

Regulatory Modernization Act BIG BROTHER IS WATCHING

The Regulatory Modernization Act, 2007 (RMA) came in like a lamb in mid-January 2008. It has far reaching consequences for the regulated community. Once regulations are in place, Ontario's government regulators and enforcers can share compliance and complaint-related information. Government ministries may also publish information on compliance and convictions against regulated companies on the Internet. Past convictions, even those dated before the RMA, will be used by the courts to increase fines for new convictions. Beware: what your employees say to a Ministry of Labour inspector can also end up in the file of an MOE inspector. Companies with multiple points of contact with regulators should consider adapting their contact policies and training accordingly. One step is to appoint and train one individual at each facility to manage contacts with all provincial regulators.

What a Ministry inspector doesn't discover during a sanctioned visit through the front gate, he might be able to finagle from another agency when he gets back to the office. That's because Ontario's new *Regulatory Modernization Act, 2007* will allow staff from 15 Ministries to share information and observations "likely to be relevant" to

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the enforcement or administration of a long list of acts and regulations.

The Act, proclaimed in force on January 17, 2008, will have little impact until the regulations come into force later this year.

The list of 15 ministries includes MOE, MOL and MNR. The list of almost 600 acts and regulations includes the EPA, OWRA, CWA, OHSA, *Mining Act* and *Aggregate Resources Act*.

Ministers can authorize staff to

- ◆ collect, use and disclose information about compliance and complaints
- ◆ publish compliance and complaint information about a company, (including information collected before the RMA came into effect)
- ◆ assemble inter-ministry field teams that could allow officers from one ministry to collect information for others during an inspection or audit.

Information sharing between agencies would not be so unsettling if every ministry followed the same investigative rules. But they don't. A provincial officer from the MOE has broad powers to access a site, ask questions and collect data on compliance and abatement. However, as soon as an officer begins to investigate an offence, he or she must obtain consent, or prepare a case and apply to the court for a search warrant or an investigative order.

Brownfields Regulation Ontario Cedes Control of "Qualified Persons" to Engineers and Geoscientists

As of October 1, 2009, MOE has ceded control over who is a QP to regulated professional engineer and geoscientist organizations. Current QPs who are agrologists or technologists will no longer be QPs unless they get temporary or limited licenses or memberships. Some changes took effect on April 1, 2008.

Also, the regulation now authorizes the MOE to use the *Environmental Site Registry (ESR)* to provide information to the public about *Qualified Persons*.

The following changes to Ontario's Records of Site Condition Regulation are being phased in:

Effective April 1, 2008:

1. Holders of limited engineering licences and limited geoscientist memberships will now be eligible as QPs.
2. MOE can post QP information on the ESR.

Effective October 1, 2009:

The only persons entitled to act as QPs for Phase One or Phase Two ESAs and RSCs will be:

1. Professional engineers or those who obtain temporary or limited engineering licenses under the *Professional Engineers Act*; and
2. Registered geoscientists (under *Professional Geoscientists Act, 2000*) who are practising, limited or temporary members of the Association of Professional Geoscientists of Ontario.

An "end-run" could be challenged in court as a violation of the *Charter* and an abuse of process. Success in court would be small comfort for the unlucky defendant stuck being the "test case."

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The RMA permits more than just sharing of data. Ministries can form teams to target repeat offenders, and ministers can publish consolidated information about an organization's complaints and compliance record. Previous convictions for provincial offences under an unrelated law, including those occurring before RMA came into force, will be considered as factors to increase fines and penalties under environmental laws.

All of this means that plant personnel should be careful about what they divulge voluntarily to any inspector, and what they leave in plain view. From now on, all inspections should be considered multi-ministry inspections. Companies should be aware that regulators can share compliance data for approval or reporting purposes. Freedom of information confidentiality provisions should be invoked where applicable.

With the enforcement of some 85 statutes and almost 600 regulations loosely tied together under the Act, most businesses will be challenged to recognize the gaps in their compliance with each. Consider designating a single individual at each facility to serve as the compliance coordinator for all provincial regulatory contacts.

Every inspection should be considered a multi-ministry inspection

“A person who is lawfully present in a place in the exercise of powers or performance of duties under an Act or regulation and who makes an observation, visual or otherwise, that is likely to be relevant to the administration or enforcement of another Act or regulation may record the observation and disclose it to a person who administers or enforces the other Act or regulation.”

Regulatory Modernization Act, 2007 s. 9(1)

For legal advice on the *Regulatory Modernization Act*, call W+SEL Environmental Law Specialist Doug Petrie at 416-862-4835.

Ottawa stays the course on its greenhouse gas plans

Despite protests from Ontario and Quebec, the federal government intends to stick more or less to its Turning the Corner plan for reducing greenhouse gas (GHG) emissions released in April 2007. This means Ottawa remains committed to reducing “emissions intensity”, rather than absolute emission reductions. The government claims that this will result in a 20% absolute reduction from 2006 by 2020. Provinces that set more stringent plans will be offered equivalency agreements; the federal plan, if it is ever implemented, would establish the minimum national standard.

Some observers say that this federal plan will be irrelevant. Provinces are establishing more stringent local standards, or joining regional alliances. For example, B.C. and Manitoba have joined the Western Climate Initiative that now includes 7 western U.S. states including California, Washington and Oregon.

On March 10, 2008, Ottawa disclosed some more details about its proposed regulatory framework in three key areas. Mandatory carbon capture and storage requirements will apply to oil sands upgraders and coal plants, but only to those that start operation in or after 2012. (Most observers believe that the technology will not be ready by then.) The construction of new “dirty coal plants” would be banned. And Ottawa will establish a clean electricity task force to work with provinces and industry to find an additional 25 Mt reduction by 2020.

Each prescribed industrial sector – from the oil industry to chemical companies, from smelters to pulp and paper mills – will be required to reduce its emissions intensity from 2006 levels by 18% by 2010, with 2% reductions every year after that. The plan would also establish a market price for carbon, and provide alternative mechanisms to allow regulated industries to meet their

emissions targets. These include contributions to a clean technology fund, domestic emissions trading and offsets, and access to the UN's Clean Development Mechanism. Early Action Credits will be allocated among regulated companies for GHG reductions achieved from 1992 to 2006.

The latest plan is short on operational details. The government proposes to publish draft GHG intensity reduction regulations for consultation this fall (2008). Additional air pollutants will be added once the regulatory framework has been finalized. The final regulations are intended to take effect in 2010. This is a slower timeframe than anticipated by the emissions trading industry.

Ontario enforcement first EP upstaged

On March 3, 2007, the Ontario Ministry of the Environment issued its first-ever Environmental Penalty under the province's Bill 133 “you-spill, you-pay” legislation. EPs are financial penalties ordered by MOE, with no need for trial. CGC Inc. of Hagersville was ordered to pay \$9,000 for failing to prevent runoff from its gypsum processing plant into a tributary of the Grand River. Although the fine was modest, the EPA and OWRA authorize EPs of up to \$100,000 per day. The EP regulations, which came into force in August 2007, apply to the 148 facilities that are part of the nine industrial sectors regulated by the Municipal-Industrial Strategy for Abatement (MISA) regulations.

The CGC EP was upstaged by a trial verdict on March 6, 2008. Three corporate officers were jailed and four companies were fined a total of \$1.7 million (plus a 25% victim surcharge) under the EPA. The convictions were for causing or permitting an adverse effect. Specifically, the adverse effect was from smoke and odour generated by a week-long fire at a solid waste transfer site in Vaughan in October 2004.

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