

## **Post-Lafarge Update: How will revised SEVs influence day-to-day environmental decision-making in Ontario?**

Following a lengthy review and public consultation period, the Ministry of Environment's Statement of Environmental Values — as well as SEVs for 10 other ministries — were recently updated and revised. The SEV is a formal framework document that directs how a ministry must apply the purposes of the *Environmental Bill of Rights (EBR)*. The need to apply a ministry's SEV in routine environmental decision-making was affirmed in the Lafarge Environmental Review Tribunal (ERT) and Divisional Court decisions and more recently confirmed by the Ontario Court of Appeal (as discussed in our last issue).

New provisions related to energy conservation, aboriginal consultation and the greening of government operations were added to MOE's SEV. In addition to these rather modest revisions, much of the ambiguity has been stripped out of the SEV, making it more likely than ever that environmental factors previously excluded from decisions on instruments will have to be considered in the future. The final SEVs were posted on the Environmental Registry on October 30, 2008.

So where do we go from here? There are no MOE protocols for assessing the cumulative and synergistic effects of a proposal in a systematic way. Over the next 24 months, MOE will work with the Ministry of Natural Resources to develop "the long-term tools, including science, policies and guidelines to support the application of an ecosystem approach, including consideration of cumulative

**The approvals process in Ontario is at a crossroads. Will it be business as usual? Or, in light of the recent Lafarge decision will proponents be forced to assess a much wider range of potential environmental impacts, including cumulative effects? The answer lies in how important a role a ministry's Statement of Environmental Values is expected to play in day-to-day decision-making.**

### **In this issue ...**

- ◆ The fallout from the Lafarge court case continues, with the Ontario Ministry of the Environment contemplating applying its Statement of Environmental Values (SEV) to many of the environmental decisions it makes daily.
- ◆ How will the federal government's preoccupation with the economy and the budget impact its environmental portfolio? Will the push for infrastructure spending tempt it to downsize the EA process? How will it apportion funds for clean drinking water among First Nations communities? And how will it handle imminent discussions on climate change with the new U.S. administration?
- ◆ As Ontario develops a cap-and-trade system for managing greenhouse gases, new reporting requirements proposed by the Western Climate Initiative would tighten reporting thresholds and broaden the GHG generators subject to the provincial plan.



effects, to environmentally significant decision making.” It will also coordinate a comprehensive review of the Province’s existing SEVs.

The MOE had always maintained that its SEV is relevant only in the development or revision of legislation, regulations and policies. The Environmental Review Tribunal disagreed in the Lafarge case. The Tribunal insisted that Ministry staff “consider” additional factors, including the potential cumulative ecological consequences, total loadings and synergistic effects of an undertaking, in accordance with the Ministry’s SEV.

We’ll be watching and reporting on how the ERT will handle the expected flood of “leave to appeal” applications it is sure to receive as a result of the Lafarge decision. Despite its insistence that MOE must “consider” its SEV in the Lafarge case, it is uncertain how the ERT will rule on future appeals. The Tribunal is not bound by precedent, and will assess each appeal on a case-by-case basis.

For its part, the MOE has prepared training materials to support its staff in applying its new SEV and has “reviewed its business process to support a more systematic application of its SEV.” Until the legal dust settles, it appears that the MOE will employ an *ad hoc* approach in order to keep the CofA process moving and expedite those projects currently in the approvals pipeline. Applications for projects to be sited in stressed or compromised airsheds and watersheds could be subject to cumulative effects analysis.

**While the uncertainty has made some proponents nervous, MOE has considerable experience in assessing cumulative impacts. This kind of analysis is already mandatory for large energy generation, waste management and other projects designated under the EA regulations.**

**MOE was drafting its new SEVs long before being blindsided by the Lafarge decision. It will be interesting to see whether their impact on day-to-day decision-making marks the revitalization of the EBR in Ontario.**

## **Feds turns their attention to EA reform, clean water for First Nations, and climate change talks**

Have the Feds decided to revamp the *Environmental Assessment Act* process? According to the *National Post*, a “century-old piece of legislation that frequently stalls construction projects will be among the laws the Conservative government will target for revision as it attempts to infuse billions of dollars into Canada’s lagging economy.” Now that Finance Minister Flaherty has released his budget, the government is expected to “pursue changes to EA laws and other regulations that delay infrastructure projects once they receive funding.”

From the Aboriginal file, the federal Minister of Indian Affairs and Northern Development and the Minister of Health have launched a series of “engagement sessions” on the development of a proposed legislative framework for drinking water and wastewater in First Nation communities.

W+SEL Partner, Juli Abouchar was legal advisor to the Expert Panel that looked in detail at options to ensure safe drinking water on or for First Nations. Key to the success of a legislative water framework will be the extent the framework responds to First Nations’ issues and concerns, and has efficient and adequate funding arrangements. First Nations must feel that the Feds hear and understand their concerns and their spiritual and cultural approach to water. Equally



important will be that the water system infrastructure in all First Nations is fixed and upgraded where needed, and is adequately funded and staffed to operate within compliance. The 2009 Budget included \$165 million for drinking and waste water projects in 18 centres. Mr. Harry Swain, Chair of the Expert Panel, has said that if these funds are in addition to the \$330 million budgeted in 2008, “it would bring reserve water systems up to and beyond those of comparable non-native communities.”

Other ingredients for a successful regulatory framework are accountability and compliance by all parties involved in the delivery of safe drinking water to First Nations communities.

