

Ontario's Toxics Reduction Act takes effect Jan. 1, 2010

The Ministry of the Environment has filed the General Regulation (O. Reg. 455/09) needed to implement the province's *Toxics Reduction Act, 2009*. Under the Act, facilities in the designated manufacturing and mineral processing sectors must

- ◆ track and quantify the toxic substances they use, create or release ("toxic substances" are those listed in Schedule 1 of the National Pollutant Release Inventory as well as acetone)
- ◆ prepare a toxic substance reduction plan for each substance
- ◆ prepare summaries of the plans and make them available to the public
- ◆ report to the Ministry on their progress in reducing toxic substances.

Toxic substance reduction plans must be updated at least every five years (and more often in the event of a significant process change at a facility). They must also be certified by both the facility manager and an accredited toxics reduction

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***** Alert *****

W+SEL has heard that Ontario's **new brownfield regulations are currently before Cabinet**. We expect they will be approved before the end of the year and an announcement will be posted on the Registry in early January. These will be the final regulations and we are not anticipating another round of consultation or an opportunity to comment. As soon as the regulatory text is available, we will send out a thorough summary and analysis.

Also, a quick head's up that **February 1, 2010, is the phase-in date for another batch of Ontario's more stringent air standards** and related compliance requirements under O. Reg. 419/05. Those industries listed in Schedule 4 must be able to show compliance with the Schedule 3 standards using advanced atmospheric dispersion models. Everyone else will now have to comply with the revised Schedule 2 standards. If you cannot, there's a duty to report to the Ministry of the Environment. We will be following this evolving story in our first newsletter of the new year.

Until then, Season's Greetings from all of us.

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planner. While reporting is mandatory, implementing the toxics reduction plan remains discretionary. Both the Act and the regulation will come into effect on January 1, 2010.

The Ministry received a total of 831 comments on the draft version of the regulation after it was posted in September of this year. The affected sectors were concerned about excessive compliance costs and the potential release of confidential business information. At the same time, environmental groups pushed for lower reporting thresholds, wider application of the Act and faster implementation. However, following the consultation period, only relatively minor revisions were made to the final regulation.

- ◆ The requirement to conduct uncertainty analysis on tracking and quantification methods was removed.
- ◆ The first report to be submitted need not include information related to plan implementation.
- ◆ The toxic substance reduction plan review requirements were streamlined into one section.
- ◆ Employees must be advised of the plan on the same day it is made available to the public.
- ◆ End-use products intended for human or animal consumption are not prescribed as toxic substances.
- ◆ A plan must include the anticipated date when the proposed reductions would be achieved.
- ◆ Facilities should provide the rationale for selecting the option(s) that they will implement.
- ◆ There is no requirement to estimate reductions for acetone or those substances listed in Parts 4 and 5 of NPRI.

The Ministry says that it will continue to develop additional regulations to cover the certification of toxics reduction planners, additional reporting requirements for “substances of concern” and administrative penalties. Substances of concern are potentially toxic materials not currently tracked through NPRI, and facilities using these substances would be subject to a one-time reporting requirement. Future regulations may also prescribe or remove toxic substances from the program.

The reporting requirements are being implemented in two stages, beginning with the 47 priority substances listed in Table A of the regulation. The first draft toxic substance reduction plans must be submitted by June 1, 2011 (covering the calendar year 2010), and the final toxics reduction plans are due by December 31, 2011. The second phase covers the remaining substances listed in NPRI. Facilities will have until June 1, 2013, to provide their first report to the Ministry (covering the calendar year 2012). Facilities would then complete their plans and provide a summary plan to the public and the Ministry by December 31, 2013.

The Ministry is preparing information guides and is planning a series of workshops in the new year to help facilities meet the reporting requirements.

On June 5, 2009, the *Toxics Reduction Act, 2009* received Royal Assent, and on September 18, 2009, the first draft regulation under the Act was posted to the Environmental Registry for 45 days public comment (under EBR Registry #010-6729). In addition, multi-stakeholder consultation sessions were held in Sarnia, Guelph, Toronto, Sudbury and Ottawa. On December 4, 2009, the Ministry of the Environment posted a notice on the Registry that it had filed the General Regulation (O. Reg. 455/09) under the *Toxics Reduction Act, 2009*, and that the regulation and Act both come into effect on January 1, 2010.

