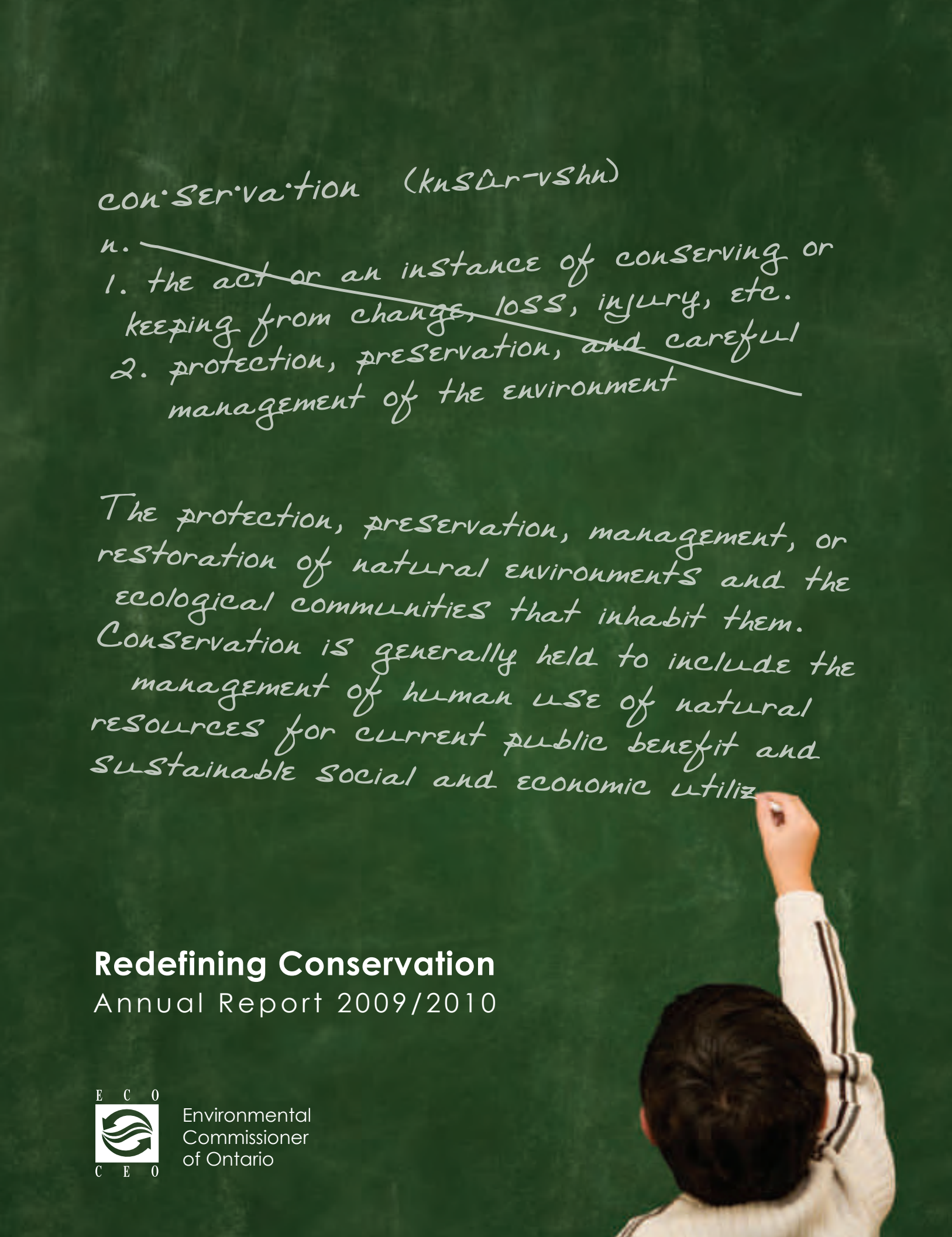

Redefining Conservation

Annual Report 2009/2010

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Simcoe County Residents Challenge PTTW for Quarry

On December 3, 2009, MOE granted a PTTW to M.A.Q. Aggregates Inc., authorizing the company to take groundwater for a new quarry located in Simcoe County for 5 years. The proposal notice posted on the Environmental Registry for this permit elicited considerable public interest, with many commenters expressing significant concern about the potential impacts of the water-taking on the surrounding water resources.

A neighbour of the proposed quarry along with a local property owners group (the Trent-Talbot River Property Owners Association) applied for leave to appeal the ministry's decision to issue the PTTW. These applicants raised several grounds for their appeal, including arguments that the PTTW is inconsistent with:

- provisions in O. Reg. 387/04 under the *Ontario Water Resources Act*;
- some of the guidelines and policies in the PTTW Manual, 2005; and
- the ministry's Statement of Environmental Values, including principles to adopt an ecosystem approach to environmental protection and resource management, and to consider the cumulative effects on the environment.

The applicants also argued that the PTTW could result in significant harm to the environment, particularly, that the dewatering activities could interfere with the neighbours' water supply.

In a decision issued on July 10, 2009, the ERT granted the application for leave to appeal, but only in part. The ERT found that the applicants had met the first part of the test for leave to appeal (i.e., that no reasonable person could have made the decision) on the ground that MOE had failed to adequately consider the cumulative effects of the proposed quarry when the PTTW was issued. The ERT also found that the applicants had met the second part of the test by providing evidence that suggested that dewatering of the quarry could present a risk to the water supply in the area of the quarry.

However, the ERT held that the applicants had not met the first part of the test for any other ground raised. Therefore, the ERT granted the applicants' request for leave to appeal only on the one specified ground. The matter may now proceed to a full hearing on this issue.

Environmental Groups Challenge PTTW for Construction of New Subdivision

On April 27, 2009, MOE issued a PTTW to two companies, authorizing them to take water from both groundwater and surface water sources over a ten-year period during the construction of a new subdivision (Findlay Creek Village) in the City of Ottawa.

