environment to verify compliance or to conduct an investigation, and may make the Act and its regulation unenforceable. With the exception of the few NMSs and NMPs that require OMAFRA approval, the only mechanism to assure the public that NMSs and NMPs are current and comply with O.Reg. 267/03 is a site visit by OMAFRA or MOE. Although the ECO understands that OMAFRA and various farm organizations continue to recommend that livestock operators keep implementation records, the ECO does not believe the legal requirement to keep these records should have been deleted.

In January 2006, the ECO was pleased to learn that the *Nutrient Management Act* and its regulation were prescribed under the *EBR* for notice and comment and for applications for review. However, since *NMA* and its regulation were not designated for applications for investigation and NMSs and NMPs were not designated as instruments, the public and municipalities will still not be notified on the Registry of local nutrient management activities that may affect them. Nor will anyone be able to request an investigation under the *EBR* into possible non-compliance with the *NMA* or its regulation. The ECO continues to urge MOE and OMAFRA to prescribe the *NMA* under the *EBR* for applications for investigation and to designate NMSs and NMPs for large livestock operations as instruments.

(A more detailed review is provided in the Supplement to this annual report, pages 128-139. For ministry comments, see page(s) 218-219.)

# Instruments

## What are instruments?

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

## Classifying instruments

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

## Effect of public comments on instruments

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As part of our work, the ECO reviews ministry decision-making on selected instruments. In order to illustrate how the public is participating in government decision-making, one of the ECO's 2005/2006 reviews is summarized below. This example confirms that instrument proposals can evoke strong public interest.

## Dofasco Acid Regeneration Plants

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In 2005 and 2006, the Ministry of the Environment made decisions on a number of separate *Environmental Protection Act (EPA)* applications by Dofasco Inc., related to the Acid Regeneration Plants (ARPs) at its integrated steel mill in Hamilton, Ontario.

(For a detailed review of these instruments, see pages 154-157 in the Supplement to this report.)

Acid Regeneration Plants recondition the hydrochloric acid solutions used to clean oxides off steel, and in the process, acid aerosol and iron oxide particulate emissions are produced.

Dofasco has two existing acid regeneration plants, one of which (#1 ARP) is 30 years old and has been the source of community concerns about visible emissions, odours and health effects. In late 2002, Dofasco announced plans to replace the existing ARPs with a new plant (#3 ARP) to double capacity and improve environmental performance.

In May 2004, MOE posted a proposal notice on the Environmental Registry for a new fan at #1 ARP to push the stack discharge higher, even though the fan was already in operation. MOE said the fan would help correct occasional down drafting of the stack plume, addressing health and safety concerns in the area. It appears that the company installed the fan to address concerns by construction workers located adjacent to the acid regeneration plant who were exposed to the acid discharge and risked eye, nose and throat irritation from the hydrochloric acid.

In May 2005, MOE issued a new certificate of approval (C of A) for the air emissions associated with the new #3 ARP, and by April 2006, the plant had all necessary approvals and was fully operational. The new plant, while more efficient than the old, doubles Dofasco's processing capacity and will still have significant emissions. Homes, a school, and nursing home are all located within a 200-metre radius of exhaust stacks and fans at the new facility.

The C of A for the #1 ARP was set to expire on December 31, 2005, but MOE approved an extension because of delays in commissioning the new plant. MOE informed the ECO in April 2006 that the extension was not used, and the #1 ARP stopped operating by the end of 2005 as scheduled. However, the #2 ARP is expected to be in operation until the end of 2006.

## Public participation and the EBR process

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One person commented on all the proposals posted to the Environmental Registry and another member of the public also commented on the proposal to install the fan at the #1 ARP. They described a history of concerns with emissions and compliance at the facility, and asked for tighter controls by the ministry.

The commenters asked MOE to impose lower emission limits on #1 ARP as long as it continued to operate, and asked that the new #3 ARP be subject to a number of improvements. They pointed to strict US Environmental Protection Agency standards for acid regeneration plants and Canada-Wide Standards (CWS) for ozone and PM2.5 (fine particulates). They also requested additional conditions on odours, continuous emission monitoring, and a warning system for the community and workers. MOE decided not to address any of these suggestions, stating that the facilities are subject to the General Air Quality Regulation and Spills reporting requirements under the *EPA*, and that the ministry would not add any specific performance requirements to the Cs of A.



The commenters both raised concerns that the new fan had merely shifted the pollutants onto nearby residences. One suggested that Dofasco should cut back on the reactor flows, reducing scrubber losses and emissions of hydrochloric acid and red oxide particulates. MOE responded that the emission modelling report submitted with the application demonstrated net reductions in ground-level concentrations of contaminants from the stack.

Another commenter was very concerned that the fan had already been installed and was operating at the time the proposal was posted on the Environmental Registry. The ministry's Hamilton District Office forwarded the alleged *EPA* offences to the MOE's Investigations and Enforcement Branch for investigation, but the branch decided not to act on the report.

## ECO Comment

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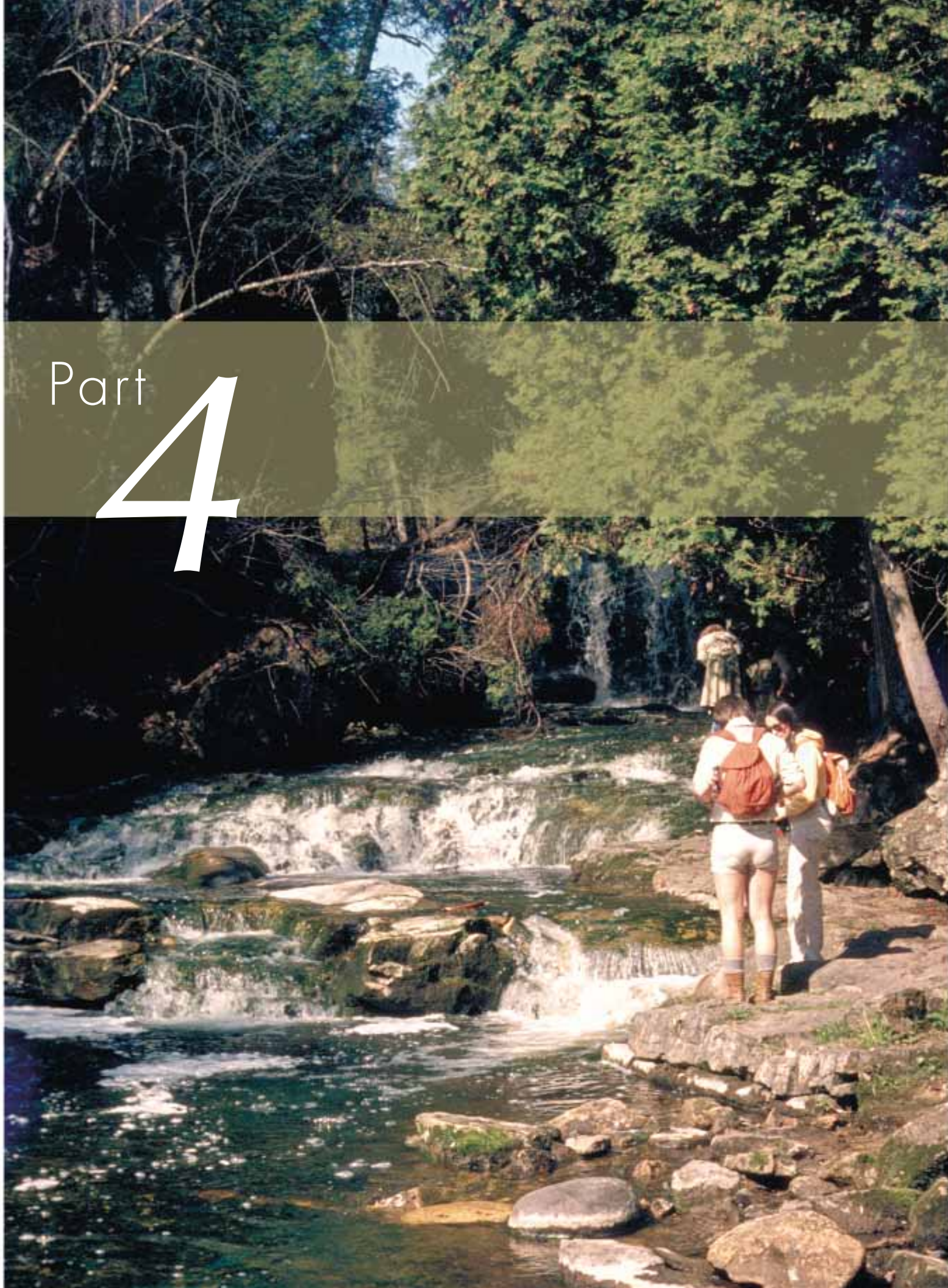
The ECO is concerned about the *EBR* implications of processing applications (including providing a Registry comment period) after proponents have already installed the equipment. Under the *EBR*, proposals are supposed to be posted for comment before decisions are made, and the public has the right to expect that comments may influence the decision. In this case, equipment was already installed and operating before the public was asked for comment – a poor approach to consultation. The ECO suggests that MOE develop a process to deal with the *EBR* posting requirements when the ministry discovers situations where a proponent has made changes before receiving approval.

MOE decided against tighter rules for the old plant while it continued to operate, but this was probably a reasonable judgement call. However, it is unfortunate that MOE also decided against tougher emission requirements for the new facility, given its doubled capacity and close proximity to a residential area. MOE provided a weak response to suggestions from commenters that Canada-Wide Standards for ozone and fine particulates be incorporated into the C of A.

This review also highlighted a broader issue in regulating air emissions. It is unclear to the ECO why MOE has chosen not to incorporate the CWS for ozone and fine particulates into Cs of A to meet Ontario's emission reduction targets, yet has moved to incorporate CWS for other contaminants into Cs of As for certain sectors and facilities that are major contributors. MOE proposed in 2004 to revise the Cs of As for electric arc furnaces at all steel mills, including Dofasco's, to incorporate the CWS for dioxins and furans. MOE says that a decision on this proposal is imminent. This would be a positive step. The ECO will continue to monitor MOE's implementation of the CWS.

(For ministry comments, see page(s) 221.)

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# Reviews and Investigations

Under the *EBR*, Ontario residents can ask government ministries to review an existing policy, law, regulation or instrument (such as a certificate of approval or permit) if they feel that the environment is not being protected. Residents can also request ministries to review the need for a new law, regulation or policy. Such requests are called applications for review. Ontario residents can also ask ministries to investigate alleged contraventions of specific environmental laws, regulations and instruments. These are called applications for investigation.

## The ECO's Role in Applications

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Applications for review or investigation are first submitted to the Environmental Commissioner of Ontario, where they are reviewed for completeness. Once ECO staff have decided that a particular application meets the requirements of the *EBR*, the ECO forwards it to the appropriate ministry or ministries. The ministries then decide whether they will conduct the requested review or investigation or whether they will deny it. The ECO reviews and reports on the handling and disposition of applications by ministries. The issues raised by the applications are an indication of the types of environmental concerns faced by members of the public, and sometimes lead the ECO to do follow up research on them.

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

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

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

- Agriculture, Food and Rural Affairs
- Municipal Affairs and Housing

In the 2005/2006 reporting year, the ECO forwarded 16 applications for review and 10 applications for investigation. Individual applications for review and investigation received by ECO may be forwarded to more than one ministry if the subject matter is relevant to multiple ministries, or if the applicants allege that Acts, regulations or instruments administered by multiple ministries have been contravened.

The following tables provide a breakdown of the disposition of applications handled by the ministries during the year. The total number of reviews and investigations indicated as completed or denied during the year also may include applications that were listed as “in progress” in the previous fiscal year.

#### Reviews

Ministry	Total Forwarded In Year	Reviews Denied	Reviews Completed	Reviews in Progress as of March 31, 2006
MOE	8	4	5	5
MNR	4	6	0	2
MAH	1	0	0	1
MNDM	1	1	0	0
ENG	2	2	0	0

#### Investigations

Ministry	Total Forwarded In Year	Investigations Denied	Investigations Completed	Investigations in Progress as of March 31, 2006
MOE	7	6	0	1
MNR	3	2	0	1

As in previous years, the majority of applications for review and investigation were denied. In many cases, the ECO did not agree with the ministries' rationale for denying these applications. Under s.70 and s.78 (3) of the *EBR*, ministries are required to inform applicants as to whether or not a review or investigation will be conducted within a 60- day period. The ECO has noted several instances this year where MOE has exceeded this time limit. In one case (see the Supplement to this report, pages 182-184 – R2004007), MOE was almost four months late in notifying applicants of its decision. We urge the ministry to ensure that it complies with this statutory requirement in the future.

ECO reviews of the applications for review and investigation are found in Sections 5 and 6 of the Supplement. In the following pages, we provide brief summaries of selected applications handled by ministries during this reporting period.

## Prescribing Education: Critical to Future Sustainability

In May 2004, two applicants requested that the Ministry of the Environment review O.Reg. 73/94, the General Regulation under the *Environmental Bill of Rights*, to determine whether the Ministry of Education (EDU) should be added as a prescribed ministry under the *EBR*.

When the *EBR* was first proclaimed in February 1994, the Ministry of Education was not listed as a prescribed ministry in O.Reg. 73/94, and thus the ministry was not required to develop a Statement of Environmental Values (SEV) nor to post notices on the Registry inviting public comments on proposed decisions for environmentally significant Acts and policies. The applicants believe that this decision has had a negative impact on ministry decision-making related to the financing and support of environmental education and outdoor education.

The applicants drew on a previous 1999 application, described in the 2000/2001 ECO annual report (pages 165-166), though they noted that many things had changed since the original 1999 application was filed. They pointed to research delineating a decline in environmental literacy in Ontario and how this can be linked to real world problems, and referred to a number of research studies conducted between 1999 and 2004. One of the applicants, a university professor at Lakehead University in Thunder Bay, was the principal researcher for all of the studies. While the applicants did not provide copies of all of the studies, some of them were available in published journals. The application also provided extensive extracts from the studies.



The key research study referred to by the applicants was a 2001 report on ecological literacy at the secondary school level demonstrating that “students in Ontario are not ecologically literate because they are not being taught ecological education.” The applicants explained that between 1988 and 1998, Environmental Science was a discrete subject in the secondary school program in Ontario with its own provincial curriculum guideline for students in grades 10 and 12. In 1998, the Ministry of Education removed Environmental Science from the secondary school curriculum as single-focus, stand-alone courses. Instead, the ministry decided to integrate or “infuse” environmental concepts into other science and geography courses.

The applicants went on to note that Ontario, once a leader in creating environmental education, has now fallen far behind the major initiatives undertaken by other jurisdictions, and put forward various reasons for the decline. There also is “no subject area” taught in Ontario schools that would make Ontarians “more aware of how we could behave” in an ecologically responsible manner, and there is no program to “provide lifelong ecological literacy to the general public.” The applicants go on to argue that “there are few things we can do as a society to protect the environment better than through public education.”

The applicants recommended the creation of a new discipline called “ecological education”: compulsory, discrete courses at the secondary school level and a sequenced and sensitive curriculum, covering Kindergarten to Grade 12. They suggest that in light of the serious challenges the ecosphere faces in the future, “ecological literacy must become the first imperative.” The applicants cited several examples of problems associated with declining ecological knowledge, including:

- The Walkerton deaths and the O’Connor Inquiry, which demonstrate the consequences of inadequate ecological knowledge. The applicants quoted a 2001 article that stated that “not being aware of the facts about environmental problems indicates a lack of knowledge (i.e., lack of education) and a problem with the failure of our institutions to promote an awareness of that knowledge.”
- Lack of action on the Kyoto Agreement. The applicants contend that the imperatives of climate change should provide a strong motivation to policymakers to improve environmental education programs in Ontario’s schools.
- The continual abysmal assessment of Canada as one of the lowest ranked countries in the OECD in terms of environmental performance.

## Ministry response

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MOE accepted this review in June 2004, and in October 2005, released the results of its review. After consulting with EDU staff and management, MOE determined that the Ministry of Education should prepare a State of Environmental Values and consider it when making environmentally significant decisions. But MOE recommended that other provisions of the *EBR* should not apply to EDU. MOE prepared a detailed nine-page analysis and attached seven pages of appendices, offering a wide range of arguments to support its position.

MOE noted that during the course of its review, strong public interest was expressed in making the Ministry of Education subject to the *EBR*, pointing out that approximately 120 individual letters were written to the ministry. MOE went on to observe that making EDU subject to “at least some provisions of the *EBR* would acknowledge the potential” for EDU to make environmentally significant decisions and would improve the transparency of those decisions.

However, while recognizing that EDU makes “a small number” of policy decisions relating to curriculum and facilities management that could have a significant effect on the environment, MOE also suggested that most of EDU’s decisions are financial and administrative in nature and thus outside the purview of the *EBR*. MOE indicated that SEV consideration could improve decisions at EDU, but did not provide much detail on how this would be achieved. Presumably, this detail will be forthcoming once EDU develops its draft SEV.

MOE concluded that EDU should not be subject to the Environmental Registry notice and comment processes of the *EBR*. MOE’s rationale was that EDU has “processes in place for public participation in curriculum development that largely mirror the requirements of the *EBR*,” and the *EBR* “was not intended to duplicate existing processes, as evidenced by specific exemptions contained in the Act...”

MOE also concluded that EDU should not be subject to the *EBR* application for review process, noting that the Ministry of Education established an ongoing five-year cycle of curriculum review in 2003. This review process is intended to ensure that the curriculum remains current, relevant and is age-appropriate from Kindergarten to Grade 12, pointing out that each year the ministry commences reviews in numerous subject areas. MOE claims these reviews allow lead time for development and updating of curriculum and supporting materials.

Stakeholder reaction to MOE's decision was mixed. Some stakeholders and one of the applicants viewed the decision as a modest breakthrough. Others saw it as narrow and overwhelmingly negative. Earthroots developed an Action Alert in early November 2005 that requested its members to write to MOE and urge that EDU be prescribed for a full range of *EBR* rights.

In mid-November 2005, partly in response to concern about its October 2005 decision on this *EBR* application for review, MOE posted a proposal to amend O.Reg. 73/94, making EDU subject to the SEV provisions of the *EBR*. The proposal notice seemed to hint that the scope of the application of the *EBR* to EDU might be expanded when the final decision was made. As of June 2006, MOE had not posted a decision notice.

## Building a conservation culture in Ontario

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MOE's response to this application for review failed to mention the Ontario government's plan to create a "culture of conservation" in the province. In January 2004, the Ontario government created a Conservation Action Team (CAT), comprised of 12 parliamentary assistants from eight Ontario government ministries responsible for a broad range of policy and program areas. CAT has been working on initiatives to promote the government's conservation initiatives across the province by engaging stakeholders from a variety of sectors to seek out and promote the best in conservation ideas and practices, developing an action plan to help the government meet its conservation targets, and identifying barriers to conservation in existing government policies and programs.

In May 2005, the Ministry of Energy released a report titled *Building a Conservation Culture in Ontario*. The report was compiled by CAT, based on meetings with more than 300 groups and individuals across Ontario. The report's recommendations included one to "accelerate the introduction of conservation and sustainability into the Kindergarten to grade 12 curricula by encouraging partnerships between teachers and the Ministries of Education, Energy, Environment, Natural Resources, Agriculture and Food to ensure the school curriculum successfully develops a conservation ethic in children." (Recommendation 16)

## ECO Comment

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The ECO, the applicants, several non-governmental organizations, academics and some school boards have for many years been asking the province to make EDU subject to the public participation provisions and the applications for review process under the *EBR*. To this end, MOE's recommendation was disappointing and perplexing. The ministry



disregarded some of the evidence submitted in support of the application and did not respond to some of the issues raised. Defending EDU's existing framework for curriculum review, MOE dismissed the applicants' request to make decisions on environmental and science curriculum subject to *EBR* processes.



Prescribing EDU for SEV consideration is an important first step, and the ECO welcomes this development. But MOE's recommendation is also highly unusual, since no other ministry has ever been prescribed only for SEV consideration. To date, all ministries have been prescribed for SEV consideration and for posting proposals for new policies and Acts on the Registry. Both of these requirements were seen as basic elements of the new system of accountability and transparency that was developed by the Task Force on the Environmental Bill of Rights in 1992. Many ministries with smaller environmental protection mandates, such as the Ministries of Labour and Economic Development and Trade, have been prescribed for more than a decade, and it has not been onerous for them to comply with the Registry notice and comment process.

Environmental sustainability is a critical issue for all Ontarians. Sustainability aims to enhance and maintain the life-supporting ecological systems and processes that provide people with clean air, water, soil and aquatic life, and a suitable climate. To sustain a world in which humans and other species can survive and flourish, we must begin to reshape our values and change the dominant paradigm of our culture.

Our informal and formal education systems and the values they promote are at the very heart of our unsustainable lifestyles and practices. If Ontario is to make progress toward sustainability, we must transform our social, cultural, economic and political systems as well as our technical systems. Increased EDU accountability under the *EBR* and regular commentary by the ECO would be important steps in this transformation.

Several non-government organizations have worked hard for decades to provide leadership in the area of environmental education for sustainability. The ECO believes that making EDU more fully subject to the *EBR* would send an important message to the boards of education in Ontario and the schools under those boards: that more can and should be done to promote sustainability. As noted in previous annual reports, too many Ontario children and adults have limited contact with nature and natural environments. The ECO believes that education, both formal and informal, is crucial to the transformation that our economy and society must undergo in the next decade.

(For a more detailed review of this application, see the Supplement to this report, pages 168-176.)

The ECO recommends that the Ontario government move quickly to prescribe the Ministry of Education and that the government consider making the ministry subject to a broader range of *EBR* rights than those recommended by MOE in October 2005.

## Regulating Logging in Algonquin Park



Algonquin Provincial Park, at over 7,500 square kilometres, is southern Ontario's largest park. It was created in 1893 partly in reaction to increased pressure to clear its vast forests for agriculture. It is often considered the flagship of Ontario's park system.

From the beginning, private logging companies have been allowed to operate in the Park. In 1974, the licences of over a dozen logging companies were transferred to the Crown agency – the Algonquin Forest Authority (AFA) – created under the *Algonquin Forestry Authority Act (AFAA)* to manage forestry operations in the Park.

Today, logging is allowed in the Recreation-Utilization zone, approximately 78 per cent of the Park. Over 8,000 kilometres of road have been built to accommodate the heavy equipment used by the loggers. In 2002/2003, the AFA sold forest products worth \$25.4 million; in fact, Algonquin Park timber accounted for approximately 40 per cent of the timber volume harvested annually from Crown forests in central and eastern Ontario. Although the Park has employed some progressive approaches compared to forestry practices elsewhere on Crown land, there have been strong advocates for eliminating logging from the Park altogether.

In October 2005, two applicants used the *EBR* to request that the Ministry of Natural Resources and the Ministry of the Environment conduct a review of the need to prescribe the *Algonquin Forestry Authority Act* under the *EBR* for rights such as making proposals for regulations under *AFAA* subject to public notice and comment; allowing the public to request reviews of the need to amend, repeal or revoke the *AFAA* and associated policies, regulations or instruments; or allowing the public to request investigations into potential contraventions of the *AFAA* and associated regulations and classified instruments.

The *AFAA* is one of several statutes and policies that together provide overall direction regarding activities undertaken in the Park.

- Park operations are currently regulated under the *Provincial Parks Act (PPA)*, which requires parks to be managed for the enjoyment of the public and the benefit of future generations, but it does not require parks to be managed to preserve or restore ecological integrity.
- Forestry operations are regulated under the *AFAA* and the *Crown Forest Sustainability Act (CFSA)*. Under the *CFSA*, the AFA has been issued a Forest Resource Licence by MNR, to carry out logging in Algonquin Park. The Park's Superintendent is responsible for ensuring that forestry operations in the Park are conducted in accordance with the *CFSA*.
- Forestry operations must also be conducted in accordance with the Algonquin Park Forestry Agreement between the AFA and MNR, which requires the AFA to supply specified volumes of lumber to specified companies. The AFA's responsibilities include timber cutting, forest management, silviculture, pest management, and the monitoring of compliance with all applicable legislation, manuals and guidelines. MNR considers this Agreement to be analogous to a Sustainable Forest Licence under the *CFSA*.

The public has the full range of *EBR* rights with respect to the *PPA* and *CFSA* and their regulations and proposals for environmentally significant policies, including the right to file applications for investigation if the AFA or the operators contracted by the AFA to harvest timber in the Park contravene the *CFSA* or the *PPA*. But the public does not have the right to public notice and comment on forest management plans or on forestry resource and sustainable forest licences issued under the *CFSA*.

### *Algonquin Forestry Authority Act*

The *AFAA* provides general direction to the AFA in matters related to its governance, finances, priorities, principles and forest management obligations. It outlines rules related to staffing, benefits, powers and liability, and requires the AFA to harvest timber in accordance with the *CFSA*. It also allows MNR to set production objectives for the AFA and requires MNR to ensure that the Algonquin Park Management Plan balances maintaining and improving the quality of the park for the purpose of recreation with providing a supply of logs from the Park. Furthermore, the AFA is required to act in accordance with the Park's management plan and to have regard for the aesthetics and ecology of the Park. There are no regulations and no instruments issued under the *AFAA*.

