

In this issue ...

- ◆ Ottawa is modernizing nine of its environmental statutes with a mix of traditional and innovative enforcement provisions to “crack down” on environmental crimes. Fines and other penalties have been increased significantly. Surprisingly, the Government did not include the *Fisheries Act* in its omnibus amendment package. This is surprising because the *Fisheries Act* triggers the preponderance of federal environmental law enforcement activity.
- ◆ Despite industry pleas for an extended phase-in, an Ontario-wide ban on the domestic and commercial use of pesticides for cosmetic purposes goes into effect on Earth Day. The move replaces the patchwork of municipal restrictions and by-laws that have sprouted like weeds over recent years. The provincial scheme is said to be less restrictive than some municipal by-laws. It will be interesting to track usage patterns by the exempted sectors.
- ◆ Ottawa is granting a two-year exemption from federal environmental assessment for some 90% of the infrastructure projects included in its economic stimulus package, Building Canada. The federal Environment Minister may also opt to substitute provincial assessments for those remaining projects that entail potentially significant environmental impacts.
- ◆ W+SEL counsel has helped negotiate an agreement between our client, the Historic Saugeen Métis, and Bruce Power that will ensure the community participates fully in the environmental assessment of the planned expansion of the company’s nuclear facilities.
- ◆ The CCME has launched public consultations on options to streamline environmental assessments for projects that may be subject to both provincial/territorial and federal assessments. A second discussion paper tackles a timely EA concern: the use of regional assessments to address cumulative effects and other ecosystem concerns.
- ◆ Ottawa’s Chemical Management Plan is still on track, releasing its screening assessments of a fifth batch of potentially dangerous compounds. Only two compounds were deemed “toxic”, according to the CEPA 1999 criteria, and the repercussions for Canadian industry should be relatively painless.
- ◆ The Ontario Energy Board has announced a comprehensive and province-wide program to assist low-income energy consumers. The announcement follows last year’s successful Court challenge by the Low-Income Energy Network of the Board’s refusal to institute rate affordability programs.
- ◆ For the 3rd straight year, applications for the import of hazardous wastes and hazardous recyclables into Canada have declined.



The *Environmental Enforcement Act* : Ottawa modernizes federal statutes to get tough on environmental crime

Ottawa is modernizing nine of its environmental statutes, equipping federal officers, prosecutors and judges with a broad array of more effective enforcement tools and hefty deterrents in order to “crack down on polluters, poachers and wildlife smugglers”. Introduced for First Reading on March 4, 2009, The *Environmental Enforcement Act* (Bill C-16) reinforces the Government’s get-tough-on-crime agenda. It raises the maximum fines for the most egregious environmental crimes to \$1 million for individuals and \$6 million for large corporations; and those penalties could be doubled for repeat offenders. In addition, the profits realized or benefits gained by commission of an offence could be added to the final fine. The practical impact of Bill C-16 won’t be clear unless or until there is a track record of increased federal enforcement activity, especially since the Act would not apply to the enforcement of the *Fisheries Act*.

While a number of the new enforcement provisions – such as those related to director and officer liability – have been available in other jurisdictions for some time now, the Bill contains some interesting wrinkles:

- ◆ A public registry would be created to list corporate offenders
- ◆ All fines collected would be credited to an Environmental Damages Fund for use by community groups for environmental restoration or research projects
- ◆ Upon conviction, publically-traded firms could be required to notify shareholders of the offence
- ◆ Courts would be directed to consider certain aggravating factors in sentencing, such as the nature of the damage, whether it was committed intentionally or recklessly, whether the perpetrator stood to benefit financially, and so on

Bill C-16 would amend nine existing statutes that are administered by Environment Canada and the Parks Canada Agency:

- ◆ *Antarctic Environmental Protection Act*
- ◆ *Canada National Marine Conservation Areas Act*
- ◆ *Canada National Parks Act*
- ◆ *Canada Wildlife Act*
- ◆ *Canadian Environmental Protection Act, 1999*
- ◆ *International River Improvements Act*
- ◆ *Migratory Birds Convention Act, 1994*
- ◆ *Saguenay-St. Lawrence Marine Park Act*
- ◆ *Wild Animal and Plant Protection and Regulation of International and Interprovincial Trade Act*

Unfortunately, the federal *Fisheries Act* was left out of the omnibus enforcement package.

