

Ontario's new environmental approval system to launch in September 2011

On June 14, 2011, the Ministry of the Environment (MOE) provided an intriguing preview of how its modernized approvals process is going to work with the posting of three operational regulations on the Environmental Registry. Both the new Environmental Compliance Approval process and the Environmental Activity and Sector Registry will begin accepting applications on September 19, 2011. Once the new permit-by-rule system is in place for low risk projects and less complex undertakings, MOE can begin to provide better service on the more complex approvals applications.

The first new regulation, O. Reg. 255/11, sets forth the generic applications process for the new Environmental Compliance Approvals (ECAs). The second, O. Reg 245/11, lays the groundwork for the first three designated sectors permitted to take advantage of the fast track registration system. And the third, O. Reg 261/11, starts the process of amending the other related regulations needed to implement the streamlined approvals process.

All three regulations were filed June 14, 2011, and come into effect on the day that subsection 2(1) of Schedule 7 of the *Open for Business Act, 2010* – which provides the statutory basis for the modernized approvals process – comes into force.

How to apply for an ECA

O. Reg 255/11 (Applications for Environmental Compliance Approvals) focuses on the generic requirements for completing an application for an ECA under subsection 20.2(1) or (2) of the *Environmental Protection Act (EPA)*. The new process does not apply to renewable energy projects, water takings, drinking water systems, and licensing and certification programs for pesticide applicators or well drillers.

An ECA application must be submitted in accordance with a new electronic “smart application form” and accompanying guidance documents. These have not yet been released, but eventually will be made available on MOE’s website. A summary of the information that must be included as part of an ECA application is presented on page 2 of this newsletter.

Certain of the regulatory provisions are prescriptive to a fault. For example, the mapping criteria are described in detail down to the scale, legend and inclusion of an arrow pointing north. The technical materials included in the

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More info on modernized approvals system ...

Copies of the final regulations can be accessed through links provided in their recent Registry postings and will be published in the *Ontario Gazette* of July 2, 2011. They should also be available through ServiceOntario's online e-Laws website before that date. More information is available through the Ministry's “Modernization of Approvals” webpage at www.ene.gov.on.ca/environment/en/industry/assessment_and_approvals/modernization_of_approvals/index.htm

application must be certified as complete and accurate by a person or persons with “the relevant education and experience necessary.” The regulation specifies who may certify the person(s) who provide(s) the certification.

Registering low risk activities

Everyone has been waiting to see the details of the simpler registration process for designated low risk activities. O. Reg. 245/11 (Prescribed Activities and the Environmental Sector and Activity Registry) designates the first three sectors – automotive refinishing, heating systems, and standby power systems – that are eligible for the abbreviated registration process under section 20.21 of the *EPA* (see the sidebar on page 3 for a more complete description of these three sectors). It also sets out, this time with very little explanation, the broad categories of information to be included.

Again, proponents of prescribed activities will be able to register online through MOE website beginning this fall. The registration must include: the contact information of the person who is engaging in (or proposing to engage in) the activity, “information about the activity” and “information about the site” where it is to take place, and any additional information required by the Director. Updated information must be filed within 30 days after the day the person becomes aware that the information is no longer complete or accurate.

While the registration form may be vague, the process requirements for each of the three designated activities are described in some greater detail. For example, the provisions related to automotive refinishing require, among other things, that: all operations must take place in a spray booth between 7 am and 7 pm; the type of spray equipment used exhibits a minimum transfer efficiency of 65%; the coatings used meet federal VOC concentration standards; water and solvent-based materials are kept separate and not disposed together; filters remove at least 95% of the particles from spray booth exhaust; the exhaust stacks meet prescribed heights and discharge velocities; and so on. The regulation also covers minimum setback distances, acoustic barriers, staff training and record keeping.