The applicants noted that the *AFAA* grants the AFA the authority to “permit and regulate commercial forestry operations in Algonquin Provincial Park.” Since forestry operations have significant effects on the environment, the applicants argue that the *AFAA* is an environmentally significant Act. The applicants also reasoned that the Statements of Environmental Values of the Ministries of Natural Resources and Environment indicate that their decisions must be consistent with an ecosystem approach and protection of significant natural heritage features and landscapes – and, therefore, they reason, the *AFAA* should be prescribed under the *EBR*. Finally, the applicants noted that the *AFAA* does not require a “periodic review of the impact of logging on the ecosystem integrity within the Park” and that other statutes regulating forestry, such as the *CFSA*, have already been prescribed under the *EBR*. In support of their request, the applicants attached a copy of the Forest Management Plan Summary for Algonquin Park.

## Ministry response

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In late March 2006, MNR denied the applicants’ request for review. MNR contended that the *AFAA* is “predominantly administrative” in nature, concluding that there would be negligible harm to the environment and the significant features in the Park if it doesn’t undertake the review. The AFA must conduct its operations consistent with the *Provincial Park Act* and relevant policies, the Algonquin Park Management Plan, and the *CFSA* and relevant policies and manuals, the ministry wrote, all of which are already prescribed and subject to the public participation requirements of the *EBR*. The Registry is used to notify the public of the public participation opportunities, MNR stated, adding that sustainable forest management is a requirement of the Recreation-Utilization zone in Algonquin Park.

MNR also denied the review on the basis that forest management activities are subject to periodic review, and that every five years the ministry reviews the Agreement. In addition, an Independent Forest Audit is conducted every five years, during which time the public has an opportunity to raise issues.

## ECO Comment

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The ECO disagrees with MNR’s decision that the *AFAA* is “predominantly administrative” in nature and therefore does not need to be prescribed under the *EBR*. The legislative framework that governs forestry operations in Algonquin Park is a series of interconnected components that includes the *PPA* and *CFSA* and related policies and manuals, the *AFAA*, AFA’s Forest Resource Licence, the Agreement and contracts with the local logging companies. The *AFAA* is the piece of the framework that designates the AFA as the agency responsible for harvesting timber in Algonquin Park; however, MNR

has not recognized the environmental significance of this Act, nor has it prescribed the Act under the *EBR*. Since any future decision to limit or end logging in the Park would also need to address the existing legal obligation of the provincial government under the *AFAA* to supply timber, the ECO believes that the *AFAA* should be prescribed for the full rights under the *EBR*.

The ECO recognizes that many of the environmentally significant activities conducted by the AFA are already subject to statutes and policies that are prescribed under the *EBR* and subject to periodic review. However, AFA's Forest Resource Licence and the Agreement are unique instruments – the only forestry-related approvals that apply in a provincial park – and are exempt from the requirements of the *EBR*. The ECO believes that these instruments are environmentally significant and should be designated for public notice and comment under the *EBR*, and be subject to applications for review and investigation.

Although MNR failed to respond to the applicants' concern that the *AFAA* does not require a "periodic review of the impact of logging on the ecosystem integrity with the Park," the ministry does recognize that the ecological integrity of provincial parks is an issue deserving attention. In June 2006, the *Provincial Parks and Conservation Reserves Act*, which requires parks to be managed in a manner that maintains ecological integrity as a first priority, received Royal Assent.

Algonquin Park represents some of the best and most beautiful natural heritage in Ontario. However, the zones where logging is banned aren't much more than a few "islands" within the Park. Furthermore, logging roads that provide access into the heart of the Park are a corridor for invasive alien species and increase the risk to sensitive Park features such as the interior trout lakes and the endangered wood turtle. Despite the threat that logging poses to achieving ecological integrity, MNR plans to continue to allow commercial forestry operations in Algonquin Park. However, the ministry is considering a public review of the management of the Park and is seeking advice on how to "lighten" logging's footprint. The ECO urges MNR to proceed with a comprehensive public review of its policy to allow logging in the Park and to consider how the proposed park management goal of ecological integrity would be achieved if this policy is allowed to continue.

(A detailed description of this application is found in the Supplement to this report, pages 233-240. For ministry comments, see page(s) 219.)

*... Algonquin Park represents some of the best and most beautiful natural heritage in Ontario. But the zones where logging is banned aren't much more than a few "islands" within the Park ...*

## Prescribing MTO: More Scrutiny of Ontario's Planes, Trains and Automobiles

Since the inception of the *Environmental Bill of Rights* in 1994, the Ministry of Transportation has been one of a number of ministries not subject to all of the provisions of the *EBR*. In fact, to date, MTO's participation has been limited to creating a Statement of Environmental Values and posting proposals for new environmentally significant Acts and policies on the Registry for public comment. But in June 2003, two applicants requested that the Ministry of Transportation be made subject to Part IV of the *Environmental Bill of Rights*. The request, if granted, could permit residents of Ontario to ask for reviews of MTO's policies and prescribed Acts, regulations, and instruments such as permits and licences. It would also allow the public to ask MTO to review the need for new Acts, regulations and policies. The applicants believe 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 because they believe that MTO should also consider and promote modes of travel other than highway-based, including alternatives such as rail. (See also pages 44-48 of this report.)

In autumn 2004, before MOE had finalized its decision on this June 2003 application, another application was made by a different set of applicants, requesting essentially the same outcome and for similar reasons: their concerns about the environmental impacts of transportation activities.

Granting the requests of these applicants would require amending a regulation administered by the Ministry of the Environment – O.Reg. 73/94 under the *Environmental Bill of Rights*. This regulation specifies which ministries of the Ontario government are subject to all or parts of the *EBR*.

### Ministry response

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The ECO forwarded the first application to MOE in July 2003. MOE subsequently advised the applicants, on September 9, 2003, that the ministry would conduct the requested review and that it was expected to take six months. But, in fact, the review took two years.

Between September 2003 and April 2005, MOE wrote to the first applicants and the ECO on five separate occasions to extend the timeline to carry out this review. The last advisory, dated April 12, 2005, indicated that the applicants could expect the review to be completed by June 30, 2005, and that a written response would arrive by the end of July 2005. Over this period, the second application arrived and was forwarded

to MOE. MOE indicated to these applicants that a second review would not be necessary, since one dealing with the matter of prescribing MTO was already under way. According to a letter from MOE in early 2005 to the second set of applicants, they would be notified of the outcome when the results of the ongoing review were available. The following response was directed to both sets of applicants on September 28, 2005, nearly two months later than promised.

The Ministry of Transportation undertakes a variety of policy and legislative activities that the public has an interest in, and that are potentially environmentally significant. Most visible amongst these would be activities related to the creation, maintenance and operation of transportation infrastructure. While the public is currently able to comment on environmentally significant policy and legislative proposals initiated by the ministry through the Environmental Registry, the public would benefit from being able to more actively participate in environment-related transportation decisions by proposing ideas for improving the environment to the Ministry of Transportation for its consideration. As a result of these findings, the Ministry of the Environment recommends prescribing the Ministry of Transportation for the purposes of applications for review under the *Environmental Bill of Rights*.

MOE and MTO further identified some Acts administered by MTO that both ministries agreed had environmentally significant aspects. They include the *Airports Act, 1990*; the *Public Transportation and Highway Improvement Act, 1990*; the *Railways Act, 1950 (as amended)*; and the *Short Line Railways Act, 1995*.

The ministries acknowledged that since these Acts provide for the construction and implementation of infrastructure projects on a massive scale, activities conducted under the powers of these Acts could have significant effects on the environment.

## ECO Comment

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The ECO recognizes that the transportation sector in Ontario has substantial impacts on the natural environment. The sector is responsible for almost one-third of the province's greenhouse gas emissions and is a large contributor of the emissions that lead to smog. Ontario's road network leaves a major footprint on the landscape, resulting in altered waterways and fragmented ecosystems. Roads in Ontario also demand enormous amounts of aggregate and salt for maintenance or expansion each year.

The applications under the *EBR* raised many of the issues that the ECO regards as valid. Each year, our office receives complaints directly from the public about the local impacts of transportation-related undertakings in many parts of the province. Thus,

the ECO welcomes the opportunity for the public to initiate reviews of MTO's policies and hopes that it will improve the public dialogue regarding Ontario's system of transportation planning and environmental protection. We commend the Ministries of Environment and Transportation for moving forward in this regard.

Furthermore, because specific Acts must be prescribed for reviews in order for applicants to submit requests for reviews of those Acts and any regulations that may flow from them, the ECO believes it would be worthwhile for MOE and MTO to prescribe the following Acts as well under Part IV of the *EBR*: the *Highway Traffic Act, 1990*; the *GO Transit Act, 2001*; the *Dangerous Goods Transportation Act, 1990*; and the *Toronto Area Transit Operating Authority Act, 1990*.

The ECO also believes that MOE and MTO should consider ensuring that certain future legislative initiatives, for example, legislation involving transportation in the Greater Golden Horseshoe Area, are captured under the *EBR*'s request for review provisions. (For ministry comments, see page(s) 219.)

## Needed: Big Picture Planning for the Northern Boreal



In September 2005, the Sierra Legal Defence Fund (SLDF) filed an *EBR* application for review on behalf of the Wildlands League, requesting that several ministries consider the need to create a comprehensive land use planning system for northern Ontario. The applicants asserted that a wide array of evidence suggests that landscape-level planning is needed in advance of resource development decisions in Ontario's northern boreal region. The application for review was sent to the Ministries of the Environment, Natural Resources, Northern Development and Mines, and Energy.

Ontario's boreal forests begin just north of the Great Lakes. The boreal forests to the north of the 51<sup>st</sup> 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<sup>2</sup> – an area equivalent to New Brunswick, Nova Scotia and Prince Edward Island combined. SLDF and the Wildlands League contend that the current lack of policy with respect to comprehensive land use planning puts this area at risk of irreversible environmental harm.

SLDF and the Wildlands League believe that MNR's ongoing Northern Boreal Initiative (NBI) does not address all of the planning issues at hand, since it covers only a small



portion of the area in question and is primarily focused on commercial forestry activities. Further, the applicants contend that the NBI does not address landscape-level planning and that 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 an illustration of some of their concerns, the applicants took issue with what they called the “piecemeal” approval process for the Victor Diamond Mine near Attawapiskat.

The applicants believe that a comprehensive land use strategy must include proper engagement of First Nations communities in the northern boreal and the public at large; environmental assessments of each project; proper land use planning, with consideration of the ecosystems in question; and the designation of protected areas before resource allocations are made. The applicants also assert that the strategy must take an inter-ministerial approach.

SLDF and the Wildlands League stress that such a strategy should address the cumulative impacts of all proposed developments in the northern boreal, including the impacts of developments such as forestry activities already under way further south. SLDF and the Wildlands League also argue that landscape-level plans should be complete before any areas are licensed to industry or allocated for development. They believe that land use plans should be required to have large core protected areas, wildlife movement corridors, buffer zones, traditional use areas, protected sacred areas, and areas designated for other uses.

### *Ministry of the Environment*

As of June 2006, MOE had not provided a decision to the applicants on their request for a review; the ministry was approximately seven months beyond the deadlines prescribed by the *EBR*.

### *Ministry of Natural Resources*

MNR denied the application in November 2005, stating that the public interest did not warrant a review for a new comprehensive land use policy in advance of decisions being made about resource allocation. The ministry also asserted that the existing environmental assessment approvals and permitting processes are sufficient to address, mitigate, and minimize potential harm to the environment.

The ministry stated that it was responsible for a relatively limited number of approvals with regard to the Victor Diamond Mine. The ministry asserted that these decisions were based on “approved land use planning documents for the region and numerous scientific studies conducted by the MNR and the disposition applicant DeBeers Canada to ensure environmental effects were considered during project evaluation.”

MNR stated the Northern Boreal Initiative directs community-based land use planning, and asserted that the NBI allows First Nations to take a leading role in land use planning, “with an important objective of fostering sustainable economic opportunities in forestry and conservation.” MNR claims that this local-level process also “utilizes a landscape-scale approach to ensure that achievements are measured appropriately and that impacts beyond the planning area are adequately considered.”

Despite denying the application, MNR stated that it was working on a policy that addresses some of the concerns raised by the SLDF and the Wildlands League. The ministry informed the applicants that “in early 2005 MNR began exploring potential approaches for land use planning in Ontario’s far north and has initiated discussions with the first nation treaty organizations and tribal councils, as well as several non-governmental organizations. This exercise is continuing and MNR would welcome discussions regarding the land use planning elements proposed in the review application.”

### *Ministry of Northern Development and Mines*

MNDM denied the application in November 2005, stating that the public interest did not warrant a review. The ministry also asserted that it was not the lead ministry for the development of such a strategy, but that it would actively participate with MNR in developing and implementing its approaches to land use planning.

With respect to the Victor Diamond Mine, MNDM stated that it participated in the review of a Comprehensive Study Environmental Assessment under the *Canadian Environment Assessment Act*. The ministry also stated that three environmental assessment processes were carried out for activities related to the mine site, as well the signing of an Impacts and Benefits Agreement between the Attawapiskat First Nation and DeBeers.

The ministry stated that “mining is a temporary land use, and that mining regulations ensure that a mine site is rehabilitated to natural, recreational or commercial land uses.” MNDM asserted that Ontario’s *Mining Act*, along with other permitting processes, ensures that proponents carrying out mineral exploration and development endeavour to mitigate the short-term effects of mining on the environment; eliminates the long-term effects of mining on the environment; ensures continuing availability of mineral resources for the long-term benefit of the people of Ontario; and protects natural heritage and biological features of provincial significance.

### *Ministry of Energy*

ENG denied the application in November 2005, stating that the public interest did not warrant a review. The ministry did not specifically address the concerns raised by the

applicants, but, rather, described the numerous regulatory processes that must be followed for new energy projects. ENG also stated that “Ontario must confront a massive shortfall between supply and demand for electricity within the next 15 years” and the solution to this shortfall “will require the consideration of major energy projects.” The ministry also stated that “possible northern Ontario energy projects include small hydro projects, wind turbines, and a major new electricity transmission line from northern Manitoba to southern Ontario.”

## ECO Comment

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In our 2002/2003 annual report, the ECO provided extensive commentary on the need for comprehensive planning in northern Ontario. The ECO wrote that “landscape-level planning should inform community-by-community decision-making” and that “it is imperative that MNR assess the ecological implications of industrial logging in the northern boreal forest.” In that report, the ECO also made two formal recommendations related to resource development in northern Ontario:

The ECO recommends that the Ministry of Natural Resources conduct gap analyses and develop objectives and targets in order to establish a protected areas network for the Northern Boreal Initiative area as a whole.

The Ministry of Natural Resources should carry out a thorough assessment of forest management approaches that are ecologically suited to the northern boreal forest and make the research results available to the public.

The ECO notes that as of summer 2006, the environmental impacts of permitting forestry in the northern boreal forest have not yet been assessed formally. Allowing logging in the northern boreal forest will require either approval or exemption under the *Environmental Assessment Act*.

The ECO concurs with the applicants that significant changes should be made to the way in which the Ontario government regulates and plans for the northern boreal. The existing approval processes typically operate in isolation from one another, and they do not take a comprehensive “big picture” approach. This “silo mentality” does not effectively serve Ontarians nor provide adequate assurances of environmental protection in the path of resource development. The northern boreal has a unique and varied ecology that merits the same standard of planning that applies to the rest of the province, if not higher.



Unfortunately, the ECO is unable to comment substantively on this application, since the Ministry of the Environment has failed to provide a response within the timelines

prescribed by the *Environmental Bill of Rights*. While the ECO acknowledges that the issues raised by the applicants are complex, excessive delays frustrate the public interest and undermine the *EBR*. The ECO is also disappointed that the Ministry of Natural Resources denied this application for review, especially in light of the fact that the ministry is developing new approaches to land use planning in Ontario's far north. The ECO commits to reporting fully on this application in a forthcoming annual report, following the legally required response by MOE.

(For ministry comments, see page(s) 219.)

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### Recommendation 13

The ECO recommends 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.

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## MOE Neglects Obligations, Delays Action on Ozone Depleting Substances

In late 2005, two applicants applied for an investigation of an automobile dealership. The applicants stated that the air conditioning unit ("A/C unit") in a vehicle that they had purchased from the auto dealer had been filled with refrigerant in June 2005. In August of that same year, the owners of the vehicle had its A/C unit tested at another garage because of poor cooling performance. That technician informed the vehicle owners that the A/C unit was faulty and that it should not have been recharged with coolant at the dealership where the car was purchased. At that point in time, the applicants wrote, they became aware that the dealer's action in June may have contravened section 14 of the *Environmental Protection Act (EPA)* – prohibition, contamination causing adverse effect. The applicants noted that, based on handwriting on the original bill of sale, the dealer likely had knowledge that the A/C unit was not functioning properly. The handwritten note was: "... could be a leak / Put gas for A/C – works / No Warranty on A/C." Based on this, the applicants alleged the dealer had committed an "illegal refuelling of leaky air-conditioning unit" with refrigerant that subsequently leaked, and this, they felt, was a violation of section 14 of the *EPA*.

The specific basis for characterizing the refilling of the A/C unit as improper or illegal is Ontario's Refrigerants regulation, O.Reg. 189/94, made under the *EPA*. O.Reg. 189/94 governs the use, testing and servicing of refrigeration equipment, and has a general

prohibition against the discharge of refrigerant, as well as more specific prohibitions such as “8. (2) No person shall refill refrigeration equipment with a refrigerant if,...

(b) the equipment appears damaged in a manner that may have had the effect of permitting the discharge of the refrigerant into the natural environment.” The refrigerants of greatest environmental concern are called chlorofluorocarbons, or CFCs. CFC-based equipment is gradually being replaced worldwide with equipment using refrigerants that are much less harmful to the earth’s ozone layer.

## Ministry response

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The ministry denied this application for an investigation. MOE said it conducted an assessment of the evidence provided by the applicants, information found in ministry files, input from staff and a review of the relevant policy, legislation and regulations governing ozone depleting substances in Ontario. The ministry reported that its search of its files brought up no reports or records involving the alleged contravener.

MOE’s Air Policy Branch provided the opinion that the purpose of O.Reg. 189/94 is to govern the use, testing and servicing of refrigeration equipment and to detail processes and procedures related to the documentation of such activities. The regulation deems that a discharge in excess of 100 kilograms (kgs) into the natural environment is significant, requiring that it be reported to MOE, and requiring the ministry’s further involvement. MOE staff estimated that a motor vehicle typically contains less than 1 kilogram of refrigerant. MOE went on to write:

Although the alleged contravener suspected that there “could be a leak” in the A/C equipment, there is no evidence (e.g. statements from the applicant) indicating that the equipment was in fact tested to confirm or deny a leak at the time of sale and, there is no evidence stating that the applicant was actually informed or knew that the alleged contravener refilled the A/C equipment.

In summary, MOE staff concluded that there was no clear evidence of harm to the natural environment from this emission and thus that an investigation under the *EBR* would not be conducted. Further, there was no indication that MOE takes into consideration the cumulative effects of these small discharges and the need to deter future similar small discharges.

## ECO Comment

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The principal reasons MOE denied this application were that the leak was small and therefore would not likely cause harm to the environment and that the applicants somehow failed to provide adequate proof of the infraction. On the first point, it should be noted

that MOE has pursued enforcement of small discharges of CFCs on several past occasions. On the second point, MOE wrote that “there is no evidence (e.g. statements from the applicant) indicating that the equipment was in fact tested to confirm or deny a leak at the time of sale and, there is no evidence stating that the applicant was actually informed or knew that the alleged contravener refilled the A/C equipment.” A member of the public purchasing a vehicle is unlikely to be familiar with the intricacies of A/C equipment-testing procedures and the provisions of refrigerant regulations. The ECO feels MOE is placing too great a burden of proof on the applicants in this instance. The applicants have made a reasonable case that improper refrigerant handling and/or A/C equipment repair may have occurred.

MOE also did nothing to explain what, if any, enforcement provisions exist under the *EPA* and Ontario’s Refrigerant Regulation O.Reg. 189/94. In its response to the applicants, MOE may have led the applicants to believe that O.Reg. 189/94 has no provisions for enforcement, when in fact, as pointed out above, the regulation does contain specific prohibitions. MOE wrote: “... the purpose of Ontario Regulation 189/94 is to govern the use, testing and servicing of refrigeration equipment and, detail process and procedures related to the documentation of such activities.” This gives the public the false impression that some regulations are little more than good advice or best practices documents.

Despite its inaction on this application, MOE indicated that it intends to visit the alleged contravener in the year ahead. In a note attached to the decision summary that the ECO received, MOE wrote that it intends to add this dealership to its roster of “proactive” inspections for 2006/2007. The applicants may or may not have been made aware of this. In either case, the applicants were probably left wondering on what basis MOE makes its decisions about enforcing key pieces of environmental legislation in Ontario.

In defence of MOE’s approach to this application for investigation, it is understandable that it would be resource-intensive for the ministry to pursue every small discharge. Further, the nature of refrigerant leaks makes them difficult to pursue – the gas is colourless and disperses readily, the amount discharged is often small, and little if any residue is likely to be found. Because of this, there may not be much physical evidence to collect, which is not the case with soil or water contamination, where there may be a medium to test in order to verify that a discharge occurred.

However, a regulation such as this does require some level of enforcement by MOE, to signal to operators that there is a real risk of penalty if time- or cost-saving shortcuts are used. Moreover, even small discharges are of concern, since one atom of chlorine (CFC-11 has two) can destroy up to 100,000 molecules of ozone in the stratospheric ozone layer before it forms a stable compound and diffuses out of the atmosphere.

Eyewitness reports, review of written records, and tips can greatly assist regulators in pursuing enforcement of refrigerant mishandling or discharges. In effect, the applicants provided this type of information to MOE, which should have constituted a valid starting point for an investigation.

Aside from an enforcement approach, the ECO believes there remain ways in which MOE could be demonstrating action on the regulation of ozone depleting substances. This application highlights an important but under-attended area of MOE's air quality program: the phase-out of ozone depleting substances. Many people believe that this phase-out was effectively complete shortly after the ratification of the Montreal Protocol in the late 1980s. Yet a lot of work remains to be done in the years ahead to achieve the ultimate goal of repairing the stratospheric ozone layer that shields the earth's ecosystems from harmful ultra-violet radiation (see the ECO's 2001/2002 annual report for greater detail).

An MOE proposal for a CFC phase-out regulation has languished on the Environmental Registry since March 2003. If adopted, the regulation would lead to a complete phase-out of the use of CFC-based refrigerants in Ontario. The commercial applications still using CFC-based refrigerant include mobile refrigeration, commercial refrigeration and certain types of air conditioning and chillers. In autumn 2005, the ECO met with representatives of the industries that would be affected by this regulation. These representatives stated that they were in support of MOE's proceeding with this initiative. The ECO and the industry association have since written to MOE encouraging the ministry to adopt this regulation. As of the close of the 2005/2006 reporting year, this initiative, regrettably, remains a proposal.

The ECO believes it is time for the Ministry of the Environment to help close the gap in the earth's stratospheric ozone layer by shoring up its enforcement efforts when members of the public present the ministry with a very reasonable opportunity to do so. Also, MOE should close the gap in the national regulatory framework on the phase-out of CFC-based ozone depleting substances. Most of Canada's other provinces and territories have already taken action equivalent to that of Ontario's proposed CFC phase-out regulation. (For ministry comments, see page(s) 219.)

## The *Aggregate Resources Act*: Conservation ... or Unconstrained Consumption?

In response to concerns that the province is not doing enough to conserve aggregate resources and to ensure that aggregate sites are rehabilitated, the Pembina Institute and Ontario Nature requested that the Ministry of Natural Resources review the



rehabilitation requirements defined in Part VI of the *Aggregate Resources Act (ARA)* and the fee structure defined in O.Reg. 244/97. The applicants also requested a review of the need for a new policy – an aggregate resources conservation strategy. To support their application, they attached a copy of the report, “Rebalancing the Load: The need for an aggregates conservation strategy for Ontario,” published by the Pembina Institute in January 2005.

Under the *ARA*, pit and quarry operators in southern Ontario and designated areas in northern Ontario are required to rehabilitate disturbed areas. Under O.Reg. 244/97, operators are required to pay an annual licence fee of six cents per tonne of excavated aggregate. Although the Ministry of Natural Resources continues to be responsible for enforcement and for issuing licences and permits and setting standards, the aggregate industry is now largely self-regulated under the Ontario Aggregate Resources Corporation (TOARC), whose sole shareholder is the Ontario Stone, Sand & Gravel Association (OSSGA). TOARC’s responsibilities include gathering and publishing information related to the management of aggregate resources and rehabilitation, and auditing production data. Aggregate producers are responsible for rehabilitation of land they have disturbed, and TOARC is responsible for managing the portion of the six-cent annual licence fee – i.e., one-half of a cent per tonne – that is allocated to the rehabilitation of abandoned pits and quarries.

