

ENVIRONMENTAL LAW

KYOTO IF NECESSARY, BUT NOT NECESSARILY KYOTO

After months of speculation, the federal government has released a few more hints about its oft-touted, but still unreleased “made-in-Canada” approach to addressing global climate change. While the Prime Minister praises the voluntary Asia-Pacific Partnership on Clean Development and Climate, Environment Minister Rona Ambrose insists we have to “explore new options with open minds.” As chair of the Conference of Parties (CoP) drafting the next stage of the UN Framework Convention on Climate Change, Ambrose is reportedly pushing for less-stringent targets and looser deadlines. Canada is also threatening to pull out of the supplementary Kyoto agreement unless it wins the support of the U.S., China, India and other major polluters.

To date, the federal plan has largely entailed denigrating the effectiveness of previous Liberal policies — policies that had fallen some 195 Mt short of

In this issue ...

- ◆ Ottawa is slow to unveil plans to counter global warming.
- ◆ Ontario drafts new reg. and code of practice to speed EA approvals.
- ◆ NBA and AMO issue proposals to limit civil liability and promote redevelopment of brownfields.
- ◆ Ontario proposes new standards for 15 air pollutants, amendments to O. Reg. 419/05.

achieving Canada’s GHG reduction targets — and scrapping plans to buy international carbon credits to make up the shortfall. “We will not send Canadian taxpayers’ dollars overseas to buy credits,” said Minister Ambrose in mid-May. “These are billions of dollars that can be invested in Canada to help reduce pollution and greenhouse gases.” Ottawa has committed to coordinate a national renewable fuels strategy to promote ethanol production, and to allow commuters to claim tax deductions for monthly transit passes.

The Conservatives’ first budget killed EnerGuide for Homes, a widely-praised and practical program of energy conservation retrofits. The government also nixed funding for construction of additional high tension power lines, promised by the previous government. These lines would have allowed Ontario to replace some of its coal-fired power with clean hydro-electricity from Manitoba and Quebec.

Minister Ambrose has pledged to get tough on “real” air pollutants with a new *Canadian Clean Air Act*. In the meantime, the Minister is pushing for a two-year ‘timeout’ on Kyoto to let us assess what’s working and what’s not. Only then would we “decide whether or not we can make further [Kyoto] commitments.”

ONTARIO MOVES TO “IMPROVE” EA PROCESS FOR MAJOR INFRASTRUCTURE PROJECTS

Ontario’s Ministry of the Environment has announced its intention to amend the province’s controversial environmental assessment (EA) process. This is a big step forward. The announcement sounds particularly promising for Ontario’s waste disposal problems. According to the Minister changes won’t likely take effect for six to 18 months. Given the significant drafting and public consultation required, 18 months seems more likely.

The MOE does not intend to amend the EA Act but does plan new regulations and guidance documents.

According to Environment Minister Laurel Broten, the changes are intended to save both “time and money in the planning of energy, transit and waste initiatives.” MOE says that the planned reforms will,

1. streamline the approvals process for transit projects;
2. reduce opportunities for appeals by delegating decisions on bump-ups and elevation requests [it is unclear to us how delegation of decision making could reduce rather than increase appeals];
3. consolidate activities such as consultation for multiple approvals;
4. integrate the EA process with planning processes under other provincial legislation to reduce duplication, especially for energy, transit and waste initiatives; and
5. improve government approvals timelines.

(Continued on page 2)

www.willmsshier.com

Spill and Emergency Cell No.
(416) 802-0711

4 King Street West, Suite 900
Toronto, Ontario, M5H 1B6
Tel: 416 863-0711 Fax: 416 863-1938

EDITOR: Barry N. Spiegel
Email: bspiegel@willmsshier.com



(Ontario moves, continued from page 1)

Over the years, there have been plenty of complaints registered about Ontario's environmental assessment (EA) process. It's too costly. It takes too long. It's overly complex and duplicates other planning requirements. It provides too many ways to slow down or even kill important projects.

There have also been plenty of recommendations on how to fix the process. The most recent was the multi-stakeholder advisory panel that tabled its report last March (2005). The new reforms are based in part on the panel's recommendations. The MOE says that they will "make it easier to navigate and enable major infrastructure projects ... to proceed more quickly."