Two environmental groups – the Greenspace Alliance of Canada's Capital and the Sierra Club Canada – sought leave to appeal MOE's decision to issue this PTTW on a number of grounds, including:

- The development is in a provincially significant wetland, which is prohibited by the Provincial Policy Statement, 2005, and the PTTW does not include appropriate conditions to protect the wetland from adverse effects;

- MOE's decision fails to comply with O. Reg. 387/04, the Water Taking and Transfer Regulation under the *Ontario Water Resources Act*; and
- MOE failed to consider and incorporate its Statement of Environmental Values in the PTTW.

On July 29, 2009, the ERT granted leave to appeal to the applicants, but only in part. The ERT concluded that the applicants had satisfied the first branch of the test for leave to appeal (i.e., that no reasonable person could have made the decision) with respect to a small number of issues argued under the ground that MOE's decision failed to comply with O. Reg. 387/04. The ERT concluded that the applicants satisfied the second branch of the test, having provided sufficient evidence to demonstrate that MOE's decision to issue the PTTW could result in significant harm to the environment.

Accordingly, the ERT granted the applicants leave to appeal, but only on specific provisions of the PTTW. The remaining grounds raised by the applicants were not allowed as part of the appeal. The matter may now proceed to a full hearing.

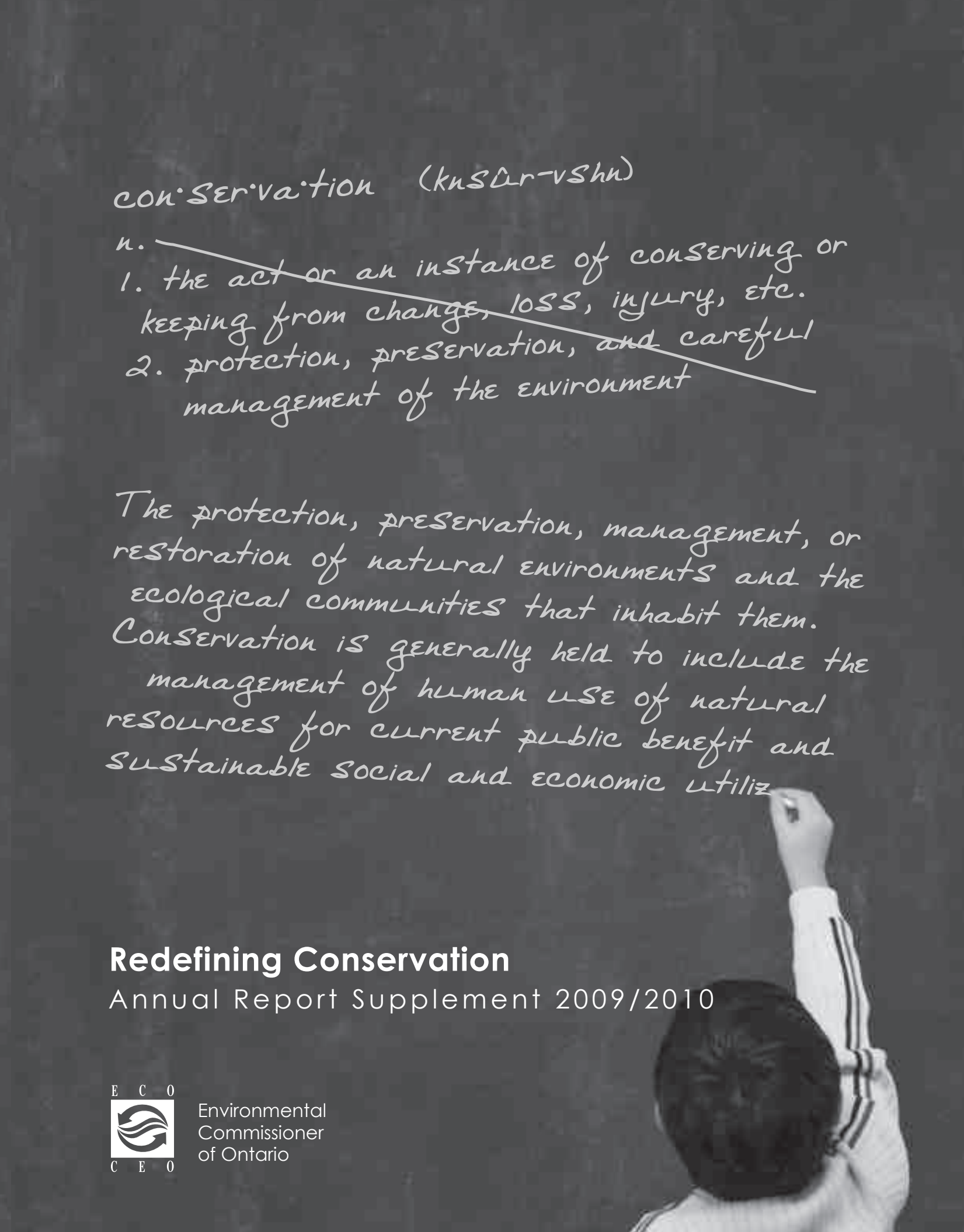
Public Nuisance Cases

Before 1994 when the *EBR* came into force, claims for public nuisances in Ontario had to be brought by, or with leave of, the Attorney General. Since 1994, under section 103 of the *EBR*, someone who has suffered direct economic loss or personal injury as a result of a public nuisance that has harmed the environment can bring forward a claim without the approval of the Attorney General.

