

## Ontario to Protect Boreal Forest - Grant Resource Rights to Aboriginals

Ontario's Far North Planning Initiative will be a difficult balancing act. In July Premier McGuinty announced a proposal for sweeping restrictions on the right to develop forest and mineral resources in Ontario's North. Expected to take 10 to 15 years in mapping, consultation and planning, the Premier said that the initiative is intended to:

- ◆ preserve more than half the province's boreal forest;
- ◆ support mining and forestry in the remaining lands;
- ◆ guarantee that First Nations are integrally involved in the planning of both; and
- ◆ ensure that remote Northern communities share in the resulting economic benefits.

According to the Premier "at least" 225,000 square kilometres of the boreal region will be "permanently protected" in an interconnected network of conservation lands. Activity on those lands will be restricted to "tourism and traditional Aboriginal uses." Priority will be given to protecting lands with key ecological features, such as endangered species habitat or important carbon sinks.

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## In this issue ...

- ◆ Ontario's Boreal Forest Protection Initiative
- ◆ Ontario Launches *Mining Act* Update Process
- ◆ Right-to-Know Bylaw on Hold
- ◆ Important GHG Deadline Approaching Fast
- ◆ *Lafarge* ERT Decision Alarms Industry, Challenges MOE

First Nations relations feature prominently. Land use planning will be done in agreement with individual Aboriginal communities; and any new forestry or mining projects must comply with these plans. The province says it will also begin consultations with Aboriginal communities to create a new system of Resource Benefits Sharing and will provide a "down payment" sometime this fall to kick start the fund.

The government envisions that by spring 2009, First Nations and Métis communities, Northerners, the resource sector and scientists will have drafted the broad framework for the plan. The province will also undertake the scientific mapping of the region's biodiversity, carbon sequestration potential, Aboriginal cultural heritage and mineral and other natural resources.

## Ontario Launches *Mining Act* Modernization Process

In August 2008, Michael Gravelle, Ontario's Minister of Northern Developments (MNDM) launched a province-wide consultation intended to "modernize the way that mining companies stake and explore their claims to be more respectful of private land owners and Aboriginal communities." According to the Discussion Paper "Modernizing

Ontario's *Mining Act*: Finding a Balance", the reform is intended to address five critical policy issues:

1. Mineral tenure system and security of investment.
2. Aboriginal rights and interests related to mining development.
3. Regulatory processes for exploration activities on Crown Land.
4. Land use planning in Ontario's Far North.
5. Private rights and interests relating to mining development – mineral rights/surface rights issues.

The discussion paper is available from the MNDM website. It is quite simplistic and general. At this stage, it seems that the government is seeking stakeholder opinions on very general and open-ended

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## GHG Credits for Early Action

Ottawa has launched the first phase of its Credit for Early Action Program. This program applies only to facilities that "could be subject" to proposed industrial air emission regulations in 2010. Companies that will be regulated can claim a "one-time allocation" of credits on a pro rata basis from a total budget of 15 megatonnes, for GHG reductions made between 1992 and 2006. The Program establishes a carbon market where companies will be able to sell excess credits. Claims will need to be verified by a third-party. The deadline for the Phase I Submission (information on the facility, early action details, estimation of GHG tonnes to be claimed and quantification approach) is September 5, 2008. The Phase II Final Submission will be due in May 2009. For more details, visit the program website at [www.ec.gc.ca/cmap-cea](http://www.ec.gc.ca/cmap-cea).



Continued from page 1

questions. For example, questions include: "What are the necessary elements of an open and transparent process?" and "How could a regulatory process work in a fair and timely fashion?" Initial stakeholder consultations are being conducted in select municipalities such as Timmins, Sault Ste. Marie, Kingston and Toronto in August and September. MNDM anticipates legislation in the fall/winter of 2008-9, with new rules in place before the end of 2009.

