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ARTICLES

Doing Business Under Canadian Environmental Law

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INTRODUCTION: DOING BUSINESS UNDER CANADIAN ENVIRONMENTAL LAW

In recent years, the role of the environmental risk management has become increasingly significant to multinational corporations.¹ Corporations from the United States and elsewhere are now undertaking aggressive assessments of environmental regulatory compliance, and are incorporating environmental due diligence into transactions such as mergers, acquisitions, joint ventures, and divestitures. The first step toward assessing compliance often involves interpretation of complex, vaguely written environmental statutes and regulations. Matters are made more difficult by the fact that each governmental structure is differ-

¹ S. Wassersug, *The Role of Risk Assessment in Developing Environmental Policy* [Analysis and Perspective], Int'l Env't Rep. (BNA) 33-40 (January 1990).

ent, and environmental controls inevitably will be administered in ways unfamiliar to foreign companies, even in countries which have emulated the United States' system of environmental regulation.²

This article provides an overview of environmental requirements in Canada, primarily from the viewpoint of one already familiar with the United States regulatory framework. The article begins with an introduction to Federal laws and to the interrelationships between Federal and Provincial law and enforcement. It then focuses in greater detail on environmental laws in Ontario. That province is second only to Canada as the largest trading partner of the United States.³ American businesses conduct an increasingly diverse array of operations in Ontario, including manufacturing, real estate development, and capital investment, all of which come under extensive environmental regulation. Ontario is also the most industrialized province of Canada, and accounts for approximately one-half of the total volume of hazardous waste generated in Canada.⁴

II. LEGISLATIVE POWERS AND THE CANADIAN ENVIRONMENT

Canada, originally comprised of British Colonies, is a Federation consisting of ten provinces and two territories. This Federation was created by the British North American Act of 1867 (hereinafter "BNA")⁵, commonly referred to as "the Constitution Act."⁶ The Canadian government retains vestiges of the British Commonwealth—the Queen of the United Kingdom remains as the nominal Chief Executive. In practice, however, all governmental powers are distributed among the Federal,

² P. Nightingale & G. Bibler, *Environmental Law in Latin America* [Analysis and Perspective], Int'l Env't Rep. (BNA) 507 (October 1989).

³ Shantora, *Environmental Regulation in Canada: A Shared Responsibility*, Int'l Environmental Business Requirements Conference, Government Inst. 1 (1985).

⁴ K. Geiser, K. Fischer, N. Beecher, *Foreign Practices in Hazardous Waste Minimization* A Report to the United States Environmental Protection Agency, the Center for Environmental Management, Tufts University 75-76 (1986). The Center for Environmental Management (CEM) is a research education and training institute founded in 1984 with a grant from the United States Environmental Protection Agency. The CEM, located at Tufts University in Medford, Massachusetts, serves as a center for research in hazardous and solid waste, the communication of risks, the prevention of pollution, corporate environmental management and global environmental concerns. Among other institutions and corporate affiliates, the Center is associated with the Fletcher School of International Law and Diplomacy and the Tufts Graduate School of Urban and Environmental Policy.

⁵ British North American Act, 1867, 30 & 31 Vict. ch. 3. For a basic review of Canadian governmental history see: *The World Almanac and Book of Facts* at 695 (1986), and *Minister of Supply and Services, Canada Handbook 42* (Ottawa: Canadian Government Publishing Centre, 1984).

⁶ Personal communication from, M.B. Jackson, Q.C., Counsel, Legal Services Branch, Ontario Ministry of the Environment, (January 31, 1990).

Provincial and municipal levels of government.⁷ Some provinces, including Ontario, also have a county system of government.⁸

The Canadian Federation exists under a basic division of legislative powers which significantly affects the framework of environmental law in Canada, making it generally more decentralized than environmental law in the United States. In Canada, all constitutional legislative powers are divided between the Federal Parliament and the ten Provincial legislatures.⁹ Jurisdiction over environmental issues is divided, and in some cases shared, between the federal and the provincial governments. An understanding of this basic regulatory structure is essential to understanding how environmental laws are enacted and enforced in Canada.