In our 2002/2003 annual report, the ECO reported that between 1992 and 2000, the average number of hectares disturbed by aggregate operations was more than double the number of hectares rehabilitated. By 2004, the aggregate industry had improved its rate of rehabilitation, but it had not been able to reduce the estimated backlog of 24,000 hectares of disturbed land that still require rehabilitation.

The applicants recommended that existing aggregate policies and legislation be updated to strengthen the rehabilitation requirements of the *ARA* and that aggregate operators not be allowed to expand their operations until they have made substantial progress on rehabilitating their disturbed areas.

The applicants noted that public information on aggregate supply and demand has not been updated since 1992 and that “Ontario needs to develop and implement a comprehensive strategy for the management and conservation of the province’s aggregate resources,” as previously recommended by the ECO and acknowledged in the *Places to Grow Act*. According to the applicants, aggregate fees have not increased since 1990, are too low to encourage the efficient use of the resource, and do not include environmental, social and economic costs. The applicants believe that the Provincial Policy Statement (PPS) under the *Planning Act* has given access to aggregate resources priority over other land uses so that aggregate producers can locate close



to their markets to minimize significant transportation costs. Instead, the applicants contend that conservation and recycling can help reduce the negative environmental effects of transporting heavy loads of aggregates long distances by road and that increasing fees will encourage “more efficient building and infrastructure design” and increase demand for alternatives.

## Ministry response

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MNR denied the applicants’ *EBR* request for review. The ministry maintained that its Aggregates Resources Program minimizes the adverse effects of aggregate operations, promotes conservation, and influences land use planning by ensuring that aggregate resources are protected from “incompatible uses.” MNR stated that Ontarians receive a fair return on Crown-owned aggregate resources, adding that the demand for aggregates will continue to grow despite measures to curb demand. The ministry pointed out that municipalities, which are responsible for almost 90 per cent of the roads in Ontario, are under no obligation to use recyclable materials when they resurface roads.

MNR advised the applicants that it had already agreed to conduct a review of the rehabilitation requirements of the *ARA* in response to an earlier *EBR* application requesting a similar review. Pointing out that the *ARA* already requires sites to be rehabilitated, the ministry indicated that it would inform the applicants about the outcome of the earlier *EBR* application. (For a discussion of the earlier application, from a citizen’s group called Gravel Watch, see pages 42-43.)

MNR also denied the application on the basis that the ministry had formed an inter-ministerial Aggregate Resources Conservation Strategy Committee, with representatives from the Ministries of Natural Resources, Environment and Transportation, to develop a draft strategy. MNR acknowledged that, as of April 2005, only preliminary discussions had been held. However, MNR added that because of the additional issues raised by the applicants, the ministry would invite the Ministries of Municipal Affairs and Housing, Public Infrastructure and Renewal, Northern Development and Mines, and Finance to send representatives to the committee. MNR also acknowledged that fees had not been increased in over 14 years and royalties for nearly 30 years, and advised that the committee will review the fees as part of its work. MNR indicated that it would advise the applicants on how they could participate in the review of the draft strategy after the public participation process had been determined.

MNR disputed the applicants’ view that provincial policies have given aggregate operations priority over all other land uses, and cited recent legislation such as the Greenbelt Plan, the Niagara Escarpment Plan, and the *Oak Ridges Moraine Conservation*

*Act*, as well as changes to the PPS, as evidence that access to aggregate resources is not given priority over all other land uses. Furthermore, the ministry stated, because federal, provincial and municipal levels of government consume 50 per cent of aggregate production, provincial policy that advocates close-to-market sourcing of aggregates has reduced the costs to the Ontario taxpayer, lessened greenhouse gas emissions and traffic congestion.

Finally, MNR advised that “a lot of recycling” of aggregates occurs at the job site and that these numbers are not included in recycling statistics. The ministry emphasized that Ontario continues to be a leader in North America in recycling of aggregates, citing a 1992 study.

In a letter sent to the Minister of Natural Resources in May 2005, the applicants expressed their disappointment that MNR had denied their application and noted their belief that the province was not acting in a proactive manner.

## ECO Comment

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MNR was technically justified in denying this application for review since many of the matters raised by the applicants are already under review by either the Aggregate Resources Conservation Strategy Committee or by the ministry’s review of the Gravel Watch application. However, the ECO is very concerned about the ministry’s slow progress on both of these initiatives and has brought many of the concerns raised by the applicants to MNR’s attention in the past.

The ECO is also very disappointed that MNR continues to take the position that aggregate operations are not given planning priority over other land use considerations. The revised PPS, which came into effect March 2005, states that “as much of the mineral aggregate resources as is realistically possible shall be made available as close to markets as possible” and “demonstration of need...shall not be required.” In addition, the ARA clearly states that it applies “despite any municipal by-law, official plan or development agreement,” and that MNR need only “have regard to” any other planning and land use considerations when approving applications for aggregate licences. The ECO is also very concerned that MNR relied on studies performed in the early 1990s, reinforcing the applicants’ contention that more current information on the state of aggregate resources in the province is required.

In its response to the applicants, MNR stated that it expects that “the conservation strategy will be developed in an open and transparent manner,” but that the Aggregate Resources Conservation Strategy Committee will decide how the public will participate

in the process. The ECO notes that policies developed by all three of the original ministries represented on the committee are subject to the public participation rights defined under the *EBR*. Due to the significance of this strategy, the ECO urges the committee to provide additional public participation opportunities beyond the minimum notice and comment requirements defined under the *EBR*.

Public concerns regarding aggregate operations have escalated over the years, and owners/operators are facing increasing pressure from neighbours to mitigate impacts on the environment and on the community. However, MNR has been slow to respond with a stronger management framework and has failed to put forth credible proposals that will both ensure the long-term sustainability of aggregate resources in Ontario and mitigate the impacts of aggregate operations on the environment.

(For additional information on this *EBR* application, see the Supplement to this report, pages 213-220. For ministry comments, see page(s) 220.)

## Sewage Bypasses at the City of Kingston

In June 2005, two environmental organizations submitted an *EBR* application requesting that the Ministry of the Environment review all the certificates of approval (Cs of A) for the City of Kingston's sewage works. The applicants, representing the Canadian Environmental Law Association and Lake Ontario Waterkeeper, noted that Kingston is served by an aging sewage system, which often results in sewage bypass incidents. Such incidents have happened about 10 times a year – usually during rainfall or snow melt events that produce more stormwater than the treatment system can handle, resulting in untreated sewage discharging to waterways.

Of particular concern to the applicants was a major bypass incident on April 2 and 3, 2005, resulting in untreated sewage (including syringes, condoms, tampons and other debris) strewn along a kilometre of shoreline downstream. The applicants emphasized the inadequacy of the existing Cs of A, and recommended adding requirements to:

- provide timely warnings to downstream residents and communities.
- monitor and report on the movements of raw sewage released during bypasses.
- clean up sewage debris along watercourses and shorelines after incidents.
- provide compensation to those affected, or undertake mitigation measures.
- do public education on how to properly dispose of syringes, personal care products, etc.
- put in place measures to remove such items from sewage prior to bypasses.

While the applicants recognized that upgrades to the city's sewage infrastructure were planned or under way, they noted that some of the upgrades were at very early stages and years from completion, and in any case would not totally eliminate bypass incidents. The applicants were also aware that the city and MOE were privately discussing ways to address bypass incidents, but stressed that such discussions should involve the public and should lead to formal amendments to the Cs of A. Voluntary abatement approaches were not appropriate, in the view of the applicants.

The applicants drew attention to one of MOE's existing policy directions regarding sewage treatment bypasses (Procedure F-5-1): that such incidents shall not be allowed except in "emergency conditions." An average bypass frequency of 10 incidents per year is too frequent to be interpreted as an "emergency condition," the applicants asserted. Procedure F-5-1 also states that:

It is the goal of the ministry to abate all discharges of untreated sanitary wastewater.... All municipalities serviced by combined sewerage should, however, prepare a staged program leading towards the ultimate goal of total containment for treatment of all sewage flows.

## Ministry response

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MOE decided not to carry out the review requested by the applicants, arguing that there was not sufficient evidence that environmental harm would ensue if the requested review were not undertaken. The ministry also put forward numerous additional arguments, saying that when Cs of A are reviewed, public consultation rules follow the Class Environmental Assessment framework. The ministry also argued that the requested review would duplicate some past efforts by staff and would have resource implications for the ministry, adding that the city has spent more than \$41 million over the last 13 years and is carrying out a number of programs to help reduce future sewage bypass events.

MOE noted that the April 2005 sewage bypass incident had been referred to the ministry's Investigation and Enforcement Branch, and that the file had been closed without charges being laid. The ministry acknowledged that Cs of A are not subject to periodic reviews, but noted that when amendments are made, all conditions are reviewed to protect the health of the public and the environment. The ministry was over a month late in its rejection of the application request, even after having restarted its timeline twice in response to two late supplementary submissions by the applicants. In effect, MOE took six months to make a decision that under normal *EBR* procedures should take two months.

Instead of carrying out the requested review, MOE signed a voluntary “letter of commitment” with the City of Kingston regarding sewage bypassing, and invited the applicants to a meeting to discuss this letter after the fact. The letter of commitment documents that Utilities Kingston is carrying out a Pollution Control Plan, with the intent to “reduce the volume and frequency of sewage bypass events into Lake Ontario....” The letter also itemizes a number of ongoing sewage infrastructure upgrades (including two combined sewer overflow storage tanks), and lists four measures that Utilities Kingston has agreed to in the event of a sewage bypass – specifically: 1) notification of all sewage bypass events; 2) a monitoring plan for all bypass events; 3) a debris/floatables removal program; and 4) a public outreach program on the proper disposal of hypodermic needles and personal health products.

## ECO Comment

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MOE rejected this application on a number of narrow, unpersuasive grounds. In the ECO’s view, there is evidence that discharges of untreated sewage cause environmental harm. The ECO is also unimpressed by the ministry’s reference to consultation opportunities under the Class Environmental Assessment process. Further, the ECO does not agree that the requested review would have duplicated ongoing and past efforts by the ministry.

### *Strong evidence of bypass events*

The ECO observes strong, unrefuted evidence of a long history of sewage bypass events at Kingston, and notes that these events have been ongoing even in 2005 and 2006 and are unlikely to cease in the near future. Annual sewage bypasses of well over 100 million litres were recorded for each of 2003, 2004 and 2005, and 47 million litres of sewage were bypassed in January through March of 2006. While ministry staff anticipate that the frequency of bypass events will decline gradually as infrastructure upgrades are undertaken, the ministry nowhere asserts or even suggests that Kingston’s bypass events will cease any time in the future.

### *Acknowledged risk to health and environment*

It is clear to the ECO that these ongoing, large discharges of untreated sewage into open waters represent a significant risk of harm to the environment and a threat to human health. The ministry, too, has expressed its concern in letters sent in 2005 to both Utilities Kingston and to the applicants. Indeed, the ministry’s entire regulatory and policy infrastructure for municipal wastewater is built on the understanding that waterways must be protected from the release of untreated sewage, as illustrated by the ministry’s Procedure F-5-1, cited earlier.

### *Inadequate public consultation*

The ECO has highlighted the inadequacy of public consultation under Class EA processes in several past annual reports. Sewage approvals under the Class EA process are excepted from important *EBR* notice, comment and appeal requirements. This means that the public does not see such approvals on the Environmental Registry, does not have the right to comment under the *EBR*, and does not have the right to request leave to appeal such instruments.

### *No duplication of efforts*

Despite MOE's assertion, a review of the Cs of A as requested and described by the applicants would not have been a duplication of activities already under way. The applicants requested that the City of Kingston "be legally obliged by its Cs of A to undertake all reasonable measures to avoid, minimize and mitigate the potential adverse effects associated with sewage treatment bypasses." Since MOE instead chose a voluntary letter of commitment, the ministry has not imposed a mandatory compliance order or clear timelines on the city, and has not provided the degree of accountability or transparency requested by the applicants.

For example, the ministry and the city agreed on a voluntary system for warning downstream residents. The applicants have complained that this system is not working, because the notifications are not actually reaching the affected residents, but rather are filed away in the records of the agencies receiving them.

Beyond the ministry's narrow technical arguments, this application also deserves a broader evaluation of the themes stressed by the applicants.

### *Legally binding instruments*

The applicants had stressed the need for legally binding instruments; they believed that voluntary abatement would leave requirements and deadlines too unclear and could not be backed up by enforcement or administrative penalties. But the decision summary the ministry sent to the applicants failed to explain why MOE opted for a voluntary abatement approach.

At a meeting held with the applicants in January 2006, the ministry asserted that voluntary abatement has been demonstrated to work with the city. However, the evidence shows that voluntary abatement has resulted in many years of chronic sewage bypasses in Kingston, continuing, well into 2006, with no improvements in either frequency or size. Key upgrades to Kingston's sewage infrastructure have recently been completed, but they were slow in coming. Amid a larger multi-year program to

upgrade pumping stations, sewer mains and the Ravensview Sewage Treatment Plant, the construction of combined sewer overflow storage tanks is specifically targeted to control sewage bypasses. Two such tanks were constructed in 1998/1999, and an additional two tanks were completed in 2005/2006, at a total cost of over \$14 million.

In past annual reports, the ECO has criticized MOE's evident reluctance to use the full set of available legal tools when dealing with larger municipalities and wastewater issues (e.g., the ECO's 2002/2003 annual report, page 158). The same criticism is due in this case. The fact that Ontario residents can no longer apply for *EBR* investigations of alleged contraventions of the *Fisheries Act* also supports the argument for legally binding instruments (see the ECO's 2001/2002 annual report, pages 58-59). The ECO does not believe that the larger public interest is served when compliance and enforcement processes under the *Environmental Protection Act* and the *Ontario Water Resources Act* are essentially abandoned in favour of soft, unenforceable approaches like letters of commitment.

### *Transparency*

Although the applicants had emphasized their desire for a formal, open and consultative process, the ministry failed to justify closed-door discussions with the city. The applicants made clear in June 2005 that they were interested in participating in these discussions, but were not invited until a month after the letter of commitment had been finalized. The ECO does not find it appropriate to exclude the public from such discussions, and also questions why the applicants were required to resort to freedom of information legislation to access several years of sewage bypass records. These bypass records should be open to public scrutiny, in part because they catalogue a quintessentially public problem. Thousands of homes and public land use decisions contribute to the problem. The released sewage pollutes public waterways, and the solution requires investments of public funds. The ministry and the city's technical solutions might also have enjoyed more public understanding and support if, at an early stage, interested members of the public had been diligently welcomed and engaged in a legitimate dialogue.

### *MOE's obligation*

This *EBR* application is site-specific, but it illustrates a province-wide problem. MOE has overwhelming evidence that sewage bypasses and inadequate sewage treatment remain major, chronic pollution sources for many Ontario lakes and rivers. The Ontario Legislature has assigned to MOE the obligation of protecting these waterways from exactly these types of impacts. Over the past generation, growing societal concerns about the health of waterways have added numerous useful laws and policies to the

ministry's arsenal, strengthening its capacity to protect public waters. Failure in this instance lies not with laws or policies, but with their lack of application. At some crucial level, the ministry lacks the resolve to face and fix the problem.

The ministry's reluctance to tackle the issue is underscored by the continued lack of an up-to-date summary of Ontario sewage treatment plant performance and monitoring data. MOE's last comprehensive summary was published in 1993, based on 1991 data. In response to an ECO recommendation in 2003, MOE said in March 2005 it was working on a summary. But in 2006, MOE acknowledged that this work is not likely to begin until 2007 at the earliest. Moreover, MOE considers the review of plant performance an "internal exercise," and says "there are no plans to share the results of the review with the public" (see pages 196-197).

On the issue of regulating municipal sewage discharges, MOE has failed to show the required leadership. MOE needs to take seriously its obligations as regulator and should exercise its full range of legal tools on behalf of the environment. MOE also needs to break the habit of negotiating sewage discharge matters privately with select partners. The ministry has an obligation to operate in an open and consultative way, to present the public with the facts, and to treat the environment as its primary client.

*Postscript:* In June 2006, Kingston Utilities began, as promised, to post a log of sewage bypass events on its Web site, as well as a summary of annual sewage bypass records for the years 2000-2006. Regrettably, the city reported a bypass event on June 27, 2006, when heavy rain forced the bypassing of approximately 5 million litres of sewage into Lake Ontario, despite the recent infrastructure improvements.

(For a more detailed review, see the Supplement to this report, pages 197-204. For ministry comments, see page(s) 220.)

## Wildlife in Captivity: The Licensing of Ontario's Zoos

In January 2006, applicants submitted a request for a review of the Ministry of Natural Resources' zoo licensing regime, asserting that it is both grossly inadequate and significantly inferior to those of the other provinces. MNR's zoo licences have only four basic conditions: record keeping, the identification of birds, the size of enclosures, and the provision of veterinary services. The applicants asserted that these minimal licensing requirements are inadequate to protect captive wildlife, the environment and the public in Ontario.



The applicants further asserted that MNR's inadequate licensing regime has resulted in a proliferation of sub-standard zoos in Ontario. They provided a report setting out the results of an Ontario zoo audit commissioned by the applicants – 83 per cent of the inspected exhibits failed to meet the applicants' criteria for basic housing and animal welfare. According to their report, animals were frequently housed in barren, ramshackle cages, lacking shelter, shade or other important aquatic or terrestrial habitat features such as branches or ponds.



Some exhibits were too small for animals even to move about freely and exercise natural behaviours. As a result, many animals displayed signs of boredom, frustration and abnormal behaviour, such as pacing and bar-biting. In addition, the auditor found dirty cages and water bowls, which could result in disease transmission.

The report also noted that many zoos did not have adequate barriers to prevent animals from escaping or public contact with dangerous animals. MNR's failure to impose security standards to ensure the safe containment of captive wildlife, the applicants asserted, poses significant threats to both public safety and the environment. They noted that potential impacts include escaped exotic zoo animals becoming established in Ontario, competing with native animals in the wild, breeding, disrupting natural ecological relationships and gene pools, spreading diseases, putting native populations at risk of being supplanted by invasive species, and, ultimately, threatening Ontario's biodiversity.

The applicants also noted that even if MNR's licensing standards were improved, an estimated two-thirds of all animals kept in Ontario's zoos would still remain unprotected. The *Fish and Wildlife Conservation Act (FWCA)* requires only people who keep prescribed species of native wildlife – species listed in the schedules or regulations under the *FWCA* – in captivity to obtain a licence from MNR. There are no licensing requirements for exotic – non-native – wildlife or native wildlife that are not prescribed.

## Ministry response

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MNR decided that the requested review was not warranted. In its response to the application, MNR contended that the *FWCA*, its regulations and its policies already protect and manage prescribed native wildlife in Ontario zoos. MNR noted that in addition to the four general licensing conditions, the ministry modifies or adds to these conditions on a case-by-case basis to ensure a minimum standard of care. MNR also pointed out that it continues to work with interested parties to review the general licence conditions on an ongoing basis.



In response to the applicants' assertion that exotic species should be regulated, MNR simply noted that its mandate is to protect and manage only the native fish and wildlife resources of Ontario and that the *FWCA* addresses only native wildlife resources. MNR also commented that animal welfare for both native and exotic animals falls under the mandate of the Ministry of Community Safety and Correctional Services (MCSCS), which deals with cases of cruelty to animals through the Ontario Society for the Protection of Cruelty to Animals (OSPCA).

MNR also noted that the *FWCA* prohibits people from releasing wildlife from captivity, as well as requiring persons who keep wildlife in captivity to ensure that they do not escape. These provisions apply to both native wildlife (s. 46 of the *FWCA*) and exotic wildlife (s. 54 of the *FWCA*). According to MNR, these provisions protect the environment and wildlife populations living in nature from contact with escaped captive animals.

## ECO Comment

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In the time since the *FWCA* was enacted in January 1999, MNR has stated numerous times, including in response to this application for review, that it is meeting with interested members of the public to assess or develop standards for zoo licences in Ontario. MNR did actually develop comprehensive draft "Minimum Standards for Zoos in Ontario" in July 2001; however, these standards have never been posted on the Registry for consultation, nor have they been implemented.

Given MNR's promises to develop new standards for zoo licences, the ECO is disappointed that it failed to take this timely opportunity to review and develop those standards in an open and transparent public process. The ECO believes that MNR should at least have provided an explanation as to why, more than seven years after the enactment of the *FWCA* and its regulations, it still has not followed through on its promises to finalize regulated standards. MNR's process for the review and development of zoo standards appears to be taking place behind closed doors. The ECO urges MNR to engage in a formal, open and transparent review of its licensing conditions, and that it post any such policies or standards on the Environmental Registry for public comment.

The ECO disagrees with MNR's decision that a review is not warranted. A preliminary review of the various provincial regimes suggests that Ontario does indeed lag behind most other provinces in Canada in regulating captive wildlife. Almost all of the other provinces have more comprehensive and stringent standards than Ontario. In fact, every

other province, except for British Columbia, regulates both native and exotic wildlife in captivity. A few jurisdictions even set out specific standards by species or groups of species. Most provinces impose far more detailed standards with respect to enclosure size, diet, sanitation, veterinary care, security requirements and design (including materials, landscape features, shelters and equipment).

There are clearly large regulatory gaps and overlaps in Ontario's zoo licensing regime, including the regulation of exotic species, public safety and animal welfare. For example, MNR stated that general animal welfare falls within the mandate of MCSCS. However, that ministry, through OSPCA, deals with cases of animal cruelty – the deprivation of food, water, or shelter, or the violent abuse or neglect of an animal. MCSCS does not, as MNR itself acknowledged, set out general standards or licensing requirements for the general well-being of captive animals—for instance, for stimulation, enrichment and quality of life.

The ECO believes that for the protection of wildlife, the environment and the public, there must be one key agency responsible for *all* aspects of zoo regulation, and that agency should be MNR. There is convincing support for the argument that MNR has the authority and the mandate to regulate all aspects of zoo licensing. In 2002, the Ontario Court of Appeal stated: "Concerns regarding animal welfare... fall squarely within the policy and objectives of the *FWCA*." As the *FWCA* is administered by MNR, this provides a strong legal basis for the claim that MNR is responsible for regulating the general welfare and well-being of wildlife in captivity. In fact, MNR seems to have accepted this responsibility to regulate animal well-being by imposing a zoo licence condition regarding the size of enclosures and by including, in its draft zoo standards, provisions for animal welfare.

Similarly, MNR has established precedents in regulating exotic species, despite its assertion that this is not within its mandate. In December 2004, MNR amended O.Reg. 665/98 (Hunting) under the *FWCA* making it illegal to hunt all wildlife in captivity, not just native captive wildlife, in order to provide "more equitable treatment of native and non-native wildlife." In addition, the *FWCA* includes provisions concerning the release, escape and recapture of both native and non-native captive wildlife.

Finally, the ECO believes that a comprehensive zoo licensing regime must include security standards for the purpose of preventing the escape of captive wildlife. The prevention of wildlife escapes to protect animals living in the wild and the environment is clearly within MNR's mandate. The only security requirement currently imposed under the *FWCA* is that a person who keeps wildlife in captivity "shall ensure that it does not escape." Specific security standards would provide zoo owners with necessary guidance

on how to achieve this goal and would enable MNR to better enforce this requirement. It would also have the benefit of addressing public safety concerns at the same time.

(A more detailed review of this application is found in the Supplement to this report, pages 229-233. For ministry comments, see page(s) 220.)

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#### Recommendation 14

The ECO recommends that MNR engage in a formal and transparent review of its zoo-licensing policies, posting a proposal on the Environmental Registry for public comment.

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## MOE Reviews Rules for Sewage Haulers ... Outside the *EBR*

On October 12, 2004, the ECO received an application that focused on the kinds of approvals required by septage haulers. The applicants represent approximately 200 small companies that pump septic tanks and portable toilets and handle biosolids. Some companies use a small tank truck to pump out septic tanks and portable toilets, then pump the contents of the small tank truck into a larger tank truck to be hauled to a sewage treatment plant or to land application sites for disposal. In some cases the contents of the small tank truck are pumped into a temporary holding tank on the owner's property for future transportation to sewage treatment plants or land application sites.

The applicants requested a review of Regulation 347, R.R.O. 1990 (the General Waste Management Regulation), under the *Environmental Protection Act (EPA)*. The applicants dispute the Ministry of the Environment position that a certificate of approval (C of A) for a waste disposal site is required where a transfer of hauled sewage occurs prior to transport for final disposal. The applicants alleged that MOE officials are incorrect in their interpretation of "transfer" and "transfer station" under Regulation 347. Noting that "transfer" is defined in Regulation 347 as a "physical transfer of possession," the applicants questioned whether the transfer of waste between vehicles or tanks owned by the same company is considered a physical transfer of possession. They also questioned how a transfer station could be considered a waste disposal site. (This application is almost identical to an application that was reviewed in the Supplement to the 2003/2004 ECO annual report, pages 234-236.)

