

Strong opposition to *Far North Act* continues to build

Ontario says it will move forward with its controversial *Far North Act, 2010* which is designed to safeguard “at least” 225,000 km² from development, or about half the land north of the 51st parallel. The Act prohibits new resource development until the Minister of Natural Resources has approved a “community based land use plan” for the “area”.

Bill 191 may have won support from environmental NGOs, but it has certainly triggered opposition from First Nations, resource companies, and northern communities.

Although there was some indication that Bill 191 might be referred back to committee for further review and public input, the *Far North Act, 2010* was moved for Second Reading on September 16 and following some raucous debate, passed Third Reading on September 23. The Act now awaits Royal Assent.

In early September, the province unveiled extensive amendments to the Bill based on informal discussions with

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After a relatively slow summer, from an environmental law perspective, it's shaping up to be a busy fall.

To kick things off, the Ontario Legislature has moved quickly on three major pieces of environmental legislation. Although the government's controversial *Far North Act, 2010* was amended to enhance First Nations involvement in shaping development in the north, the Legislature was flooded with petitions and depositions from Aboriginal groups and northern communities all urging that Bill 191 be deferred for further discussion. Despite the opposition, the legislation was quickly pushed through committee, amended, and passed both Second and Third Reading in just ten days.

On the same morning that Bill 191 received final reading, Bill 72, the *Water Opportunities and Water Conservation Act, 2010*, passed Second Reading and was referred to committee for review. In addition to creating a new agency, WaterTAP, to support homegrown water treatment technology, the Bill will require municipalities to prepare and submit to the MOE detailed “sustainability plans” for municipal water, waste water and storm water services.

Finally, the Legislature debated omnibus Bill 68, the *Open for Business Act*, which among many other things streamlines the MOE's environmental approvals process and fast tracks projects with lesser environmental impacts. Despite the flurry of legislative action, what's missing from this list is any official pronouncement on the proposed *Waste Diversion Act* reforms. Last spring, the cabinet quietly decided to delay First Reading until the fall at the earliest.

This issue of the newsletter also contains:

- ◆ short updates on revisions to Ontario's greenhouse gas reporting regulation (which bring it in-line with the WCI reporting requirements), as well as Ottawa's user friendly one-window GHG reporting system
- ◆ the Environmental Review Tribunal's revised rules to expedite appeals of renewable energy approvals
- ◆ an update on Ontario's proposed Extended Producer Responsibility (EPR) initiative for underwriting waste recycling and diversion
- ◆ MNR proposed new development limits and MOE's new approval standards for offshore wind farms

Hope you find it interesting, John Willms



First Nations communities, development stakeholders and environmental groups. It also committed \$10 million to support First Nations communities in their development of land use plans, as well as \$2 million annually over three years for skills training related to community-based land use planning.

Although summer hearings were cancelled, the Standing Committee on General Government undertook a clause-by-clause review of the Bill on two days in September. The committee defeated a motion by opposition members that Third Reading be deferred until “such time as a process of consultation and consent has been agreed to by the First Nation communities and the government.” As a result the opposition members walked out and all of the government’s 43 proposed changes to the Bill were adopted.

The attached table provides a summary of some of the amendments made to Bill 191 designed to ensure that First Nations share in the decision-making process.

“The subject matter of the bill is not about First Nations’ jurisdiction over the land, nor does the bill address treaty interpretation,” said Hon. Linda Jeffrey, Minister of Natural Resources in moving Bill 191 for Third Reading. “What the bill does do is set out a joint land use planning process between First Nations and Ontario. The bill confirms a leadership role for First Nations through community-based land use planning in deciding which lands in the Far North will be protected and where development may occur. It would put into law, for the first time in Ontario’s history, a requirement for First Nations’ approval of land use plans on public lands.”

The government has proposed that a “joint body” with equal representation by First Nations people and provincial government officials be established to recommend a Far North land use strategy and policy statements. This body would also advise the Minister on matters related to “the development, implementation and co-ordination of land use planning in the Far North” in accordance with this Act, including dispute resolution. Policy statements could cover

- ◆ cultural and heritage values
- ◆ ecological systems, processes and functions, including considerations for cumulative effects and for climate change adaptation and mitigation
- ◆ the interconnectedness of protected areas
- ◆ biological diversity
- ◆ areas of natural resource value for potential economic development
- ◆ electricity transmission, roads and other infrastructure
- ◆ tourism
- ◆ other matters that are relevant to land use planning under this Act if the Minister and the joint body agree to the matters.