Even though protection of the environment is not specifically mentioned in the BNA the Act gives the Canadian Federal Government primary constitutional authority to regulate trade and commerce, enter into treaties, establish rules of criminal law, and enact legislation promoting federal interests in peace, order and general welfare. All of these powers may be used to some degree to regulate for the purpose of managing the environment. Additionally, the BNA grants exclusive powers to the federal government over fisheries, navigation and shipping. As in the United States, however, these powers have been limited in order to preserve individual rights and freedom of commerce.¹⁰

The Canadian provinces have much broader powers than the Federal Government to legislate on issues of environmental management. Legislative powers reserved to the provinces are enumerated in section 92 of the BNA, and include powers to regulate land use, public works, and other matters local in nature. Historically, issues of air and water pollution, soil contamination, and waste management have generally been considered local in nature and therefore within the nearly exclusive authority of the provinces. Judicial interpretations have been consistently

⁷ Personal communication with Robert Fishlock at Blake, Cassels & Graydon, April 1990. The executive powers of the federal government are exercised by the Prime Minister, the leading member of the governing party in the House of Commons. The Prime Minister governs under the advise of the Cabinet which is appointed by the House of Commons. The executive powers of the provincial, governments are similarly assigned and exercised by the provincial, Premiers and the provincial cabinets which are made up of appointees of the provincial legislatures. Municipalities are governed by locally elected Councils. Government departments are called "Ministries" and are headed by Cabinet Ministers who, at the federal level, are directly responsible to the elected representatives sitting in the House of Commons. At the provincial level, the Ministers are responsible directly to the Premier and the provincial legislature. Cabinet Ministers tend to be more involved in the politics of the day, leaving a considerable amount of administrative power to be exercised by Deputy Ministers within the various government departments.

⁸ *Id.*

⁹ Franson, Canadian Environmental Law §§ 2.1-2.4(19).

¹⁰ *Id.*

restrictive of federal authority over land management and pollution control.¹¹

Like the Federal Government, the Provincial Governments have exclusive powers to legislate with respect to their proprietary interest. The BNA confers on the provinces, including Ontario, exclusive rights to all lands not federally owned. As a result, the Province of Ontario controls vast resources formerly owned by the Crown. This further expands its authority to regulate with respect to certain water rights, fisheries, mines and minerals, wildlife habitation, and the beds of navigable rivers.¹² These proprietary rights, together with the constitutional powers to regulate local matters, amount to broad provincial jurisdiction over natural resource management and pollution control. As a result, most environmental requirements regulating conduct of businesses in Canada arise from Provincial law. The federal role generally is limited to issues relating to navigation, fisheries, any federally significant "works", inter-provincial transportation, and management of federal lands, as well as cross boundary pollution and other problems of federal interest.¹³

Despite the broad powers conferred on the Provinces, Federal authority remains supreme. The BNA imposes four basic limitations on provincial powers to legislate. First, the provinces may not adopt legislation pertaining exclusively to matters within federal jurisdiction, such as interprovincial navigation and shipping. Second, provincial legislation will be preempted to the extent that it conflicts or overlaps with federal legislation. Third, provincial legislation generally is not applicable to the property or instrumentalities of the Federal Government. Fourth, provincial legislation may apply only to matters occurring within the Province. Provincial environmental laws cannot be applied extraterritorially.¹⁴

Canadian municipalities possess only those powers conferred on them, expressly or by implication, under provincial statutes. The legislative authority of municipalities is generally limited to particular local matters such as providing water supply, police protection, and fire prevention services. Municipalities also may be granted authority over environmental protection and land use planning. In Ontario, for example, the powers of municipalities include land use regulation (zoning and construction) granted under the Planning Act¹⁵ and authority over certain

¹¹ *Id.* at § 2.6; BNA, 30 & 31 Vict, ch. 3, at § 109.

¹² Franson, *supra* note 9, at § 2.5.

¹³ *Id.* at § 2.5.

¹⁴ *Id.* at § 2.3; *see also* Interprovincial Co-operation Ltd. & Dryden Chemicals Ltd. v. The Queen, 53 D.L.R. (3d) (321 S.C.C. 1975).