## Ministry response

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On April 5, 2005, MOE denied the request for review, stating that there is no potential for harm to the environment if the review is not undertaken. The ministry maintained its position that a C of A is required, but offered to look into ways to reduce the administrative burden on haulers.

In its detailed "Decision Summary," MOE explained the *EPA* and Regulation 347 requirements and definitions to counter the applicants' interpretation. A "waste disposal site" is defined broadly in the *EPA* as:

- (a) any land upon, into, in or through which, or building or structure in which, waste is deposited, disposed of, handled, stored, transferred, treated or processed, and
- (b) any operation carried out or machinery or equipment used in connection with the depositing, disposal, handling, storage, transfer, treatment or processing referred to in clause (a).

MOE stated that transferring waste from one vehicle to a holding tank, regardless of whether there is a change in possession, is an activity that triggers the need for a C of A to protect the environment. Sites used for storing, handling and transferring hauled sewage require a C of A to ensure environmental protection because they fall under the definition of a waste disposal site.

MOE explained that Cs of A perform a preventative role, since they include terms and conditions to protect the health and safety of people and the environment, after considering the environmental constraints of the site and the public interest.

Certificates of approval are intended to accomplish the following objectives:

- To provide protection to the natural environment by minimizing discharges or spills that could occur when waste is deposited, disposed of, handled, stored, transferred, treated or processed.
- To describe the site system and process reflecting sound engineering and design principles as well as adequate controls and contingencies.
- To encourage sound environmental practices.
- To require the submission of adequate financial assurance so that financial resources are available for site cleanups.
- To ensure compliance with Acts, regulations, policies, objectives and guidelines.
- To act as a compliance mechanism to make applicable standards legally binding.
- To identify administrative responsibilities to proponents.

MOE did offer to review the administrative burden, stating that “as part of the ministry’s management of septage, Waste Management Policy Branch and the Environmental Assessment and Approvals Branch will assess opportunities to reduce the paperwork associated with a system C of A in situations where septage is transferred from one mode of transportation to another, such as truck to truck.” MOE stated that the ministry’s Manager of Policy and Special Projects would be contacting the applicants to arrange a meeting to discuss their concerns.

## Rules for haulers reviewed outside the *EBR*

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The ECO discovered in May 2006 that MOE had completed the review of opportunities to reduce the paperwork to address the applicants’ concerns. In a fact sheet issued in February 2006, MOE described “improvements the ministry has made to streamline the approval process for owners of hauled sewage waste management systems.”

MOE made a number of changes to provide more flexibility to sewage haulers, including a complete reversal of the decisions made in the April 2005 response to the *EBR* application for review. “The EAAB has concluded that in-transit storage, treatment and processing prior to final disposal are activities integral to the transportation of hauled sewage.” Sewage haulers are now permitted to incorporate in-transit storage as part of their waste management system C of A, and hauled sewage transferred from one truck to another will no longer require a separate waste disposal site C of A.

Existing C of A holders will be required to obtain an amendment to their system C of A from the ministry to be allowed the flexibility of the new system. Other changes that the ministry made as part of this review include allowing haulers to dewater or stabilize hauled sewage as part of their system C of A; to deposit hauled sewage at any site in Ontario that has been approved by the ministry to receive this type of waste (if the site is willing to accept the waste), without being listed on the sewage hauler’s C of A; and to undertake pilot projects. The changes also give haulers increased flexibility in the labelling of trucks, documentation, operating procedures and record keeping. Because hauled sewage management system Cs of A are not prescribed instruments under the *EBR*, new or amended hauled sewage waste management systems having in-transit storage, processing and system-to-system transfers will not be posted on the Environmental Registry.

In the Supplement to our 2003/2004 annual report, the ECO agreed with MOE's decision to turn down a similar application for review, writing that "MOE correctly interpreted the provisions of the *EPA* and Reg. 347 in deciding that the sewage haulage company was required to obtain a C of A in order to transfer sewage in its yard," and that "MOE made an appropriate decision that it was in the public interest not to conduct this review." The ECO also agreed with the ministry's April 2005 decision to maintain the requirement for Cs of A for septage transfers. MOE's stated rationale for not conducting the review was sound; the ministry provided a clear and thorough explanation of the existing regulatory regime and fair reasons for deciding not to make changes. Thus, the ECO was surprised to learn in May 2006 that the ministry subsequently reversed its 2004 and 2005 *EBR* decisions and decided to streamline the approvals as requested by the applicants. After saying in the response to the last *EBR* application that a review is not in the public interest because the requirement for a separate C of A for the transfer of septage protects the environment, the ministry now states that the approvals process was streamlined "in consideration of the limited environmental impacts associated with these systems."

The ministry's offer to meet with the applicants to discuss opportunities to "reduce the paperwork," instead of undertaking the review requested under the *EBR*, was problematic. The ECO generally commends ministries for taking steps to address applicants' concerns. However, we would prefer that ministries conduct such reviews under the provisions of the *EBR* so that the applicants and ECO are apprised of the outcome of the review in a formal, transparent process. In this case, the ministry clearly did undertake the review requested by the applicants, but it should have been undertaken under the auspices of the *EBR*.

MOE also committed a serious breach of the *EBR* in failing to provide notice of its decision whether or not to carry out a review within 60 days of receiving the application. In fact, MOE's response was almost four months late. The ECO reminds ministries that the time limits are legislative requirements and should not be disregarded.

(For ministry comments, see page(s) 220-221.)



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# Appeals, Lawsuits and Whistleblowers

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

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

## Appeals

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

## Status of Appeals

During the 2005/2006 reporting period, concerned residents, environmental groups, and a large Ontario oil re-refining company, Safety-Kleen, filed four leave to appeal (LTA) applications involving approvals issued by the Ministry of the Environment. The MOE instruments that were appealed included permits to take water (PTTWs) and certificates of approval (Cs of A). In two cases, leave was granted. In a third LTA application, filed in February 2006, Safety-Kleen challenged two Cs of A issued to Dunn Paving. The ERT ruled on this case in May 2006, and it will be reviewed in the next ECO reporting period. In a fourth application filed by the Georgian Bay Association and involving a PTTW issued to a golf course, the ERT ruled that it did not have jurisdiction because the LTA application was filed after the 15-day period for filing applications had ended. (Further details on these applications are provided in the chart on leave to appeal applications found in Section 7 in the Supplement to this report.)

One LTA application was pending as of March 31, 2005; it involved an application by Haldimand Against Landfill Transfers (HALT), the Six Nations and local residents challenging the Edwards Landfill (see the ECO's 2004/2005 annual report, pages 17-19, and pages 33-34 in this report). In June 2005, the ERT granted leave to HALT and other local groups. The appeal of this instrument is likely to proceed in the fall of 2006.

The ERT also concluded two appeal hearings and issued decisions on disputes about instruments that initially began with successful LTA applications described in previous ECO annual reports. Discussion of one of these older cases, Trent Talbot, is set out below.

### Leave to Appeal Application Results (as of March 31, 2006)

Leave Granted	3*
Leave Denied	0
LTA Decision Pending	1
No Jurisdiction	1

*\* This includes the HALT application that was pending as of March 31, 2005.*

## MOE Instruments

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

### *MAH Instruments*

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



### *MNR and MNDM Instruments*

There were no instrument holder appeals or leave to appeal applications with respect to prescribed instruments in 2005/2006 for the Ministries of Natural Resources and Northern Development and Mines.

## Hamilton residents challenge new biodiesel plant

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In April 2005, BIOX Canada Limited applied for a Comprehensive Certificate of Approval (Air) that would replace its existing Cs of A and include the addition of new or historically unapproved sources for all emissions from a new biodiesel plant to be constructed in Hamilton. The plant is designed to produce 60 million litres per year of biodiesel fuel, which is derived from a process using refurbished cooking grease, animal fats, vegetable oils and agricultural seed oils. BIOX sought approval for a C of A that includes all sources at the facility. Potential emissions include products of combustion from natural gas and biodiesel fuel, particulate from a cooling tower and volatile solvent emissions (tetrahydrofuran and methanol) from the process.

In September 2005, MOE granted the new single C of A, which required that the company comply with Regulation 346, RRO 1990, made under the *Environmental Protection Act*, and other performance requirements and conditions. (For further information on Regulation 346, see the discussion of Ontario's new air pollution standards, pages 89-96.) The C of A also permits modifications such as process changes or the addition of new equipment subject to certain limits on operational flexibility



(for example, the C of A stipulates a production limit for the facility). These operational flexibility conditions in the C of A will expire in 2010, after a five-year period. In addition, BIOX is required to make available to the public an Emissions Summary Table that documents the facility's compliance with Regulation 346. However, the C of A relied on air emissions modelling provided by BIOX, rather than requiring testing of actual emissions.

In early October 2005, two local residents and a representative of Environment Hamilton applied for leave to appeal MOE's decision. The grounds for the application included the following: 1) The C of A lacked any conditions requiring the proponent to undertake stack testing to determine actual emissions of pollutants from the facility, including acrolein and tetrahydrofuran, and noted that both of these substances are odorous and pose risks to human health. 2) The C of A lacked any reference to pollution or odour control equipment and associated operation and maintenance requirements for such equipment for the facility's process stacks, indicating that the stacks are not required to have any pollution control systems. 3) The C of A did not include any reference to the safe storage and handling of the residual waste that will be generated by the biodiesel production process.

In November 2005, the Environmental Review Tribunal granted a partial LTA on the grounds that the C of A issued by MOE lacked conditions requiring BIOX to undertake stack testing to determine the actual emissions of pollutants, including tetrahydrofuran and acrolein, from the facility.

The ERT observed that stack testing requirements in the C of A should be consistent with MOE's commitment to the precautionary principle, as set out in the ministry's Statement of Environmental Values. Given that BIOX has acknowledged the need for follow-up air emission monitoring, the ERT ruled that there is reason to believe that no reasonable person could have issued a C of A without a condition requiring such stack testing because the potential exists for significant harm to the environment. The ERT refused leave to appeal on the other grounds raised by the applicants. As of June 2006, this matter is ongoing.

## Trent Talbot River Property Owners case

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In November 2002, the Trent Talbot River Property Owners Association (TTRPOA) and other local applicants, including the Lamarre/McIntosh family, sought leave to appeal an MOE decision to issue a PTTW to dewater the proposed McCarthy quarry in Simcoe County. The applicants alleged that the PTTW application contained a number of flaws,

including: conflicting estimates of the quarry's influence on the groundwater; that the model submitted to the MOE Director to estimate drawdown is based on four inaccuracies that underestimate the drawdown radius; and there was no consideration of the potential impact on significant surface water features such as the impact on springs, wetlands, or the Trent Canal.

The ERT granted leave to appeal to TTRPOA and other residents on several grounds. First, the ERT ruled that the opinion of the MOE 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" was too conservative an interpretation of the data and modeling. Second, the ERT ruled that since the proposed quarry is located in a recharge area, local drilled wells are vulnerable to impacts on water quality as well as quantity.

In the meantime, the proponent applied for a second C of A for sewage works for quarry dewatering at the site. After a challenge was made to the first C of A, MOE granted a revised C of A to the proponent in November 2003. The applicants sought leave to appeal the decision to issue the C of A for the quarry dewatering in late 2003. The grounds for seeking leave included the following: a prior C of A issued and subsequently revoked for this quarry included a condition to deal with the risk that normal operation of the quarry may result in discharges causing long-term contamination of the property, but the November 2003 C of A did not include this condition. There are several potential sources of contamination, including fuels, lubricants and solvents that could be spilled, as well as dust control chemicals. In the meantime, the minimum information set out in MOE's Guide for Applying for Approval of Industrial Sewage Works was not provided to the MOE Director.

The ERT granted this leave to appeal application in regard to the MOE Director's decision to issue a C of A for sewage works without a valid PTTW in place, because it appeared to be impossible to know certain facts concerning the dewatering regime for the quarry, such as the volume of water involved. This raised the possibility that an approval for a sewage works could result in significant harm to the environment. The ERT also expressed concern that the multiple proceedings related to this quarry application might result in fractured hearings concerning the PTTW and the sewage works C of A. The ERT suggested that in the future any hearings should be heard concurrently.

On March 12, 2004, lawyers for MOE filed notice in Divisional Court of an application for judicial review of the ERT's decision to grant leave to appeal the sewage works C of A. MOE argued in its brief that the ERT failed to apply or incorrectly applied

the leave test under the *EBR*, erred in law in finding that no valid PTTW was in place, gave vague reasons for its decision, and did not provide sufficient notice to MOE or other parties to allow them to participate in the hearing in a meaningful way. Although the application for judicial review was not resolved, the ERT and the parties agreed to proceed to a full ERT hearing in late 2004.

The ERT began its concurrent appeal hearing on the two instruments in late 2004. A number of procedural and evidentiary issues arose, and this further delayed the hearing.

In December 2005, the ERT issued its ruling on the two instrument appeals. The panel upheld the appeals in part, by adding some additional conditions to the PTTW. One minor condition was amended on the C of A for the quarry's sewage system.

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 ERT 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 the 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 in the C of A 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 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 Web site. Regarding water quality impacts of the PTTW, the Tribunal did not find evidence that the permitted water taking would have a significant impact on water quality of nearby domestic wells.

With respect to the C of A (sewage) for discharge of quarry water, the Tribunal did not find that discharged water would have potential adverse effects on aquatic life. Since minnows had been observed in the discharge stream, the ERT found that testimony

regarding potential lethal impacts of discharge water on other aquatic organisms (rainbow trout and the common waterflea, *Daphnia magna*) was not credible. In the Tribunal's view, there was almost no potential for discharged quarry water to affect water quality in downstream waterways, and the conditions of the amended C of A would be sufficient to monitor and remediate any such impacts.

The Tribunal decision noted that its review extended only to the PTTW and C of A, and it ruled that other concerns raised by the appellants, local residents and municipal officials, such as potential road deterioration, traffic hazards, noise, dust and vibrations from the proposed quarry, were outside the ERT's jurisdiction. The ERT panel also acknowledged the parties' and citizens' concerns about the lengthy and convoluted process of applications and hearings, but found that this matter could be addressed only through changes in legislation and not by the Tribunal.



The ERT also stated in its decision that the PTTW and C of A for the quarry carry far more environmental protection provisions than are found in the instruments for other quarries. The ECO received many letters of complaint about the decision, and some of these were forwarded to the ERT Chair.

In early 2006, counsel for the TTRPOA applied to the ERT for a re-hearing of some of the issues addressed in the ERT's December 2005 decision. The TTRPOA alleged a number of serious irregularities in the ERT hearings procedure that resulted in the exclusion of crucial evidence related to the hydrogeology of the site. In March 2006, the re-hearing was held before a different ERT panel. However, in a ruling issued in late May 2006, the ERT denied the TTRPOA request and refused to address most of their concerns about the December 2005 ERT decision.

## Public nuisance cases

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Prior to 1994 when the *EBR* was brought into force, claims for public nuisances had to be brought by the Attorney General or with leave of the Attorney General. Under s. 103 of the *EBR*, someone who has suffered direct economic loss or personal injury as a result of a public nuisance can bring forward a claim and no longer needs the approval of the Attorney General. No new cases including public nuisance as a cause of action came to the ECO's attention during the reporting period, although one case launched in 2001 continues to move through the courts.

In previous annual reports, the ECO has described the environmental class action related to the Port Colborne Inco facility, *Pearson v. Inco Limited et al.* In March 2001, Wilfred Pearson launched a class action lawsuit against Inco Limited, the City of Port Colborne, the Regional Municipality of Niagara, the District School Board of Niagara, and the Niagara Catholic District School Board. Section 103 of the *EBR* is listed as one cause of action. Mr. Pearson resides near Inco's Port Colborne refinery where Inco has operated a refinery producing nickel, copper, cobalt and other precious metals since 1918.

In February 2004, the Divisional Court upheld the lower court's decision that it was not appropriate to certify this as a class action. By March 2004, MOE and the other defendants had agreed to settlements with the plaintiff, leaving Inco as the only defendant in the lawsuit.

The plaintiff and class members appealed the Divisional Court decision to the Ontario Court of Appeal (OCA), and the appeal was heard on May 30, 2005. The ECO was given leave, in conjunction with the Canadian Environmental Law Association and Friends of the Earth, to intervene on the issue of the representative plaintiff's liability for costs. The interveners submitted that cases involving damage to the environment, harm to public health or safety, and cases where the relief has direct or indirect implications beyond the interests of the immediate parties are cases that are likely to invoke the public interest.

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 determined that when environmental class litigants properly frame their claims, they can be certified, notwithstanding the earlier precedents that appeared to limit such claims, 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 now would be based solely on reduced property values that resulted from a September 2000 MOE announcement of nickel contamination in the community. Both lower courts had been concerned with the arbitrary nature of the original class definition, which in some respects was overly broad (including properties or persons who might not have been affected by the nickel contamination) and, in other respects, too limited (excluding properties or persons that might have been affected, but were located outside of the defined boundaries). Since the common issues before the OCA were more limited than those raised in the lower courts 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 that 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 decision of the OCA in *Cloud v. Attorney General of Canada* was cited as an indication that the OCA is taking a more liberal approach to certification of class proceedings than had been taken in the past.

The *Pearson* decision should provide new hope to environmental class litigants. Moreover, it may lead to a resolution of the concern first raised by the ECO in 2001, when we intervened in *Hollick v. Toronto* at the Supreme Court of Canada (SCC). The ECO argued that in its 1999 *Hollick* decision the OCA did not properly interpret and apply s. 103 of the *EBR* and its relation to the *Class Proceedings Act*. In drafting s. 103, the Task Force on the Ontario Environmental Bill of Rights intended that this provision work together with class action legislation in order to facilitate public nuisance claims. (See the ECO's 2001/2002 annual report, page 139.)

In late June 2006, the SCC rejected a leave to appeal application by Inco, which will allow this dispute to proceed to trial. The ECO will report on the progress of this case in a future report.

## The right to sue for harm to a public resource

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

## Whistleblower rights

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



Part  
6

# The Environmental Registry

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

## Quality of Information

The Environmental Registry is only as good as the information it contains. The *EBR* sets out basic information requirements for notices that ministries post on the Registry. The ministries also have discretion on whether to include other information. Previous annual reports of the Environmental Commissioner of Ontario (ECO) have recommended that in posting information on the Environmental Registry, ministries should use plain language and provide clear information about the purpose of the proposed decision and the context in which it is being considered. Ministries should clearly state how the decision differs from the proposal, if at all, and explain how all comments received were taken into account. All notices should provide a ministry contact name, telephone and fax number, as well as hypertext links to supporting information whenever possible.

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

## Comment periods

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

The Ministry of the Environment posted 35 out of 48 proposals for new policies, Acts or regulations for 45 days or more, including 21 proposals that had comment periods of 90 days or more. The Ministry of Natural Resources posted 24 out of 44 proposals for new policies, Acts or regulations for 45 days or more. In general, the ECO is pleased with the improved efforts by prescribed ministries to allow for longer comment periods on many of their proposals.

## Adequate time to comment on Acts

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The *Environmental Enforcement Statute Law Amendment Act (EESLAA)* is a recent example of a proposal notice on the Environmental Registry with an insufficient comment period. It was introduced as Bill 133 in the Ontario Legislature on October 25, 2004, and the initial comment period of 30 days for the Act was inadequate. MOE had provided an earlier period of policy consultation between April and September of 2004, related to the formation and work of the Industrial Pollution Action Team (IPAT). IPAT was formed after several spills occurred along the St. Clair River, outraging people in local communities in both Ontario and Michigan, who were not always adequately informed of the risks and who were required to shut down their water treatment



systems. However, the scope of the *EESLAA* was different from many of the proposals outlined in the key IPAT report released in July 2004. Moreover, this was the first opportunity for the public to see the specific provisions of Bill 133. (For more details, see pages 102-107 of this report.)

Many stakeholders contacted the ECO and requested that the comment period for Bill 133 be extended to 90 or even 120 days. After requests from the ECO and other stakeholders in mid-November 2004, MOE increased the comment period to 71 days. While it is understandable that the Ontario government probably wished to pass the *EESLAA* quickly, the Act was far too controversial and complex for the minimum comment period. Since the *EESLAA* was not passed into law until late June 2005, a much longer comment period should have been provided.

### Needed: Multiple Comment Periods for Complex Proposals

Most proposals on the Environmental Registry involve only one initial proposal notice and an accompanying public comment period. However, complex proposals may require multiple proposal notices and comment periods as a ministry moves along in its decision-making process. For example, with regard to provincial parks, the Ministry of Natural Resources posts multiple proposal notices on the Environmental Registry with lengthy comment periods for each new management plan.

Early public notification of a proposal is important because the ministry will not yet have made any firm decisions and public input will have its greatest impact. Also, early notification allows for the identification and avoidance of options that contradict the public interest, identification of new issues or facts, early resolution of problems, and the legitimization of decisions.

If early consultation with the public leads to new legislation, it is then important for a prescribed ministry to provide a new comment period when the bill is introduced for first reading in the Legislature. This additional comment period is necessary, as the earlier proposal notices likely did not contain the same level of detail as the bill itself or new directions that may have been chosen.

As an illustration, MNR posted a proposal notice posted on the Environmental Registry for “A Review of Ontario’s Protected Areas Legislation” in September 2004. The ECO commends MNR on its early consultation on this proposal, which included a 61-day comment period, the provision of a discussion paper, a questionnaire, a dedicated Website for the initiative, and the use of a third-party panel to provide advice to the minister. 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 the proposed *Provincial Parks and Conservation Reserves Act, 2006*, and transparency was undermined.

The ECO is concerned that MNR may follow this model for future statutes. The ECO notes that MNR has rarely posted regular Environmental Registry notices for proposed Acts, as required by the *EBR*, after they are tabled in the Legislature. Indeed, a review of Environmental Registry notices reveals that only a minority of proposed Acts were posted for public comment at the first reading stage.

The ECO urges MNR not to follow this model as it works on the bill that is likely to be developed as part of its “Review of Ontario’s Species at Risk Legislation,” which was posted on the Environmental Registry in May 2006. The ECO urges all prescribed ministries to consult the public early in their development of new legislation, as well as when a bill is introduced for first reading in the Legislature.

## Description of proposals

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Ministries are required to provide a brief description of proposals posted on the Registry. The description should clearly explain the nature of the proposed action, the geographical location(s), and the potential impacts on the environment. During this reporting period, descriptions of proposals for policies, Acts and regulations generally met the basic requirements of the *EBR*. The proposal notices provided brief and understandable explanations of the actions the ministries were proposing. However, ministries could still improve the contextual background information for their proposals, since many readers may not be familiar with environmental law and policy in Ontario.

The quality of descriptions for instrument proposal notices was again varied in 2005/2006. Prescribed ministries have taken steps toward providing better descriptions. However, improvements can still be made. In the case of some certificates of approval, MOE is often relying on the verbatim description of the proposal as written by the company requesting approval. Such descriptions may be difficult for lay people to understand, especially if they contain technical jargon or are overly brief.

## Access to supporting information

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The majority of proposals for policies, Acts, and regulations posted on the Registry in 2005/2006 provided access to supporting information by listing a contact person, phone number and address. The vast majority of policy proposals had “hypertext” links to supporting information, which can be an excellent aid to the public. The ECO commends MOE for routinely providing an electronic copy of certificates of approval with its decision notices.

## Environmental impacts

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The ECO has expressed concern in previous annual reports that ministries are not adequately explaining the environmental impacts of proposals. Although the *EBR* does not legally require ministries to include this information, it provides the public with the information necessary to make informed comments on proposals. In 2005/2006, most ministries failed to provide an adequate explanation of potential environmental impacts in their proposal notices for policies, Acts, regulations, and instruments. Environmental impacts were typically explained only in regulations proposed by MNR and MOE.

## Description of the decision

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

### Poor Use of the Environmental Registry: Ontario Trails Strategy

- Few details were provided on the notice as to the proposed strategy or its environmental impacts.
- Copies of the proposed and final document were not available electronically.
- The public was unable to obtain a copy of the final document until a week after the decision notice was placed on the Environmental Registry.
- Public comments were not summarized and it was not explained how they were considered in reaching a final decision.
- The notice failed to explain that the responsibility for the strategy had changed from the Ministry of Tourism and Recreation to that of the Ministry of Health Promotion.
- The only Internet hyperlink to supporting information was no longer accessible as of May 2006, approximately a year after it was originally posted.
- The ECO contacted the Ministry of Health Promotion to suggest ways to correct some of these errors in September 2005, but no changes were made.

## Explaining how public comments were addressed

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

## Summary

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

(For ministry comments, see page(s) 221.)

## Unposted Decisions

Under the *EBR*, prescribed ministries are required to post notices on the Environmental Registry to inform the public of environmentally significant proposals and to solicit public comment. Sometimes ministries fail to meet this legal obligation, and the ECO must make inquiries and report to the public on whether their *EBR* public participation rights have been violated.

