WILLMS & SHIER ENVIRONMENTAL LAWYERS LLP

Report

ENVIRONMENT • ABORIGINAL • ENERGY

February 2012

Ontario registers big jump in environmental fines

Financially, the legal staff at the Ontario Ministry of the Environment reaped a bumper crop in 2011. While the number of successful prosecutions held steady, the fines levied were up significantly over the 2010 totals, more than doubling from $1.5 million to almost $3.3 million. The number of cases in which the MOE scored at least one conviction totaled 119 over the period April through December 2010, and 111 over the equivalent period in 2011.

The biggest jump was in the number of cases arising from violations of the *Ontario Water Resources Act* (*OWRA*), which increased from 12 in 2010 to 32 in 2011. Over the same period, total *OWRA* fines quadrupled from almost $300,000 to more than $1.2 million.

While a ministry spokesperson could not explain the overall jump in fines, she said they would depend on the circumstances of each case. “The fines are a function of two factors, the severity of the environmental impacts and legal history of the plaintiff,” she said. “Releases with adverse effects and repeat offenders would warrant higher fines.”

(Continued on page 6)

Inside this issue ...

Ontario’s environmental enforcement fines make big jump in 2011 1

Drummond report makes a number of recommendations for environment and energy programs 2

Industry to pay full costs of WDO’s waste diversion programs 4

New governing structure for WDO will remove conflict of interest 4

Ottawa drafts regs for coal plants and new vehicles 5

CAPP sets new operating standards for shale gas development 5

Experts disagree on findings of water pollution study 6

MOE revises greenhouse gas reporting guidelines 6

What’s the future of federal environmental assessment? 8

Summary of MOE Court Bulletins, 2010-1011

Year	Activity	*OWRA*	*EPA*	*OWRA / EPA*	*PA*	*SDWA*	*NMA*	Total
2010	Prosecutions	12	42	3	3	7	1	68
	Fines	$299,250	$1,000,150	$84,800	$26,086	$106,500	$6,500	$1,523,286
2011	Prosecutions	32	53	3	6	9	1	104
	Fines	$1,273,000	$1,613,375	$270,000	$14,500	$70,000	$16,000	$3,256,875

EPA – *Environmental Protection Act*, NMA – *Nutrient Management Act*, OWRA – *Ontario Water Resources Act*, PA – *Pesticides Act*, SDWA – *Safe Drinking Water Act*, *OWRA/EPA* – indicates a single prosecution resulted in fines levied under both acts

WILLMS & SHIER
ENVIRONMENTAL LAWYERS LLP

What does the Drummond Report have to say about Ontario's environment and energy programs?

The cost-savings in health care, education and social programs proposed by the Commission on the Reform of Ontario's Public Services have garnered a lot more attention than its recommendations relating to the environmental and energy portfolios. However, the Drummond Report (*Public Services for Ontarians: A Path to Sustainability and Excellence)* devotes entire chapters to each of these areas and recommends changes so far-reaching that, if adopted, could dramatically change the future of environmental management in Ontario. Drummond calls for a "new paradigm for environmental and natural resource programs" to meet the challenges of future development in a time of fiscal restraint. Unfortunately, the report offers little practical direction for easing the transition to this new paradigm.

Many of the Commission's environmental analyses have not progressed far beyond the musing stage. For example, combining all of southern Ontario's conservation authorities into a single Metrolinx-like agency in order to achieve some vague economy of scale savings is as unlikely as it is impractical. Merging all the parks commissions so that their gift shops can buy in bulk seems naively simplistic. Other recommendations, such as fast tracking environmental approvals or minimizing federal/provincial duplication in environmental assessment, are already well underway. And some recommendations are so vague as to be meaningless – for example, a call to "rationalize" the federal, provincial, local and municipal roles in environmental protection. The predicted cost savings of most of the environmental recommendations have not even been calculated. It is unlikely that a provincial government struggling to tame the deficit will move quickly on many of these suggestions. Premier McGuinty has already said that he will not cancel the Ontario Clean Energy Benefit before its scheduled phase-out in 2015.