¹⁵ Planning Act, Ont. Rev. Stat. Ch. 379 (1980), ch. 1.

health and safety matters under the Municipal Act.¹⁶

The decentralization of environmental policy and enforcement in Canada has hampered the development of integrated policies relating to land, air, and water resources. To some extent, intergovernmental organizations such as the Canadian Council of Ministers of the Environment (CCME) have provided vehicles for cooperation and communication among federal and provincial administrators. The CCME, which includes federal and provincial ministers of the environment, has no regulatory authority but holds regular meetings to formulate and standardize federal and provincial policy. Similar organizations have been created to provide guidance on other governmental functions such as management of natural resources.

Ad hoc attempts also have been made to establish federal-provincial panels to conduct administrative hearings and arrive at cooperative agreements, but no practicable system exists to coordinate federal or provincial environmental controls that overlap. However, an effort is underway to inaugurate "cooperative federalism" by establishing a federal provincial regulatory board to issue federal environmental approvals where projects are regulated under the federal Environmental Assessment and Review Process (EARP) Guidelines and provincial environmental assessment laws. Bill C. 78, which was before the Canadian legislature in September 1990, would create such a board. Project proponents in Canada supports passage of the bill as a major step toward solving the problem of overlapping jurisdiction.¹⁷

III. CANADIAN FEDERAL ENVIRONMENTAL STATUTES

Comprehensive Federal statutes governing environmental issues have been developing in Canada since approximately 1967.¹⁸ The agency primarily involved in implementing environmental statutes is the Department of the Environment, known as "Environment Canada", which is based in the Canadian capital of Ottawa.

The original body of Canadian federal environmental law was a mixture of statutes, some of which contained only broad policy goals and programs for federal/provincial coordinated efforts, while other laws established programs of direct federal regulation through permits and directly enforceable standards. For example, the 1971 federal Clean Air Act later repealed, established general ambient air quality objectives still

¹⁶ Municipal Act. Ont. Rev. Stat., ch. 284 (1970).

¹⁷ Personal Communication with Stanley Barger, Ontario Ministry of the Environment, Legal Services Branch, July, 1990.

¹⁸ Franson, *supra* note 9, at § 2.9.

in place today, (CEPA 145) which had no binding force but could be used by provincial governments as guidance in establishing programs of direct regulation.¹⁹ The 1970 Canada Water Act was limited to the creation of guidelines establishing water quality management areas and plans, promotion of cooperation with provincial governments on the study of water quality, and the prohibition of certain phosphate detergents.²⁰ The fact that the authority to establish water management areas has not yet been implemented illustrates the lack of forcefulness of such planning statutes. In contrast to these general policy-oriented statutes, other federal laws, including the hazardous Products Act,²¹ the Environmental Contaminants Act²² and the Transportation of Dangerous Goods Act,²³ were established to accomplish direct regulation of certain activities.

The enactment of the Canadian Environmental Protection Act ("CEPA") in 1988 constituted a major change in federal law and policy.²⁴ It represents a new effort to pursue federal interests comprehensively through direct regulation. CEPA repealed certain prior Acts, including the Clean Air Act, the Environmental Contaminants Act, and Part III of the Canada Waters Act, and re-incorporated them under a new, more comprehensive federal law.²⁵ The Act also contains new provisions which require certain industries to test and analyze new chemicals for environmental and human health hazards prior to their introduction into the marketplace; establishes new federal penalties for violation of environmental laws; and gives the federal government the authority to engage in a more comprehensive system for regulating past releases of toxic substances and hazardous wastes which may impose risks of federal concern²⁶

CEPA is for several reasons less comprehensive than analogous United States programs. Thus, provincial programs continue to play a primary regulatory role. CEPA provides that provincial laws which are at least equivalent to federal law may supersede certain new requirements and operate in place of the federal law.²⁷ Paradoxically, the most impor-

¹⁹ See generally, Canada Clean Air Act, ch. 47, 1970-72 Can. Stat. 951 (1971).

²⁰ See generally, Canada Clean Water Act, R.S.C. ch. 5 (1st Supp. 1970).

²¹ Hazardous Products Act, R.S.C. ch. H-3 (1985).

²² Environmental Containments Act, R.S.C. ch. E-9 (1985).