The MOE intends to promulgate a new waste regulation under the *Environmental Assessment Act* to standardize the EA process based on the type, size and environmental impact of projects. It will also publish a new Code of Practice to improve the guidance provided to both proponents and the public on the regulatory requirements and the Ministry's expectations under the Act.

There are few firm details available on the promised changes. The draft waste regulation will be circulated to industry and municipal stakeholders for discussion this summer and MOE plans to post it on the Environmental Registry for public comment sometime this fall. MOE is still working on the Code of Practice, and it won't be available for general review until the fall.

A Ministry spokesperson calls EA a "proponent-driven process" and says the new Code will work to "eliminate confusion and false starts," and help the public contribute to the EA process in a more meaningful way. To this end, the Ministry is drafting "clear, consistent standards and principles so that EAs are complete and correct."

STAKEHOLDERS URGE GOVERNMENT TO LIMIT BROWNFIELDS LIABILITY

There are three major impediments blocking the development of brownfield properties, according to the Brownfields

Task Force established by Ontario's Ministry of Municipal Affairs and Housing. First, there is a lack of funding and resources. Second, there is a lack of knowledge and training, especially among municipal and other public officials in charge of brownfields development. And most importantly, there are serious concerns about financial and civil liability.

"Owners of contaminated land don't want to sell if it means they divest themselves of the property, but not the liability," says John Willms, senior partner of Willms & Shier Environmental Lawyers. "Owners are reluctant to sell when they retain regulatory and civil liability. Developers are afraid to buy without some limit on potential third party liabilities. And some municipalities, wary of lawsuits, are overly cautious in signing off on their requirements."

To answer some of these concerns, the Ontario Chapter of the National Brownfields Association (NBA) has proposed a Regulatory and Civil Liability Management Framework to promote the responsible reuse and redevelopment of brownfields in Ontario.

The NBA says that the *Environmental Protection Act* should be amended to provide liability protection for non-polluting owners against the off-site migration of historic contaminants from the time they acquire a property. This would significantly increase the interest in redevelopment and play a critical role in liability management.

To facilitate the sale of contaminated property, the NBA asks the Province to recognize any contractual allocation of regulatory and civil liability to a *bona fide* arms length purchaser, as long as the contracting parties file adequate financial assurances and insurance with public officials.

The NBA also calls for the termination of civil liability after a clearly defined period in order to provide certainty and closure to all of the key parties involved in brownfield redevelopment. Ten years after the filing of a Record of Site Condition, the property owner would be immune from civil claims. Claimants would apply for compensation to a proposed Brownfield Liability Insurance Fund.

AMO proposes limits on liability

In its recent position paper, *What Has Been Achieved, What Remains to be Done*, the Association of Municipalities of Ontario (AMO) presented 73 recommendations to overcome the legal, regulatory, technical, administrative and financial barriers to brownfields redevelopment.

AMO called on Ontario to protect municipalities by amending applicable legislation, including the *Building Code Act*, the *Limitations Act*, the *Environmental Protection Act*, the *Negligence Act*, and the *Municipal Act, 2001*. AMO echoed the NBA submission, in asking that the Province consider an annuity or insurance fund to be drawn upon to address future claims.

AMO also stressed the need for greater certainty, and says it is paramount that developers be protected from orders, penalties and prosecutions, for a minimum of 10 years, from the time lands are acquired until any cleanup is completed.

AMO said that once a site is cleaned up, property owners should not be forced to meet ever stricter regulatory standards in the future, so long as the use remains unchanged. Liability must be limited to meeting the standards of the day, and remediation that complied with the statutory provisions of the day should be "grandfathered."

ONTARIO PROPOSES NEW AIR STANDARDS, REGULATION AMENDMENTS

Ontario has posted proposals for new standards for 15 priority air pollutants, along with proposed amendments to the new air pollution regulation O. Reg. 419/05. The proposed amendments would: update air dispersion models and regional met data; introduce receptor-based odour standards and guidelines; clarify opacity reporting rules; provide exemptions for standby generators; and amend other provisions for clarity. MOE is still working on a policy for dealing with odours from mixtures.

Details and links to proposals are in EBR postings RA06E005, RA06E005. Consultation ends September 25.