New Ontario regulation limits greenhouse gas reporting requirements to major emitters

On December 1, 2009, Ontario filed its final Greenhouse Gas Emissions Reporting Regulation (O. Reg. 452/09) under the *Environmental Protection Act*. The regulation will ensure that an estimated 200 to 300 large emitters of prescribed greenhouse gases (GHGs) will provide regulators with the kind of credible and detailed GHG emissions data needed to support a multi-jurisdictional cap-and-trade system. The new regulation, which comes into force on January 1, 2010, covers who has to report, how the data is to be collected, analyzed and verified, and when the annual submissions are due.

The final regulation closely resembles the draft posted for public comment on October 7, 2009 (see W+SEL's September/October Newsletter). There have been some minor revisions relating to third party verification, the protection of confidential business information and various technical clarifications. These changes are summarized in the Environmental Registry posting (under EBR # 010-7889) of December 1, 2009.

The regulation applies to refineries, pulp and paper companies, energy generation facilities, chemical producers and metallurgical companies, as classified in 26 sectors (see sidebar on this page). All prescribed facilities will be required to quantify their annual GHG emissions using standardized methods set out in the new *Guideline for GHG Emissions Reporting*. For the 2010 reporting year, facilities will be permitted to use alternative methods as described in the Guideline or approved by the Ministry of the Environment. The standardized quantification methods, which have been tailored for each of the 26 sectors, are based on procedures developed by the Western Climate Initiative (WCI) and the U.S. Environmental Protection Agency.

All prescribed facilities must collect emissions data but only those that emit 25,000 tonnes of carbon dioxide equivalent (CO₂e) or more per year are subject to the annual reporting requirements. The first emissions report, covering the 2010 calendar year, is due by June 1, 2011. Beginning with the 2011 reporting year, the emissions data must be verified by an accredited third party and a verification report submitted by September 1 of the calendar year following the reporting period. All documentation and data must be retained for at least seven years. The Director can require any prescribed facility that does not file an annual emission report to submit proof that its emissions did not exceed the 25,000 tonne threshold during the relevant reporting period.

In response to a number of comments on the costs and administrative burden associated with third party verification of emissions data, the Ministry says it will continue to look for ways to "streamline" the verification requirements, in accordance with its other cap-and-trade partners. It will also work with accreditation agencies and verification service providers to ensure sufficient capacity is in place when the verification provisions take effect in the 2011 reporting period.

From adipic acid to zinc

O. Reg. 452/09 applies to greenhouse gases (listed in Table 1 of the regulation) generated from any of the following sources:

- 1. adipic acid manufacturing**
- 2. primary manufacturing of aluminum**
- 3. ammonia manufacturing**
- 4. carbonate use**
- 5. cement manufacturing**
- 6. coal storage**
- 7. copper production**
- 8. electricity generation and cogeneration**
- 9. ferroalloy production**
- 10. general stationary combustion**
- 11. glass production**
- 12. HCFC-22 production**
- 13. hydrogen production**
- 14. iron manufacturing**
- 15. steel manufacturing**
- 16. lead production**
- 17. lime manufacturing**
- 18. nickel production**
- 19. nitric acid manufacturing**
- 20. petrochemical production**
- 21. petroleum refining**
- 22. phosphoric acid production**
- 23. pulp & paper manufacturing**
- 24. refinery fuel gas use within a petroleum refinery**
- 25. soda ash manufacturing**
- 26. zinc production**



A number of concerns were also raised about the protection of confidential business information. The Ministry has removed from the final regulation data submission requirements that are “not essential for the design of a future cap-and-trade program or for a high level quality assessment of the reported emissions.” In addition, much of the sensitive information does not have to be submitted, but can be kept on site by the company for audit by the Ministry.

For more information, contact: Paul Manning, W+SEL Partner and Certified Specialist in Environmental Law at 416-862-4843.

OPA’s renewable energy program attracts Aboriginal projects

The rollout of Ontario’s green energy strategy has sparked an unanticipated ‘green rush’ of renewable energy applications under Ontario Power Authority’s Feed-in-Tariff (FIT) program. While the Ontario Power Authority (OPA) has allocated some 2,500 megawatts of electrical capacity for the first round of FIT contracts, the applications received so far would generate more than three times that total. The OPA started accepting FIT applications on October 1 and, among the flood received to date, there are a significant number of proposals for green power development from First Nations and Métis proponents: over 40 according to one unofficial count, with about half hydroelectric projects and one-quarter for on-shore wind. However, delays in promised incentive funding for Aboriginal proponents and partners are causing concern.