No new lawsuits that include public nuisance as a cause of action came to the ECO's attention during the reporting period, although one case launched in 2001 – *Pearson v. Inco Limited et al*, later renamed *Smith v. Inco* – has continued to move through the courts for almost a decade. As reported in previous annual reports, in 2005, the Ontario Court of Appeal allowed a group of over 7,000 property owners to be certified as a class of litigants to bring their lawsuit against Inco. The property owners sought damages for loss of property values resulting from nickel emissions from an Inco facility near Port Colborne. In June 2006, the Supreme Court of Canada rejected Inco's application to appeal the class action certification, enabling the case to finally proceed to trial.

In October 2009, the case was tried in the Ontario Superior Court of Justice in a 101-day trial. On July 6, 2010, the court released its decision, siding with the property owners and awarding them $36 million in damages. The court found Inco liable under the strict liability doctrine set out in *Rylands v. Fletcher*. That case established the legal principle that a person who engages in a "non-natural" activity, using something that is likely to cause mischief if it escapes, is liable for all damages that are the consequence of its escape. The court found that nickel refining is not "an ordinary use of the land," and that the escape of nickel particles from the Inco property through emissions into the air has the potential to cause damage to neighbouring properties.

However, the court found that the class members did not have a claim for public nuisance as they had made no allegation that Inco's conduct had affected any public resource, such as a lake or river.



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ECO believes that this is an unreasonable delay. MNR's delay on this application seriously undermines the basic purposes of accountability and transparency found in the *EBR.*

In its February 2007, response to the applicants, MNR relied heavily on its unreleased Caribou Conservation Framework to allay any possible concerns about the vulnerability of this species and its habitat. MNR told the applicants and the ECO that this framework would be released in the fall of 2007; this framework is now targeted for release in June 2009. The ministry also has committed to regulating the habitat of the forest-dwelling population of woodland caribou under the *ESA* by June 2009. Further, MNR has targeted the fall of 2009 to release its new Forest Management Guide for Boreal Landscapes that will apply to the habitat of woodland caribou. The ECO will review the framework, habitat regulation, and forest management guide in a future Annual Report.

Review of Applications R2009001, R2009002, R2009003, R2009004:

5.4.2 Need to Legislate Development and Mineral Exploration in Uranium Zones (Review Denied by MNDMF, MMAH, MNR, and MOE)

This application was reviewed in conjunction with R2009001 (MNDMF), R2009002 (MMMAH) and R2009004 (MOE). Please see the Ministry of Northern Development, Mines and Forestry portion of this Section for the full review.

Review of Application R2009005:

5.4.3 Request for Amendments to the *Conservation Authorities Act* and a Review of the Adequacy of Provincial Transfer Payments to Conservation Authorities (Review Denied by MNR)

Background/Summary of Issues

Since the establishment of the first Conservation Authority (CA) in Ontario in 1946, these watershed-based agencies have evolved to do more than just regulate development in natural hazards such as flooding and erosion prone areas. Many CAs also plant trees, secure land for natural area protection, restore and rehabilitate streams and wetlands and educate local communities on the importance of healthy ecosystems.

When the province significantly cut funding to CAs in the 1990s, the authorities began to charge fees (e.g., development applications and entrance to conservation areas) and accept donations to stay afloat. In May 2009, the ECO received an application for review asserting that it is a conflict of interest for CAs to accept donations from developers and other organizations that have a vested interest in expanding or intensifying the development of lands under the purview of the CAs. The applicants requested: a provision in the *Conservation Authorities Act* (*CAA*) to regulate private donations to CAs in order to prevent conflicts of interest from occurring; and a review of the adequacy of provincial transfer payments to CAs under section 39 of the *CAA*.

Conflict of Interest/ Conservation Authority Permits

CAs are created under the *CAA* and the objectives of a CA are to "establish and undertake, in the area over which it has jurisdiction, a program designed to further the conservation, restoration, development

and management of natural resources other than gas, oil, coal and minerals." Each CA is governed by a Board of Directors whose members are appointed by municipalities located within the CA's watershed.

Each CA has an individual regulation under section 28 of the *CAA* and in 1998 the Act was amended to ensure that the regulations would become consistent across the province. Ontario Regulation 97/04 under the *CAA* outlines the content required for these individual regulations (the ECO reported on O. Reg. 97/04 in the Supplement to our 2005/2006 Annual Report).

CAs regulate development and activities in or adjacent to river or stream valleys, Great Lakes and large inland lakes shorelines, watercourses, hazardous lands and wetlands. Permission for development may be required from a CA to confirm that the control of flooding, erosion, dynamic beaches, pollution or the conservation of land is not affected. CAs also regulate the straightening, changing, diverting or interfering with an existing channel of a river, creek, stream, watercourse or for changing or interfering with a wetland. The ECO noted in our 2006/2007 Annual Report that CAs are not consistently regulating wetlands across the province because of a lack of resources or a lack of political will.

The CA Board of Directors is responsible for approving (or denying) all permit applications under the *CAA*. Board decisions are guided by (Board approved) policies and procedures for administering its regulation. An applicant can request a CA hearing under *CAA* to object to a permit refusal or conditions of a permit. An applicant also has the ability to appeal the CAs decision to the Office of the Mining and Lands Commissioner. The *CAA* does not have a provision for third parties to appeal permits. In addition, these permits are not prescribed as instruments under the *EBR* and therefore not required to be posted on the Registry for public input.

CAs accept private donations to conduct a variety of local environmental projects. For example, donations have been used to build and maintain nature trails, plant trees, conduct biodiversity monitoring and research, rehabilitate gravel pits, and acquire greenspace land. Many CAs have established foundations, which are registered as charitable agencies, to handle donations and fundraising. While the *CAA* speaks to the receiving of grants from the Minister of Natural Resources, it does not address the accepting of donations from third parties.

In some cases, donations come from organizations, such as real estate developers, construction companies, and energy and resource companies, with a vested interest in expanding or intensifying the development of lands. The applicants reasoned that by accepting donations, the objectives of the CA (as defined in the *CAA*) are compromised, creating a conflict of interest.