"A new paradigm for environmental and natural resource programs and services is desperately needed, shaped by factors of both supply and demand. On the supply side, the fiscal restraint we recommend in this report will further limit the funding available to meet these ministries' legislated and policy-driven obligations. At the same time, demand for continued oversight of environmental approvals, compliance and natural resource stewardship is set to rise… Transformational changes are essential to improve how government operates in this area. We recommend several measures that would improve effectiveness and efficiency."

— Public Services for Ontarians: A Path to Sustainability & Excellence

Selected Energy Program Recommendations in the Drummond Report

#	Program Recommendation	Rationale for Action
12-10	Eliminate as quickly as possible the Ontario Clean Energy Benefit, which provides a 10% rebate on electricity bills for residential, farm and small business customers.	The program (intended to cushion the transition to higher electricity prices) distorts the true cost of electricity and discourages conservation.
12-11	Review all other energy subsidy programs (such as the Ontario Energy and Property Tax Credit, Northern Ontario Energy Credit, and Northern Industrial Electricity Rate Program) for money and achievement of specific policy goals.	Over time, these programs may discourage conservation, leading to higher costs.
12-14	Lower the initial prices offered in the feed-in tariff (FIT) contract; introduce degression rates that reduce the tariff over time; and make better use of "off-ramps" built into contracts.	Reducing FIT rates would encourage innovation and discourage any reliance on public subsidies.
12-18	Increase the on-peak to off-peak price ratio of time-of-use pricing. Make critical peak pricing available on an opt-in basis.	The change would make regulated prices more reflective of wholesale prices.

Selected Environment Program Recommendations in the Drummond Report		
#	**Program Recommendation**	**Rationale for Action**
13-1	Move towards full cost recovery and user-pay models for environmental programs and services.	User fees associated with a number of environmental programs, such as Permits to Take Water and environmental approvals, do not cover their administrative costs.
13-2	Rationalize roles and responsibilities for environmental protections that are currently shared across levels of government.	Jurisdictional crowding results in inefficient use of government resources and creates uncertainty and confusion for industry, developers and citizens.
13-3	Employ a risk-based approach for environmental approvals that focuses on improving outcomes and prevention.	Despite recent improvements to the approvals process, more can and must be done.
13-4	Review opportunities to further streamline the environmental assessment process (coordinate further with the federal government's process or integrate EA with certain approvals).	Full use of the equivalency provisions in the *Canadian Environmental Assessment Act* would serve to reduce unnecessary, costly duplication.
13-5, 19-12	Adjust the current legislation so that more focus is placed on the polluter-pays principle using appropriate financial tools, such as financial assurance. Other options include the introduction of a Superfund-like program.	The province may not recover all costs and expenses incurred for a spill or site cleanup if the site owner is insolvent, no longer exists, or lacks sufficient funds.
13-6	Review the effectiveness of the current governance structure of the Ontario Clean Water Agency (OCWA) to evaluate the merits of restructuring it as a for-profit, wholly owned government entity.	The OCWA's current business model is not sustainable. It cannot offer competitive pay to skilled operators, or move quickly and flexibly to pursue more lucrative business opportunities.
13-7	Rationalize and consolidate the entities involved in land use planning and resources management across south-central Ontario. The Niagara Escarpment Commission, EcoVision, Greenbelt, Oak Ridges Moraine and Conservation Authorities could be merged into a single agency to deliver natural resource management activities. Merge activities of the Niagara Parks Commission, St. Lawrence Parks Commission and Ontario Parks.	Consolidation of multiple agencies into a single agency, with its one-window approach, could offer streamlined, more efficient service and fiscal savings over the long term.
13-8	Ensure that the government's approach to the Ring of Fire maximizes opportunities for Aboriginal people and all Ontarians through innovative approaches to expand labour-market and training programs.	Managed properly, the project will improve socio-economic opportunity and quality of life for Aboriginal people and other residents of the North.
20-5	Advocate for federal greenhouse gas mitigation programs to provide fair and equitable support for Ontario's clean energy initiatives.	Although the federal government has promised support for clean energy, most has been directed to fossil fuels (such as carbon capture and subsidies to the oil and gas sector).