**Lafarge / ERT Decision  
Alarms Industry, Challenges MOE**

*The recent Divisional Court decision supporting neighbors and environmental advocates in opposing an MOE approval has raised concerns with industry associations and the Ministry of the Environment. The decision upheld the neighbours' rights to appeal MOE's approval allowing Lafarge to burn municipal solid waste and used tires in its cement kiln in Bath, Ontario.*

*Many industry advocates argue that the decision will increase the delay, uncertainty, complexity and cost in the industrial approval process, particularly for industrial air and waste approvals. They argue that the decision means that industrial applicants can no longer rely on meeting government standards to obtain a Certificate of Approval.*

*The MOE is considering how it can incorporate an ecosystem approach, the consideration of cumulative effects and the precautionary principle into its approval process.*

*Has this decision really introduced significant new uncertainty into the approvals process? For decades it has been the law in Ontario that emissions causing "adverse effects" are prohibited, even if the emissions comply with a Certificate of Approval. This decision does not change the law. However, it may impose new obligations on the MOE to give more consideration to potential adverse effects of discharges and emissions that would otherwise comply with regulated standards.*

**Toronto's Right-to-Know  
Bylaw on Hold Until the Fall**

Toronto's proposed Environmental Reporting and Disclosure Program is on hold, at least until October, pending release of a proposed provincial toxics use reduction strategy. The municipal by-law would require thousands of businesses operating in Toronto to track their use of 25 chemicals posing "priority health concerns" and to submit annual, publicly-accessible reports. There would also be incentives for facilities that adopt environmental best practices and reduce releases. Toronto wants assurances that the provincial strategy will encompass all the chemicals on its priority list and that threshold reporting levels will be set low enough to capture small and medium-sized businesses in the GTA. Toronto's Medical Officer of Health, Dr. David McKeown, says that if the province is too slow in releasing the details of its strategy, "I'll want to make a recommendation to council to move forward based on what we do know."

*In the short term the MOE will likely continue with the business-as-usual approach to most standard industrial approvals. However, MOE will have to develop a policy to apply more scrutiny and caution for higher risk approvals, and to advise applicants that additional studies may be required.*

**The Case**

Lafarge operates a cement plant in Bath, Ontario. In December 2006, the MOE issued approvals to Lafarge that would permit it to burn municipal waste and used tires in its cement kilns. A number of local residents and environmental groups opposed the MOE approvals, and sought leave to appeal to the Environmental Review Tribunal (ERT), under the *Environmental Bill of Rights* (EBR). The ERT granted leave to appeal (the ERT case was called *Dawber v. Ontario (MOE)*).

The EBR imposes a strict test for granting leave to appeal. The ERT may not grant leave to appeal unless it appears to the Tribunal that (a) there is good reason to believe that no reasonable person, having regard to the relevant law and applicable government policies, could have made the decision, and (b) the decision could result in significant harm to the environment.

**Divisional Court Decision**

Instead of proceeding with the appeal, Lafarge went to court to challenge the leave to appeal. In June 2008, three Divisional Court judges upheld the decision of the ERT allowing the residents and environmental groups to be heard at a full ERT appeal hearing.

Significant findings of the Divisional Court include:

- ◆ The EBR requires MOE to consider its Statement of Environmental Values (SEV) whenever it issues an approval instrument. The SEV endorses an ecosystem approach, including the assessment of cumulative effects of emissions. It also adopts the precautionary principle in dealing with uncertainty of risk.
- ◆ The ERT may grant leave to appeal on the full scope of a Certificate of Approval - the appeal is not limited to the grounds for appeal that satisfy the test for leave.

The Divisional Court took care to note that its decision did not decide the merits of the appeal - those would be decided at a full ERT hearing. However, instead of arguing the appeal before the ERT, Lafarge is seeking leave from the Court of Appeal to appeal the Divisional Court decision. If the Divisional Court decision stands, Lafarge has stated that it will abandon the ERT appeal and the project.

**Conclusion**

If this decision stands, MOE will have to consider cumulative effects and the sensitivity of the local environment when issuing orders and approvals. MOE intends to consult with a wide range of stakeholders in order to develop approval policies and procedures that meet the SEV requirements.