The applicants provided an example of a potential conflict of interest in which a developer, interested in building a subdivision in and around the provincially significant Leitrim wetland near Ottawa, committed to donating land and money to the South Nation River Conservation Authority (SNC). The applicants alleged that the CA failed to properly administer its regulation (O. Reg. 170/06 under the *CAA*) because it received donations from the developer. SNC does not have an established foundation or associated charitable organization to handle its donations. Despite the developer's commitment, the land has not yet been transferred to the CA.

The applicants argued that because similar conflicts of interest could be occurring throughout the province, the Ministry of Natural Resources (MNR) should establish a provision in the *CAA* that clearly regulates private donations to CAs. In addition to this application for review, the applicants also submitted an application for investigation related to this example; for more information, please see Section 6.2.3 of this Supplement.

The applicants requested that MNR consider its Statement of Environmental Values (SEV) when considering the application. The applicants stated that by accepting private donations, CAs are pressured to "subordinate their watershed conservation, restoration, and management responsibilities to the interests of economic development." The applicants claim that this poses a serious risk of harm to the environment and is therefore incompatible with MNR's SEV.

Provincial Underfunding of Conservation Authorities

Under section 39 of the *CAA*, MNR provides an annual operating cost transfer payment grant to each of the CAs for provincially mandated activities. In 1992, MNR provided CAs with approximately $59 million per year total as transfer payments for flood and erosion control activities. During the late 1990s, MNR reduced the amount provided, stating that it would no longer fund certain activities (i.e., construction of flood and erosion control works, municipal plan review for natural hazards, implementation and enforcement of section 28 regulations and shoreline management activities). The applicants stated that CAs responded to the funding reduction by "cutting back programs, seeking increased municipal funding and maximizing self-generated revenue." For the past decade, the total amount allocated by MNR amongst Ontario's 36 CAs has remained stagnant at approximately $7.6 million per year.

The types of projects eligible for funding are outlined in MNR's Policies and Procedures for Determining Eligibility for Provincial Grant Funding to Conservation Authorities (1997), a chapter in the CAs Policies and Procedure Manual (1997). This document states that MNR would fund 50 per cent of the cost of eligible projects. Eligible projects include:

- Operation of Flood and Erosion Control Structures;
- Routine/Minor Maintenance of Flood and Erosion Control Structures;
- Preventative Maintenance of Flood and Erosion Control Structures;
- Flood Forecasting and Warning;
- Ice Management;
- Plan Input;
- Information;
- Legal Costs; and
- Administration.

Historically, MNR and municipalities would jointly fund the cost of these eligible projects – MNR through the transfer payment grants and municipalities through levies. When MNR cut the amount provided to CAs in the late 1990s, the amount provided by municipalities increased as did self generated revenues (e.g., fees for municipal plan input and review, land rentals and conservation area gate fees).

Conservation Ontario, the network for all 36 CAs, examined CA audited financial statements from 2002 to determine MNR's funding shortfall in its report, Now and in the Future (2004). Given MNR's commitment to fund 50 per cent of eligible projects, Conservation Ontario found that MNR should have provided CAs with $16 million because the total cost of eligible projects was approximately $33 million. Since MNR only provided $7.6 million to CAs as transfer payments in 2002, Conservation Ontario estimated that MNR's funding shortfall was over $9 million. Conservation Ontario requested that MNR provide:

1) fair, equitable and sustainable funding for those basic operational activities defined to be eligible for provincial transfer payment in accordance with its own policies;
2) re-instatement of funding to some activities that were specifically excluded in 1997; and
3) an annual Consumer Price Index adjustment to funding.

In 2007, Conservation Ontario re-estimated the shortfall to be $14.3 million, based on the same criteria as the 2002 assessment, and stated that "[a]t the current funding levels in Ontario, our collective ability to protect lives and property from natural hazards is diminishing."

The applicants requested that the province review the level of funding provided to CAs through transfer payments under section 39 of the *CAA* because insufficient funding is linked to the potential conflict of interest created by accepting private donations. As part of the application for review, the applicants submitted a copy of the report, Now and in the Future, to MNR. The applicants argued that MNR's decision to keep transfer payments below historic levels has significantly contributed to the conflict of interest described above and is therefore incompatible with the ministry's SEV.

Ministry Response

In July 2009, MNR denied this application for review. MNR stated that a review for the need of a provision in the *CAA* to regulate private donations is unwarranted because:

- the application does not provide sufficient evidence to support the claim that the mandate of CAs is compromised through the acceptance of donations and that conflicts of interest have occurred;
- the CA application and decision making process under the *CAA* for permitting of development and development related activities is open, transparent and demonstrates impartiality and is based on policies guided by provincial guidelines; and
- MNR ensures its acts and policies, including the *CAA* and policies and guidelines related to the act, are regularly reviewed and updated.

MNR stated that a review of the adequacy of funding provided to CAs is unwarranted because:

- MNR provides an annual operating cost transfer payment grant to each of the 36 CAs for specific provincially mandated activities related to public safety and emergency management and not for a broad mandate of activities;
- CAs can secure funding from other sources such as municipal special levies to carry out additional programs under their broad mandate; and
- As additional funding will not be reasonably available in the foreseeable future, there is no reasonable prospect that the CA operating cost transfer payment will be increased.

MNR stated that additional funding is provided to CAs, including $5 million annually under the Water and Erosion Control Infrastructure (WEI) Capital Program for repairs and studies on existing CA owned dams, dykes and flood and erosion control works. It also highlighted that in 2008/2009, $16.8 million was provided through a separate transfer payment to CAs for source water protection under the *Clean Water Act, 2006*.