The examples highlighted below are environmentally significant policies of the Ministry of Natural Resources. The ECO was very disappointed this year at the numerous failures of MNR to live up to the transparency and consultation requirements of the *EBR* when developing new policies.

Other ministries not complying with *EBR* notice and comment requirements during the reporting period include the Ministries of the Environment, Municipal Affairs and Housing, Culture, Labour, and Energy. (For a description of all the unposted decisions reviewed by the ECO this year, refer to pages 1-14 of the Supplement to this report.)

## MNR's forest management policies

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The *Crown Forest Sustainability Act* and the *EBR* together lay out public transparency, consultation and accountability requirements for decision-making on forest management policy. However, MNR has recently revised a number of forest management policies through "interpretation notes" and "training material," without opening these policy changes to public scrutiny. The following are examples:

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



In the case of both the FMP Notes: Old Growth and the Marten Habitat Guide Interpretation Note, the documents were not even made available to the public on MNR's Web site.

MNR's response to the ECO's queries was that such training and interpretation notes are not used to alter policy, but rather to explain it, taking into account the variability of the province and MNR's experience with implementing the policy. However, the ECO's review of the documents determined that they went beyond "interpretation" to actually setting policy for forest management – and thus, under the *EBR*, should be posted as such on the Environmental Registry.

We remain concerned with a creeping loss of transparency when MNR policy direction moves from publicly accessible regulated manuals and forest management guides to "notes" and "training materials" developed in isolation from public input.



### A Strategy to Circumvent Public Consultation

The Provincial Forest Technical Committee (PFTC) is a group composed of MNR staff, industry representatives and other stakeholders who advise the Ministry of Natural Resources on changes to its forest management guides. This year the ECO obtained the minutes from the 2004 meetings of the PFTC and discovered that, on the committee's advice, MNR was engaged in a concerted strategy to sidestep the *EBR* – and public consultation – when revising forest management policy.

The PFTC discussed strategies to avoid public consultation when amending forest management guides. They suggested that the guides – which are posted to the Registry – be written in a less prescriptive way. More of the definitive policy direction could then be spelled out in documents that "interpret" the guides, and these documents would not be subject to public consultation. Examples proposed at the committee meetings included interpretation notes to the guides, training materials, and questions & answers.

The ECO is disappointed to observe that MNR has, indeed, been pursuing such a strategy.

In our 2003/2004 report (pages 99-104), the ECO criticized MNR decisions that moved forest policy direction out of the Forest Management Policy Manual into "notes" and other non-regulatory documents, and that failed to consult the public on the Old Growth Management Planning Interpretation Note. We are extremely disappointed that this represented part of a conscious strategy by MNR to expedite forest management policy development by avoiding legal requirements for public notification and consultation.

## MNR's recovery strategies for endangered species and spaces

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The Carolinian life zone in southwestern Ontario is the most biodiverse area of Canada, but it is also home to 25 per cent of the country's human population, and its woodlands and wetlands have been reduced to a fraction of their former areas. MNR is involved in the development of a Carolinian Woodland Recovery Strategy for species and natural communities at risk in the Carolinian life zone. In November 2004, a Carolinian Woodland Recovery Team, composed of MNR staff and other stakeholders, began meeting to develop goals and objectives for the recovery strategy, and in the fall of 2005, the team began to review a draft strategy.

The ECO wrote to MNR, urging the ministry to post the draft strategy and all other recovery plans as proposals on the Environmental Registry. MNR responded by arguing that recovery strategies are not government policy, but rather, are "science-based" advice documents used to guide policy development and do not take socio-economic impacts into account. The ECO disagrees, and observes that such recovery strategies go beyond a purely scientific assessment of the status and needs of threatened species or landscapes. They include elements of management planning, and take economic and social factors into account.

The ministry also argued that it is not obligated to post the strategy for consultation on the Registry because the recovery team was multi-agency, and MNR is not obligated to follow the team's recommendations. The ECO recognises the value of multi-agency teams in developing recovery strategies. However, such partnerships do not relieve the provincial government of transparency and accountability provisions of the *EBR*.

MNR asserted that it posts information notices on the Registry for all recovery strategies involving Ontario species. The ministry noted that it is developing a "recovery planning information package" to guide staff and partner agencies in using recovery planning for the conservation and recovery of species at risk, and will post this document as an information notice on the Environmental Registry.

The ECO is not satisfied by MNR's assertion that it posts all recovery strategies as information notices. Under the *EBR*, recovery strategies should be posted as proposals. Moreover, this assertion does not appear to be accurate: as of late May 2006, no such information notices had been posted, MNR had posted only three recovery strategies or plans on the Registry, and all three were regular policy proposals.

In the past, in response to questions from the ECO about other recovery planning guidance documents (see pages 23-24 of the 2003/2004 ECO report), MNR indicated that draft recovery strategies and proposals would be posted on the Registry for public review and comment. MNR has not lived up to that commitment, risking public confidence in the recovery planning process.

## A policy by any other name

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Under the *EBR*, a policy is “a program, plan or objective and includes guidelines or criteria to be used in making decisions about the issuance, amendment or revocation of instruments ...” The ECO is unconvinced by arguments from MNR that various environmentally significant policies do not have to be open to public scrutiny simply because the ministry has chosen to rename the documents as “training materials,” “interpretation notes” or “science.” Strategies, management plans and other policy documents under MNR’s authority should be subject to full notification and consultation requirements.

The ECO looks forward to improvements in MNR’s adherence to the *EBR* notice and comment requirements in developing future policies and strategies for forest management and species recovery.

(For ministry comments, see page(s) 221.)

## Information Notices

A ministry may post an “information notice” in cases where it is not required to post a proposal notice on the Environmental Registry for public comment. During the 2005/2006 reporting period, the seven ministries listed below posted 171 information notices in total, related to 92 different initiatives. For the purposes of tracking trends year to year, the count of 92 does not include multiple postings for the same initiative, or the notices the Ministry of Natural Resources posted related to 28 forest management plans:

• Environment	9
• Government Services	1
• Municipal Affairs and Housing	26
• Natural Resources	42 (+ forest management plans)
• Public Infrastructure Renewal	2
• Northern Development and Mines	10
• Transportation	2

The ECO reviews whether or not ministries use information notices appropriately and considers whether notices are clear and complete. Please refer to Section 2 in the Supplement to this report for a discussion on the appropriate use of information notices and on the components of a quality information notice. The Supplement also presents a description of each information notice posted this year.

## Good use of information notices

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MOE posted an information notice describing its intention to impose new terms and conditions in a certificate of approval for the Kitchener Street Landfill in Orillia. MOE was not required to provide notice of this instrument on the Registry because the landfill is considered an “undertaking” under the *Environmental Assessment Act*. MOE used an information notice to invite comments, then posted an update to describe how it considered the comments it received. (For more information on the *EBR* application that led to this review, see pages 176-182 in the Supplement.)

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

The ECO is also pleased that MOE posted an information notice to act as an index to the ministry’s recent notices related to the development of Air Standards in Ontario. The notice explained that the ministry had recently finalized several proposals to improve the regulatory framework for local air quality, and described the status of new air standards for various substances. The notice also provided links to relevant materials on the ministry’s Web site. (For further information regarding the ministry’s air activities, please refer to pages 86-96 and 97-102 of this year’s annual report.)

## Inappropriate use of information notices

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Ministries also used some information notices inappropriately during this reporting period, stating that the initiatives were not “policy decisions” for a variety of reasons. The ECO concludes that the following ministry decisions should have been posted for public comment as policy proposals before they were implemented.

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

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

MNR posted an information notice to describe its Natural Spaces Program, a two-year initiative to help reduce loss of green space in Ontario. MNR said that the program would be developed in more detail over the next 18 months and that it would post information notices or regular proposal notices outlining the main elements of the program as it evolves. The ECO believes that MNR should have provided the public with the opportunity to comment on the proposed program, since at least two key elements described in the information notice are policy decisions that have already been implemented: a new tree planting and native tree seed collection program, and a new land acquisition program. (For more information on the land acquisition program, see pages 79-81 of this report.)



MAH posted an information notice to describe its Intergovernmental Action Plan (IGAP) for Simcoe, Barrie and Orillia. The ministry said that it was working with local governments to address development pressures in the area. MAH said IGAP is not considered a policy, and committed to posting any future policies or regulatory proposals regarding IGAP on the Registry for further public review and comment as required. The ECO would have preferred to see a regular proposal notice posted on the Registry to allow for broad public participation in the development of IGAP.

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

(For ministry comments, see page(s) 221.)

## Exception Notices



The *Environmental Bill of Rights* allows ministries, in very specific circumstances, to post "emergency exception notices" or "equivalent public participation exception notices." During the 2005/2006 reporting period, MOE posted 10 emergency exception notices. MNR posted one emergency exception notice and 12 equivalent public participation exception notices. The ECO reviews whether ministries use exception notices appropriately and considers whether the notices are clear and complete.

(Please refer to Section 3 of the Supplement to this report for a discussion on the appropriate use of exception notices and on the components needed for a quality exception notice. The Supplement also provides a more detailed description of and comment on each notice.)

## MOE's use of exception notices

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This year, MOE used emergency exception notices appropriately in two situations where contaminated sites needed to be cleaned up quickly to reduce or avoid human exposure to health hazards. In a third situation, MOE issued a Director's Order under s. 17, s. 18 and s. 43 of the *Environmental Protection Act (EPA)* to General Chemical Canada, Ltd. for remedial work, preventative measures and the removal of waste and restoration at an abandoned plant in Amherstburg. MOE said that it used an exception notice because *EPA*, s. 43 Orders do not have to be posted as proposals on the Registry. However, the ECO notes that Orders under s. 17 and s. 18 are required to be posted on the Registry, and therefore this was an inappropriate use of an exception notice. While MOE suggested in the notice that the situation did not permit public consultation because of possible risks to health and safety, it failed to provide evidence of an emergency and it did not post the exception under s. 29 of the *EBR*, as required.

MOE also issued seven separate emergency exception notices to increase the tonnage at waste transfer stations operated by Waste Management of Canada Corporation, for the short-term management of the Regional Municipality of Peel's solid municipal waste. The approvals were all waste disposal site certificates of approval under s. 27 of the *EPA* to allow the municipality to manage waste that could, for one reason or another, not be shipped to the region's Algonquin Power Energy From Waste facility. The reasons included maintenance shut-downs at the EFW facility, the potential for a labour disruption at the facility, and an expected temporary increase in the number of bags set out at the curbside. MOE said it used an exception notice because if the municipality did not find a legal alternative for waste disposal, there could have been a risk of illegal dumping, increase in vermin and disease, and destruction of property.

MOE explained its rationale for each emergency notice. But the number of such notices, along with others issued to the same proponents in past reporting years, is troubling. Given the number of different rationales provided by the municipality and Waste Management of Canada Corporation, it would appear that the need for alternate waste storage and disposal is ongoing, and should be planned for with public consultation. MOE's decision to turn down one of the requested approvals due to odour concerns underscores the need to provide notice on the Registry and an opportunity for comment to the public.

MNR responded this year to a concern that the ECO had raised about the ministry's practice of posting equivalent public participation exception notices for the regulations establishing or modifying park and conservation reserves set out in Ontario's Living Legacy. In November 2004 the ECO urged MNR to post regular proposal notices for comment on the Registry for the remaining protected areas with pre-existing mining claims, since the boundaries may be substantially different from those proposed in 1999. MNR decided that of the remaining 66 sites needing to be regulated, 41 would be posted for comment as regular proposal notices and 23 would be posted as exception notices, because no changes to land use are proposed. The ECO is pleased that MNR did begin to post these sites on the Registry during this reporting year, garnering substantial public comment.

## Late Decision Notices

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

The ECO periodically makes inquiries to ministries on the status of proposals that have been on the Registry for more than a year and suggests they post either updates or decision notices. Below is a small sampling of the many proposals for policies, Acts, regulations, and instruments posted before March 31, 2005, and still found on the Registry in April 2006. Some of these proposals were posted as far back as 1997. The ECO noted that these very same notices were out of date in last year's annual report and no action has been taken to update them.



*Ministry of the Environment*

PA00E0022 Proposed Environmental Management Agreement between Environment Canada, Ministry of the Environment and Algoma Steel Inc. (2000/05/25)

*Ministry of Northern Development and Mines*

PD02E1001 Provincially Significant Mineral Potential Procedural Manual for Ontario (2002/08/16)

*Ministry of Municipal Affairs and Housing*

PF03E0001 Public Consultation on the Central Ontario Smart Growth Panel's draft advice on a Smart Growth Strategy (2003/02/19)

*Ministry of Health and Long-Term Care*

PG04E0005 Protocol for the Issuance of a Boil Water or a Drinking Water Advisory (2004/01/28)

*Management Board Secretariat*

PN7E0001.P Government Business Plans (1997/07/03)

The ECO commends the Ministry of Natural Resources for its recent efforts to update older postings on the Environmental Registry in order to minimize the number of late decision notices. Other ministries, particularly the Ministry of the Environment, should undertake similar comprehensive efforts to ensure the timeliness of their notices on the Environmental Registry.



Part 7



# Ministry Progress

The ECO follows up annually on the progress made by prescribed ministries in implementing ECO recommendations made in previous years. The ECO has requested progress reports from those ministries on key issues and recommendations made in our last report, and in some cases previous reports. In some cases, ministries may also submit updates on their own initiative and these are also summarized in this section where relevant.

## The ECO's Obligation: Keeping the *EBR* in Sync with New Laws and Government Initiatives

As regular readers of ECO annual reports know, a major challenge facing the ECO and the Ontario government is to keep the *EBR* in sync with new laws and government initiatives, including the creation of new ministries. 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 Environmental Commissioner and his staff constantly track legal and policy developments at the ministries prescribed under the *EBR* 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. In last year's annual report, the ECO outlined some of the reasons why it is necessary to constantly update the *EBR* regulations and provided a summary of the status of various recent Acts and regulations. We recommended that

new government laws and related initiatives be prescribed under the *EBR* within one year of implementation. This year we have updated the summary presented in the 2004/2005 annual report. The following Table is merely an indication of the scope of the problems faced, and not a comprehensive review. (More detail is provided in the Supplement in the Status Report, pages 287-294.)

As indicated in the Table, there continue to be 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 the right to participate in environmentally significant decisions. Prescribing laws under the *EBR* also ensures that ministry Statements of Environmental Values are considered, that leave to appeal applications can be filed, and that *EBR* investigations and reviews can be requested. 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 and regulations.

In the 2005/2006 reporting period, the ECO observed progress in expanding *EBR* coverage over brownfields. In June 2005, the Ministry of the Environment posted a proposal on the Environmental Registry to amend O.Reg. 681/94 (Classification of Proposals for Instruments) in order to classify Certificates of Property Use (CPUs) under the *EBR*. In October 2005, the decision notice was posted and the regulatory changes were passed, making CPUs prescribed instruments under the *EBR*. (For further discussion, see the update on brownfields on pages 57-58.)

In early 2006, more than four years after the ECO's initial request, MOE and the Ministry of Agriculture, Food and Rural Affairs finalized their proposal to prescribe certain parts of the *Nutrient Management Act* under the *EBR*. (For further discussion, see pages 111-116.) The ECO commends MOE and OMAFRA for these positive initiatives.

One significant disappointment in 2005/2006 was the lack of progress in prescribing the Ministry of Public Infrastructure Renewal under the *EBR*. 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 to promote sound urban and rural development. In 2004, the ECO urged the Ontario government to prescribe MPIR under the *EBR*, and MPIR agreed to proceed. In spring 2005, the Ontario government enacted a major piece of MPIR legislation with significant environmental implications titled the *Places to Grow Act (PGA)*. As of May 2005, MPIR reported that the work of prescribing the ministry was still ongoing. In the 2005/2006 reporting period, ECO staff met with MPIR staff and discussed a range of issues, including options for prescribing the *PGA* for various parts of the *EBR*. However, MOE has not yet posted a proposal to

amend O.Reg. 73/94 to prescribe MPIR and the *PGA*, despite the fact that MPIR continues to work on critical growth management plans such as the Proposed Growth Plan for the Greater Golden Horseshoe (described in the ECO's 2004/2005 annual report, page 53).

The ECO continues to urge the ministries to respect our obligation to the Ontario public to keep the EBR in sync with new laws and government initiatives by making a stronger effort to ensure that laws such as the *PGA* and the *Oak Ridges Moraine Conservation Act, 2001*, are prescribed under the *EBR* in the 2006/2007 reporting period.

Table – Status of Selected ECO Requests to Prescribe New Laws, Regulations and Instruments under the *EBR* as of July 2006

Act, Regulation or Instrument (Ministry)	ECO request to prescribe	Status as of July 2006 and ECO Comment
<i>Greenbelt Act, 2005</i> (MAH)	ECO wrote to MAH in April 2005 requesting that it prescribe the <i>Greenbelt Act</i> under the <i>EBR</i> for regulation and instrument proposal notices and applications for reviews.	In March 2006 MAH reported that it is committed to prescribing the <i>Greenbelt Act</i> under the <i>EBR</i> , and “is taking the necessary steps to achieve this.” However, no timeline was provided regarding when the Act is likely to be prescribed.
<i>Kawartha Highlands Signature Site Parks Act, 2003</i> (MNR)	ECO wrote to MNR in April 2005 requesting that it prescribe the <i>KHSSPA</i> under the <i>EBR</i> for review and investigation applications.	In March 2006 MNR advised that the park boundaries are now regulated under the <i>Provincial Parks Act</i> and a request will be made to MOE to prescribe the <i>KHSSPA</i> under the <i>EBR</i> once it is proclaimed.
<i>Lakes and Rivers Improvement Act (LRIA)</i> , Water Management Plans (WMPs) issued under s. 23.1	The <i>Reliable Energy and Consumer Protection Act</i> (AB02E6001) received Royal Assent in June 2002 and created s. 23.1 of the <i>LRIA</i> , which appears to have effectively replaced s. 23 of the Act. Section 23 of the <i>LRIA</i> remains as a prescribed instrument under the <i>EBR</i> but it appears to be of little or no force and effect.  In our 2002/2003 annual report, the ECO encouraged MNR to amend O.Reg. 681/94 to include WMPs issued under s. 23.1 as prescribed instruments. MNR posted information notices for 20 WMPs during the reporting period. These notices should have been subject to public notice and comment under the <i>EBR</i> .	In March 2006, MNR advised the ECO that it is not proceeding with the classification of WMPs as instruments under the <i>EBR</i> because its Water Management Planning Guidelines for Waterpower “establishes a comprehensive approach to public engagement.” The ECO disagrees with this assertion. MNR also noted that the majority of WMPs are complete or close to completion. MNR previously had committed to posting WMPs and this reversal seriously undermines transparency for WMP decisions. The ECO continues to urge MNR to prescribe s. 23.1 of the <i>LRIA</i> as an instrument under the <i>EBR</i> .

Act, Regulation or Instrument (Ministry)	ECO request to prescribe	Status as of July 2006 and ECO Comment
<p><i>Nutrient Management Act</i> (OMAFRA and MOE)</p> <p>Note: In late 2003, MOE assumed jurisdiction for enforcement of several aspects of the <i>NMA</i>.</p>	<p>ECO wrote to OMAFRA in late 2001 and again in 2002 and 2003, requesting that it prescribe the <i>NMA</i> under the <i>EBR</i> 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 <i>EBR</i> into possible non-compliance and request reviews of specific NMSs and NMPs.</p>	<p>In January 2006, the ECO was pleased to learn that the <i>NMA</i> and its regulations had been prescribed for notice and comment and for applications for review. The ECO continues to urge MOE and OMAFRA to prescribe the <i>NMA</i> for applications for investigation and to designate NMSs and NMPs for large livestock operations as instruments subject to notice and comment on the Registry.</p>
<p><i>Oak Ridges Moraine Conservation Act, 2001</i> (MAH)</p>	<p>ECO wrote to MAH in December 2001 requesting that it prescribe the <i>ORMCA</i> under the <i>EBR</i> for regulations and instrument proposal notices and applications for reviews. In early 2003 MAH staff briefed ECO staff on its interim plan to use information notices for official plan amendments (OPAs) related to <i>ORMCA</i> implementation rather than regular instruments.</p>	<p>MAH informed the ECO in March 2006 that, with the approval of the <i>Greenbelt Act, 2005</i>, and Plan, which includes the ORMCP area, it continues to work on the amendments to O.Reg. 73/94 that are required to prescribe the <i>ORMCA</i> under the <i>EBR</i>.</p> <p>MAH posted information notices for 26 OPAs and 12 zoning orders related to the <i>ORMCA</i> during the reporting period. These notices should have been subject to public notice and comment under the <i>EBR</i>.</p>

(For ministry comments, see page(s) 221-222.)

## Statements of Environmental Values Remain under Review

The *Environmental Bill of Rights* requires each prescribed ministry to develop a Statement of Environmental Values (SEV) to guide its decision-making. The SEV outlines how each ministry applies and considers the purposes of the *EBR* in its environmental decision-making, along with social, economic, scientific and other factors. Ministries are required to consider their SEVs whenever environmentally significant decisions are made in the ministry, and the ECO is required to report annually on ministry compliance with SEVs.

The drafters of the *EBR* had hoped that SEVs would act as change agents within ministries and would drive decision-making toward the greener part of the spectrum. Unfortunately, most observers believe, and the ECO tends to agree, that the SEVs have had little impact on decision-making in the ministries. The ECO has commented on this weakness repeatedly, most recently in a special report in March 2005, and has also noted that SEVs are too vague and outdated.

Responding to these concerns, the ministries worked together to update their SEVs in 2004/2005. In July 2005, the ministries shared their proposed new SEVs with the public through a proposal notice on the Registry, and provided a 60-day comment period. It appears that ministries are now contemplating public input and possible next steps, since a decision had not yet been posted as of June 2006.

The ECO continues to believe that SEVs can and should serve as potent catalysts for environmental sustainability within ministries. The ECO will review the new SEVs once they are finalized.

## Ministry Responses to Past ECO Comments and Recommendations

### Climate Change Mitigation

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Last year the ECO examined one aspect of what is perhaps the most debated and potentially consequential environmental issue of our time – the need to take action to mitigate or reduce green house gas emissions contributing to global climate change. The ECO recommended that the government expressly identify a lead ministry so that a provincial strategy can be prepared to help meet Canada’s climate change obligations, and that the ministry be provided with adequate resources. MOE reported to the ECO recently that it does not have a formal climate change strategy plan or policy, but cited a number of its air programs and regulations as examples of progress being made on climate change mitigation. These were: the planned replacement of coal-fired electricity generating stations with cleaner sources of electricity and energy conservation; O.Reg. 194/05, Industry Emissions – Nitrogen Oxides (NO<sub>x</sub>) and Sulphur dioxide (SO<sub>2</sub>), a decision the ECO reviewed this year (see pages 97-102); and O.Reg. 535/05 – Ethanol in Gasoline. MOE estimates that its ethanol initiative will reduce annual GHG emissions by about 800,000 tonnes. Finally, MOE cited the completion of several agreements on climate change as progress on this issue. (This year the ECO looks at the need to develop strategies for adaptation to climate change, page 59-65.)

## Renewable Energy Targets

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In 2004/2005, the ECO recommended that the Ministry of Energy establish more substantial targets for the generation of electricity from renewable energy sources. ENG replied that the Ontario Power Authority's Supply Mix Report, which was being considered for implementation by the ministry in 2006, includes targets for renewable energy as well as conservation for the years 2015, 2020 and 2025. The ministry also referred to its 2005/2006 program of issuing requests for proposals (RFP) for renewable energy projects. The first renewable RFP process, initiated in 2004, resulted in contacts with 10 successful proponents for renewable energy projects, totaling 395 MW. A second renewable RFP process was initiated in April 2005 and resulted in contracts with nine successful proponents for renewable energy projects, totaling 975 MW.

## Removing Barriers to Conservation

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The ECO recommended in 2003/2004 that the Ontario government remove barriers that discourage commercial landlords with Ontario government tenants from undertaking major energy efficiency upgrades and recouping these costs through increases in rents paid by those tenants. Much of the Ontario government's leased space is managed by an agency called the Ontario Realty Corporation (ORC), which reported to a former ministry called Management Board Secretariat (MBS). MBS is now part of the Ministry of Government Services, but ORC was reassigned in 2005 to the Ministry of Public Infrastructure and Renewal (MPIR). Staff at MPIR and ORC responded as ORC continues to be the principal manager of leased space for the Ontario government.

ORC provided reasons why it considers taking action on this recommendation an unreasonable request, including the initiative now under way across the Ontario Public Service to reduce the accommodation expenditure for government agencies by \$50 million – the ECO notes that retrofit costs *and savings* could potentially be shared between landlord and tenants. ORC also cited the difficulty of confirming that efficiency gains had been achieved when retrofits are carried out in a building owned by a third party – the ECO suggests that carrying out an energy audit before and after the retrofit could work.