Producers to pay the full cost of waste diversion under Ontario's revamped cost recovery protocols

Rather than forcing consumers to pay additional eco-fees to cover the recycling of the hazardous products they buy, Ontario is downloading those costs directly onto brand owners and importers. The Ministry of the Environment has instituted a new fee-setting methodology to ensure producers reimburse Stewardship Ontario for the full cost of its hazardous and special waste diversion programs. Regulatory amendments to O. Reg. 542/06 under the *Waste Diversion Act, 2002* replace the current cost recovery system.

In addition, the Minister has asked Waste Diversion Ontario (WDO) to undertake a detailed review of Stewardship Ontario's budgets and expenditures, and has directed WDO to work with the Ontario Tire Stewardship to develop similar fee-setting methodologies by March 23, 2012, and with the Ontario Electronic Stewardship by April 30, 2012.

The regulation implements a new deficit recovery fee. To calculate the amount to be paid by a particular steward, one must multiply Stewardship Ontario's accumulated deficit related to the relevant class of municipal hazardous or special waste (as it stood on December 31, 2011), by the quantity of that material commercially supplied by the steward, divided by the quantity supplied by all stewards designated under the Act during the period July 1, 2008, to December 31, 2011. Simply put, if a company was responsible for supplying one-third of a particular class of material over that 30-month period, it would be responsible for paying one-third of Stewardship Ontario's deficit, if any, for diverting that class of material. A steward has until January 31, 2013, to pay that fee in four equal installments.

That covers the accumulated deficit. Going forward, each steward will have to calculate its share of Stewardship Ontario's deficit for each class of designated municipal hazardous or special waste on a quarterly basis. Payment will be required no later than 180 days following the end of each fiscal quarter. At least 30 days before a fee is required to be paid, written notice must be provided to Stewardship Ontario. The previous funding rule, last updated December 14, 2011, is revoked.

Ontario Regulation 11/12, amending O. Reg. 542/06 (Municipal Hazardous or Special Waste) under the WDA, was filed and came into effect on February 9, 2012. On the same day, the changes were posted as an "information notice" on the Environmental Registry. A call for public comment is not required for regulatory proposals that "would not have a significant effect on the environment or are predominantly financial or administrative in nature." We expect the

Waste Diversion Ontario to be restructured

The Ministry of the Environment is adjusting the governing structure of Waste Diversion Ontario to better reflect the "knowledge and expertise required to oversee waste diversion programs" under the *Waste Diversion Act, 2002*. The minister has accepted in principle a WDO report that proposes to

- move the WDO board from an "interest-based appointment system" to one that is "skills-based" and better reflects modern governance practices
- eliminate "real, potential or apparent conflicts of interest" between WDO board members and the programs they oversee
- reduce the number of board members from 16 to 11, amend the nomination and appointment process, and limit terms

Exclusion criteria precludes the appointment of any officer or employee of an industry funding or steward organization, municipality, WDO or any organization or company under a contractual obligation in excess of $5,000 annually with WDO, an IFO and/or an ISP. In addition, several new advisory committees would be established to review and provide feedback on the development, implementation and operation of waste diversion programs. The committees would include individuals from consumer focused organizations, as well as representatives excluded from the WDO board.

The proposal was posted on the Environmental Registry February 10, 2012, for 30 days public notice and comment. The minister anticipates that the new governing structure will be in place in time to allow a new board to be appointed at the WDO's next annual general meeting in April 2012.

Environmental Commissioner of Ontario may have something to say about this lack of public consultation in his next annual report.

New standards for coal-fired plants and new vehicles expected in 2012

Proposed federal regulations designed to slash greenhouse gas emissions from coal-fired electricity are being disparaged by environmentalists for being too weak, while provincial authorities claim they will drive up power prices and shorten the life of generating units.