While the extensive amendments to Bill 191 appear to be more inclusive of First Nations, FN leaders say that the process falls short of the government-to-government approach that First Nations are looking for. Nishnawbe Aski Nation

“We’ve gone through a lengthy consultation process, we have worked very closely with our aboriginal communities, and we now find ourselves at a point where it’s necessary for us to move forward. One of the assurances I do want to provide [NAN] Grand Chief Stan Beardy and all our aboriginal communities is that we will, if requested, put in place an advisory committee comprised one half of representatives of our aboriginal communities so that they can, on an ongoing basis, have continuing influence as we shape this policy to ensure that we get it right.”

—Statement to the Legislature by Premier Dalton McGuinty, September 16, 2010

“The act does not create a partnership; it creates a rigged game where Ontario holds all the cards. At every single step of the planning process, Ontario’s approval is necessary to proceed. Once a plan is approved and in place, Ontario can overrule it. Ontario controls the purse strings for the costs of planning, so Ontario can sabotage the process whenever it likes. The act doesn’t create a new relationship. It cements the old one, where First Nations are treated like wards of the state.”

— Mr. Howard Hampton during Third Reading debate, September 22, 2010



Summary of selected amendments to *Far North Act, 2010*

Current Section	Original draft text (June 2, 2009)	Amended text (September 16, 2010)
s.1	The purpose of this Act is to provide for community based land use planning in the Far North that directly involves First Nations in the planning and that supports the environmental, social and economic objectives for land use planning for the peoples of Ontario that are set out in section 6. [s.1 in first draft]	The purpose of this Act is to provide for community-based land use planning in the Far North that, <ul style="list-style-type: none"> a. sets out a joint planning process between the First Nations and Ontario; b. supports the environmental, social and economic objectives for land use planning for the peoples of Ontario that are set out in section 6; and c. is done in a manner that is consistent with the recognition and affirmation of existing aboriginal and treaty rights in section 35 of the <i>Constitution Act, 1982</i>, including the duty to consult.
s.6.1	The Minister shall provide opportunities for the involvement of First Nations in the preparation of the Far North land use strategy. [s. 7(3) in first draft]	First Nations may contribute their traditional knowledge and perspectives on protection and conservation for the purposes of land use planning under this Act.
s.6.2(1)	When establishing a[n advising] body under subsection 16(1), the Minister shall consider what role First Nations should play in the establishment of the body and the extent to which First Nations should participate in the work of the body. [s. 16(2) in first draft]	Any First Nation having one or more reserves in the Far North and any First Nation with whom the Minister has agreed to work to prepare terms of reference under subsection 8(2) may indicate an interest to the Minister to initiate discussions with respect to establishing a joint body to, <ul style="list-style-type: none"> a. advise on the development, implementation and coordination of land use planning in the Far North in accordance with this Act; and b. perform the other advisory functions to which the Minister and the First Nations that participate in the discussions agree.
s.11(7)	[No corresponding section in first draft]	If a First Nation provides information to the Minister in relation to whether or not a development contributes directly to meeting community needs of the First Nations or is predominantly for community use in the area, the Minister shall consider the information in making an order [to permit development in an area where no community based land use plan is in place].
s.17.1(3)	[No corresponding section in first draft]	Despite any other Act, if there is a conflict on matters related to land use between a growth plan and the Far North land use strategy, the strategy prevails.



(NAN) represents 49 First Nation communities in the north. NAN contends that Bill 191 lets Ontario impose its authority over First Nations treaty territories.

"The passing of Bill 191 ... indeed shows how little regard the McGuinty Government gives to the concerns of First Nations and other Northern Ontarians when it comes to decision making," said NAN Deputy Grand Chief Mike Metatawabin. "It is a disappointing day for all of us who spent tireless hours opposing Bill 191 as our opposition was obviously ignored. As we have stated time and time again, NAN First Nations and Tribal Councils do not and will not recognize this legislation on our homelands ... The real fight is just beginning."

The Minister of Natural Resources must approve by order the individual community land use plans to be developed by First Nations communities. The strategy and policy statements to be prepared by the joint committee are intended to serve as recommendations to the Minister but it is unclear what weight they will be given. From the perspective of First Nations, MNR retains effective control over development in the north.