Instead of removing barriers that discourage commercial landlords from undertaking major energy efficiency upgrades, as the ECO recommended, ORC is relying on conditions in leases set up with private landlords. These conditions set minimum energy efficiency standards on lighting, heating, cooling and water devices in the leased space – for



example, “Individual four-foot fluorescent lamps shall consume no more than 30 watts each.” Other conditions, for example, those on limiting water use, are optional – “Consider sub-surface drip irrigation systems.” However, some of the lease conditions could be considered mandatory – for instance: “The Landlord shall ensure that all office lights in the Building are switched off promptly at 6:00 p.m. ...”

## Population Growth Modeling and Projections

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In the 2004/2005 annual report, the ECO recommended that MAH undertake public consultation on the Ontario government’s population growth modeling and projections in order to provide a transparent context for land use planning decisions.

In response, MAH said that it believes the broader public has been and continues to be consulted regarding population projections. First, MAH explained, while the Ministry of Finance produces detailed population projections for the 30-year period following every national Census, these projections do not represent Ontario government policy targets or desired population outcomes, nor do they incorporate explicit economic assumptions. Instead, these projections are meant to provide an outlook of population growth for Ontario. A standard demographic methodology is used to establish these projections.

Further, the Ministry of Public Infrastructure Renewal is involved in population growth modeling and projections as part of the development of the Growth Plan for the Greater Golden Horseshoe. This has involved MPIR’s working closely with municipalities over a two-year period to develop population forecasts. Work was also undertaken with a consultant to develop a growth model reflective of economic and market trends and expectations while considering the potential impact of both provincial and local planning policy on population growth distribution.

MPIR states that a growth forecast technical paper was produced and made available to the public in 2005. MPIR has consulted on this work as part of the public consultations on the Proposed Growth Plan for the Greater Golden Horseshoe. This plan also proposes that MPIR review population forecasts at least every five years, with the release of new Census information.

While the ECO recognizes the value of the above initiatives, MAH has still not initiated any significant public consultation on the population growth modeling and projections, which are integral to strategic land use planning decisions.

## Oak Ridges Moraine

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The ECO has been tracking implementation of the *Oak Ridges Moraine Conservation Act (ORMCA)* and the Oak Ridges Moraine Conservation Plan (ORMCP) since the Act was passed in 2001. In March 2006, MAH and MNR provided updates on their progress in implementing the Act and Plan.

### *Implementing the Plan*

MAH said that the government is continuing to finalize the technical guidance documents required to implement the Plan. An inter-ministry committee, led by MAH, has been meeting regularly to finalize MNR and MOE's guidance documents, posted on the Registry for comment in 2004 and 2005, respectively. The draft documents are being revised to address comments received during the *EBR* postings, but in the meantime the documents are available for use, in draft form, on MAH's website. (For more detail about the guidance documents, please see page 85.)

MAH reported that an inter-ministry committee on performance measures for the ORMCP and the Greenbelt Plan has been established. MNR says that it is currently working on the first stage of the monitoring system, which is the analysis of the policies of each plan to identify suitable performance measures. The ECO is disappointed that progress reported two years ago on this initiative has been lost, as the ministries appear to be starting the process anew.

## The Greenbelt Act, 2005, and Greenbelt Plan

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The ECO asked MAH to provide an update on progress in implementing the *Greenbelt Act, 2005*, and Plan. MAH provided the following summary of initiatives:

### *Education and Training*

- MAH held several Greenbelt education and training sessions for provincial staff and municipalities over the last year and continues to use its Web site to communicate Greenbelt news to municipalities and the public. The Municipal Services Office has been advising and assisting several municipalities to commence implementation of the Act and Plan through conformity amendments as part of their five-year Official Plan review.

### *Greenbelt Council*

- The Council has been meeting regularly since its June 2005 inaugural meeting and its terms of reference were recently finalized. Its advice is being sought on monitoring and performance measurement and harmonization efforts described below.

### *Monitoring and Performance Measurement*

- Working cooperatively with partner ministries, including MOE and MNR, MAH staff have initiated and are in the process of developing a monitoring and performance measurement framework for the Greenbelt Plan. This framework builds on the work that was done for the development of the ORMCP monitoring program. The framework for performance measures will consist of the entire Greenbelt area, including the ORMCP and the Niagara Escarpment Plan.

### *Harmonization*

- MAH has started to coordinate inter-ministry efforts to initiate a regulation to harmonize the policies of the Niagara Escarpment Plan and Oak Ridges Moraine Conservation Plan with the new Protected Countryside policies of the Greenbelt Plan. The advice of the Greenbelt Council is also being sought on this issue.

### *Guidance Documents*

- MAH has provided comments to MNR on the draft Greenbelt Technical Guides. Implementation includes working with MNR in its capacity as the ministry responsible for the Niagara Escarpment Planning Area.

## Peat Harvesting

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The ECO's 2004/2005 annual report included a recommendation that "MNR, in consultation with MOE and MAH, develop a law to ensure that peat harvesting is carried out with minimal ecosystem disturbance, and that appropriate rehabilitation is undertaken." In July 2005, MNR informed the ECO that it would review options for managing peat harvesting. Then, in a March 2006 update to the ECO, MNR acknowledged that the legislative and policy framework governing peat extraction could be clarified. However, MNR added that the new Provincial Policy Statement (2005) includes policies aimed at protecting water quality and quantity that may affect the manner in which peatlands are managed. MNR also pointed out that Conservation Authorities are required, under O.Reg. 97/04, to develop regulations to prohibit development in wetlands – and not just provincially significant wetlands – unless it can be demonstrated that such development does not affect flood control, erosion, dynamic beaches, pollution, or land conservation. MNR has indicated to the ECO that it will monitor the effectiveness of the Provincial Policy Statement and O.Reg. 97/04 implementation, as well as municipal use of the bylaw powers under the *Municipal Act*, as methods for the protection of peatlands before making any decision regarding the need for a law to regulate peat harvesting and rehabilitation. Finally, MNR has expressed concern, based on available research,

about the feasibility of rehabilitating peatlands that have been completely harvested. The ECO will continue to monitor MNR progress on this issue.

## Protected Areas and Mining Disentanglement

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In 1999, the Ministry of Natural Resources released Ontario's Living Legacy (OLL) Land Use Strategy, which recommended the creation of 378 new protected areas on Crown lands in Ontario. Although seven years have elapsed, 66 of these sites remain unprotected, in large part due to conflicts about mining tenure. MNR advised in an Information Notice posted to the Environmental Registry in May 2005 that a consensus had been developed on a proposed approach for 55 of 66 sites where disentanglement remained at issue. The government has proposed disentanglement strategies for the 11 remaining sites.

In a progress report to the ECO in March 2006, MNR advised that land use planning has been initiated at 15 sites in 2005-2006, and all these sites were subject to Registry notices. The balance of the sites (26) where land use planning is required will be dealt with in subsequent years. Another 25 sites are proposed as "status quo," retaining the existing Forest Reserve land use designation until mining tenure lapses, then regulating the area for protection. As of July 2006, MNR reports that 54 of the 66 sites have been legally established as provincial parks or conservation reserves.

## Managing Water Taking Data

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In our 2004/2005 report, the ECO reviewed amendments to the Water Taking and Transfer Regulation (O.Reg. 387/04) under which MOE issues permits to take water (PTTWs). Emphasizing the importance of accurate data on water takings to support the province's water management activities, we urged MOE to actively manage PTTW data: to make it readily available for MOE's own activities and for the broader water protection community; to audit reported water use volumes, maintain an up-to-date database, and ensure accurate geo-referencing of permits; and to develop methods for water budgeting for activities such as agricultural irrigation which do not require PTTWs.

MOE responded (page 217 of the ECO's 2004/2005 annual report) that it is "developing a system to manage data to be reported by permit holders beginning in 2006. These data will be available to support PTTW decisions and other water management activities such as water budgeting." The ECO asked MOE for an update on the status of this data management system, and has been informed that MOE developed an internet-based

Water Taking Reporting System for reporting water taking data by permit holders as required by the O.Reg. 387/04. This reporting system is housed on the MOE PTTW Web page and became available to permit holders on March 13, 2006.

MOE also indicated that it is working toward making information on water taking accessible to the public, subject to the *Freedom of Information and Protection of Privacy Act*, in the longer term. No timelines for this initiative were specified.

## Cage Aquaculture

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The ECO requested an update from MNR on the finalization of cage aquaculture policy, and asked whether the policies would ensure use of Environmental Registry notices to consult on cage aquaculture approvals. MNR indicated that it is committed to providing a transparent, streamlined approach to cage aquaculture licence application review and approvals. The ministry also asserted its commitment to appropriate public consultation under the *EBR* and under the *Environmental Assessment Act (EAA)*. The ECO finds the ministry's response on this point ambiguous. It remains unclear whether the ministry plans to address the consultation weaknesses detailed in the ECO's 2004/2005 annual report.

MNR has initiated a project, with the involvement of Fisheries and Oceans Canada, Transport Canada, the Canadian Environmental Assessment Agency, OMAFRA, MOE, and the University of Guelph, to develop a Harmonized Application and Review Guide for Cage Aquaculture in Ontario and an electronic Decision Support Tool. MNR indicated that these two products will clarify the roles and responsibilities of regulatory agencies, identify information requirements and decision criteria, streamline and harmonize the application and review process, and bring transparency and consistency to the decision-making process.

MNR stated that harmonized guidelines would provide clear direction on screening cage aquaculture projects under the Class EA for MNR Resource Stewardship and Facility Development Projects, where applicable. The ministry added that requirements for public and Aboriginal consultation will be identified for all cage aquaculture licence applications, and will meet or exceed those of the Class EA, the *Canadian Environmental Assessment Act* and the *EBR*.

The ministry committed to consulting with the public and First Nations communities on the development of these tools, including a proposal notice on the *EBR*.

The ECO notes that MNR did not commit to finalizing its own Aquaculture on Crown Land policy (FisPp 9.2.2), which was not released in August 2004 when MNR's 10 other policies on aquaculture were finalized. Nor did MNR commit to posting Registry notices for all site-specific cage aquaculture applications and undertaking public consultation under the *EBR*. MNR also did not indicate a timeline for delivering the guide and the Decision Support Tool described above. The ECO urges MNR to finalize its cage aquaculture policy to ensure the protection of Georgian Bay and other public waters.

## Sewer Use Bylaws

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MOE informed the ECO in July 2005 that the ministry was working with municipal representatives to prepare an inventory of existing Best Management Practices (BMPs) and to develop complete BMPs for selected industry sectors that are intended to reduce concentrations/loadings of harmful pollutants discharged into municipal sewers, with a final report expected in 2006. In January 2006, the ECO requested an update on this work, and MOE's expected timeline for producing a sewer use best management practices guide for municipalities.

In March 2006, MOE advised that work was continuing with a team of municipal representatives to develop several sewer use Best Management Practices (BMP) documents for selected industry sectors. An inventory of existing BMPs will be included as part of this review. The resulting documents will focus on reducing concentrations and loadings of targeted harmful pollutants. These documents will be shared by municipalities with the industries that discharge into the municipal sewers. MOE expects to have a series of sector-specific BMPs completed by the end of 2006.

## Sewage Treatment

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In March 2005, MOE informed the ECO that a review of current sewage treatment plant (STP) monitoring data was being carried out to discern their performance as well as the reduction of total loading from the sector to Ontario waterways. In January 2006, the ECO requested an update, asking how the results would be shared with the public.

MOE responded in March 2006 that as part of updating its municipal wastewater policies, MOE had committed to a review of STP monitoring data to assess the performance of STPs relative to the proposed policy. MOE has delayed commencement of this review, as the ministry's proposed policy on municipal wastewater effluent quality cannot yet be finalized and may change, pending the outcome of the Canadian Council of the Ministers of the Environment (CCME) strategy to manage municipal wastewater effluent,

which is currently under development. MOE is an active member of this project, which is anticipated for completion in early 2007. As the review of municipal STP performance is an internal exercise intended to inform the development of policy, and is not related to *EBR* requests, there are no plans to share the results of the review with the public.

In March 2005, MOE informed the ECO that additional sampling would be undertaken in 2005 for harmful pollutants in effluents of STPs. In January 2006, the ECO requested an update on the outcome of this sampling work, and asked how the results will be shared with the public. In March 2006, MOE responded that the sampling program for harmful pollutants in effluents of municipal sewage treatment plants ran from October 2004 to the end of 2005, and laboratory analyses will be completed by the end of fall 2006. The results of the study will contribute to the revision of the current policies for municipal wastewater discharges. The revision of current policies will also consider the outcomes of the CCME municipal wastewater effluent strategy as it relates to harmful pollutants. As the sampling program for harmful pollutants relates to an *EBR* request regarding treatment of landfill leachate and harmful pollutants, it is anticipated that sharing of results with the public would be done through the *EBR*.

In December 2004, as a result of an application for review, MOE agreed to examine the adequacy of Pollution Prevention Control Plans for the cities of Toronto, Hamilton, St. Catharines and Kingston, as well as the use of voluntary versus mandatory measures for these municipalities with respect to meeting the objectives of Procedure F-5-5, Determination of Treatment Requirements for Municipal and Private Combined and Partially Separated Sewer Systems. MOE anticipated that this work would be completed by the end of 2005. In January 2006, the ECO requested an update on the progress of this work and a copy of the resulting report, once completed.

In March 2006, MOE responded that the ministry had completed reviewing the implementation of Procedure F-5-5, and would be meeting with the municipalities and other stakeholders over the next few months to discuss the findings. The ECO will be included in these discussions.

## Land Application of Septage

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MOE reconfirmed in March 2005 that “the ministry is committed to end the land application of untreated septage.” In January 2006 the ECO requested an update on timelines for a phase-out, and on the progress to develop standards for treatment of septage destined for land application.

In March 2006, MOE replied that the government remains committed to taking action by 2007 to end the practice of spreading untreated septage. But the ministry cautioned that there must be capacity to treat the septage, and that capacity does not currently exist in Ontario. MOE is working to develop science-based septage treatment standards and to promote and expand septage treatment capacity. A team of technical staff from MOE and the Ministry of Agriculture, Food and Rural Affairs is working to develop standards for lime (alkaline) stabilization, composting and lagoon treatment. As a part of standards development, the ministry is working with stakeholders in pilots and studies that include the following:

- The ministry retained the Ontario Rural Wastewater Centre (ORWC) and XCG Consultants Ltd. to demonstrate and train Ontario septage haulers on cost-effective approaches to alkaline stabilize and screen septage prior to land application. A report was prepared with input from OASIS (Ontario Association for Sewage Industry Services) and was posted on the ORWC Web site in December 2005. The link is: <http://www.orwc.uoguelph.ca/ENGLISH/researchE.htm>.
- A study with the Municipality of West Grey, the District of Muskoka and members of OASIS examines septage composting and lagoon treatment. This study will compile field operational information and experience from U.S. and Canadian jurisdictions on the design, operation and costs of septage composting and lagoon treatment. The study is expected to be completed in late summer of 2006.
- Under the March 1, 2005, Provincial Policy Statement, the government has ensured that new building lots that will be serviced by septic or holding tanks will be permitted only if the capacity to treat their septage exists within the municipality.
- As a first step toward ending the land application of treated septage, Regulation 347 (RRO 1990) was amended to prohibit the land application of untreated portable toilet waste as of October 30, 2003.

## Double-Crested Cormorants

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In 2005, the ECO asked MNR to provide an update on the development of a provincial cormorant management policy to guide future decisions on local management issues at Presqu'île Provincial Park and other locations in Ontario. In a March 2006 update, MNR informed the ECO that it plans to undertake consultations in 2006 on a cormorant status report, a management framework, and any proposed management activities. Further, MNR indicated that it is considering cormorant management activities during



2006 for Presqu'île Provincial Park using the Management Strategy for Double-Crested Cormorants, which extends to the end of 2006, as well as the recommendations made by the Cormorant Management Scientific Review Committee. The new strategy for 2007 and beyond will be developed within the context of the management framework.

## Caribou

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The ECO requested an update on MNR's progress in implementing a caribou recovery strategy for Ontario. Woodland caribou are designated as a threatened species in the Species at Risk in Ontario list. MNR advised in March 2006 that it is planning to post an information notice on the Environmental Registry notifying the public of its completion of a recovery strategy for forest-dwelling woodland caribou.

## Invasive Alien Species

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Last year the ECO reported on the problem of invasive alien garden, water garden and aquarium plants as a threat to Ontario's biodiversity. MNR and OMAFRA report that they are addressing the problem by working with the federal government, identifying regulatory gaps and developing a "transition strategy and governance structure for integration and implementation of the national action plans." MNR is working with the Ontario Federation of Anglers and Hunters on a multifaceted outreach program, and with OMAFRA on media productions to bring greater awareness on invasive aquatic alien species. MNR also reports that it is working with the Department of Fisheries and Oceans on a risk assessment of the water garden and aquarium trade pathway for invasive plant species.

## Enforcement of the *Fisheries Act*

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As noted in the past five ECO annual reports, enforcement of s. 36(3) of the *Fisheries Act (FA)* by MOE and MNR was inconsistent between 1999 and 2003, and there were serious problems with implementation of the Fish Habitat Compliance Protocol first published by a multi-advisory group in 1999, and revised in 2004. The protocol clarifies rules and responsibilities for federal and provincial agencies that administer and enforce water laws, regulations and policies. Under the new protocol, DFO and Environment Canada are assigned lead roles in enforcement of the *FA*, with MOE and MNR providing support but not directly enforcing the *FA*. Because of this change in the provincial role, ECO staff have had to advise members of the public that it is no longer possible to file *EBR* investigations of *FA* contraventions even though the *FA* is listed as a prescribed Act in O.Reg. 73/94 under the *EBR*.

MNR recently stated that a revised version of the 2004 protocol will be distributed to affected ministries and agencies in 2006. The implementation of the 2006 protocol “will be reviewed by [the] agencies at the end of 2006, and next steps, including posting on the Registry, will be determined at that time.” However, MNR continues to maintain that the 2004 and 2006 protocols are interim documents and not subject to *EBR* notice and comment procedures, even though hundreds of MOE and MNR staff have been trained on the application of this protocol and thousands of copies of it have been provided to agency staff and the public across Ontario. The notion that the protocol is an “interim” document is at odds with the definition of policy under the *EBR*. In effect, this ongoing four-year saga of protocol revision and application is an abuse of process that has deprived Ontario residents of their rights to comment on a crucial shift in policy and has insulated decision-makers in MOE and MNR from public concern about the evident continuing decline in the protection of fish and aquatic resources that inhabit waters supposedly protected by the *FA*. The ECO continues to urge MNR and MOE to post a proposal notice about the protocol on the Registry as soon as possible.

## Old Growth

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The ECO asked MNR for a response to our 2003/2004 recommendation that MNR develop policies, plans and targets for conserving old growth forests in southern Ontario. MNR confirmed that the Old Growth Policy for Ontario’s Crown Forests does not apply to privately owned forest lands in southern Ontario, but said that the definitions used to support that policy are being used to assist in the identification of old growth conditions in remnant forests in southern Ontario. MNR stated that public agencies such as MNR, MAH, municipalities and various non-government organizations are working together through a variety of cooperative efforts and incentives to assist private forest landowners to adopt sustainable management practices. It appears to the ECO that MNR has no plans to act on the ECO recommendation to develop policies, plans or targets for conserving old growth forests in southern Ontario.

## Environmental Assessment

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The ECO requested an update on the ministry’s response to several recommendations in the 2003/2004 annual report: that MOE ensure that public consultation practices under the *EAA* are consistent with the minimum rights enshrined in the *EBR*, particularly with regard to permits, licenses and approvals; that MOE review the need to amend the *EAA* to expand to two years the statute of limitation for prosecutions; and that MOE address the difficulties faced by members of the public when trying to access

relevant environmental assessment approval documents. The ECO also asked for an update on the status of the ministry's draft EA compliance strategy and its user's guide to the Class EA process. The ECO also requested an update on the ministry's response to the March 2005 recommendations of the Minister's EA Advisory Panel.

MOE told the ECO in March 2006 that it had received a report from the EA Advisory Panel and posted the report on the Environmental Registry for a 90-day comment period, which ended on July 4, 2005. The ministry received comments from a range of interested stakeholders, including municipalities, industry associations and the public. The government is committed to improving the EA process by making it more efficient and transparent. MOE is developing options for moving forward with process improvements based on the Advisory Panel's report, stakeholder submissions, and ongoing discussions with stakeholders. MOE said it is considering the Panel's recommendations regarding the draft EA compliance strategy as it continues work on finalizing the strategy.

Guidance materials for various aspects of the EA program, including stakeholder guidance on Class EAs, will be developed as part of the broad improvements to the EA process. Decisions on these improvements will inform the development of guidance material, and MOE intends to provide stakeholders with opportunities for input in the development process. MOE did not provide a response to the ECO's recommendations.

## Road Salt Release Reduction

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In 2001/2002, the ECO recommended that the Ministry of Transportation explore the establishment of an ecological monitoring program involving vegetation or aquatic organisms near road salt release reduction areas in order to evaluate the impact of reducing road salt releases over time. As of May 2006, the ministry had not established such a program, and stated in a March 2006 report to the ECO: "MTO is reviewing how best to determine changes in the environment in areas where salt use has been reduced." MTO also reported that it has not completed an inventory of areas vulnerable to road salts.

The ministry did report the status of certain measures like ensuring that salt storage facilities are completely covered and the introduction and use of certain types of equipment, e.g., pre-wetting equipment. In 2005, 67 per cent of Ontario's highway maintenance vehicle fleet was equipped to pre-wet road salt, with the long-term goal of 100 per cent. MTO indicated that none of its storage sites have run-off collection systems and that the ministry has not established a long-term objective about installing these systems. The ministry reported using 112,000 litres of a non-chloride-based

de-icing agent on bridge or ramp locations. MTO reported not having a formal written “good housekeeping” policy regarding de-icing material storage. MTO has committed to writing up such a guideline, but has not indicated a timeline for its completion.

## Aggregates Industry Compliance

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The ECO requested an update from the Ministry of Natural Resources regarding the recommendation in the 2003/2004 ECO annual report that “ MNR ensure that the aggregate industry operates in compliance with existing rules, and that the ministry demonstrate to the public that its compliance and enforcement programs for this industry are working effectively.” The ECO also asked for the percentage of aggregate licenses and aggregate permits that were field audited in 2005. MNR advised that it would be pleased to provide this information for fiscal year 2005/2006 in May or June of 2006.

## Progress on Revising the MTO Class EA

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In July 2005, MTO noted that a review of the MTO Class EA process would be timely. In January 2006, the ECO requested an update on the progress of this review, its key objectives, and the type of public consultation to be employed. In March 2006, MTO confirmed it would be conducting a review of the Class EA, and that it intends to respond to the ECO’s past comments on the document and improve its overall EA public consultation process. Staff of MTO and MOE are working cooperatively to assess what changes are needed to the Class EA document and process. MTO will develop a consultation plan after proposed amendments are submitted to MOE.

## The Environmental Standards Project

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In March 2006, the Ministry of Transportation offered an update on the Environmental Standards Project, an initiative that had been reviewed in the ECO’s 2004/2005 annual report. MTO drew attention to five recent proposal notices available on the Environmental Registry:

- Environmental Reference for Highway Design
- Environmental Guide for Wildlife and Transportation in the Oak Ridges Moraine
- Environmental Guide for Noise
- Environmental Guide for Built Heritage and Cultural Heritage Landscapes
- Environmental Guide for Patrol Yard Design

MTO advised that further documents are in preparation, including Environmental Guides for Fish and Fish Habitat, for Contaminated Property Management, and for Erosion and Sediment Control. Work on an Environmental Reference for Contract Preparation and an Environmental Inspectors Field Guide is also under way. MTO staff are hopeful that all documents will be posted and finalized by September 2006. This will be followed by comprehensive training for staff, contractors and consultants, and by the introduction of an Environmental Management System for the ministry.

## Highway Construction Practices

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In July 2005, MTO informed the ECO that an Action Plan had been prepared to respond to the audit of construction practices along Highway 400 (see the ECO's 2004/2005 annual report, page 69), and that the ministry was examining construction practices across the ministry to ensure continued compliance with environmental legislation. In January 2006, the ECO requested an update, including any initiatives to provide environmental training to construction staff and contractors, as well as the status of remediation work along affected properties.

In March 2006, MTO advised that remediation work was undertaken along the 27 km stretch of highway that had been audited. As well, MTO had ensured that construction staff and private sector contract administrators in MTO's Northeastern Region received training, focused on the significance of the environmental protection measures built into construction contracts. Contract requirements were also strictly enforced through increased contact with regulators, including MOE staff. A brochure was produced as a guide to private property owners who are approached by contractors who want to use their property for disposal of excess construction material.

MTO noted that further discussions were under way with MOE about the challenges of constructing roads in muskeg and wetland. MTO explained it has revised its curricula for the training and certification of private sector construction contract administrators, strengthening environmental protection aspects. It is also finalizing the inspection (and remediation if necessary) of one remaining property.

(For ministry comments, see page(s) 222.)