²³ Transportaton of Dangerous Goods Act, R.S.C. ch. 7-19 (1985), amended by reg. 77, 1985.

²⁴ (CEPA), ch. 22, 1988.

²⁵ *Id.* at §§ 145, 147, 141.

²⁶ *Id.* at §§ 11-48.

²⁷ *Id.* at §§ 63 (2)-(7). This section gives the Minister of the Environment the power to issue, with the approval of the Governor in Council, two types of agreements between Federal and provincial governments regarding administration of the Act. "Equivalency Agreements" permit the spe-

tant role of CEPA may be as a catalyst for increased provincial regulation.

CEPA has for the most part merely incorporated pre-existing programs within its new mandate and structure. For example, federal powers to control air pollution under the former Clean Air Act, which are now incorporated within CEPA, are still much narrower than those delegated under the United States Clean Air Act. Generally, under CEPA the Federal Government is limited to establishing national ambient air quality objectives and administering programs for addressing federal interests in national and international impacts from air pollution.²⁸

CEPA does create a new framework for regulating toxic substances at virtually all states of their existence, including research and development, manufacture, importation, transportation, distribution, use, and ultimate disposal. Part II of CEPA incorporates provisions of the Former Environmental Contaminants Act to prohibit the use of specific chemical products considered to be toxic under a strategy similar to the Toxic Substances Control Act ("TSCA") in the United States.²⁹ The Federal Hazardous Materials Information Review Act³⁰ is a separate statute that complements the hazardous substances program by requiring disclosure of chemicals in the workplace by means of material safety data sheets much like programs under the Occupational Safety and Health Act ("OSHA"), the Emergency Planning and Community Right-to-Know Act ("EPCRTKA"), and state "Right to Know" laws in the United States.³¹

Like TSCA, certain chemicals listed under the CEPA's contaminants section, as well as all unregistered chemicals, are banned for manufacture or import into Canada, or restricted to specific uses only. A

cific provincial regulations to operate in place of comparable Federal Regulations. Administrative Agreements operate as Federal Regulations.

²⁸ Compare OEPA §§ 11-14, 15 U.S.C.A. §§ 2601-2671. *Id.* at 61-65. See Ontario Ministry of The Environment, Stopping Air Pollution At Its Source: Clean Air Act Program, Discussion Paper, 1-3, (1987) [*hereinafter* Discussion Paper]. While actual regulatory authority for enforcing most air pollution controls falls under the jurisdiction of the provinces, the federal government retains a major role in the control of acid precipitation ("acid rain"). The federal role is primary since controls frequently involve international agreements. Canada, through its CCME, has committed itself to a 50% reduction in acid causing emissions even though no similar commitments have been forthcoming from other nations, particularly the United States.

²⁹ Fishlock, Environmental Protection Legislation in Ontario: An Overview, Executive Enterprises Inc., 22-23 (April 1987). Toxic Substances Control Act ("TSCA"), 15 U.S.C.A. §§ 2601-2671 (1982; Supp. 1990).

³⁰ Hazardous Materials Information Review Act, R.S.C. ch. 24 (3rd Supp. 1985), amended by Reg. 456, 1988 Can Gaz. 3823.

³¹ See generally OSHA, 29 U.S.C.A. §§ 651-678 (1985; Supp. 1990); EPCRTKA, 42 U.S.C.A. §§ 11001-11050 (1989).

number of lists are also developed for the purposes of identifying special use substances. CEPA's "List of Toxic Substances" is intended to contain those substances which are most restrictively regulated, and currently includes such substances as polychlorinated biphenyls ("PCBs"); chlorofluorocarbons ("CFCs"); polybrominated biphenyls ("PBBs"); and polychlorinated terphenyls for all uses. Other substances, including asbestos, lead, mercury, and vinyl chloride are subject to special use restrictions.³² The "Priority Substances List" is a list under CEPA of substances which are to be assessed further for specific regulations.³³ The "Domestic Substances List" is a list of all substances now presently in commercial use within Canada. Manufacturers or importers may refer to this list to determine whether or not they may be creating or importing a "new" substance requiring government notification and toxic assessment.³⁴ To date, the toxic substances program has not been implemented comprehensively, and, in comparison to TSCA, has been used to regulate only a fraction of the toxic substances manufactured or imported by Canada.