Opposition probes 'hidden costs' of proposed Water Conservation Act

On September 23, Bill 72, the Ontario government's proposed *Water Opportunities and Water Conservation Act, 2010*, passed Second Reading and was referred to the Standing Committee on General Government for review. The legislation would require municipalities and water utilities to prepare and submit to the Minister of the Environment sustainability plans for municipal water, waste water and storm water services under their jurisdiction. It would also facilitate and support the development and sale of home-grown technologies for water treatment and water conservation, and encourage Ontarians to use water more wisely. For a detailed description of Bill 72, see our special report on water (<http://www.willmsshier.com/newsletters.asp?id=57>)

Much of the Second Reading debate focused on the potential economic costs of the proposed initiatives and whether these might be passed on to consumers through some kind of "tax on water". One opposition member claimed that the increased bureaucracy, paperwork and reporting requirements in the legislation will push up municipal water rates an average of 20%. There were additional complaints that the Bill fails to address substandard water quality on First Nations reserves, impinges on the autonomy of municipal councils, creates yet another costly provincial agency, and duplicates long term planning and financial accountability protocols already in place at the local level.

"Bill 191 is a travesty for northern Ontario. It's why the Liberals used time allocation to shut off debate, to prevent proper discussion and consultation with our northern First Nations. We now see what the motivator behind Bill 191 truly is. The Ontario PC Party has said—our leader has said—that come October 2011, when we're successful in the election, we will repeal Bill 191."

— Mr. Randy Hiller during Third Reading debate, September 22, 2010

"One of the first steps would involve establishing a new water partnership called the Water Technology Acceleration Project—WaterTAP for short—a new non-crown corporation that would support research and development as well as the commercialization of new technologies and innovations in Ontario's water sector. This new corporation would bring together government, industry, academic and financial experts to support the creation and growth of globally competitive companies."

—Hon. Monique M. Smith in moving Bill 72 for Second Reading

Environmental approval reforms clear committee and head to Third Reading

It looks like Ontario is one small step closer to implementing its streamlined, two-tier environmental approvals system (see our Special Alert <http://www.willmsshier.com/e-flash.asp?id=58>). On September 15, Bill 68, the amended *Open for Business Act, 2010* was introduced for Third Reading debate. Designed to streamline and fast track government services, the omnibus package of amendments impacts 10 different ministries and some 50 statutes.

In addition to the environment-related provisions, the Bill will also speed the resolution of employment standards claims, harmonize transportation and TDG standards with other provinces, modernize the *Construction Lien Act*, and remove unnecessary citizenship requirements for individuals who apply for a professional engineer's licence.

The Standing Committee on Finance and Economic Affairs heard a number of deputations from environmental groups and other stakeholders earlier this summer before completing its clause-by-clause review of the Bill. A number of minor wording and other administrative changes were made to the revised approvals process.

For example, the Minister of the Environment will have to publish, by electronic means or otherwise, information about environmental compliance approvals and other instruments under the *Environmental Protection Act* or *Ontario Water Resources Act* as specified in regulation.

At the urging of Canadian Manufacturers and Exporters (CME), the provisions for administrative penalties were also amended. While a Director will still be permitted to levy such penalties, similar orders by Provincial Officers may be subject to limits to be set forth in future regulation or subject to review. An Officer's Order may be appealed to a Director; if no action is taken within seven days, it is automatically confirmed as a Director's Order and, as such, may be appealed to the Environmental Review Tribunal.

In addition, if a corporation is the target of an administrative penalty, then the order may NOT be issued to "an employee, officer, director or agent of the corporation."

The committee refused to entertain any amendment to sections of the *EPA* or other acts that were not already in the version introduced for First Reading. That eliminated, among many others, a proposal to consider "cumulative adverse effects" when issuing regulations, guidelines, orders, approvals or other instruments.

Several other proposed changes were voted down, including an amendment that would have deemed the registration of 'lower risk' activities as "instruments" under the *Environmental Bill of Rights*. That would have required that such activities be posted for public notice and a 30-day comment period on the registry, as well as providing a public right of appeal. The government members argued that the registration process for lower risk and well understood activities in the as-yet-to-be-developed regulations will provide the requisite public transparency.

Ontario's greenhouse gas reporting regs revised to meet WCI requirements

Ontario continues to realign its regulatory regime to better reflect the greenhouse gas (GHG) reporting protocols of the Western Climate Initiative (WCI). The Ministry of the Environment is seeking comments on proposed amendments to O. Reg. 452/09 (Greenhouse Gas Emissions Reporting Regulation) and its supporting guideline in order to simplify the reporting requirements, align them with those in other WCI jurisdictions, and remove certain administrative limits on the burning of biomass.

The WCI, which is made up of seven western states and Quebec, British Columbia, Manitoba and Ontario, is creating a GHG cap-and-trade network to meet its members' climate change goals. The proposed amendments were posted to the Environmental Registry on September 10, 2010, for 45 days public notice with a closing date for comments of October 25, 2010.