## Cooperation from Ontario Ministries

The Environmental Commissioner of Ontario and staff rely upon cooperation from Ontario ministries to carry out the mandate of the ECO. We are in frequent contact with staff of the prescribed ministries and agencies with requests for updates and other information. Clear, prompt responses from ministries allow the ECO to conduct

reviews of the ministries' environmentally significant decisions in an efficient and straightforward manner. Section 58 of the *Environmental Bill of Rights* requires the ECO to include in our annual report to the Ontario Legislature a statement on whether or not prescribed ministries have cooperated on these requests by the ECO for information.

During this reporting period, staff of the prescribed ministries have generally been cooperative in providing information when it is requested. The 13 prescribed ministries and two agencies (the Technical Standards and Safety Authority and the Ontario Realty Corporation) each have one staff person who is designated as an *EBR* coordinator or contact. Most of the day-to-day interaction between the ECO and the ministries occurs via these coordinators, who provide a pivotal role in delivering effective *EBR* implementation. Among other things, these individuals are responsible for coordinating the ECO's access to documents needed for reviewing ministry decisions posted on the Environmental Registry. For the *EBR* coordinators at MOE and MNR, this can be a significant workload, and the ECO is pleased to report that these documents have been provided promptly during the past year.

The ECO makes monthly requests for information from the Ministry of the Environment's *EBR* Office (EBRO) and from the *EBR* coordinators of other ministries when Registry decisions are posted. During this fiscal year, the prescribed ministries were generally very cooperative with the ECO in meeting these monthly requests. Some deficiencies arise from time to time with ministry postings on the Environmental Registry. When brought to the attention of *EBR* coordinators, they are usually dealt with promptly.

Late posting of decision notices on the Registry is discussed in Part 7 of this annual report. On occasion, the ECO tries to determine reasons behind delays in decision postings. For example, the ECO made inquiries in November 2005 and on several subsequent occasions about the status of a decision notice on the *Environmental Enforcement Statute Law Amendment Act* (Bill 133), which was passed into law in June 2005. No responses were received. In February 2006, the ECO also requested that MOE consider providing a copy of the set of comments made on the draft law, or a summary of the comments in advance of the posting of the decision notice so that the ECO could commence its review work. Following an inquiry in early March 2006, MOE advised in mid-March that the documents in the MOE approvals office were close to being approved. However, MOE did not forward the comments on Bill 133 to the ECO until early May 2006, and still had not posted a decision notice as of May 29th, 2006. The ECO finds this delay in posting a decision notice to be unreasonable and MOE's failure to respond to ECO inquiries on Bill 133 to be uncooperative.

Several ministries have cooperated with the ECO in providing opportunities for information exchange and dialogue on various current issues during the year. Subsequent to the ECO's expressing concern about the pace of progress on resolving beach pollution issues on the Huron shoreline, MOE staff provided two briefing sessions with the ECO, updating us on recent research directions. MTO staff also arranged a briefing session for the ECO on issues related to environmental standards and policy. Staff from the Ontario Realty Corporation also updated ECO staff on planned revisions to the ORC Class EA.

MNR staff also visited the ECO on several occasions. Staff of MNR's Lands and Waters Branch and Northwestern Region met with ECO staff to clarify permitting requirements for Crown land use under the ministry's Free Use Policy. On two occasions MNR senior staff provided progress briefings concerning the Great Lakes Charter Annex and Agreements (see pages 14-19 for details). MNR was also very helpful in providing further details on the proposed lake trout strategy (see article on pages 48-50). Staff followed up very promptly on requests for information about lake trout assessment, providing details on a pilot State of the Resource lake trout lake monitoring study.

# Part 8 Financial Statement



Office of the Auditor General of Ontario  
Bureau du vérificateur général de l'Ontario

## *Auditor's Report*

To the Environmental Commissioner

I have audited the statement of expenditure of the Office of the Environmental Commissioner for the year ended March 31, 2006. As described in note 2, this financial statement has been prepared to comply with the reporting requirements of the Office of the Assembly under the *Legislative Assembly Act*. This financial statement is the responsibility of the Office's management. My responsibility is to express an opinion on this financial statement based on my audit.

I conducted my audit in accordance with Canadian generally accepted auditing standards. Those standards require that I plan and perform an audit to obtain reasonable assurance whether the financial statement is free of material misstatement. An audit includes examining, on a test basis, evidence supporting the amounts and disclosures in the financial statement. An audit also includes assessing the accounting principles used and significant estimates made by management, as well as evaluating the overall financial statement presentation.

In my opinion, this financial statement presents fairly, in all material respects, the expenditures of the Office of the Environmental Commissioner for the year ended March 31, 2006, in accordance with the accounting policies described in note 2 to the financial statement.

The statement of expenditure, which has not been, and was not intended to be, prepared in accordance with Canadian generally accepting accounting principles, is solely to meet the reporting requirements of the Office of the Assembly under the *Legislative Assembly Act*. This financial statement is not intended to be and should not be used for any other purpose.

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Toronto, Ontario  
July 24, 2006

Gary R. Peall, CA  
Deputy Auditor General



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**Office of the Environmental Commissioner****Statement of Expenditure****For the Year Ended March 31, 2006**

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	<b>2006</b>	<b>2005</b>
	\$	\$
Salaries and wages	1,142,240	1,161,663
Employee benefits (Note 4)	240,809	197,926
Transportation and communication	72,982	83,313
Services	518,683	530,492
Supplies	34,249	56,110
	<u>2,008,963</u>	<u>2,029,504</u>

See accompanying notes to financial statement.

Approved:

  
Environmental Commissioner**Public Sector Salary Disclosure Act****Environmental Commission****Employees paid \$100,000 or more in 2005**

<b>Surname</b>	<b>First</b>	<b>Position</b>	<b>Salary Paid</b>	<b>Taxable Benefits</b>
MCRBERT	DAVID	Sr. Policy Analyst/Counsel	\$ 118,461.20	\$ 200.28
MILLER	GORDON	Environmental Commissioner	\$ 131,061.61	\$ 220.70

Prepared under the Public Sector Salary Disclosure Act

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## Office of the Environmental Commissioner

### Notes to Financial Statement

March 31, 2006

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#### 1. Background

The Office of the Environmental Commissioner commenced operation May 30, 1994. The Environmental Commissioner is an independent officer of the Legislative Assembly of Ontario, and promotes the values, goals and purposes of the *Environmental Bill of Rights, 1993 (EBR)* to improve the quality of Ontario's natural environment. The Environmental Commissioner also monitors and reports on the application of the *EBR*, participation in the *EBR*, and reviews government accountability for environmental decision making.

#### 2. Significant Accounting Policies

##### BASES OF ACCOUNTING

The Office follows the basis of accounting adopted for the Office of the Assembly as required by the *Legislative Assembly Act* and accordingly uses a modified cash basis of accounting which allows an additional 30 days to pay for expenditures incurred during the year just ended. This differs from Canadian generally accepted accounting principles in that for example liabilities incurred but unpaid within 30 days of the year end are not recorded until paid, and expenditures for assets such as computers and office furnishings are expensed in the year of acquisition rather than recorded as fixed assets and amortized over their useful lives.

#### 3. Expenditures

Expenditures are paid out of monies appropriated by the Legislative Assembly of Ontario.

Certain administrative services are provided by the Office of the Assembly without charge.

#### 4. Pension Plan

The Office of the Environmental Commissioner provides pension benefits for its permanent employees (and to non-permanent employees who elect to participate) through participation in the Ontario Public Service Pension Plan (PSPF) which is a multiemployer plan established by the Province of Ontario. This plan is accounted for as a defined contribution plan as the Office has insufficient information to apply defined benefit plan accounting to this pension plan. The Office's contribution to the Plan during the year was \$80,536 (2005 – \$77,500) which is included in employee benefits.

The cost of post-retirement non-pension benefits were paid by the Ministry of Government Services and are not included in the statement of expenditure.

#### 5. Lease

The Office has a lease agreement with its landlord for its current premises expiring on February 28, 2013. The minimum lease payments for the remaining term of the lease are as follows:

	\$
2006/07	184,000
2007/08	187,000
2008/09	219,400
2009/10	219,400
2010/11	219,400
2011/12	219,400
2012/13	201,100
	<u>1,449,700</u>

# 2005/2006 ECO Recommendations

## Recommendation 1

The ECO recommends that MOE ensure transparency and a mechanism of public involvement and accountability in the new COA agreement.

*Cleaning Up the Great Lakes – The Canada Ontario Agreement, p. 20*

## Recommendation 2

The ECO recommends that MOE develop a provincial solid waste management strategy that addresses the whole waste stream.

*60% Waste Diversion by 2008 – Pipe Dream or Reality? p. 26*

## Recommendation 3

The ECO recommends that MOE update and enhance its landfill inventory and make it accessible to the public.

*The Environmental Impacts of Ontario's Small and Aging Landfills – Who Is Keeping Track? p. 33*

## Recommendation 4

The ECO recommends that MTO take the lead with MAH 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 the strategy on the Environmental Registry.

*A Sustainable Transportation System for Ontario: MOE and MTO Remove One Roadblock, But Others Remain, p. 44*

## Recommendation 5

To increase transparency and accountability, the ECO recommends that MAH and MOE fully prescribe the *Ontario Building Code Act* and its regulations under the *EBR* for the purposes of commenting on proposals and applying for reviews.

*Adapting to a Changing Climate: Neglecting Our Basic Obligations? p. 59*

## Recommendation 6

The ECO recommends to the Ministry of Culture that the Ontario Heritage Trust become an *EBR*-prescribed agency.

*Amending the Ontario Heritage Act, p. 76*

## Recommendation 7

The ECO recommends that MAH, MTO, MNR and MOE collaborate to develop technical guidance regarding municipal roads in the ORM Plan area and finalize their draft guidance to municipalities regarding natural heritage and water protection.

*Environmental Protection Requirements for Highway Projects: The Oak Ridges Moraine, p. 81*

### **Recommendation 8**

The ECO recommends that MOE support the roll-out of Regulation 419/05 by strengthening its inspection, compliance and enforcement capacity, and by monitoring and reporting on the effectiveness of these reforms over time.

*Updating Ontario's Regulatory Framework for Local Air Quality, p. 89*

### **Recommendation 9**

The ECO recommends that MOE and ENG develop a plan to reduce air emissions, especially emissions of mercury, from Ontario's coal-fired power plants.

*If the coal plants don't close ... p. 101*

### **Recommendation 10**

The ECO recommends that MOE expand the range of capped emitters and restrict emissions trading to within that group only.

*Ontario's Industry Emissions Trading System for Nitrogen Oxides and Sulphur Dioxide, p. 96*

### **Recommendation 11**

The ECO recommends that MOH and MOE prescribe under the *EBR* portions of the *Health Protection and Promotion Act* pertaining to small drinking water systems, to ensure the appropriate level of transparency and public consultation.

*Smaller Drinking Water Systems: An Interim Solution, p. 106*

### **Recommendation 12**

The ECO recommends that the Ontario government move quickly to prescribe the Ministry of Education and that the government consider making the ministry subject to a broader range of *EBR* rights than those recommended by MOE in October 2005.

*Prescribing Education: Critical to Future Sustainability, p. 123*

### **Recommendation 13**

The ECO recommends 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.

*Needed: Big Picture Planning for the Northern Boreal, p. 134*

### **Recommendation 14**

The ECO recommends that MNR engage in a formal and transparent review of its zoo-licensing policies, posting a proposal on the Environmental Registry for public comment.

*Wildlife in Captivity: The Licensing of Ontario's Zoos, p. 150*



# Appendix A Ministry Comments

## Managing Great Lakes Waters

**MNR:** MNR is pleased with the Environmental Commissioner's report on managing the Great Lakes waters and shares the view that the Annex Agreement's ultimate success will be measured by its implementation. Ontario is pursuing a collaborative approach to implementation – provincially, regionally, with the federal government, Ontario First Nations and stakeholders (the Annex Advisory Panel). MNR is coordinating implementation with key ministries (MOE and MIA) through an inter-ministerial Steering Committee and supporting Work Groups on water conservation, information and science, and legislative and regulatory changes. Annex implementation will benefit from other related water initiatives (e.g., Permit to Take Water, *Clean Water Act*, Great Lakes Water Quality renegotiation). Ontario will build on recent Permit to Take Water program enhancements and other sector specific initiatives that promote conservation (e.g. the Canada-Ontario Environmental Farm Plan Program). Information and science commitments will be achieved through strengthened commitment to the Canada-Ontario Water Use and Supply Project, regional collaboration (e.g., Great Lakes Commission, International Association of Great Lakes Research), and progress on other water initiatives in the province including water use reporting (PTTW), and technical studies supporting source protection planning (water budgets). Ontario will provide regional leadership as Vice Chair of the Regional Body in 2006 and Chair in 2007. Recognizing the limitation of a good-faith Agreement, we are pleased the U.S. will implement through a binding Compact. Ontario and Quebec will make Agreement provisions binding through amendments to domestic law.

## Cleaning Up the Great Lakes: COA

**MOE:** There are 11 Goals and 26 Results supported by 181 commitments listed in the Agreement. These commitments represent the responsibilities or actions that the Parties will undertake to achieve the Goals and Results. The 2002 COA ends in March 2007 and a full public report back will be completed at that time. The public are directly involved in COA activities in a number of ways including participation in Area of Concern/Remedial Action Plan implementation committees, Lake Management

Plan working groups and as partners in Great Lakes initiatives. As part of the \$50 million 2002 COA funding envelope (MOE and MNR funding), Ontario invested \$14.2 million in 2005/2006 and has budgeted \$3.4 million for 2006/2007 to directly support its COA commitments.

**MNR:** MNR worked with over 260 partners to implement more than 400 projects to make significant progress on all of its 52 COA commitments. MNR, through COA, funded projects to conserve biodiversity, restore fish and wildlife beneficial uses, and gain new knowledge about the ecological health of the Great Lakes Basin. MNR partnership projects, newsletters, hosted events, and participation in state of the lake conferences where opportunities to report publicly. Detailed MNR work plans exist that describe project deliverables, funding and progress made. Interagency work plans report on performance measures. MNR, informed by the *Invasive Alien Species Strategy for Canada*, directed COA funding to raising awareness, control, monitoring and research about the impacts of aquatic invasive species.

#### *Protecting Drinking Water Sources: The Clean Water Act*

**MOE:** The Ministry allocates resources for many priorities including air, waste and water, with significant resources being dedicated to source water protection. Conservation Authorities and municipalities have a role in source protection planning, municipalities will have a lead role in the implementation of source protection, other implementation responsibilities will be allocated to the province, property owners and the public. The proposed legislation will ensure that the greatest protection of municipal drinking water prevails. Non-municipal wells are not subject to the proposed CWA though the draft Act provides the ability for municipalities to identify private systems for equivalent protection at the discretion of the municipality. The Act will provide additional protection for regional aquifers and groundwater recharge areas, many of which serve non-municipal wells. The CWA will not apply outside of municipal and conservation authority boundaries. Discussions are on-going to engage First Nations in source protection on a voluntary basis. Existing conditions arising from historical land uses will be addressed in the Assessment Report. MOE is in the process of developing methodology and guidance to manage cumulative impacts and historical land uses.

**MNR:** The Ministry of Natural Resources continues to provide on-going support to the MOE-led source protection program through a Memorandum of Agreement with Conservation Ontario and Conservation Authorities which enhances capacity for the CAs for technical studies on a watershed basis. MNR will continue to support MOE in the development of legislation, regulations and technical guidelines.

#### *60% Waste Diversion by 2008 – Pipe Dream or Reality?*

**MOE:** Increasing waste diversion is a key priority of the government. We are taking steps to divert as much waste as possible from disposal. Specific initiatives being pursued include: opening the door for innovative waste management solutions by improving the approvals process for pilot and demonstration facilities; pushing for a review of the national packaging protocol which is now more than 15 years old; expanding diversion programs for household hazardous waste; and expanding the scope of recyclable materials and streamlining the approvals process for certain recycling facilities. On June 9, 2006 we announced that regulations had been passed allowing Plasco Trail Road Inc. to proceed with a 2-year pilot project for an innovative new energy-from-waste technology in the Ottawa area. Also on June 9, 2006, we announced that a draft regulation had been posted on the Environmental Registry to begin the process of having Waste Diversion Ontario (WDO) develop a new initiative for managing household hazardous and special waste. A second new program that we will be moving forward on involves electronic equipment such as computers, printers and cell phones. MOE is also conducting focused compliance inspections in the Industrial, Commercial and Institutional sectors to determine their level of compliance with the recycling regulations. These inspections are supported by planned compliance inspections for this and other sectors. Our strategy is to work cooperatively with municipalities and industry to increase waste diversion and address Ontario's waste disposal needs. Many municipalities are already putting in place new household organics programs and through inspections and working with industry, we will ensure they do their part. All of these initiatives will help to increase waste diversion and reduce the dependence on landfills.

### The Environmental Impacts of Ontario's Small and Aging Landfills – Who is Keeping Track?

**MOE:** Annual reports, where required by Cs of A, provide ministry staff with adequate and timely information supporting effective determination of regulatory compliance at landfills. Compliance is measured against C of A conditions, regulated requirements under Regulation 347, RRO 1990 and O.Reg. 232/98 and the general provisions under the *EPA* and *OWRA*. The 1991 inventory provides a record of all sites and their status at the time of the inventory (1990). Changes to landfill sites, i.e. new sites, site closures, expansions, remediation, etc. require approval under the *EPA*. These tools provide the framework for monitoring and regulating landfill sites. MOE inspects landfills as part of its annual risk-based inspection program based on risks to human health and the environment. Selection criteria for inspections include the district staff informed judgment of local landfills and compliance history. Where non-compliance is found MOE takes appropriate abatement action. MOE's sources of information on landfills are the Waste Disposal Site Inventory (WDSI) and the C of A database. While these tools are available to MOE staff for inspection and compliance purposes, they are not in a form easily accessible to the public. MOE maintains a database on landfill capacities of the 26 largest sites in Ontario. MOE will provide this information to the ECO. To update the 1991 landfill inventory would take significant resources. As the ministry has access to this information it needs to monitor and regulate landfill sites, these resources are better spent on other environmental priorities. MOE systematically updates landfill Cs of A through the Protocols for Updating Certificates of Approval for Waste Management, and the field alert program enables field staff to proactively identify outdated or problematic certificates which are then updated.

### Ontario's Sand and Gravel Extraction Policy: Overdue for Review

**MNR:** The Ministry of Natural Resources (MNR) is continuing to make improvements to the aggregate resources program:

- Aggregate inspectors have been given strong direction to verify that rehabilitation complies with the *Aggregate Resources Act (ARA)* during inspections, review of site plans, or audits of extraction operations. The recently finalized Policies and Procedures for the Administration of the ARA manual (*EBR* Registry Number: PB05E6006) provides clear direction to Aggregate Inspectors and industry regarding the importance of progressive rehabilitation and the need to consider the suitability and compatibility of rehabilitation with the surrounding landscape.
- Aggregate Inspectors have been provided with an additional enforcement tool as a result of amendments made to the *Aggregate Resources Act* under Bill 190, *Good Government Act, 2006*. An inspector now has the authority to issue an order (under section 63 of the ARA) directing compliance with a provision of the Act or the regulations that is being contravened and, where a pit or quarry is being operated without a license, an order may be made requiring that operations cease.
- MNR has also recently implemented a new compliance leadership model that will improve how MNR carries out compliance activities and realigns enforcement services. Changes to be implemented include: (1) establishing an integrated "Compliance Steering Committee"; and (2) the development of an improved framework to support risk-based compliance planning. Better risk assessment will ensure enforcement resources are focused and in support of MNR's strategic priorities. The issuance of a Subsection 48 (2) Rehabilitation Order has been found to be the most efficient and cost-effective tool to obtain compliance with rehabilitation requirements. MNR has made significant efforts to rectify this problem and for the three year period 2003-2005, have issued 69 rehabilitation orders.

### A Sustainable Transportation System for Ontario: MOE and MTO Remove One Roadblock, But Others Remain

**MTO:** MTO follows the provisions of the *EAA* in effectively engaging the public on all transportation initiatives. An enhanced public consultation process has been implemented to ensure that the public has ample opportunity to participate as transportation projects move forward. This process involves holding several Public Information Centres, assembling municipal and community advisory groups

and working on community values plan with local citizens. This model will be incorporated into all our Individual EA projects. MTO is developing a formal provincial-federal protocol to address the air quality and climate change impacts of major provincial transportation planning projects. This will commit MTO to a high standard in environmental stewardship with respect to air quality and greenhouse gas emissions. The ministry has taken a number of steps to reduce provincial greenhouse gas emissions. As part of our broader transportation strategy, we are investing \$1.4 billion in gas tax funding over 5 years to support municipal public transit. This has already resulted in an increase in transit ridership and the reduction of cars on the road. MTO welcomes the opportunity to work with the ECO to further explore opportunities in this area.

#### Lake Trout Management

**MNR:** MNR recognizes the importance of accounting for the variability in life history characteristics of locally adapted lake trout populations. We have invested significant resources in research and assessment of lake trout populations to ensure our policy direction is based on the best science available. The distribution, characteristics and status of Ontario lake trout lakes has been regularly updated (Martin and Olver 1976; MNR Lake Trout Community Synthesis 1990; Gunn *et al.* 2004; and MNR 2005). MNR is confident that the proposed regulatory guidelines will strike a balance between the need for a more consistent approach across a broader landscape with options to address biological and environmental variability.

**MOE:** The ministry is currently amending the *Lakeshore Capacity Assessment Handbook* to incorporate the new MNR-derived dissolved oxygen criterion for the protection of lake trout habitat into its guidance (the decision was posted on the Environmental Registry in May 2006). These revisions are anticipated to be completed by the fall of 2006. The document will be posted on the Registry for public comment.

#### Neglecting our Water Wells

**MOE:** *Disinfection* – Regulation 903 details requirements for well construction, maintenance, abandonment and disinfection procedures. MOE continues its consideration of the advice provided by the Council. *Lack of Guidance* – The Well Aware Program provides outreach and education to private well owners regarding best management practices and well stewardship. A manual is planned, in collaboration with key stakeholders for the regulated community. Information can be found on the MOE's website or hotline. *Enforcement* – Pending the result of a review, MOE continues with a complaint-driven compliance model. *Environmental Monitoring* – MOE has hired a licensed company to install equipment into Provincial Groundwater Monitoring Network wells and has provided funding to CAs to hire licensed well technicians where required to provide services including water sample collection. *Promises Without Action* – Regulatory amendments or clarification will be determined after further consideration of input from stakeholders. Guidance materials recommend testing frequently for home owners and well owners are encouraged to take their samples to the local MOHLT Lab for free testing.

#### Acquiring Land/Saving Nature

**MNR:** MNR maintains involvement in land securement for natural heritage and biodiversity protection by supporting partnership programs. These programs (EHJV, Parks, Greenlands, Land Trust partnership) are now grouped under one land securement framework to ensure landscape level strategic planning and implementation. MNR has approved \$4.38 million in expenditures for 2006/07, and is planning for approximately \$5 million annually thereafter. Through partnerships, MNR successfully leverages provincial funding at a minimum of 1:1, and often at 1:3, which enhances the overall acquisition funding.

**MCL:** The Natural Spaces Land Stewardship and Acquisition Program was created through funding provided to the Ontario Heritage Trust (OHT) in March 2005 by MNR. Budget enhancements to NSLASP are dependent upon MNR's annual allocations and decisions about land acquisition and stewardship delivery options. NSLASP is one of a number of delivery mechanisms for land acquisition and stewardship. For example, MNR has provided funds for land acquisition to the Ontario Land Trust Alliance.



### Brownfield Development Becomes More Transparent

**MOE:** This government is committed to brownfields redevelopment and ensuring continued public transparency and involvement in brownfields. MOE has developed a plain language technical guidance document entitled "Procedures for the Use of Risk Assessment under Part XV.1 of the *Environmental Protection Act*". This document is a plain language guide which details the process for conducting site-specific risk assessments and provides best practices for fulfilling the regulatory requirements with respect to conducting both the human health and ecological components of a risk assessment for contaminated properties. In June 2006, the Ministry posted an information notice on the Environmental Registry informing the public of the availability of this technical guidance document.

**MTO:** The ministry carefully assessed all remedial options. The option selected allowed for effective remediation, was responsible use of taxpayer dollars and is consistent with provincial brownfields guidelines. MTO will retain ownership until the natural bioremediation process is complete. Since no off-property migration of impacts is occurring, MTO is confident its approach is responsible and prudent. The Ministry continues to proactively carry out semi-annual ground water monitoring at this site to assess contaminant concentrations in ground water and to ensure that off-property migration of impacts is not occurring.