On September 4, 2009, the Minister of Energy and Infrastructure directed the OPA to manage a new Aboriginal Energy Partnerships Program (AEPP) that is intended to underwrite certain “soft costs” of renewable energy projects. The AEPP would fund the preparation of Community Energy Plans, project pre-feasibility and feasibility studies, business cases, resource assessments, and environmental and technical studies. However, the details about funding arrangements, delivery partners and access to services are still being worked out, in consultation with an advisory committee of Aboriginal leaders and experts in the area of renewable energy development. According to the OPA, the AEPP details should be unveiled during the first quarter of 2010, and updates will be posted on a new website being developed for the Aboriginal Renewable Energy Network.

There is concern among Aboriginal proponents who applied into the OPA’s launch program that they may not be able to take advantage of the AEPP funding if their application is accepted by the OPA prior to the AEPP being finalized. This means that funding that was otherwise set aside as an equity contribution may need to be allocated towards soft cost expenses, and it is unclear whether such expenses would be reimbursable at a later date. Nor is it clear whether the Ontario Financing Authority, that is administering the \$250-million Aboriginal Loan Guarantee Program, will deem soft cost expenses towards equity valuation for a proponent.

As of December 1, 2009, OPA had received 1,022 FIT applications for projects over 10 kW and another 1,193 microFIT applications. Almost 80% of applications are for wind energy projects, 16% for solar and the remainder for biogas, biomass, landfill gas and water power projects. OPA has redeployed resources to review and verify the applications and will give priority to the most viable, “shovel-ready” projects that can be in operation soonest.

In February 2010, OPA says it will start offering FIT contracts, beginning with Capacity Allocation Exempt projects (those 500 kW or less), and will continue through March with all of the rest of the FIT projects. Economically viable projects that do not receive contracts will be considered when more transmission connection capacity is available or approved.



Federal legislation to ease development on reserve lands

On December 10, 2009, the federal Minister of Indian Affairs and Northern Development introduced legislation designed to enable First Nations to better develop commercial real estate on reserve land. Bill C-63, *The First Nations Certainty of Land Title Act*, would eliminate differences in property rights on and off reserves, which could have a positive effect on property values and the ability to obtain mortgage financing in respect of commercial projects on reserve lands. On-reserve commercial real estate developments would be registered in a system that replicates the provincial land titles systems, rather than the registry system currently used on reserves, which does not allow third parties to independently register and protect their legal interests in land with the same flexibility as in current provincial land titles systems. According to the Government, the new approach would provide “certainty of land title” and allow property purchasers “to buy with confidence”.

However, the proposed Act is deemed “optional legislation”—in order to be applied, a First Nation community would need to have a commercial or industrial proponent, desire to establish an alternative land registry system, and obtain the agreement of the province to participate. The bill amends and expands the regulation-making powers of the *First Nations Commercial and Industrial Development Act* (FNCIDA). Regulations to be developed under FNCIDA would only be considered once the federal government receives a request from the First Nation in the form of a Band Council Resolution and apply only to the specific project and specific parcel of reserve lands identified in those regulations. If a regulation specifies that provincial officials will carry out administration and enforcement functions on behalf of the federal government, an agreement between the three parties must be signed before the regulations can be made.

For more information, contact: W+SEL Aboriginal law specialists Juli Abouchar at 416-862-4836 and Cherie Brant at 416-862-4829.

Water charges extended to medium and small users

The Ministries of Environment and Natural Resources have developed proposals for enhancing three key elements of water management in Ontario. The implementation of ‘Phase 2’ of the province’s water charges program would extend the existing charge to medium and low consumptive commercial and industrial users. In addition, two undertakings would be taken under the *Great Lakes – St. Lawrence River Basin Sustainable Water Resources Agreement*. First, a water conservation and efficiency strategy for Ontario would be developed. Secondly, the regulation of new or increased transfers of water from the watershed of one Great Lake to another would be strengthened.

The proposed policies were posted to the Environmental Registry for 60 days comment from August 5 to October 4, 2009, under EBR Registry # 010-6350.