According to O. Reg. 255/11, all ECA applications must contain

- ◆ a complete project description (as set out in Schedule 1 of the regulation), including the process used, the operational parameters, any discharges and wastes, the operation of waste management systems and sewage works, and contaminant monitoring programs
- ◆ an executive summary of that description
- ◆ a description of the ownership of the land (including permission to undertake the activity if the applicant is not the owner)
- ◆ current land uses on the site and adjacent lands, as well as additional mapping requirements related to the activity, including the siting of buildings and other structures, roads, railway tracks, utility corridors, paved areas, berms, site fencing, pollution control devices, contaminant discharge sources, waste disposal systems, sewage works, any municipal boundary, etc.
- ◆ any boundary of the Lake Simcoe watershed, the Niagara Escarpment Planning Area, the Oak Ridges Moraine Area or the Protected Countryside (under the *Greenbelt Act*) that is within 125 metres of the site of the activity
- ◆ the zoning of the site and the adjacent lands, including a copy of the municipal zoning map (if available)
- ◆ the configuration of any mobile equipment that may be used or operated (note, certain provisions do not apply if the activity involves mobile equipment)
- ◆ special mapping requirements for new or existing sewage works
- ◆ a financial assurance estimate, if required under the Financial Assurance Guideline (F-15) or O. Reg. 232/98 (Landfilling Sites)
- ◆ a list of any ministry approvals, orders or other instruments relevant to the application that have been issued (or have been requested) under the *EPA*, *Ontario Water Resources Act*, *Environmental Assessment Act*, or the *Safe Drinking Water Act, 2002*

Operators of auto refinishing facilities must review and, if necessary, update their Registry listing every year on the anniversary of the date the applicant received confirmation of the initial registration. The registrations of both standby power systems and heating systems must be reviewed every five years. MOE intends to develop supporting materials before implementing the Environmental Activity and Sector Registry that will explain how stakeholders can determine if their activities are eligible, how to use the Registry and how to maintain their registrations.

Making the required consequential amendments

Finally, O. Reg. 261/11 makes a number of changes to O. Reg. 681/94 (Classification of Proposals for Instruments) to update the public notice and consultation requirements under the *Environmental Bill of Rights, 1993 (EBR)*. These cover the new instruments that will be issued under the *EPA* and remove existing classifications that are no longer valid:

- ◆ proposals for ECAs (issued under Part II.1 of the *EPA*) are classified as Class II instruments
- ◆ proposed orders to suspend or remove a registration for compliance reasons (issued under s. 20.23(2) of the *EPA*) are classified as Class I instruments
- ◆ existing classifications for proposals for approvals under ss. 9, 27 and 31 of the *EPA* and s. 53(1) of the *Ontario Water Resources Act* are revoked.

This means that Ontario residents will lose their *EBR* rights to consult on and appeal those lower risk proposals to be listed on the Environmental Sector and Activity Registry. For transition purposes, if an application for a Class I instrument is submitted before O. Reg. 261/11 comes into force, it remains a Class I instrument.

The Ministry has also amended 42 other regulations under a dozen provincial statutes ranging from the *Cemeteries Act* to the *Nutrient Management Act* to the *Provincial Offences Act*. Generally, the amendments reflect new terminology – Certificates of Approval will become Environmental Compliance Approvals. The amendments also remove references to sections that will be revoked and update cross references to sections in the statutes.

Ontario to make energy conservation planning mandatory for public agencies

Energy conservation planning is a practical, economically responsible idea – something that you probably should be doing, if you aren't already. Well, if you are a "public agency" – a hospital, school, university or almost any kind of municipal facility from a community centre to a library to a wastewater treatment plant – planning for energy conservation is likely to become mandatory within the next two years. A recently proposed regulation, under section 6 of Ontario's *Green Energy Act, 2009*, would also require those same prescribed public agencies to collect and submit data on their energy consumption and greenhouse gas emissions every year.

Designated Sectors

Automotive refinishing – the application of a coating on or the repair or customization of a motor vehicle body or parts of a motor vehicle body and the repair and customization of the interior of a motor vehicle.

Standby power system – any apparatus, mechanism, equipment or other thing, and any related fuel tanks and piping, that includes one or more generator units and that is intended to be used only for the provision of electrical power during power outages or involuntary power reductions. The standby power system uses only one or more of the following as fuel: biodiesel, diesel, natural gas or propane. The rated capacity of each generator cannot exceed 700 kW.

Heating system – any apparatus or mechanism, and any related fuel tanks, piping, duct vents, equipment or other thing, that is used to produce heat or to supply that heat to the interior of a building or structure for the comfort of occupants, for the maintenance of the building or structure, for the provision of a suitable temperature for materials, plant or animal life or for heating water for domestic purposes, and includes an HVAC system. The heating system uses only natural gas and/or propane.