Until CEPA is fully administered, and new enforcement mechanisms and resources are established and implemented, it is difficult to predict the effect of these statutory changes. While traditionally federal environmental laws have lacked a significant enforcement mechanism, relying instead on provincial enforcement mechanisms, the federal government has, under CEPA, been given new enforcement powers and authority to issue strict penalty assessments.³⁵ The Act provides for penalties ranging from fines of \$200,000 and six months in jail, to \$1,000,000 and three to five year in jail. Officers and Directors of corporation are liable, and criminal violations can result in imprisonment. Enforcement activities are on the rise: in 1988-89, Environment Canada carried out more than 5,000 inspections or investigations. Additionally, any two citizen may require Environment Canada to investigate and prosecute any violation of the Act,³⁶ seek an injunction to prevent individualized harm, and sue for damages if such harm occurs. Any citizen can petition the Ministry to have a chemical substance added to the Pri-

³² CEPA § 33, Schedule I.

³³ CEPA § 12, R.S.C. ch. 16 (4th Supp.) (1985), and Canada Gazette Part I, February 11, 1989, pp. 543-45. The substances designated for earliest assessment include dioxins, furans, pulp mill effluents, arsenic, benzene, hexachlorobenzene, polycyclic aromatic hydrocarbons, methyl tertiary-butyl ether, and waste crankcase oils. An additional thirty-five substances are listed on the Priority Substances List.

³⁴ CEPA, ch. 22, 1988 Can. Stat. at Schedules I and II. *See also* List of Priority Chemicals under the Environmental Contaminants Act, November 1, 1979.

³⁵ CEPA, ch. 22, 1988 Can. Stat. at §§ 108-109.

³⁶ *Id.* at §§ 108, 135, 136.

ority Substances List.³⁷

Other important federal environmental statutes include the 1980 Transportation of Dangerous Goods Act.³⁸ This Act targets a significant problem involving non-provincial jurisdiction: the regulation to trans-boundary intra-Canadian and international shipment of hazardous wastes. Spills of hazardous waste shipments have alerted Canada to the need for federal regulation in this area. The Act's requirements are administered by the Canadian Department of Transport with the advice of Environment Canada. The program directly regulates air, water, and rail transport of designated "dangerous goods". All Canadian manufacturers or importers of more than 500 kilograms of "dangerous goods" as defined under the Act must register with the Directorate in Ottawa and comply with an extensive set of handling, packaging, and transport requirements.³⁹ Internationally, Canada has been working with the United States EPA toward standardizing hazardous waste tracking requirements and manifest forms. Canada also supports certain initiatives of the Organization of Economic Cooperation and Development ("OECD") establishing principles relating to transfrontier movements of hazardous wastes.⁴⁰

The Canadian Fisheries Act, which remains separate from the new CEPA, authorizes Environment Canada to enforce broad prohibitions against discharging into all Canadian waters any "deleterious substance" which may harm fish.⁴¹ This is still the primary water pollution statute at the federal level. Unlike other general non-regulatory statutes, the broad prohibitions under the Fisheries Act have been implemented by specific regulations further defining regulated discharges from particular industrial sectors.⁴² Despite these specific regulations, most provisions of the Fisheries Act have been supplanted by provincial water pollution control requirements.

³⁷ *Id.* at § 12(4).

³⁸ Transportation of Dangerous Goods Act, ch. 36, 1980-1983 Can. Stat. 225. For Great Lakes transportation *see* Dangerous Goods Shipping Regulations, Reg. 951, 1981 Can. Ga. 3525, *amended* by reg. 1053, 1982 Can. Gaz. 3952, reg. 891, 1983 Can. Gaz. 4296, reg. 23, 1987 Can. Gaz. 235.

³⁹ *Id.* *See* Transportation of Dangerous Goods Regulations, S.O.R./85-77, as amended. *See also* Ontario Dangerous Goods Transportation Act of 1981. This is the provincial counterpart to the Federal Act which regulates Dangerous Goods while they are on Ontario highways.

⁴⁰ Shantora, *supra* note 3, at 3-4.