The framework must be binding on all parties including the federal government whose responsibility it is to fund the systems and their operations. The framework must use inspection and enforcement to improve performance rather than to penalise those lacking capacity to perform. Ideally enforcement will incorporate a measure of flexibility to focus on training and continuous improvement. The legal framework should provide for appeals and investigation of complaints. It should build on the current Circuit Rider Training program to develop training and certification, and encourage sharing of information and success stories.

From the “Wishful Thinking” file, the federal government hopes to persuade U.S. President Obama that any new climate accord between Canada and the U.S. should protect the tar sands from tough new emissions regulations in the interests of “U.S. energy security regulations.” According to the *Globe and Mail*, this is part of a proposed package of “common environmental standards and energy-development plans” that go beyond a North American cap-and-trade system for greenhouse-gas emissions. On the harmonization agenda will be goals for using ethanol and other bio-fuels, fuel-efficiency standards for cars, and targets for so-called “low-carbon power plants.”

### **Greenhouse Gas Update: Tighter reporting rules loom for Canadian utilities, manufacturers and other large GHG emitters**

The Western Climate Initiative (WCI) has proposed a greenhouse gas (GHG) reporting mechanism that would, eventually, be used to support and verify a “cap-and-trade” system among WCI members. At the same time, Ontario has asked for public feedback on its on own proposed cap-and-trade system, a system that could be implemented as early as 2010. While the two initiatives are proceeding independently, the Province intends to harmonize and integrate its emissions trading system within the broader WCI program.

Under the WCI program, facilities in 29 designated sectors that emit more than 10,000 tonnes of GHG annually would be required to submit and verify emissions

**Greenhouse generators in provinces or states that have joined the Western Climate Initiative may face stringent new reporting requirements. If adopted, the WCI program would constitute a ten-fold tightening of the reporting threshold and impact thousands of Canadian facilities currently exempt under federal and provincial GHG emissions reporting requirements.**



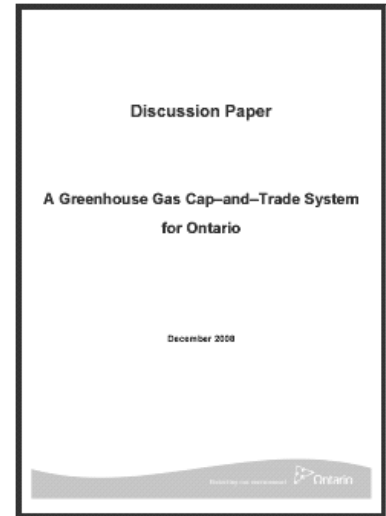
data to the environmental agency in their state, province or territory. Any CO<sub>2</sub> captured for on-site use or storage or for transfer off-site must be included in the emissions total. In addition to direct emitters, the mandatory reporting requirements would also cover electricity importers and fossil fuel suppliers if the electricity generated or fuels combusted would result in GHG emissions that meet or exceed the 10,000 tonne threshold.

To date, the premiers of British Columbia, Manitoba, Ontario and Quebec, as well as seven U.S. governors, have signed on with the WCI to assemble a market-based cap-and-trade system for GHGs. The requirements would need to be incorporated into the regulatory regime of each WCI signatory and would take effect in 2012. Ontario has already indicated it “will seek to harmonize” its GHG requirements with the WCI system when it takes effect.

Data on Canadian GHG emissions is currently being collected nationally under the authority of *CEPA, 1999* and the *Statistics Act*, as well as several provincial programs, including Ontario’s *Airborne Contaminant Discharge Monitoring and Reporting* regulation (O. Reg. 127/01) and Alberta’s *Climate Change and Emissions Management Act*. However, only those facilities emitting more than 100,000 tonnes of GHGs annually are covered under these programs. In 2006, the last year for which national data is available, 343 facilities reported cumulative emissions of 273 megatonnes of GHGs, representing a little over one-third (37%) of the estimated Canadian total emissions.

On June 2, 2008, Ontario and Quebec signed a memorandum of understanding concerning a regional “cap-and-trade” system that would “be based on absolute reductions in emissions and be compatible with systems emerging in North America and the world.” This was followed by the December 10<sup>th</sup> release of a discussion paper, *A Greenhouse Gas Cap-and-Trade System for Ontario*, designed to achieve the province’s Climate Change Action Plan targets. While the initial emphasis would be on large emitters, the trading system would broaden over time to cover more companies to be consistent with the WCI trading system and, eventually, with other large regional and global systems. Similarly, the reporting thresholds proposed in the discussion paper would be ratcheted down in a stepwise manner to match those in the WCI plan.

The province has requested feedback on provisions to cover such tricky details as the distribution of allowances, offsets, credits for early action, banking of credits, and compliance reporting requirements. Stakeholder discussions are expected to last through early 2009, and the system could be implemented as early as January 1, 2010. Additional details on the proposal have been posted on the Ministry of Environment’s Climate Change webpage at [www.ene.gov.on.ca/en/air/climatechange/capAndTrade.php](http://www.ene.gov.on.ca/en/air/climatechange/capAndTrade.php)



**“Ontario has a comprehensive strategy and is pursuing through partnerships such as the Western Climate Initiative the integration into a broad North American cap-and-trade system for greenhouse gases — one that will guarantee reductions in greenhouse gas emissions from these sources. The initial emphasis would be on the large emitters, but the trading system would broaden over time to cover more companies, to facilitate trading among companies at the regional, national and global levels.”**

**— from the Ontario Discussion Paper**