The draft regs would reduce carbon dioxide emissions through the adoption of carbon capture and storage (CCS) and the promotion of renewable energy and high-efficiency natural gas generation. The proposed performance standard – fixed at 375 tonnes of CO_2/GWh – is scheduled to come into effect on July 1, 2015. If adopted, it would reduce GHG emissions by an estimated 175 Mt CO_2e over the period 2015–2030. The proposals were published in the *Canada Gazette Part I* on August 27, 2011.

While the draft CO_2 emission standard is considered stringent, it will only apply to new units and to "old units that have reached the end of their useful life." The end of useful life date is defined as 45 years from a unit's commissioning date or the end of its power purchase agreement, whichever is later. In addition, new and old units would be able to apply for a temporary deferral until January 1, 2025, from the application of the performance standard if they incorporate CCS technology. Units would be required to begin reporting two years in advance of when they reach their end of useful life date.

Environmental groups have decried the draft regs as too weak and say more than 5,000 people had registered their complaints about the proposals before the 60-day deadline for comments closed in October. On the other hand, Alberta, Saskatchewan and Nova Scotia have indicated they may use the *Canadian Environmental Protection Act's* equivalency provisions to opt out of the proposed federal regulations.

Media reports say that federal environment minister Peter Kent has indicated privately that he is willing to be flexible in how the new emissions rules are implemented. It is possible that Ottawa would allow provinces to set individual emission targets and permit companies to purchase emission credits or reallocate emissions across their entire operations. Finalized regulations are expected in 2012.

Moving ahead with new standards for vehicles

Environment Canada has released a consultation paper on proposed GHG emission and fuel economy regulations that would apply to new passenger automobiles and light trucks of model years 2017 and beyond. The Canadian standards, which will be aligned with those of the U.S. Environmental Protection Agency, follow the general approach of the existing regulations covering the 2011 to 2016 model years. Manufacturers and importers of new vehicles will be required to meet separate fleet average GHG emission standards for each of their fleets of passenger automobiles and light trucks and these standards will become progressively more stringent – by an average of 5% per year for cars and 3.5-5% for trucks – over model years 2017 through 2025. The deadline for comment on the proposals closed December 16, 2011, and draft regulations are intended to be developed for pre-publication in the *Canada Gazette, Part I* in the fall of 2012.

CAPP announces new operating practices for shale gas development

On January 30, 2012, the Canadian Association of Petroleum Producers (CAPP) announced new hydraulic fracturing operating practices for shale gas and tight gas development across Canada. In addition to supporting and abiding by all regulations, CAPP committed to protecting water resources. The Association also committed to establishing a process for addressing stakeholder concerns and making much of the information collected publically available. The operating practices, which apply to all CAPP members exploring for and producing natural gas in Canada, adopt the following six measures

1. disclose on a well-by-well basis the chemical ingredients in fracturing fluid additives, including trade names, general purpose and concentrations

2. develop well-specific risk assessment and management plans for hydraulic fracturing fluid additives, which are to be available to the public
3. develop domestic water well sampling programs, participate in regional groundwater monitoring programs, and continue to collaborate with government and other industry operators
4. design and install wellbores in a manner that maintains integrity before hydraulic fracturing begins, including creating a continuous cement barrier to protect groundwater and remedial plans in the event that a wellbore is compromised
5. assess and measure water sources, monitor as required to demonstrate the sustainability of the source, and collect and report water use data
6. identify, evaluate and mitigate potential risks related to the transport, handling, storage and disposal of fracturing fluids, produced water, flowback water and wastes, and ensure a quick response to accidental spills.

EPA and shale gas company disagree on findings of water pollution study

Hydraulic fracturing, or fracking, a controversial method for extracting natural gas from shale deposits may be responsible for groundwater contamination in Pavillion, Wyoming. On December 8, 2011, the US Environmental Protection Agency (EPA) released a draft analysis of three years of data that showed "compounds likely associated with gas production practices" were present in the aquifer, although at levels generally below established health and safety standards. The lease holder and developer of the field, a subsidiary of Calgary -based Encana Corp., has vehemently disputed the findings of the draft report, which it says are "conjecture, not factual and only serve to trigger undue alarm."