The amendments would

- ◆ add a new greenhouse gas (nitrogen trifluoride) to the program
- ◆ provide additional powers for the Director to request historical emission data that facilities have already submitted to the federal government

- ◆ reflect changes in calculation methods to align with changes proposed under the WCI
- ◆ remove limits on the amount of emissions from the combustion of biomass that can be omitted from a facility's determination of whether it exceeds the 25,000 tonnes GHG emission reporting threshold
- ◆ clarify the submission of verification statement by verifiers to facilities.

Federal 2010 GHG reporting rules employ a new single window reporting system

Environment Canada has released its 2010 reporting requirements for greenhouse gas (GHG) emissions. Emission reports may be submitted through Environment Canada's "single window" reporting system, which was launched in March 2010. This system is being used to collect information under Alberta's Specified Gas Reporting Regulation, and is being considered for GHG reporting by other provinces.

The Notice is published in the *Canada Gazette, Part I* on August 14, 2010. It sets forth the lists of GHGs subject to mandatory reporting, the reportable information that must be submitted and the formulae to be used in calculating reporting thresholds.

The federal reporting requirements apply to any facility (including a pipeline transportation system or offshore installation) that emits 50,000 tonnes of carbon dioxide equivalent (50 kt CO₂ eq) or more in the 2010 calendar year. Emissions from the combustion or decomposition of biomass are not included in determining whether a facility exceeds the threshold.

The ERT expedites rules to fast track appeals of renewable energy approvals

The Environmental Review Tribunal (ERT) has revised its rules to expedite appeals of renewable energy approvals by members of the public. The amended rules set out a tight scheduling timeline: provision of all reports, the preliminary hearing, offering mediation, and finalizing issues will all have to be completed within just eight weeks. Hearing dates will be considered peremptory to all parties, participants and presenters, and will only be changed in exceptional circumstances.

The draft revisions were released for comment on May 14, and the amended Rules of Practice and Practice Directions, and a new guide to appeals by the public were posted on the ERT's website (<http://www.erto.gov.on.ca/english/default.html>) earlier this summer.

Under recent amendments to the *Environmental Protection Act*, members of the public may appeal a new, renewed or amended green energy approval to the ERT within 15 days of a notice being posted on the Environmental Registry. However, they must demonstrate that engaging in the project in accordance with the approval will cause serious harm to human health or serious and irreversible harm to plant life, animal life or the natural environment.

With certain limited exceptions, the ERT is required to issue its written decision not later than six months after a notice of appeal is served on the Tribunal. Otherwise, the Director's decision on the approval is deemed to be confirmed. This tight timeframe compelled the ERT to devise an innovative and expedited hearing process for these appeals. Persons considering bringing an appeal should assume that they will have to be ready for a preliminary hearing within four weeks of launching their appeal, and will proceed with a full hearing after a further four weeks.

Despite 'eco fee-asco', Ontario is still committed to EPR initiative

Just about this time last year, the Ontario Ministry of the Environment was on course to completely revamp the funding of the province's municipal solid waste recycling program. An Extended Producer Responsibility (EPR) model would shift the full costs of waste disposal and diversion onto the shoulders of the brand owners, packagers and importers responsible for producing the newspapers, cans, bottles and other wastes that land in millions of garbage bins and recycling boxes each week. The Ministry would gradually expand the list of targeted waste streams over the next five years.

As an added benefit for industry, the EPR initiative would reopen the market for waste management services. Within the constraints of diversion standards,

producers would be free to choose the most cost effective ways to deal with waste, including the invisible “R” – product redesign.

The proposals were spelled out in the discussion document *From Waste to Worth: The Role of Waste Diversion in the Green Economy*. For more information see the Willms & Shier special report at <http://www.willmsshier.com/newsletters.asp?id=56>

True, there were some difficult problems that still needed to be addressed. How would operational responsibility for recycling be transferred to the private sector without dismantling the established Blue Box apparatus? And how could municipalities recoup their considerable investment in recycling and waste disposal infrastructure? Still, municipalities are completely supportive of the reforms.

Despite several unresolved issues, Environment Minister John Gerretsen speculated that amendments to the *Waste Diversion Act* enabling the EPR initiative might be tabled for First Reading before the legislature’s summer break. When that ‘soft’ deadline expired, the cabinet decision was pushed back till sometime in the fall of 2010.

Then came the ill-timed rollout of Stewardship Ontario’s second wave of “eco-fees”. These surcharges, ranging from a few cents to a few dollars, were to cover the cost of diverting from landfill some 13 additional categories of hazardous or special wastes, including aerosols, cleaners, thermometers, fluorescent lights and pharmaceuticals. Unveiled without public notice or explanation, on the same day as the province’s harmonized sales tax, the eco-fees sparked a strong public and political backlash. It didn’t help that some major retailers were charging wildly divergent fees for the same product, or that some stores listed the fee on their receipts while others did not.