Other Information

The ECO described flood prevention and mitigation measures in Ontario in our 2006/2007 Annual Report. The ECO reported that about one-quarter of Ontario's dams are more than 50 years old and in need of maintenance and repair. The ECO also noted that "CAs are struggling to prohibit development and site alteration in flood prone areas." Moreover, aging and/or inadequate flood control structures and insufficient funding for flood management activities are "increasing the risk that future rainfall events will overwhelm existing flood prevention and mitigation measures" in Ontario. Since climate change may bring more frequent and intense rainfall events, the ECO noted that "bold pro-active steps are required to reduce the risk of significant flooding." The ECO urged the Ministry of the Environment, MNR and the Ministry of Municipal Affairs and Housing to update current flood hazard regulations, policies and guidelines so that infrastructure and development will be able to handle or withstand projected flood events from climate change.

In November 2009, MNR posted a proposal on the Environmental Registry (#010-8243) for a new chapter in the CA Policies and Procedures manual. The proposed chapter "Policies and Procedures for Conservation Authority Plan Review and Permitting Activities" outlines "the roles of CAs in the areas of municipal planning, plan review, and permitting related to development activity and the protection of environmental interests." It includes new policies related to applicant pre-consultation, complete application requirements, timelines associated with permit decision-making, and permit appeals processes. The ECO may review this decision in our 2010/2011 Annual Report.

ECO Comment

The ECO believes that MNR's decision not to review the need for a provision in the *CAA* to regulate private donations, was reasonable. Although some CAs accept donations from organizations with an interest in land development projects, the ECO is not aware of evidence to support allegations that

conflicts of interest are occurring province-wide. The applicants alleged one instance of a potential conflict of interest from the acceptance of third party donations. The ECO notes that CAs also accept donations from the general public, environmental foundations and community service groups.

Donations provided to CAs, either in the form of land or money, enable valuable environmental projects to be completed on the ground, such as planting trees and teaching children about healthy ecosystems and biodiversity. Some CAs have established foundations, separate from the CA, to manage donations and fundraising. Foundations work in partnership with the CA, municipalities and other partners to implement environmental projects. The ECO suggests that MNR should consider this model for all CAs to better ensure a transparent process for receiving donations from third parties.

Upon review of this application, it became clear to the ECO that the issuance of CA permits is not an open process for third parties. Applicants are able to appeal decisions made by the CA regarding permits issued under Section 28 of the *CAA* but there is no third party appeal process. This is important because CA permits are not prescribed as instruments under the *EBR* and therefore not required to be posted on the Registry for public input. Currently, the public has limited, if any ability to participate in the issuance of *CAA* permits. It is at the discretion of the CA board to allow public delegations to the board before a permit decision is made. Environmental organizations have recommended MNR amend the CA board structure to include representation from non-municipal members, such as environmental organizations or the public, in order to participate in the review of permit applications. The ECO is not sure this is the best solution but suggests, at the least, MNR consider prescribing CA permits as instruments under the *EBR*,

The ECO believes that MNR's decision not to review the adequacy of funding provided to CAs as transfer payments under section 39 of the *CA Act* was not reasonable. The total amount MNR provides to CAs on an annual basis, $7.6 million, has not changed in over a decade. Why would MNR not take this opportunity to review whether or not the amount provided to CAs is still enough? The applicants provided MNR with a copy of a Conservation Ontario report that identified a rather large shortfall ($9 million) in transfer payment funding to CAs. Also, Conservation Ontario has identified to the province that the current level of funding is "diminishing" the CAs' ability to protect lives and property from natural hazards.

The ECO acknowledges that MNR provides certain earmarked additional funding to CAs, such as funding for source water protection under the *Clean Water Act*. The ECO notes, however that money provided to CAs for source water protection cannot be used to cover the cost of flood and erosion control activities. Furthermore, MNR's conclusion that a review is not warranted because CAs could get additional funding from municipal special levies for broad mandate activities is somewhat irrelevant; the application for review does not ask MNR to review funding for CAs' broad mandate activities, but the funding provided under section 39 of the *CAA* for specific flood and erosion control activities, as defined by MNR policy.

In Ontario, climate change will bring more extreme weather events (e.g., an increase in the intensity, frequency and duration of rain) and with it a greater risk of flooding and erosion. The ECO has previously expressed concern that inadequate funding for flood control and prevention measures has created a situation where, due to climate change, Ontario is now vulnerable to significant flooding events. With this in mind, the ECO believes that the MNR should have conducted a thorough review of the amount provided to CAs as transfer payments for flood and erosion control activities.

Review of Application I2009007:

6.2.3 Alleged Contraventions of O. Reg. 170/06 under the *Conservation Authorities Act* (Investigation Denied by MNR)

Background

In southern Ontario there is a constant struggle between protecting wetlands and building houses for the growing population. Often environmental organizations clash with developers in an effort to preserve these ecologically important areas before they are lost forever. Conservation Authorities (CAs) play a key role in protecting wetlands through regulating development and other activities in and adjacent to wetlands under the *Conservation Authorities Act* (*CAA*).

In July 2009, the ECO received an application requesting that the Ministry of Natural Resources (MNR) investigate alleged contraventions of O. Reg. 170/06 – South Nation River Conservation Authority: Regulation of the Development, Interference with Wetlands and Alterations to Shorelines and Watercourses, (SNC) made under the *CAA*. The applicants claim that SNC and the developer, Tartan Homes contravened O. Reg. 170/06 when SNC allowed Tartan Homes to construct a residential development, Findlay Creek Village, in and adjacent to the Leitrim Wetland and to alter Findlay Creek without written permission. Moreover, the applicants expressed concern that the developer's commitment to donate land and money to SNC created a conflict of interest for SNC, and may have played a role in the alleged contravention of the *CAA*.

In addition to this application for investigation, the applicants also submitted an application for review requesting a provision in the *CAA* to regulate private donations to all CAs and the amount of money provided to CAs through transfer payment grants; for more information, please see Section 5.2.12 of this Supplement.