Samples taken from EPA's deep monitoring wells contain chemicals, such as glycols and alcohols, which may be contained in hydraulic fracturing fluids, as well as benzene concentrations well above *Safe Drinking Water Act* standards and high methane levels. The EPA notes that the findings are specific to Pavillion and has submitted its findings to an independent scientific review panel.

MOE revises greenhouse gas reporting guidelines

The Ministry of the Environment has made a number of administrative and technical amendments to its *Greenhouse Gas (GHG) Emissions Reporting Guideline*. The changes include clarifications or corrections to the standard quantification methods, including

- emissions factors
- application of equations
- sampling/analytical methods
- links to referenced standards

An information notice, which does not provide an opportunity for public comment, was posted to the Environmental Registry on February 16, 2012. As a helpful addendum to the notice, the ministry appended a copy of the previous guideline tracking all the changes line-by-line. The amendments took effect on the day they were published on the Registry.

Encana claims that the test results from the EPA's deep wells are radically different than those in domestic water wells, and reflect the chemicals one might expect to detect in the area's natural gas reserves. The company also maintains that there is "unacceptable inconsistency" within the EPA lab's analyses for numerous organic compounds. The "conclusions drawn by the EPA are irresponsible given the limited number of sampling events on the EPA deep wells and the number of anomalies seen in the data," Encana says in a press release following public release of the EPA findings.

Fines Jump *continued from page 1)*

The conviction numbers were compiled by the MOE's legal staff, while the fine totals were extracted from the Court Bulletins regularly issued by the ministry and posted on its website. While the ministry does not issue a bulletin at the resolution of every court case, the spokesperson says they release "as many as possible, including all the significant ones," and the postings are "representative" of their prosecution activities.

A similar upward trend can be seen in the number of administrative penalty orders imposed by the ministry (see "Environmental Penalties on the upswing" in the

Orders & Investigations related to Reported Exceedances						
		2006	2007	2008	2009	2010
Air	# Facilities	52	54	74	61	64
	Orders issued	15	14	16	12	10
	Investigations	4	4	6	4	4
Wastewater (industrial & municipal sewer)	# Facilities	204	231	231	234	212
	Orders issued	13	17	20	25	20
	Investigations	12	18	6	11	7
Ref: www.ene.gov.on.ca/environment/en/industry/compliance_and_enforcement/index.htm						

January issue of our newsletter), although the data for 2011 has not been released as yet.

Prosecutions in 2011 covered a wide variety of offences under five different pieces of legislation and resulted in a full range of penalties. At the lower end of the scale is the $2,500 fine levied against a Newmarket woman who, in the course of repairing her car, drained the gasoline into a ceramic bowl and poured it down the laundry tub in her basement straight into the local sanitary sewer. A spark from an electrical switch ignited the fumes in her basement, set her home on fire, blew two manhole covers off the nearby sewers, and forced the evacuation of her neighbourhood. It also resulted in a conviction under the *Environmental Protection Act* for discharging gasoline into the natural environment "that caused an adverse effect."

At the other end of the legal spectrum, some 11 cases resulted in fines of $100,000 or more (ranging as high as $230,000) and in two cases included short jail terms. For example, the director of a waste storage company in Wallaceburg reported in November 2008 that a transformer on his site had been vandalized and a quantity of PCB-laden oil had soaked into the ground. An order was issued to begin cleanup efforts, requiring five work items to be completed by specified dates. Neither the company nor the director completed any of the items within the required timeframe. In a sentence handed down December 21, 2011, the company was fined a total of $150,000 plus victim fine surcharges, while the director was sentenced to 30 days in custody and two years probation.

The increase in prosecution activity does not appear to reflect an increase in environmental malfeasance. MOE's annual Environmental Compliance Report shows that the number of reported exceedances of ministry air or water emission standards has remained relatively constant over the past five years. The ministry says that its response to an incident – which can include education, revising approvals, issuing orders or environmental penalties, or launching an investigation that may result in prosecution – is intended to be "proportionate to the severity of the incident."