NPRI program expanded to cover mine tailings & waste rock

Environment Canada has made a major adjustment to its National Pollutant Release Inventory (NPRI) requirements for the 2009 reporting year. According to a notice published in the *Canada Gazette Part I*, December 5, 2009, the rules have been restructured and rewritten to require the reporting of tailings and waste rock. Facilities must now consider the quantity of NPRI-listed substances contained in tailings or waste rock to determine whether releases fall within the mass reporting thresholds of the program. There are also new reporting provisions related to the tailings and/or waste rock stored or managed on-site, as well as those transported off-site for recycling or disposal.

Environment Canada also wants to collect retroactive data for the 2006 through 2008 reporting years. A separate notice in the same issue of the *Canada Gazette*, in accordance with s.46(1) of *CEPA 1999*, requires prescribed facilities to prepare and submit the information no later than June 1, 2010. Prescribed facilities are those that generate or dispose of tailings or waste rock as a result of “the extraction or recovery of bitumen, coal, diamonds, metals or potash, or the extraction or beneficiation of metallic ore or ore concentrate” and that meet the other criteria set out in the NPRI schedule.

Ottawa releases updates on toxic chemical screenings

The federal Ministers of Health and Environment have released the draft screening assessments for Batch 7 under Ottawa’s Chemical Management Plan. Three of the 14 substances studied – Michler’s ketone, n-BGE, and 2-butanone oxime –are deemed to be “toxic” according to the *CEPA 1999* criteria. Notice was published in the *Canada Gazette, Part I* (Vol. 143, No. 36) on September 5, 2009, with a deadline for public comments of 60 days from the date of publication. The draft Screening Assessment Reports and the proposed risk management scope documents for the Batch 7 substances are available on-line at www.chemicalsubstances.gc.ca

Michler’s ketone is found primarily as a residue in paper colourants. n-BGE is used as a diluent in epoxy resins that are then used to make coatings, adhesives, binders, sealants, fillers, electrical insulation and resins. 2-Butanone oxime is used primarily to prevent film from forming in alkyd paints, primers, varnishes and stains. While 5 of the remaining 11 substances in Batch 7 could pose a threat to the environment, they are no longer used commercially in Canada. It is proposed that *CEPA*’s Significant New Activity provisions be applied so that new and future uses of these compounds must be reported and assessed.

Meanwhile, the final decision on the Batch 6 substances has been published in the *Canada Gazette Part I* of November 28, 2009. Of the 14 “high priority” substances in Batch 6, only chloromethyl benzene (also known as benzyl chloride) has been determined to be “toxic”, according to one or more of the criteria in section 64 of *CEPA 1999*, and manufactured or used in significant amounts in Canada. The compound is used mainly as a chemical intermediate in the production of sanitizers, corrosion inhibitors, fungicides and bactericides, as well as in the organic synthesis of benzyl alcohol and benzyl butyl phthalate. As a result of the assessment, the Ministers of Health and Environment are recommending that chloromethyl benzene be added to Schedule I of the Act and may be subject to additional control.

The Ministers chose not to add any of the other Batch 6 substances—DHNUP, 3-chloropropene, DMEP, methyl chloride, and five disazo dyes, three monoazo dyes or Direct Black 38—to Schedule 1. However, the Domestic Substances List will be updated, as necessary, and new uses, manufacturing or imports of certain compounds could be subject to additional notification and assessment.

Two organotin compounds deemed “toxic” under CEPA

Tributyltins and tetrabutyltins are deemed to be toxic according to s.64(a) of *CEPA 1999*. The Ministers of Health and Environment will recommend that the two substances be added to Schedule 1 of the Act and consider tributyltins candidates for virtual elimination.

It has taken 16 years to accomplish, but two of the 109 organotin compounds on the Domestic Substances List will finally make their way onto *CEPA* Schedule 1. Organotins were included on the very first Priority Substances List back in 1993, but it was determined that their non-pesticidal uses were not “toxic” to the environment according to the *CEPA* criteria. Used primarily in pesticides and as stabilizers in PVC plastics, organotins were reassessed and cleared again in 2003. However, a follow-up ecological assessment has shown that tributyltins and tetrabutyltins actually do meet the *CEPA* s.64(a) criterion, based on their persistence in sediments and proclivity to bioaccumulate.