### Adapting to a Changing Climate – Neglecting Our Obligations?

**MNR:** MNR notes that many natural resource management projects and programs can no longer be based on the assumption of a stable climate. New management tools and techniques that account for past, current, and future climatic conditions require development and implementation. Accordingly, MNR will evaluate policies and standards (e.g., design standards) in order to identify changes that may be required to adapt to the impacts of climate change. Adaptive management tools and techniques will help MNR care for natural resources and help protect life and property in a world with rapid climate change. MNR subscribes to a comprehensive approach to managing for climate change under the auspices of a strategic plan comprised of three primary and related objectives: 1) Understand climate change. 2) Mitigate the impacts of climate change. 3) Help Ontarians adapt to climate change. MNR will continue to complete project and program strategic needs assessments in support of these primary objectives.

**MOE:** MOE takes an integrated approach to clean air and climate change because these issues are closely interrelated. Climate change involves both mitigation and adaptation. Addressing these issues crosses many ministries' mandates. MOE works with ministries and external organizations to identify the known and potential impacts of climate change on the natural and built environments. The Ontario government is also taking action to effectively adapt to climate change in areas such as emergency preparedness, forest seed management and planting strategies, and the use of more adaptive crop seeds. MMAH is proposing changes to the Building Code to increase the energy efficiency requirements for buildings and recognize the use of green building technologies, which will better deal with heat stress and precipitation drainage. The Ontario government has provided support to key programs including the Ontario Region of the Canadian Climate Impacts and Adaptation Research Network (C-CIARN), the Coastal Zone Climate Change and Adaptation workshops (focusing on the Great Lakes), and Pollution Probe's Primer Series on climate change and other policy issues. Ontario and Quebec have signed an agreement to work together to find solutions to air quality and environmental issues in Eastern Canada. We are pleased that the Environmental Commissioner recognizes the considerable work done by MOE and MNR on education and outreach on climate change and adaptation.

### Conserving Ontario's Biodiversity: Moving Forward?

**MNR:** Protecting what sustains us...Ontario's Biodiversity Strategy" establishes two goals: protect the genetic, species and ecosystem diversity of Ontario; use and develop the biological assets of Ontario sustainably, capturing benefits from such use for Ontarians. These goals are consistent with the

United Nations Convention on Biological Diversity and Canadian Biodiversity Strategy. The OBS was developed in an open, inclusive and transparent process involving many Ontarians and organizations. Implementation will require the same level of involvement, recognizing that governments alone cannot do all that is necessary to conserve biodiversity. Since its release, significant progress on OBS actions has included: passing the *Provincial Parks and Conservation Reserves Act*, launching the *Endangered Species Act (ESA)* review and implementing the Natural Spaces program. In 2005/06, over 70 teams were working on species at risk recovery plans, 3 species were regulated under the *ESA* and 60 partners worked together to prevent the spread of aquatic invasive species.

#### Provincial Strategy for Wolves

**MNR:** MNR supports ecological sustainability as a key objective for wolf conservation. The realization of associated ecological, social, cultural and economic benefits is premised on a sustainable population. An ecological and adaptive approach to protection and sustainable use of biological resources is central to MNR's strategic direction in *Our Sustainable Future* and commitment to Ontario's Biodiversity Strategy. Harvest levels, as regulated under the current management regime are considered sustainable. Implementation of the strategy will enhance the ability to take additional conservation steps should they become necessary in the future. Current implementation activities include information gathering, monitoring, and research.

#### Amending the *Ontario Heritage Act*

**MNR:** The multi-year partnership arrangement with the Ontario Heritage Trust under the Natural Spaces program recognizes the long-standing role and expertise of the OHT in acquiring and managing natural heritage properties. The OHT is a provincial agency that holds title to many properties along the Niagara Escarpment, as well as most properties acquired for the Bruce Trail. MNR is working with the OHT and focusing on acquiring ecologically significant properties throughout southern Ontario. The OHT administered fund is available to conservation groups through an application process. The Ministry will continue to work with OHT to ensure for complementary programming with other Ministry securement partnerships. In 2005, the Ministry refocused spending on land securement, and developed a Consolidated Land Securement Framework for future coordination and administration of land securement initiatives. Under this Framework, the Ministry of Natural Resources intends on continuing to play a strategic and leadership role in securement of ecologically significant land in partnership with conservation agencies in Ontario.

**MCL:** The OHT has a Natural Heritage Program with a long history of protecting our province's natural heritage. The OHT holds more than 140 natural heritage properties in trust on behalf of the Crown for the people of Ontario. OHT is delivering the Natural Spaces Land Acquisition and Stewardship Program in partnership with MNR as a component of MNR's Natural Spaces Program. Properties with high ecological significance receive priority consideration. We understand that MNR plans to meet its Minister's commitment to post details of the new program for acquisition and conservation of ecologically significant lands by posting its new Land Securement Program Framework on the Registry as soon as it is available.

#### Conservation Land Tax Incentive Program

**MNR:** MNR appreciates the support of the ECO for its natural heritage protection programs such as the Conservation Land Tax Incentive Program, and the ECO's recognition of the difficulties inherent in its implementation. MNR shares the ECO's position that natural spaces are deserving of protection, and that the CLTIP is a cost-effective and worthy program to encourage protection by private landowners. MNR also supports the good stewardship of Ontario's forests through its Managed Forest Tax Incentive Program.

#### Environmental Protection Requirements for Highway Projects: the Oak Ridges Moraine

**MTO:** The MTO Environmental Standards Project is not the forum for setting new policy or for changing existing ones. Rather, it seeks to establish a comprehensive set of documents to provide

guidance on what environmental requirements apply to MTO, how they apply, and to provide tools (best practices for impact assessment, mitigation, etc.) for the practitioner to use to comply with the requirements. These guidelines have been fully endorsed by the regulatory agencies that are responsible for the applicable legislation. Section 41 of the ORMCP allows transportation within the ORM, subject to provisions therein. MTO has prepared a new draft chapter within *Environmental Reference for Design* that will flesh out ORMCP provisions open to interpretation (to be posted on the EBR Registry in July 2006). Under the ORM Plan, policies for general development and site alteration do not apply to transportation facilities. Rather, a separate set of policies (s. 41) has been set for transportation. MTO will comply with the ORM Plan policies for transportation and will build upon these in the Environmental Standards documents. Through the fully open EA public consultation process, MTO will demonstrate project need, justify alternatives, and show how all the applicable ORM Plan requirements will be met before the project can proceed. Failure to demonstrate may result in projects not being approved or being 'bumped up' to an individual environmental assessment. MTO guidance documents prepared under the Environmental Standards Project are fully usable for regional and local roads.

#### Pretreatment of Hazardous Waste

**MOE:** A thorough and significant level of public consultation was necessary for this program due to its complexity, and to ensure that the MOE developed a regulation appropriate to Ontario's waste management and regulatory infrastructure. The phase-in of the regulatory changes between 2005 and 2009 provides time for the regulated community to prepare for the new requirements and allows the waste management industry time to respond to Ontario's increased demand for treatment capacity. The phase-in period also provides generators the opportunity to develop changes to their business that will promote waste reduction and recycling.

#### Updating Ontario's Regulatory Framework for Local Air Quality

**MOE:** MOE carried out extensive consultation to update the regulatory framework to protect local air quality. The risk-based process for site specific alternative standards will help the development and implementation of new or updated air standards proceed more quickly. There is currently no mechanism in place to fund local stakeholder participation. A protocol with Public Health Units has been developed to share information about exceedances of health-based limits. The MOE is committed to a process to review standards. In June 2006, the ministry posted on the Environmental Registry consultation documents on air standards for 15 more substances. The issue of background concentrations will require more stakeholder consultation. Persistent or bio accumulative contaminants were considered in how the priority sectors were chosen in Regulation 419. The phase-in periods in the regulation will help to manage both external and internal resource demands. From a compliance and enforcement perspective, much of the resource impact will be realized as the newer compliance points under the regulation are phased in beginning in 2010, with the largest numbers of facilities being affected by the new modeling requirements between 2013 to 2020. MOE will continue to examine resource needs as part of the normal resource-planning process. The ministry is pursuing the modernization of its approvals and inspections programs on the basis of risk. By introducing new mechanisms to increase the accountability of lower risk operations, the ministry will be able to better focus on operations posing the greatest environmental risk. Modernization will level the playing field and eliminate costly approvals delays to industry, while simultaneously broadening protection of the environment and public interest.

#### Ontario's Industry Emissions Trading System for Nitrogen Oxides and Sulphur Dioxide

**MOE:** Allowing uncapped sectors to participate in the trading program will help accelerate NO<sub>x</sub>/SO<sub>2</sub> emission reductions in the airshed and at a lower economic cost. O.Reg. 194/05 will, by 2015, lead to a 21% reduction in NO<sub>x</sub> from 1990 levels and a 46% reduction in SO<sub>2</sub> from 1994 levels for capped industries. All facilities capped under O.Reg. 194/05 are required to meet the Point of Impingement

standards (for NO<sub>x</sub> and SO<sub>2</sub>) of O. Reg 419/05: Air Pollution – Local Air Quality. Ontario continues to explore further NO<sub>x</sub> and SO<sub>2</sub> reduction opportunities. Ontario supports the federal government in its efforts to regulate off-road emissions. Most of the major users of heavy oil were captured under the Industry Emission Reduction Plan, as indicated in the August 2005 *EBR* decision notice (PA02E0031).

### Bill 133: Putting the Lid on Spills

**MOE:** The ministry received 160 comments on Bill 133. The ministry is planning to post the decision notice on Bill 133 in the summer 2006, at the same time the ministry posts the draft regulations to support the implementation of Bill 133. *Update on Regulation Development* – Since the fall, 2005, the ministry has been working with stakeholders on the development of draft regulations to support Bill 133. This included: posting a Stakeholder Consultation Paper – Developing Environmental Penalties in Ontario on the *Environmental Bill of Rights* Registry for a 52-day comment period, closing on January 1, 2006; holding regional consultation sessions in Toronto, Sarnia and Sudbury to receive input on the consultation paper; and establishing a stakeholder working group to assist with the development of draft regulations.

### Smaller Drinking Water Systems: An Interim Solution

**MOHLTC:** MOHLTC is planning to use the Environmental Registry to consult on the proposed regulatory framework for the new program for small drinking-water systems under MOHLTC and public health units. MOHLTC is also engaged in discussions with MOE regarding the prescription of appropriate portions of the *Health Protection and Promotion Act* under the *EBR*. Inspection staff capacity, inspection protocols, training and technical expertise and information management systems are critical components of the proposed new program under MOHLTC and health units which is under development. MOHLTC and MOE are working together to ensure that information about small drinking water systems will be included in the Chief Drinking Water Inspector's Annual Report.

**MOE:** O.Reg. 252/05 adheres to the intent of Justice O'Connor's fundamental test of whether protection is adequate – that a reasonable and informed person would feel safe drinking the water. The intent of the Advisory Council recommendations was achieved by transferring authority from the *Safe Drinking Water Act (SDWA)* to the *Health Protection and Promotion Act (HPPA)*, as this is the legislation under which Public Health Units operate. Given the timing of the Advisory Council's report, O.Reg. 252/05 needed to be expedited to align with treatment requirements for O.Reg. 170/03. MOE and MOHLTC have developed a risk based site-specific approach for the legislative oversight of these systems under the *HPPA* to ensure that drinking water systems provide potable water. Concerns over adequate implementation capacity will be addressed through proposed regulatory requirements under the *HPPA*. The Chief Drinking Water Inspector's Annual Report will contain information on the *SDWA* and *HPPA*.

### Amending the Nutrient Management Regulation

**OMAFRA:** The recent regulatory changes included a requirement for Nutrient Management Plans (NMP) and Strategies (NMS) to be prepared by a certified individual and be kept on-farm for compliance purposes. Certified individuals must be trained and knowledgeable in the principles of nutrient management planning, NMAN software, the content of the regulation and compliance requirements. Recent changes to the regulation increase the number of farms that require approved NMS (expanding farms < 300 nutrient units > 5 nutrient units.) The recent regulatory changes allowed farmers the flexibility to use software other than NMAN, but it is stipulated that any alternative software must be equivalent to NMAN and include the requirements under the Nutrient Management regulation. As a result, NMAN is part of the mandatory regulatory training. The delivery of the Nutrient Management program includes on-farm audits by ministry personnel, and producers are required to keep records to be made available upon request. Plans (NMPs) and Strategies (NMSs) must be updated annually and maintained on-farm if there is a change in farm operation. With respect to the non-application of the *EBR* notice and comment process to instruments issued by MOE and OMAFRA

under the NMA, MOE recognizes the concerns that the farm community has expressed with regard to the *EBR* and potential access by the public to personal and proprietary information through the posting of instruments, such as NMSs and NMPs, or instrument-related information. Therefore these instruments will not be prescribed under the *EBR*.

#### Regulating Logging in Algonquin Park

**MNR:** The *Algonquin Forestry Authority Act (AFAA)* enables the creation of the Algonquin Forestry Authority (AFA) as a Crown agency. The *AFAA* establishes the AFA's governance structures, administration, financial reporting and auditing requirements. The *Act* does not give the Algonquin Forestry Authority (AFA) the legal authority to harvest timber in Algonquin Park. The AFA's legal authority to harvest timber is a Forest Resource Licence (FRL) issued under the *Crown Forest Sustainability Act*. The content of the FRL is determined by the Park Management Plan and the Forest Management Plan. The FRL is issued every five years following public consultation and approval of the updated Forest Management Plan. Both the *Crown Forest Sustainability Act* and the *Provincial Parks Act* are prescribed legislation. MNR intends to prescribe the new parks legislation upon proclamation. The Algonquin Park Management Plan, which permits commercial forestry as a land use, and the Forest Management Plan incorporate extensive opportunities for public consultation in the planning processes and postings on the Environmental Registry.

#### Prescribing MTO: More Scrutiny of Ontario's Planes, Trains and Automobiles

**MTO:** MTO will continue to work with MOE to effectively respond to the 2 applications that have been received and to implement the provisions of Part IV, *EBR*.

#### Needed: Big Picture Planning for the Northern Boreal

**MNR:** The Northern Boreal Initiative, which directs community-based land use planning, applies to a small portion of Ontario's far north (approximately 15%), just above MNR's northern limit of commercial forestry. Community-based land use planning is a comprehensive land use planning process that positions First Nations to take a leading role in land use planning, with an important objective of fostering sustainable economic opportunities in forestry and conservation. Through a community-based land use planning process, planning takes place at a local level, but utilizes a landscape-scale approach to ensure that achievements are measured appropriately and that impacts beyond the planning area are adequately considered. The Ontario government is committed to ensuring development proceeds in a way that seeks to balance economic, social, cultural and environmental interests. Considering lessons learned from the Northern Boreal Initiative, MNR, in cooperation with other ministries, will continue to explore potential approaches to land use planning in Ontario's far north.

#### MOE Neglects Obligations, Delays Actions on Ozone Depleting Substances

**MOE:** The *EBR* Application for Investigation was filed approximately seven months after the incident. The application was assessed, taking into consideration the environmental consequences and the likelihood of finding suitable evidence after the intervening time. It was determined that this matter would be most effectively dealt with by a planned comprehensive inspection of the facility in question under this year's inspection program. The Ministry has completed the stakeholder consultation on the stewardship of Ozone Depleting Substances (ODSs) referred to in the March 2003 posting on the Environmental Registry. On June 27, 2006, the Ministry posted a new proposal for public consultation. MOE continues to enforce violations of O.Reg. 89/94 (Refrigerants) where appropriate. One prosecution is presently before the courts.

#### The Aggregate Resources Act: Conservation ... or Unconstrained Consumption?

**MNR:** Close to market aggregate extraction is a Provincial policy which results in significant reductions in traffic congestion, highway maintenance, air emissions and the cost of construction material. MNR is committed to ensuring that the development of aggregate resources balances diverse environmental, social and economic interests. MNR remains committed to working with stakeholders

to develop a long-term strategic approach that improves the Aggregate Resources Program and promotes better rehabilitation of pit and quarry sites. MNR's review under the *EBR* of the *Aggregate Resources Act* with respect to rehabilitating land from which aggregate has been excavated is on-going.

#### Sewage Bypasses at the City of Kingston

**MOE:** The 1992 Pollution Control Plan (PCP) focused on beach closures and pollution along Kingston's water front. Seven combined sewer overflow tanks (CSO) and upgrades to two pumping stations were completed. This has resulted in no further closures of Richardson's Beach, a major objective. Since the 2000 PCP revisions, two major CSO tanks, an upgrade to a major sewer trunk, and the Cataraqui River force main crossing have been completed. There have been no sewage bypass events since the new CSO tanks were completed in 2006. Further planned projects include two major pumping stations and a new secondary sewage treatment plant. The city consults with the public through the Municipal Class Environmental Assessment (MEA) process and has issued press releases, posted notices for public participation and provided progress reports on its website. As per the *EBR*, consultation during the MEA process is considered more comprehensive than posting on the Environmental Registry. MOE uses voluntary and/or mandatory abatement tools to achieve the desired compliance outcome. The city confirmed with the ministry a series of commitments including the implementation schedule, the requirement for progress reports, and the measures to be taken when a sewage bypass occurs. MOE continues to ensure matters relating to public notice, monitoring and reporting, and screening of sewage bypass flows are addressed. The city is committed to posting sewage bypass information on its website.

#### Wildlife in Captivity

**MNR:** Animal Welfare in Ontario is governed by a number of inter-related policies, programs and agencies focused on the well-being of all animals in Ontario. The *FWCA (1999)* implemented a policy decision to minimize human and wildlife health risks associated with the escape or intentional release of captive animals into the wild, the removal of native wildlife from the wild, the commercialization of native wildlife, and ensuring a minimum standard of care for native wildlife in captivity. Zoo licenses are issued under the *FWCA* for persons keeping native wildlife for public education, conservation or science. The legislation provides for conditions of care to be added to the license to ensure wildlife are adequately cared for. Zoo licensees can be refused or revoked if/when necessary. Should policy changes related to zoos be contemplated, the ministry will conduct public and stakeholder consultations.

#### MOE Reviews Rules for Sewage Haulers ... Outside the *EBR*

**MOE:** MOE always strives to provide notice of its decision whether or not to carry out a review within 60 days of receiving the application under the *EBR*. MOE's changes to the system Certificates of Approval (Cs of A) for septage haulers was not prompted by the *EBR* application to review the definitions of "transfer" and "transfer station" under Regulation 347. MOE consulted with the association of septage haulers on a number of their concerns including the administrative burden of the approvals process. Given more detailed information on their activities including truck-to-truck transfer, the ministry determined that system Cs of A could apply to these activities and the approval conditions ensure that there would be protection of the environment.

#### Instruments

**MOE:** Dofasco Approvals – 5.9 of the *EPA* states that an approval must be obtained prior to installation and operation. MOE deals with companies operating without approval by initiating appropriate abatement action. Approvals use site-specific emissions limits for each facility that ensure CWS are met. The CWS for PM and Ozone are ambient air quality standards. Therefore, they cannot be used in Cs of A, which rely on Point of Impingement standards to control emissions from point sources.

## Quality of Information

**MNR:** In the last eight years, MNR has posted five (of fifteen) proposals for new legislation or amendments allowing for public comment at or near first reading, including: *New Recreation Reserve Act*; public input used to formulate the *Kawartha Highlands Signature Site Park Act*; amendments to the *Lakes and Rivers Improvement Act*; *Government Efficiency Act* (Bill 57); amendments to four MNR statutes; and two *Red Tape Reduction Acts*. As MNR proceeds with future legislation proposals we will continue to provide opportunities for public comment both at the proposal and first reading stages of the legislative process.

**MTR:** The Ministry of Tourism strongly supports the work of the Environmental Commissioner of Ontario and will continue to ensure compliance with the Environmental Bill of Rights. Although stakeholder consultations were held prior to the "Ontario Trails Strategy" posting and the period for public comment was extended past the minimum 30 days, we recognize that there is always an opportunity to review and to improve upon "best practices."

### **Poor Use of the Environmental Registry: Ontario Trails Strategy – Ministry of Health Promotion:**

The Ministry of Health Promotion is committed to working with the office of the Environmental Commissioner of Ontario to ensure that any future ministry notices on the Environmental Registry provide sufficient detail to inform citizens of ministry proposals.

## Unposted decisions

**Public Consultation & Forest Management Policies – MNR:** The PFTC discussed ways to expedite guide updates, not circumvent public consultation. The views expressed were those of committee members, not MNR staff. The osprey guide revised using the proposed expedited approach was posted on the *EBR* for public review (*EBR* #PB05E4802). MNR uses training material and interpretation notes to explain policy, not revise existing policy or set new policy direction. Their content is within the bounds and direction set out in the original policy documents.

**Recovery Strategies for Endangered Species – MNR:** Legal responsibility for preparation of recovery strategies under *SARA* rests with the federal government. Ontario is working with the federal responsible agencies.

## Information Notices

**Use of Indicators in Forest Management – MNR:** Messages delivered during training sessions and in interpretation notes or expressed verbally as advice or guidance is used to explain policy, not revise existing policy or set new policy direction.

**Ontario CWD Surveillance and Response Plan – MNR:** The *EBR* Information Notice indicated that any policy changes would be subject to consultation. The decision to address CWD through an emergency management response process reflects the ministry's intent to address risks through the development of appropriate policies.

**Water Management Plans – MNR:** The intent of water management planning for new waterpower facilities will be met by the planning process of the *Environmental Assessment Act*, and WMPs will not be classified as instruments.

## Keeping the *EBR* in Synch

**Delays in prescribing laws under the *EBR* – MMAH:** MMAH posted its proposal for prescribing the *Greenbelt Act, 2005* for the *EBR* on the Registry on Tuesday, July 18, 2005. The Ministry has been upholding the spirit and intent of the *EBR* by committing to voluntarily post information notices for public comment, for certain decisions under the *ORMCA*.

## Ministry Responses to Past ECO Comments & Recommendations

**Removing Barriers to Conservation – ORC (Ontario Realty Corporation):** ORC continues to work with private-sector landlords to cut energy use in leased space. When performing new lease searches, ORC considers energy efficiency as criteria when rating prospective proponents.

**Oak Ridges Moraine Implementation – MNR:** MNR is currently working with MAH in the development of a monitoring and performance measure framework for the Greenbelt Plan, the Oak Ridges Moraine, and the Niagara Escarpment Plan.

**The Greenbelt Act , 2005 and Greenbelt Plan – MNR:** MNR has prepared draft technical guides to assist in implementing the Plan. Guides will be posted on the Registry in the summer of 2006.

**Managing Water Taking Data – MOE:** The Water Taking and Transfer Regulation, requires all permit holders to report their daily water taking volume to MOE on an annual basis. Monitoring and reporting under O.Reg. 387/04 is being phased in over three years. The first complete set of reported data from all permit holders is expected by March 31, 2008, when all three phases of permit holders report. MOE is currently resolving issues related to protection of privacy of permit holders with respect to allowing the public to view their water taking data and/or data summaries. **MNR:** The implementation of the Water Taking Reporting System is an important step forward in being able to quantify water takings by source.

**Cage Aquaculture – MNR:** MNR is committed to the development of the Harmonized Application and Review Guide for Cage Aquaculture Sites in Ontario, which will meet or exceed the consultation requirements of the Class EA, the CEAA, and the EBR.

**Land Application of Septage – MOE:** MOE remains committed to taking action to end the practice of spreading untreated septage. MOE will continue to investigate other technologies to treat septage and to assist municipalities to identify septage management options.

**Double-Crested Cormorants - MNR:** MNR's current policy approach was posted to the Environmental Registry as a proposal notice on May 21, 1997, and the decision notice was posted on November 20, 1998. The current policy approach states that "the control of cormorants should only be considered in specific local areas if the birds are found to be having significant negative ecological impacts on habitats or other species."

**Caribou – MNR:** A draft recovery strategy for Forest-dwelling Woodland Caribou in Ontario has been prepared by a provincial Recovery Team. The draft strategy is scheduled for posting on the Public Registry as an Information Notice in July, 2006. Comments received during the 60-day comment period will be considered by the Recovery Team in preparing a final recovery strategy.

**Enforcement of the Fisheries Act – MNR:** Ontario residents can request investigations of alleged *Fisheries Act* contraventions through the Federal Commissioner of the Environment and Sustainable Development. Changes to the 2004 interim Fish Habitat Compliance Protocol have not been finalized pending on-going discussions with the federal government. In the meantime, under the 2004 interim protocol, the federal government continues to take a lead role in enforcing habitat provisions of the *Fisheries Act* while provincial resource management agencies provide a support role. **MOE:** Federal departments administer the *Fisheries Act* and MOE will continue in a supporting role.

**Road Salt Release Reduction – MTO:** MTO has completed a study of ecological monitoring opportunities for salt management initiatives. MTO Priorities for 2006/2007 include: updated salt management training; implementing salt pre-wetting in 100% of the fleet and other initiatives.

**Aggregates Industry Compliance – MNR:** MNR is making improvements to the aggregate resources program by providing Aggregate Inspectors with a new enforcement tool and strong policy direction with respect to rehabilitation, and through the implementation of a new compliance leadership model that will improve how MNR carries out compliance activities and realigns enforcement services. MNR audited 12% of licensed sites for fiscal year 2005-06.



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