Leitrim Wetland and Findlay Creek Village

The Leitrim Wetland is located within the City of Ottawa (formally within the City of Gloucester), south of Leitrim Road and dissected by Albion Road (see figure below). The developer owns a major portion of this area (east of Albion Road, south of Leitrim Road and west of Bank Street), including a majority of the Leitrim Wetland. Findlay Creek Village is located along the north-east border of the wetland.

In 1988 the Regional Municipality of Ottawa-Carleton designated the wetland area as "urban" in its official plan. In 1989, the City of Gloucester re-designated the area for development, in accordance with the Region's "Urban" designation (Official Plan Amendment #10). In that same year, MNR categorized the Leitrim Wetland as a Class 1 Provincially Significant Wetland, protecting it from development. However, a portion of the wetland area identified as provincially significant had also been the location of a proposed residential development. The municipality could not approve the development unless the boundary was changed.

In 1991, MNR reassessed and altered the provincially significant wetland (PSW) boundary by removing the one-fifth of "altered" or "unstable" land in the north-east part of the wetland. MNR's reduction was part of a deal with the developers in return for: the creation of new linked habitats along the creek and a proposed stormwater pond; and protection of the core of the wetland by turning it over to a public agency. MNR's PSW boundary reduction allowed the developers to proceed with the Findlay Creek Village project since it was no longer within a PSW.

As part of the deal, the developer agreed to convey 96 hectares of the core wetland to SNC for protection and to donate $40,000 for maintenance of the wetland and $200 per home sold to support programs and fund wetland education. Despite this commitment, the wetland core has not yet been transferred to SNC.

With the boundary changed, the developers obtained the required land use planning and environmental approvals, including but not limited to:

- *Planning Act* approvals;
- two federal environmental assessments;
- *Fisheries Act* authorization;
- a provincial class environmental assessment;
- several certificates of approval for stormwater management facilities;
- certificates of approval for water works; and
- eight permits to take water.

The developer began construction of Findlay Creek Village in 2003 and by July 2009, approximately 50 per cent of the development (900 of the planned 1800 residential units) was completed.

Figure: Boundary of the Leitrim Provincially Significant Wetland and Findlay Creek Village (east of Bank Street and south of Leitrim Road), in the City of Ottawa.

How Conservation Authorities Regulate Wetlands

CAs are created under the *CAA* and are organized on a watershed basis. Each CA has an individual regulation under section 28 of the Act and in 1998 the Act was amended to ensure that the regulations would become consistent across the province. These amendments required all CAs to start regulating development and site alteration in and adjacent to wetlands, although some had already been regulating these areas prior to the amendment. O. Reg. 97/04 under the *CAA* outlines the content required for these individual regulations (the ECO reported on O. Reg. 97/04 in the Supplement to our 2005/2006 Annual Report). In 2006, MNR filed SNC's individual regulation - O. Reg. 170/06.

Each CA is governed by a Board of Directors whose members are appointed by municipalities located within the CA's watershed. The CA Board of Directors is responsible for approving (or denying) all permit applications under the CA's regulation. Board decisions are guided by Board approved policies and procedures for administering its regulation.

In addition to regulating development and activities in or adjacent to river or stream valleys, Great Lakes and large inland lakes shorelines, watercourses, and hazardous lands, CAs also regulate:

- activities within wetlands;
- development within wetlands; and
- development adjacent to a wetland (120 metres of Provincially Significant Wetlands and 30 metres of all other wetlands), unless development has been approved under the *Planning Act* or other public planning or regulatory processes.

To be regulated by a CA, a wetland must meet the definition provided in the *CAA* and be delineated on regulation limit maps held at the CA office. The CAs have discretion on which wetlands they regulate (e.g., include in the regulation limit maps). SNC only regulates PSWs identified in municipal Official Plans, within the city of Ottawa. Some CAs regulate and map smaller, non-provincially significant wetlands. For example the Lake Simcoe Region CA has mapped and is regulating all wetlands larger than 0.5 hectares. The ECO noted in our 2006/2007 Annual Report that CAs are not consistently regulating wetlands across the province because of a lack of resources or a lack of political will.

Protection of Wetlands under the Provincial Policy Statement

In Ontario, there is no provincial legislation that specifically requires the protection of wetlands. Land use planning legislation and policies such as the *Planning Act* and the Provincial Policy Statement (2005) (PPS) provide indirect protection for certain wetlands. For example, the PPS prohibits development and site alteration in MNR-identified PSWs in much of southern and central Ontario. However, the ECO previously reported in our 2006/2007 Annual Report on the weakness of Ontario's policy approach to protecting wetlands, including that it does not address "locally significant wetlands or wetlands that have not yet been evaluated for their significance." This is important, since many of the wetlands that remain in southern Ontario have been fragmented by development, are smaller in size and may not be considered provincially significant by MNR's standards. For example in the Credit Valley Conservation Authority watershed, the majority (approximately 1400) of wetlands are less than one hectare in size and represent 25 per cent of the total wetland area within the watershed.

Summary of Issues

The applicants claim that SNC did not issue the required written permission for either development in the wetland or the alteration of Findlay creek. In the absence of valid permission, the applicants conclude that SNC and Tartan Homes contravened O. Reg. 170/06. Furthermore, the applicants allege that SNC's allowing of the development stems not from an unbiased evaluation of the control of flooding, erosion, pollution or the conservation of land, as provided for in section 3(1) of its regulation, but rather from a conflict of interest whereby the SNC stands to benefit financially (from donations) by allowing the development.

Ministry Response

MNR denied the application for investigation for the following reasons:

- SNC permission was not required for development in or adjacent to the Leitrim Wetland;
- SNC had advised MNR that it had in fact issued permission to the developer to alter Findlay Creek;
- SNC was reviewing two permit applications related to altering Findlay Creek; and
- SNC monitors the development area for compliance with permit requirements.