An extensive “plain language” description of the proposed energy conservation regulation (although not the draft regulation itself) was posted on May 17, 2011 by the Ministry of Energy on the Environmental Registry for 45 days of review and public consideration. The deadline for public comments is July 1, 2011. The text of the final regulation will then be prepared by the Ministry of Energy staff, based on the posting and comments received. There is no timeline on promulgation of the proposed regulation, although we expect to see the proposed regulation in place before the fall election.

According to the posting, public agencies will have to develop and implement three-year energy conservation plans for designated facilities. Plans will have to include both a “high level description” of how the organization expects to conserve energy and reduce demand over the life of the plan, as well as details on energy audits, building recommissioning, improved maintenance, lighting, heating ventilation and air conditioning retrofits, and employee awareness programs. Plans could also include communications initiatives designed to promote a culture of conservation. The first energy conservation and demand management plans must be completed by July 1, 2014, with a follow-up three-year plan due by July 1, 2017.

Two or more public agencies may prepare joint energy conservation plans, although each is responsible for providing its own energy consumption and GHG emission data and submitting it on an annual basis using a proposed electronic template. The Ministry of Energy will require the data to be categorized by fuel type (electricity, natural gas, propane, diesel and steam), and include details of energy and GHG “intensity” by gross square footage. The first report, based on 2012 data would be due on July 1, 2013.

Agencies would have to update their consumption and emission data each year to demonstrate the effectiveness of their energy conservation plan. That information is to be made publicly available on a corporate website, submitted electronically to the Ministry of Energy, and made available in hard copy at the agency’s corporate head office.

Organizations implementing demand management methods, which are intended to shift high demand energy use to off-peak periods, would be required to report on their demand side results on an annual basis. Reporting must include information on why demand has increased or decreased and, if demand has increased, what measures the organization plans to undertake to address the increases. In addition, agencies would be required to provide a description of any renewable energy projects undertaken and the energy produced by those installations. Energy conservation plans prepared by universities, colleges, schools or hospitals would require the approval of the chief administrative or financial officer, while municipal plans must be approved by council.

Who would have to submit data and prepare energy conservation plans?

Municipalities – at a minimum, municipalities would report on the following facilities: offices, libraries, arts and culture facilities, emergency medical services, fire and police services, community centres, arenas, indoor pools, multi-use recreation complexes, public works/transit garages, water pumping stations, and wastewater and drinking water treatment plants.

Universities/Colleges – at a minimum, universities would report on the following facility types: academic and administration buildings, cafeterias, high and low energy use labs, libraries, residences, and student physical education centres.

Schools – in addition to facilities owned and operated by school boards, schools would also identify the number and area of portables, and if a pool or daycare centre is part of the school.

Hospitals – at a minimum, hospitals would be required to report on chronic care or acute/teaching facilities.

What's next?

While the proposed regulation restricts itself to prescribed “public agencies,” we should point out that section 6 of the *Green Energy Act* also authorizes the government to require “prescribed consumers” to prepare energy conservation and demand management plans as well. In addition, section 37 of the *Water Opportunities Act, 2010* includes a similar (but as yet unused) regulatory enabling provision that could require public agencies to develop and implement water conservation plans. The Ministry of Energy says it will attempt to coordinate its new energy conservation planning and reporting requirements with the implementation of the Ministry of the Environment’s forthcoming water conservation planning requirements as those are developed.

MOE fine-tunes its brownfields regulation before it takes effect on July 1, 2011

The Ministry of the Environment (MOE) has made a series of technical amendments to O. Reg. 153/04 (Records of Site Condition), under the *Environmental Protection Act*, before the brownfields regulation goes into effect on July 1, 2011. These amendments are intended to clarify the intent and scope of certain provisions, correct for minor errors and incorporate new data, all in support of “the safe and efficient redevelopment of brownfield sites.” The final changes, together with MOE’s response to the comments received on the earlier draft proposals, were posted to the Environmental Registry on May 26, 2011. The amendments include the following

- ◆ revising a limited set of the Soil, Ground Water and Sediment Standards to reflect current science (e.g., sodium and petroleum hydrocarbons) and correcting errors in other standards
- ◆ clarifying that use of potable ground water standards is only necessary near wells that are used for human consumption or agriculture, not near wells that are not used to produce drinking water (e.g., dewatering wells)
- ◆ clarifying and limiting the definitions of potentially contaminating activities that trigger the need for a Phase II environmental site assessment
- ◆ clarifying requirements for arenas and swimming pools and other indoor sports facilities to ensure a Record of Site Condition (RSC) is filed where appropriate
- ◆ providing a mechanism for filing a RSC where there is no soil (if all soil is removed for remediation or construction purposes, sampling and analysis will not be needed to file an RSC)
- ◆ minor technical amendments to the Approved Modified Generic Risk Assessment Model and the Protocol for Analytical Methods.