As a result, Environment Canada has posted risk management approach documents for the materials. These will form the basis for ongoing discussions with stakeholders on the appropriate preventive or control actions to be imposed either through regulation or instrument. Some progress has already been made on this issue. On March 10, 2008, Environment Canada, the Vinyl Council of Canada and the Tin Stabilizers Association entered into an Environmental Performance Agreement to “provide the continued implementation of effective stewardship practices for organotin stabilizers.” The Agreement is available online at www.ec.gc.ca/epa-epe/en/index.cfm

In addition, the Pest Management Regulatory Agency intends to re-evaluate the remaining uses of tributyltin by 2009-2010, to determine if use continues to be acceptable under “today’s standards for health and environmental protection.”

Notice of the results of the investigations was published in the *Canada Gazette, Part I* (Vol. 143, No. 32) on August 8, 2009, pursuant to ss.68(b) and 68(c) of *CEPA 1999*. The risk management approach documents for the two organotin substances deemed toxic are available on-line at www.chemicalsubstances.gc.ca

Will drought policy restrict permits to take water? Probably

The Ministry of Natural Resources (MNR) is considering additional amendments to the Ontario Low Water Response (OLWR) policy that will significantly impact access to water resources during drought conditions. A number of changes have already been proposed, primarily to improve the functioning of local water response teams (WRTs), as well as tighten up administration of the Permit to Take Water (PTTW) program. Those amendments were to be field tested this summer (a difficult task considering the record-breaking rainfall we experienced in June and July). A second round of revisions was scheduled for later this fall to address both on-going concerns and new problems, such as the impact of climate change and the need to prioritize water uses.

Following the droughts of 1998 and 1999, the province developed the OLWR to ensure provincial preparedness and to co-ordinate provincial and local efforts in the event of future droughts. The chosen response varies according to the severity of the drought, with Level I being the least severe and Level III the most severe. Water use reductions are implemented through the local WRTs comprised of stakeholders, provincial and municipal government representatives, and conservation authorities. The Ontario Water Directors Committee (OWDC) coordinates provincial response efforts.

A number of technical and procedural problems with the policy became obvious during the dry summer of 2007. WRTs were finding it difficult to achieve and quantify water use reductions at Levels I and II, as required by the OWDC, in order to recommend a more serious Level III condition in a timely manner. In addition, the governance structure of the WRTs allowed for potential conflicts of interest. There was also a “lack of clarity” around certain terms, as well as the function of the PTTW program.

MNR’s proposed revisions would address at least some of these issues: conservation authorities will now co-chair the WRTs to minimize conflict of interest charges; MNR will identify Level I and II conditions, while the WRTs dictate response measures; and the Ministry of the Environment (MOE) will provide permit data so that WRTs can request and verify usage reductions by permit holders. Roles and responsibilities have also been better defined and tighter timeframes for response have been added.

However, both the Environmental Commissioner of Ontario and the Expert Panel on Climate Change Adaptation have raised additional concerns about effectiveness of the OLWR, triggering a full policy review that was scheduled to take place in late 2009. MNR is currently reassessing the program’s effectiveness, including the need for mandatory vs. voluntary water use reductions and creating principles for prioritizing water use. The review is also considering the need for further guidance on achieving Level III declarations and better defining roles and responsibilities.

Under the proposed changes, MOE must administer the PTTW program to regulate water use by

- ◆ **imposing conditions on every water taker that safeguard against unacceptable interference with other uses of the water supply**
- ◆ **restricting new or expanded water taking in high use or sensitive watersheds**
- ◆ **requiring water use conservation measures to be identified and implemented**
- ◆ **ensuring compliance with permit conditions.**

2010 Speaking Engagements

Renewable Energy Infrastructure

January 26, Toronto

Juli Abouchar - *Developing Partnerships with Aboriginal Communities*

16th Annual Provincial/Municipal Government Liability

February 10, Toronto

Jacquelyn Stevens - *Meeting the Duty to Consult in Provincial and Municipal Matters: What Happens When You Cannot?*

Receive a 15% discount at the time of registration: Reference Jacquelyn Stevens when you register

4th Aboriginal Law Consultation & Accommodation

February 23-24, Toronto

Juli Abouchar – *Creating Model Impact Benefit Agreements (IBAs)*

Cherie Brant – *First Nations and Métis Experience: Best Practices for Resolving Disputes*

Receive a 15% discount at the time of registration: Reference service code 391L10.S

8th Annual Aboriginal Energy & Resource Partnerships

March 10, Calgary

Cherie Brant – *Exploring Ontario's Efforts to Support Aboriginal-Industry Partnerships*