MNR clarified that permission was not needed for development in the wetland because:

- wetlands under O. Reg. 170/06 are areas delineated as such on SNC maps;
- the Leitrim Wetland is delineated in SNC maps as the provincially significant boundary identified by MNR; and
- since there was no development within the provincially significant wetland boundary, SNC was not required to issue any permits.

MNR also explained that Findlay Creek Village did not need permission from the CA for development adjacent to the wetland. Under O. Reg. 170/06, the CA is not required to grant permission for development within 120 metres of a provincially significant wetland if the development has been approved pursuant to an application made under the *Planning Act* or other public planning or regulatory processes. MNR stated that because the developers obtained prior approval under the *Planning Act* for Findlay Creek Village, permission from SNC was unnecessary.

As follow-up to MNR's response, the ECO requested that MNR provide copies of SNC's permits and SNC's policies and procedures for administering the regulation. MNR advised the ECO that this "background information" was not housed at MNR and the request was passed along to SNC. MNR further stated that "verbal confirmation by [SNC] of the presence of the permits was sufficient to address the allegation." Also, MNR explained that it was unnecessary for MNR to review the policies and procedures because the "alleged contravention was absence of written permission, not contravention of policies and procedures."

The ECO contacted SNC directly to obtain copies of the permits and its policies and procedures. The SNC forwarded the documents the next day. SNC issued eight permits to Tartan Homes related to the construction of Findlay Creek Village under O. Reg. 170/06, from the period of March 2006 to June 2009. SNC issued written permission for interference with a watercourse, construction of a stormwater management facility, installation of culverts, and filling a watercourse on Findlay Creek.

Other Information

For more than a decade, several environmental organizations and members of the public have opposed this particular residential development because of potential adverse impacts on the Leitrim Wetland. The controversy has included an Environmental Review Tribunal hearing and four "bump-up" requests under the *Environmental Assessment Act*. The ECO has also received a number of telephone calls, letters and emails from the public on this issue.

In 2007, some environmental groups disputed the official boundary of the provincially significant wetland in an Ontario Municipal Board (OMB) hearing. Opponents to the proposed development claimed that MNR never officially accepted the 1991 boundary change and that the original (1989) boundary remained in effect. The developers asserted that the 1991 boundary became MNR's official position and proceeded with the project. The OMB concluded that the 1991 boundary represents MNR's official position. In 2008, MNR amended its digital maps to reflect the 1991 Leitrim Wetland boundary.

In December 2009, the ECO was notified by MNR that it received a request under the *Freedom of Information and Protection of Privacy Act* to disclose information relating to this application for investigation. The ECO advised MNR of our consent for the ministry to disclose the requested records, provided that portions containing names, addresses, phone numbers and any other personal information were obscured (blacked out). In January 2010, MNR notified the ECO that it would release the documents in their entirety, but excluding all personal information.

Two *EBR* leave to appeal applications were submitted for permits to take water issued for the construction of the Findlay Creek Village. For a more detailed review of these appeals (Environmental Registry #010-4670 and #010-1607), please refer to Section 7 of this Supplement and to Section 8 of the Supplement to our 2008/2009 Annual Report.

ECO Comment

MNR's decision to deny this application for investigation is understandable, given that SNC had issued permission to alter Findlay Creek and that CAs are not required to issue permission to develop adjacent to a PSW when the development is already approved under the *Planning Act*, as was the case with Findlay Creek Village.

Despite our agreement with MNR's decision, the ECO is troubled by the way MNR addressed this investigation. The ECO believes it is unacceptable that MNR assessed and made a decision regarding an alleged contravention without reviewing the said permits. Verbal confirmation that SNC issued permission under O. Reg. 170/06 of the *CAA* is insufficient when reviewing an application for investigation under the *EBR.* While the ECO recognizes that MNR does not issue permits under the *CAA* and therefore does not normally house these permits, as the subject of an application for investigation, MNR should have obtained copies before making its decision. Furthermore, to determine whether O. Reg. 170/06 was contravened, MNR should have reviewed SNC's policies and procedures, since they define which wetlands SNC shall regulate.

The ECO considers MNR's reason for denying this application valid only because this CA has a very narrow interpretation of regulated wetlands in its watershed – only those identified as PSWs in Official Plans, within the City of Ottawa. Many CAs in Ontario have chosen to regulate locally significant wetlands, regardless of whether they are identified as provincially significant by MNR or designated as PSW by municipalities in official plans. Given the lack of protection the PPS provides for non-provincially significant or non-evaluated wetlands, the CA regulations are currently the primary on-the-ground tool to protect wetlands from development and site alteration in Ontario. MNR should provide additional support to CAs to ensure that the regulation of wetlands under the *CAA* is undertaken consistently across the province.

Review of Applications I2009012 and I2009013:

6.2.4 Alleged Contraventions at a Quarry Site under the *Aggregate Resources Act* (*ARA*), the *Endangered Species Act* (*ESA*), the *Environmental Protection Act* (*EPA*) and the *Ontario Water Resources Act* (*OWRA*)

(Investigation Denied by MNR and MOE)

Geographic Area: Nippissing, District of Parry Sound, Ontario

Background/Summary of Issues

On January 18, 2010, two applicants submitted an application for investigation regarding a licence for an aggregate quarry in Pringle Township. The applicants alleged violations of the *Environmental Protection Act (EPA),* the *Ontario Water Resources Act (OWRA),* the *Aggregate Resources Act (ARA)* and the *Endangered Species Act (ESA).* In February 2008, this site had been issued an aggregate licence, after the geographical coverage of the *ARA* had been expanded to this region in January 2007. The applicants alleged that: the operation standards under the licence were not adhered to; a crushing machine was operated without a required certificate of approval (C of A); and there may have been damage to the habitat of a species at risk (the Blandings turtle) and to a local creek. The *EPA* and *OWRA* are administered by the Ministry of the Environment (MOE), while the *ARA* and *ESA* are administered by the Ministry of Natural Resources (MNR).