The majority of the changes to the Analytical Protocol are science-based and technical in nature pertaining to sampling technique, container type, storage temperature, sample preservation, sample handling, analytical methods, reporting

Willms & Shier voted environmental law firm of the year

Willms & Shier has been voted the “Law Firm of the Year – Environment” in the *InterContinental Finance Magazine’s* Legal Excellence Awards 2011. More than 15,500 readers responded to the magazine’s annual poll, selecting firms that “continually punch above their weight” and are the most capable within their field. In making the award, the editors noted that Willms & Shier has “performed to exceptional levels during one of the most difficult economic periods ever experienced.” We are encouraged by your support and thank all who took the time to vote. The readership of *InterContinental Finance Magazine* includes CEOs, CFOs, corporate bankers, directors of equity firms, in-house legal counsel, and partners and associates from law firms around the world.

and the quality control/assurance sections of the document. The rest of the changes are administrative, addressing typographical errors, inconsistencies, redundancies, etc.

In commenting on the draft, some stakeholders raised broader concerns, beyond technical fixes and corrections, including the movement of soil and soil-like materials in the province, the stringency of standards, and the impact on development and intensification. Others reiterated concerns about the previous, more substantive amendments to O. Reg. 153/04 made in December 2009. MOE says this batch of amendments was designed simply to correct technical glitches and clarify requirements prior to the regulation taking effect on July 1, 2011. It says it will continue to work with the brownfield community to address broader concerns following the implementation of the RSC regulation.

Ontario extends deadline for toxic substances reduction plans

The Ministry of the Environment (MOE) delayed implementation of some aspects of its *Toxics Reduction Act, 2009* for a year. Amendments to O. Reg. 455/09 have extended the due date for Phase I toxic substance reduction plans and plan summaries by one year to December 31, 2012. All other regulatory timelines remain the same. In addition, MOE clarified education and experience requirements for "toxic substance reduction planners." The proposed amendments were first posted to the Environmental Registry last fall and the final decision was loaded June 3, 2011.

The extension will provide facilities with additional time to develop their toxic substance reduction plans. The deferred timing should also ensure that there will be a sufficient number of planners in place to assist facilities with developing and certifying the plans in advance of the due date. A toxic substance reduction plan must be certified by both the highest ranking employee at the facility with management responsibilities and a toxic substance reduction planner with qualifications prescribed by the amendments to the regulation.

In related news, Environment Canada has been struggling to solve a number of technical glitches and performance problems with its One-Window to National Environmental Reporting System (OWNERS). Many facility owners/operators use OWNERS to finalize their annual reports under the National Pollutant Release Inventory (NPRI) program, as well as the *Toxics Reduction Act, 2009*, O. Reg. 127/01 (Airborne Contaminant Discharge Monitoring and Reporting) and O. Reg. 452/09 (Greenhouse Gas Emissions Reporting). Environment Canada extended the deadline to June 17, 2011 and indicated that written requests for further extensions to the NPRI reporting deadline will be considered on a case-by-case basis. To maintain consistency with the federal reporting requirements, MOE's Environmental Science and Standards Division has said it will harmonize its deadlines should any facility be granted an extension to its NPRI deadline.

A toxic substance reduction planner needs to meet all of the following four criteria to obtain a five-year ministry licence

- ◆ hold a Bachelor's degree in a relevant field and have 4 years of relevant work experience; or hold a college diploma in a relevant field and have 6 years of relevant work experience; or have 8 years of work experience, with at least 2 years in each of environmental management and operational activities in a manufacturing or mineral processing setting
- ◆ take a ministry-approved training course
- ◆ pass a ministry-approved exam
- ◆ pay a fee.



BC Supreme Court limits “duty to consult”

While the Crown has a constitutional duty to consult with First Nations before authorizing development projects on Aboriginal lands, the BC Supreme Court (2011 BCSC 388) has ruled that this duty cannot be used to reopen debate on historic grievances and long-standing environmental problems. Three First Nations bands – the Upper Nicola Indian Band, the Okanagan Nation Alliance and the Nlaka’pamux Nation Tribal Council – petitioned the BC Supreme Court to overturn the province’s approval for the construction of a new high voltage transmission line from the BC Interior to the Lower Mainland (the ILM Project). Parts of the ILM Project, which parallel a grid of transmission lines created in the late 1960s and early 1970s, run through lands over which the First Nations assert claims of Aboriginal title and/or rights.