Offender		Summary Conviction	Indictment
Individual	Most serious offences	\$5,000 to \$300,000	\$15,000 to \$1 million
	Other offences	Up to \$25,000	Up to \$100,000
Small corporations, ships	Most serious offences	\$25,000 to \$2 million	\$75,000 to \$4 million
	Other offences	Up to \$50,000	Up to \$250,000
Large corporations & ships (over 7,500 tonnes deadweight)	Most serious offences	\$100,000 to \$4 million	\$500,000 to \$6 million
	Other offences	Up to \$250,000	Up to \$500,000



- ◆ The limitation period for government prosecution would be extended from two to five years
- ◆ Upon conviction, the courts would be able to order the cancellation or suspension of certain environmental licenses, permits or authorizations held by an offender

For the first time, mandatory minimum fines – as high as \$1 million for indictable offences committed by reoffending corporations with revenues greater than \$5 million – will apply to certain serious offences. And the traditional due diligence defence will be restricted by the introduction of new monetary penalties for “less serious”, ticketable infractions. In the case of the *Canadian Environmental Protection Act, 1999*, the monetary penalty provisions would only apply to a contravention or failure to comply arising out of any provision of, or regulation issued under, Part 7 (Controlling Pollution and Managing Wastes) or Part 9 (Government Operations and Federal and Aboriginal Land).

“If a corporation that has shareholders is convicted of an offence under this Act, the court shall make an order directing the corporation to notify its shareholders, in the manner and within the time directed by the court, of the facts relating to the commission of the offence and of the details of the punishment imposed.”

-- Proposed section 274.2 to be added to CEPA 1999

Ontario refuses to delay bans on cosmetic use of pesticides

Ontario-wide restrictions on the domestic and commercial use of pesticides for cosmetic purposes take effect, appropriately enough, on Earth Day, April 22, 2009. Pleas by landscape and lawn care companies for a longer phase-in period were rejected by regulators. The province insists that the application of pesticides for purely cosmetic reasons is “an unnecessary risk to our families and pets”. The provincial ban replaces a patchwork of municipal bans and by-laws, establishing “one clear set of rules, which makes it easier for Ontario businesses to follow.” The new General Regulation (O. Reg. 63/09), under the *Pesticides Act, 1990*, was published in the March 21, 2009, issue of *The Ontario Gazette*. It replaces and revokes Ontario Regulation 914.

By the time a 45-day comment period closed last December, the province had received a staggering 3,989 comments on the proposed regulatory provisions designed to implement the *Cosmetic Pesticides Ban Act, 2008*, passed last June. There was a lot of talk about the need for a transparent, scientifically-reputable process for determining which pesticides may continue to be used for domestic and cosmetic purposes. In response, the province has adopted the federal Pest Management Regulatory Agency’s criteria for identifying bio-pesticides and lower risk pesticides. The *Pesticide Classification Guideline for Ontario*, dated February 24, 2009, provides further details of the classification system set out in O. Reg. 63/09, as well as the decision-making framework for classifying the 11 classes of pesticides.

In addition, the lists of products in each class have changed – and will continue to be subject to change – as newly registered products are classified for sale and use in Ontario. At this time, it doesn’t appear that the provincial requirements are less onerous or restrictive than various of the municipal bylaws they were designed to

“Cosmetic” is defined in the *Pesticides Act* as “non-essential”. Sections 17 to 33 of O. Reg. 63/08 outline the exemptions to the ban on cosmetic uses, including agriculture, forestry, uses integral to structural exterminations, uses required under other legislation and golf courses (with conditions). There are also exceptions for specialty turf, specified sports fields, managing natural resources, the promotion of public health or safety, arboriculture and scientific purposes, if certain conditions are met.



supplant. Over 250 products will be banned for sale and more than 80 pesticide ingredients will be banned for cosmetic uses. The list of restricted Class 9 pesticides – posted on the Ministry of Environment website at www.ene.gov.on.ca/en/land/pesticides/index.php – appears to contain all the ingredients previously banned under various municipal by-laws in the province. However, it will take some time to determine whether the various exemptions are working as intended. For example, a golf course is only conditionally exempted from the ban if its integrated pest management (IPM) plan is accredited by an authorized body. However, such a body has not yet been approved by the Ministry and it is likely this requirement will be delayed a year.

Ottawa “streamlines” federal EA oversight of its \$33-billion infrastructure package

Ottawa has moved quickly, and without public debate, to exclude from formal federal environmental assessment (EA) up to 90 percent of the forthcoming infrastructure projects designed to stimulate the Canadian economy over the next two years. The fast track initiative has been expected for some months. It is intended to “streamline the regulatory and environmental approvals process for infrastructure projects to avoid unnecessary overlap and duplication, while continuing to protect the environment.” The move reflects concerns that federal EA isn’t triggered until relatively late in the development process, often not until a provincial assessment has already been completed.

To implement the streamlined EA process, two new regulations under the *Canadian Environmental Assessment Act (CEAA)* were published in the *Canada Gazette Part II* on March 19, 2009. Given the immediacy of the current economic crisis, both regulations came into effect upon registration. Both are scheduled to be repealed March 31, 2011. According to the Government’s regulatory impact analysis, an estimated 2,000 infrastructure projects could be exempted from federal EA over the next two years as a result of the move.