Trend continues in 2012

The Ontario Ministry of the Environment regularly posts Court Bulletins on its website, detailing the results of recent prosecution activities. The first five postings of 2012 indicate that the 2011 results may not be a statistical anomaly. They represent a total of $927,000 in fines (plus victim surcharges), as well as a short jail sentence for one of the owners of an offending company.

- a wood recycling firm in Bellville and its director were fined a total of $112,000 for failing to comply with ministry orders to reduce the amount of waste stored on-site and to undertake groundwater monitoring activities
- a road construction company in Peterborough was fined $200,000 for puncturing a high pressure gas line
- a concrete manufacturing plant in Pickering was fined $100,000 for discharging sediment and cement powder into a local creek impairing water quality
- an auto garage in Hamilton, as well as its director and an employee, were fined a total of $170,000 for defrauding the Drive Clean Program
- two hog farms in Oxford County and their owners were fined a total of $345,000 and one owner was sentenced to 30 days in jail for a series of manure spills that resulted in adverse effects to residents and the impairment of water quality

WILLMS & SHIER
ENVIRONMENTAL LAWYERS LLP

What's the future of federal environmental assessment?

Although not a confirmed side-effect of global warming, environmental rhetoric in early 2012 is already soaring to record-scorching temperatures. First the Prime Minister blames environmentalists, funded by "foreign money," for hijacking NEB's environmental assessment of the controversial Northern Gate Pipeline, which is intended to ship oil from the oil sands through the Rockies to a new supertanker port on the northern BC coast. "The government of Canada will be taking a close look at how we can ensure that our regulatory processes are effective and deliver decisions in a reasonable amount of time," Harper vows.

Then federal Natural Resources Minister Joe Oliver, in an open letter to *The Globe and Mail*, claims that the ultimate goal of "environmental and other radical groups" is to stop every major project "no matter what the cost to Canadian families in lost jobs and economic growth. No forestry. No mining. No oil. No gas. No more hydro-electric dams." Oliver says that "reviews for major projects can be accomplished in a quicker and more streamlined fashion," although he offers no details on how this might be accomplished.

While there are obvious opportunities for minimizing duplication and inefficiency, it will be interesting to see how recent fulminations impact the future of this important legislation.

Which raises the question – just what does the government intend to do with the *Canadian Environmental Assessment Act* (*CEAA*)? If you'll remember, Parliament's seven-year review of *CEAA* was abruptly terminated last November with the Standing Committee on Environment and Sustainable Development only part-way through its deliberations. Instead of hearing more of the scheduled deputations and stakeholders, the Committee directed its analysts to prepare a draft version of its statutory review of *CEAA*, with recommendations addressing

- the inefficiencies of current practices and the need for improving processes
- duplication of environmental assessment activities which cause unnecessary delays in the overall process
- ambiguities which exist in the current *CEAA* legislation
- other timeline issues
- how to address small projects
- *CEAA* triggering mechanisms
- concerns brought forward by project proponents and stakeholders
- substitution and equivalency as options for environmental assessment
- simplifying the process when and where possible
- improving predictability and consistency in processes

The committee meetings, which resumed in February, are now being held *in camera*; no transcripts or background documents have been released. The government has offered no explanation for why it halted the review and what it intends to do now that the committee has resumed its deliberations.

While some proponents will no doubt support the gutting of the federal *CEAA* – few welcome the cost and delay associated with extended assessment deliberations – Ottawa should not cede EA to the sole purview of the provinces and territories. Provision of a national perspective, especially for undertakings that have national repercussions, cross provincial borders or fall under federal jurisdiction, can only strengthen environmental protections in this country. We'll keep you informed.

Willms & Shier Environmental Lawyers LLP
4 King Street West, Suite 900, Toronto, Ontario, M5H 1B6
Tel: 416 863 0711 / Fax: 416 863 1938 / Website: www.willmsshier.com

If you would like to receive Willms & Shier's Environmental Law Report, email your name, title and organization to *jhardacre@willmsshier.com*