The Petitioner First Nations argued that the Province and BC Hydro had taken an overly narrow view of their duty to consult. They said consultation should have included existing, aggregate and ongoing impacts of past failures to consult. In addition to ongoing rights infringements, the Petitioners were concerned about noise, electromagnetic radiation, decreased wildlife, the introduction of invasive species, herbicide use, the disruptive presence of works and other impacts of the existing power lines.

In dismissing the petition, the Court ruled that “The constitutional duty to consult does not apply to the larger historic impacts of previous works, or the ongoing existing impacts arising from previous decisions, for which there are other remedies.” By addressing the adverse impacts of the specific ILM Project proposed by BC Hydro and Power Authority, the Court found that the province had undertaken the “appropriate consultation with the affected Petitioner First Nations” in approving the Environmental Assessment Certificate (EAC). “There was no broader commitment to consult on the existing or ongoing impacts in a way which harmonized with or displaced or suspended the EAC Process.”

The decision appears to reaffirm the recent Supreme Court of Canada decision in *Rio Tinto Alcan Inc. v. Carrier Sekani Tribal Council* (2010 SCC 43), which we covered in our January 2011 special report on the duty to consult. While the Petitioners argued that the disposition in *Carrier Sekani* hinged on the unique facts of that case, the Court disagreed. “*Carrier Sekani* confirms that consultation is to be directed at the potential effects of contemplated conduct, not the past, existing, ongoing or future impacts of past decisions or actions,” the Court ruled in a decision published March 31, 2011.

Despite these decisions, proponents in Ontario have found value in settling past grievances prior to moving forward with consultation. Their reasons are many including an understanding of the importance of respectful relationships, corporate social responsibility, and gaining certainty beyond the regulatory process.

Willms & Shier client M’Chigeeng First Nation is the first Aboriginal developer of a wind power project

By October 2011, the bluff overlooking the Band’s Manitoulin Island Reserve will host a pair of two megawatt wind towers, which will generate enough energy to power 1,000 homes. Financing was arranged through TD Canada Trust, while the E-28 turbines are being supplied by Enercon. The Band’s fully owned Mother Earth Renewable Energy (MERE) Corporation is also considering a second phase installation on a lower ridge facing Lake Huron. Ontario Power Authority approved the 4 MW project under its Feed-in Tariff (FIT) program to promote renewable power back on March 15, 2011. The project is one of 16 important new renewable energy projects currently being built by Ontario First Nations communities.

M’Chigeeng First Nation has also taken advantage of the province’s microFIT program to install three 10 kW solar panel systems on the Band Office, arena and local school. In addition to anticipated revenues of \$30,000 per year, the Council has entered into an agreement with 3G Energy Group and Canadian Solar Inc. to receive training on system assembly and installation.

Doug Petrie retires from partnership

The partners at Willms & Shier Environmental Lawyers LLP announce that Doug Petrie has retired from the partnership. Doug will continue to work with Willms & Shier on defence of prosecution files.

Doug is now gaining a new appreciation for nutrient management in a very “hands-on” way, as managing partner of Elysee Equestrian, a performance horse (dressage and jumping) boarding and training facility at Humberview Stables, a farm along the Humber River just east of Orangeville.

Doug joined Willms & Shier Environmental Lawyers LLP in 1988 after a uniquely relevant environmental and land use planning education of some 11 years. He became a partner in 1991. Doug’s practice focused on environmental facility approvals and orders, managing investigations and the defence of environmental prosecutions in Provincial Offences Court, and appearing as counsel at the Ontario Municipal Board in land use planning matters. His practice also included extensive hearings work before the Environmental Assessment and Appeal Boards (now the Environmental Review Tribunal).

Doug is the author of the authoritative and newly updated book, *Storage Tanks in Canada: The Guide to Environmental Regulation and Compliance* (Templegate Information Services).

We will miss Doug and we wish him well in his future endeavours.

Correction

Please note the correction to the noise table on page 4 of the April 2011 issue: the current standard for Class 1 Areas (from 23:00 to 07:00) should read 45 dBA not 35 dBA. We regret the error.

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