The Regulations Amending the Exclusion List Regulations, 2007 (SOR/2009-88) remove the requirement for a federal EA where projects pose “minimal adverse environmental effects”. It contains an extensive schedule of exempted municipal and community projects and classes of projects to be funded under the Building Canada plan, including:

- ◆ Accommodations, offices and meeting spaces, medical and educational facilities, recreational and sporting centres, cultural and heritage facilities, and parking and maintenance facilities
- ◆ Modifications designed to improve energy efficiency
- ◆ Modifications for the collection, processing, diversion, treatment or disposal of solid waste

“(T)he time required to conduct the environmental assessment will be significantly reduced, by as much as 12 months, by relying on a provincial environmental assessment, while retaining federal decision-making authority on the potential environmental effects of the projects.”

– Regulatory Impact Analysis, *Canada Gazette Part II*, March 19, 2009



- ◆ Potable water treatment and distribution systems (that do not involve dams or reservoirs, or the extraction of groundwater)
- ◆ Municipal wastewater and stormwater projects

As long as certain zoning requirements are met, the list of exemptions also includes the installation of “intelligent transportation” systems, public transit systems, bus rapid transit systems, railways, highway expansions and overpasses, and bridges. The EA exemptions do not apply to certain projects that would be undertaken within 250 metres of an “environmentally sensitive area” or to any proposal sited within the boundaries of a national park, park reserve, national historic site or historic canal. In certain cases, the exemption is limited to projects below a \$10 million total cost threshold. Projects exempted from federal EA will still be subject to applicable municipal, provincial and other federal environmental laws and approvals.

For those remaining projects funded under the Building Canada plan that have not been exempted from the *CEAA*, the Infrastructure Projects Environmental Assessment Adaptation Regulations (SOR/2009-89) will allow the federal Minister of Environment to substitute a provincial process for assessing their environmental effects. However, before opting for provincial assessment, the Minister must be satisfied that any factors that would be assessed under section 16 of the federal Act will be covered, that the public will be given an opportunity to participate in the assessment, and that a final, publically-available report will be submitted. The direct cost savings of streamlining the EA process and reducing the number of assessments is estimated to be \$100 to \$150 million.

Bruce Power & Métis sign engagement protocol

On March 25, 2009, representatives from Bruce Power and the Historic Saugeen Métis signed the Métis Engagement Protocol, the first-of-its-kind in Canada. The agreement will ensure the community participates fully in the environmental assessment of the planned expansion of the company’s nuclear facilities on the eastern shore of Lake Huron.

The Protocol was negotiated and drafted by W+SEL’s Juli Abouchar and Bruce Power counsel over the past six months. It allows the Métis the technical capacity to review the environmental impact assessment of the Bruce Power New Build and take part in the hearings that are expected this fall. Funding provisions will permit the retention of a traditional knowledge consultant to review the effect of the project on the Métis’ interests, rights and way of life. The agreement also covers the costs of a part-time coordinator and legal counsel throughout the review and hearing process. If the hearing is delayed or protracted, the parties can negotiate an extension to the Protocol.

“As we consider expanding our operations, having a strong working relationship with the Historic Saugeen Métis citizens is vital to our future success,” said Brian



Armstrong, Bruce Power’s executive vice president and general counsel. “It’s an agreement that we believe will ensure the community has the capacity and the resources to be fully engaged and participate fully in the process by which our proposal will be considered, assessed and evaluated.”

Since the early 1800s, the Historic Saugeen Métis have traded along the eastern shoreline of Lake Huron, up the Bruce Peninsula, and across to the Killarney region of Lake Huron’s North Shore. The community is committed to working with public and private sector proponents on any project that may have an impact within their traditional territory.

CCME proposes EA reforms to minimize jurisdictional overlap and address cumulative impacts

The Canadian Council of Ministers of the Environment (CCME) has launched public consultations on options to streamline environmental assessments for projects subject to both provincial/territorial and federal assessments. However, a second discussion paper on the need for regional assessments – to address cumulative and broader ecosystem concerns – would add complexity to the EA process. The CCME’s Environmental Assessment Task Group (EATG) believes the two goals are not mutually exclusive. They say their proposed EA reforms will ensure that future decisions are made “in a certain, predictable, efficient and timely fashion, while safeguarding the environment.”

The first paper, *One Project-One Assessment Approach to Environmental Assessment*, proposes a one-window EA mechanism to ensure that “each order of government can make timely decisions on the same body of EA work prepared by project proponents.” This would fit well with recent action by Ottawa to streamline the EA process for economic stimulus projects in the interest of getting ‘shovels in the ground’ as quickly as possible.