The ECO sent this application to both MNR and MOE.

Ministry Response

Ministry of the Environment

On March 29, 2010, MOE advised the applicants that an investigation under the *EBR* was not warranted and would be duplicative, invoking section 77(3) of the *EBR.* MOE noted that the quarry site had been inspected during a joint visit by MOE and MNR on March 24, 2009 – nine months before the *EBR*

Imperial Precast Corp. (Registry #IA04E0896)

Instrument Issued:

In April 2009, MOE granted a C of A for air emissions (under section 9 of the *Environmental Protection Act*) to Imperial Precast Corp, a company that manufactures concrete products. The C of A provides approval for an exhaust system, a baghouse filter to control particulate matter, two storage tanks, and combustion equipment.

Leave Application:

The applicants (Georgina Beattie and others) sought leave to appeal MOE's decision to issue the C of A. The applicants argued that the C of A should include stronger requirements for pollution, noise and odour control in light of the fact that the facility is located in close proximity to a residential neighbourhood.

Leave Decision:

On July 10, 2009, the ERT denied the application for leave to appeal. The ERT found that the applicants had failed to satisfy the first part of the test for leave to appeal – i.e., to establish that no reasonable person could have made the decision to issue the C of A with the terms and conditions imposed by the Director. However, in response to the applicants' concerns regarding noise emissions from the facility, the ERT urged the MOE Director to require completion of an acoustic assessment as soon as possible.

Findlay Creek Properties Ltd. (Registry #010-4670)

Instrument Issued:

On April 27, 2009, MOE issued a PTTW to Findlay Creek Properties Ltd. and 1374537 Ontario Ltd. The PTTW authorizes the proponents to take water from both groundwater and surface water sources at different times over a ten-year period during the construction of a new subdivision (the 'Findlay Creek Village') in the City of Ottawa.

Leave Application:

The applicants (the Greenspace Alliance of Canada's Capital and Sierra Club Canada) sought leave to appeal the MOE Director's decision to issue the PTTW on a number of grounds, including:

- The development is in a provincially significant wetland, which is prohibited by the Provincial Policy Statement, 2005, and the PTTW does not include appropriate conditions to protect the wetland from adverse effects;
- The Director's decision fails to comply with O. Reg. 387/04, the Water Taking and Transfer Regulation under the *Ontario Water Resources Act*; and
- The Director failed to consider and incorporate MOE's Statement of Environmental Values in the PTTW.

Leave Decision:

On July 29, 2009, the ERT granted the applicants leave to appeal, in part. The ERT concluded that the applicants had satisfied the first branch of the test for leave to appeal (i.e., that no reasonable person could have made the decision), but only with respect to a small number of the issues argued under the ground that the Director's decision failed to comply with O. Reg. 387/04. The ERT concluded that the applicants satisfied the second branch of the test, having provided sufficient evidence to demonstrate that the MOE Director's decision to issue the PTTW could result in significant harm to the environment.

Accordingly, the ERT granted the applicants leave to appeal only specific provisions of the PTTW. The remaining grounds raised by the applicants were not allowed as part of the appeal.

Status of Appeal:
The final decision of this appeal is pending.

Thomas Cavanagh Construction Limited (Registry #010-5806)

Instrument Issued:
On June 9, 2009, MOE granted a PTTW to Thomas Cavanagh Construction Limited. The PTTW, which is a renewal of a previous PTTW, authorizes the taking of water for the purposes of industrial dewatering, aggregate washing and dust control at the proponent's quarry in the City of Ottawa. The PTTW authorizes the taking of a maximum of 6,480,000 litres of water per day, 365 days per year, for a period of 10 years.

Leave Application:
The applicant (Ken McRae) sought leave to appeal the entire PTTW. The applicant provided a number of documents dating back to 2001 to support his assertion that he has an interest in the PTTW, and to support his concerns that the PTTW would have a negative impact on the Provincially Significant Huntley Wetlands Complex. The applicant identified several grounds for leave to appeal, including:

- The permit holder has a long history of violating environmental protection laws;
- The permit holder has no regard for the importance of the wetland; and
- No reasonable person could have decided to issue the PTTW because MOE's Statement of Environmental Values, 2005 PTTW Manual and regulations under the *Ontario Water Resources Act* all indicate that a PTTW that would result in the destruction of a Provincially Significant Wetland should not be issued.

Leave Decision:
On August 21, 2009, the ERT denied the application for leave to appeal. The ERT concluded that the applicant met the first part of the leave to appeal test by demonstrating that there is good reason to believe that no reasonable person could have made the decision to issue the PTTW. In particular, the ERT agreed with the applicant that the permit holder's compliance history could be considered under the *EBR* section 41 test and that "a proponent's history of environmental compliance is relevant to whether the conditions in a PTTW will be complied with."

However, the ERT concluded that the applicant had failed to meet the second part of the test, namely that the MOE Director's decision to issue the PTTW could result in significant harm to the environment. The ERT found that, although the applicant asserted that the water-taking by the permit holder has resulted in significant harm to the Provincially Significant Huntley Wetlands Complex, the information supplied by the applicant was "light on supporting material that establishes the second branch of section 41 of the *EBR*" and was not sufficient to enable the ERT to assess the applicant's allegation of significant harm to the environment. As the applicant did not fully satisfy the leave to appeal test, the ERT dismissed the application.

Michael Wade Construction Co. Limited (Registry #010-5869)

Instrument Issued:
On July 3, 2009, MOE granted a PTTW to Michael Wade Construction Co. Limited for the purposes of irrigating the proponent's golf course in the City of Quinte West, County of Hastings. The PTTW authorizes the proponent to take up to 32,750 litres of water per day from a well, plus another 250,000