On July 20, the Premier rescinded the eco-fees, saying the province would “develop a new system that works for consumers and works to protect our landfills and waterways from dangerous materials.” Earlier phases of the program that applied to used tires, electronics and other wastes remained in effect.

On August 18, John Wilkinson was named the new Minister of the Environment. John Gerretsen, the

Cabinet Minister responsible for the EPR initiative, was shuffled over to the Consumer Affairs portfolio.

According to a Ministry spokesperson, the EPR initiative is still considered a “priority.” However, the program is on hold while the new environment minister gets up to speed in briefings on the issue. “We launched a review of the Act with the goal of achieving greater diversion in Ontario, and we are still digesting what we’ve heard,” says the Minister’s press secretary Grahame Rivers. The Ministry is hesitant to give firm timelines on when we might expect to see any proposed statutory amendments. “We are not yet at a point when any final decision can be made.”

In the meantime, the Ministry is actively reworking Ontario’s household hazardous waste diversion program “We’ve asked the public and stakeholders, including industry and businesses, for their input on our proposal,” Rivers says. “We want to hear from Ontarians about how to make the hazwaste program easy to understand and easy to use.” We await the outcome of the 90-day review to see whether the open market advocated by the Ontario Waste Management Association is facilitated by the reworking of the program.

MNR ponders new restrictions for offshore wind farms

The Ontario Ministry of Natural Resources is asking for feedback on where and when Crown lands should be made available for offshore wind energy projects and which areas should be constrained from future development. The call for comments was posted on the Environmental Registry August 18th, with a deadline for public feedback of October 4, 2010. According to the posting, areas that may be excluded from offshore wind farms could include

- ◆ navigational lanes
- ◆ areas of core commercial fishing activity
- ◆ sensitive environmental and ecological areas and features
- ◆ areas subject to important recreational activities
- ◆ cultural heritage features
- ◆ areas of natural gas activity
- ◆ areas of inland lakes not subject to the proposed five kilometre exclusion zone

- ◆ other inland water bodies (e.g., Lake Simcoe, Lake Nipissing, Lake Nipigon, Lake of the Woods, etc.)
- ◆ other considerations specific to the Great Lakes.

Until those areas constrained from development are identified, MNR will defer the processing of any existing applications and will not be accepting any new applications for offshore wind farms.

Deadline closes for comments on MOE's offshore approval policy

Meanwhile on September 7, 2010 the deadline for comment on the MOE proposals closed, with follow-up public and industry consultation sessions set to begin this fall. MOE's proposed policy for renewable energy approval requirements for offshore wind facilities, includes a proposal for a five kilometre shoreline exclusion zone for offshore turbines, measured from the water's edge and major islands. Developers of offshore wind turbines would be required to complete a stringent and comprehensive application process that would include

- ◆ ensuring the lakebed is available for a renewable energy project
- ◆ meeting requirements that minimize negative impacts to endangered and threatened species and their habitat, others who use Crown land and resources, and flooding and erosion
- ◆ meeting coastal engineering study requirements
- ◆ applying for a Renewable Energy Approval by assessing and addressing any potential negative environmental effects to significant wildlife habitat, noise assessments, and drinking water, as well as consulting with the public, municipalities and Aboriginal communities
- ◆ complying with federal environmental assessment requirements for offshore wind projects and obtaining permits if required under the federal *Fisheries Act* and/or *Navigable Waters Protection Act*.

Upcoming Speaking Engagements

- ◆ October 6 - Canadian Oil Heat Association, *1st Annual Education Day*
- ◆ October 13-15 - Educational Program Innovations Centre (EPIC), *Understanding Environmental Regulations*
- ◆ October 19 - Kettle Creek Conservation Authority, *Spills Workshop*
- ◆ October 28-29 - The Canadian Institute, *Environmental Law & Regulation in Ontario*
- ◆ November 1-3 - *Canadian Waste Sector Symposium*
- ◆ November 8 - Osgoode - 11th Annual Course, *Conducting Effective Corporate Due Diligence*
- ◆ November 15-16 - 2nd Annual OSEA Community Power Conference
- ◆ November 22-24 - *Envirogate*
 - November 22 - *Water Opportunities*
 - November 23 - *Dealing with Industrial Air and GHG Emissions*
 - November 24 - *Demonstrating & Documenting Environmental Due Diligence*