The authors insist that a ‘one-window’ approach would not require a transfer of decision-making authority between the parties. However, they concede it would likely involve changes to current EA policies and legislation, at both levels of government, to permit the coordination, delegation or substitution of assessment responsibilities. In most cases, the EA process would continue to be led by the “best placed jurisdiction”, as defined in the “Lead Party” provisions of the *CCME Sub-Agreement on Environmental Assessment*. However, the recommendations would not preclude a joint or coordinated EA model for cases where a project with significant environmental/economic impacts elicits a strong reaction from the general public or First Nations community.

The second paper, *Regional Strategic Environmental Assessment (R-SEA)*, lays out some of the principals and methodological framework for undertaking effective environmental management on a regional, ecosystem or watershed basis. Ideally,

“The traditional approach to environmental assessment in Canada has been to address the symptoms or outcomes of individual project impacts, mitigating them until they are deemed acceptable, rather than also grappling with broader regional environmental change and the cumulative effects on valued ecosystem components.”

– Regional Strategic Environmental Assessment (R-SEA), prepared by Aura Environmental Research and Consulting, Ltd, under contract to the CCME, November 2008



an R-SEA would lay the groundwork for a preferred regional development strategy and environmental management framework that would then be plugged into EAs and other environmental decision-making for individual projects. The authors argue that such a regional approach is a prerequisite to understanding and addressing cumulative environmental effects in a systematic manner. They say the current practice of considering cumulative impacts on a project-by-project basis is “simply not working”.

The working paper proposes that R-SEA could be integrated into a consolidated EA framework and should not impose an additional layer of assessment onto an already cumbersome process. The R-SEA is not intended to be an ‘every day’ appraisal tool, but would be reserved for fairly complex regional planning and decision-making exercises. For example, it might be applied to marine and coastal zone planning, integrated land use planning, urban planning, conservation and protected areas planning, watershed management, or regional energy strategies. The paper and its supporting studies provide some guidance for developing and scoping an R-SEA process.

Ottawa completes assessments for 5th batch of compounds

Health Canada and Environment Canada have released the draft screening assessments and risk management scope documents for 19 chemical substances included in Batch 5 of the Chemicals Management Plan. Only two of the screened compounds were deemed “toxic”: the widely used industrial chemical acrylamide and the plasticizer and flame retardant TCEP. However, it seems the feds are only worried about acrylamide when it arises spontaneously during the cooking of French fries and potato chips; everyone else will get a pass. The announcement did affirm, that despite rumours Ottawa might be going slow on its Chemical Management Plan, the Government “is committed to meeting the five-year timeline ... The original sequence of batches outlined for Challenge substances will be continued and the regular spacing between releases of information will also continue to allow stakeholders enough time to review and analyze the information.”

Energy Board takes LEAP forward on low-income assistance

At the prompting of a coalition of anti-poverty and green power groups, the Ontario Energy Board has announced an assistance program to ensure low-income Ontario residents won't spend next winter shivering in the cold and dark. The OEB's Low-Income Energy Action Plan (LEAP) will provide: temporary financial assistance for consumers in need; more flexible service rules on bill payments and disconnection notices; and targeted conservation and demand management programs. Under the plan, electricity and gas energy providers, together with community social service agencies, will provide a total of \$5 million annually in



LEAP emergency energy funding. The LEAP program should be fully operational across the province by the start of the winter heating season in November 2009.

The plan is the culmination of an appeal W+SEL Environmental lawyers won for the Low-Income Energy Network (LIEN) in the Ontario Divisional Court last year. The Court ruled on May 16, 2008, that the OEB has the jurisdiction to take affordability into account as part of its statutory mandate to set just and reasonable rates. LIEN was a major participant in the subsequent OEB consultations on low-income energy issues that resulted in the LEAP announcement.

Although LEAP does not provide the permanent low-income rate assistance advocated by LIEN, it certainly marks a milestone on the coalition's long-running battle to secure affordable rates for low-income consumers. "We still have a long way to go to ensure that that all Ontarians have access to green, affordable energy, and we will continue to engage in broader discussions with the Ontario government, the Board and others in this respect going forward," said Sarah Blackstock, a research and policy analyst with the Income Security Advocacy Centre, a founding LIEN member.

Approvals for hazwaste imports continue to decline

Since 2006, imports of hazardous waste and hazardous recyclable materials approved by Environment Canada for entry into Canada have declined by 29.7 percent or nearly 7.5 million tonnes. Over the same period, applications for exports have dropped nearly 38 percent. However, approved imports still outweighed exports by a factor of more than six to one. According to the March 2009 issue of *Resilog*, the newsletter of the Environment Canada's Waste Reduction and Management Division, the vast majority of transfers were into or out of the United States. The amounts approved for shipment may exceed the amounts actually shipped.

Approved Transfers	2008 (tonnes)	2007 (tonnes)	2006 (tonnes)
Exports	2,756,352	2,828,452	4,439,271
Imports	17,647,530	23,823,067	25,113,375
Transit	188,530	183,357	600,131

