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.