⁴¹ Canadian Fisheries Act, ch. F-14 (1970), *amended* by R.S.C. ch. 17 (1st Supp. 1970); ch. 35, 1976-77 Can. Stat. 949 at § 7(4)(b).

⁴² *See generally* Pulp and Paper Effluent Regulations, Can. Cons. Regs., ch. 830 (1978); Petroleum Refinery Liquid Effluent Regulations, Can. Cons. Regs., ch. 828 (1978); Chlor-Alkali Mercury Liquid Effluent Regulations, Can. Cons. Regs. ch. 811 (1978).

IV. FUTURE DEVELOPMENTS IN FEDERAL ENVIRONMENTAL REGULATION

For foreign companies doing business in Canada, CEPA warrants continued attention. It indicates that Canada is moving toward greater enforcement in areas involving federal environmental interests, and that the definition of federal interests is likely to expand.

The methods by which the Act is ultimately enforced will be the most important indicator of future trends. Traditionally, the Canadian system of environmental regulation has relied upon cooperation between industry and government regulators. Compliance with federal mandates generally has involved compromise, negotiation, and voluntary compliance. This tradition continues to influence the federal role in environmental regulation. However, CEPA appears to signal a movement toward administrative restructuring involving direct control actions and stepped-up enforcement in the particular areas discussed above.

Non-governmental initiatives are also playing a significant role in the development and guidance of national environmental policy. One such influential policy advisory group in Canada is the Science Council of Canada. This organization has been involved in reassessment of the federal role in environmental protection. Consistent with federal legislative changes, the Council has advocated more direct federal regulation of industry to protect the environment. Additionally, the Council is urging the federal government to integrate environmental and economic decision-making.⁴³ Due in part to this urging, Canada's former Environment Minister, Lucien Bouchard, has established a Cabinet committee on the environment that will have veto power over government projects and government decisions that could cause environmental damage.⁴⁴

The Council also has suggested that the federal government continue to move toward a policy of "sustainable development." It is the Council's position that a new approach is needed which reflects a prevailing attitude in Canada that a strong national environmental protection record is essential to Canada's role as a leader among international organizations working toward resolving transboundary and global crises of ozone depletion, acid rain, forest destruction, and ground water pollution.⁴⁵

⁴³ Science Council of Canada, *Environmental Peacekeepers: Science, Technology and Sustainable Development in Canada*. A Statement, 9-18 (Ministry of Supply and Services, November 1988).

⁴⁴ *Id.* at 55. *Environment Top Priority For Government, New Canadian Environmental Minister Says* [Current Report], *Int'l Env't Rep.* (BNA) 54, (February 1989).

⁴⁵ *Id.*

V. ONTARIO ENVIRONMENTAL STATUTES AND REGULATIONS

A. Overview

While environmental legislation in Ontario has been developing since 1956, a number of the most significant enactments have taken place in the last two decades. Early legislation focused primarily on water resources management. The Ontario Water Resources Commission Act of 1956, later to become the Ontario Water Resources Act of 1965, focused on coordination of provincial government activities to address sewage treatment and disposal.⁴⁶ Early clean air policies were first adopted in 1953. As a prelude to more comprehensive regulations of the 1970s, the Ontario Pollution Abatement Incentive Act of 1970 created economic incentives for industry to engage in capital investments oriented toward pollution control technology.⁴⁷

In 1971 the Ontario Ministry of Environment ("MOE") was established as the lead agency for implementing and enforcement of provincial environmental legislation in Ontario.⁴⁸ Concurrently, in 1971 Ontario

⁴⁶ Ont. Rev. Stat. ch. 36, 1980.

⁴⁷ Pollution Abatement Incentive Act, 1970, ch. 62, 1970 Ont. Stat. 613.

⁴⁸ Ministry of the Environment Act. Located in the city of Toronto, the central office of the MOE is engaged in the highest level of policy formation and interpretation of Ontario's environmental laws. The Minister, through a Deputy Minister and Assistant Deputy Ministers, delegates authority to several Divisions and Branches. There are two main operating groups and two primary support groups. The two main operating groups serving the Minister are the Operations Division and the Environmental Programs Support Services Division. These groups comprise the units responsible for the major functions of the agency. The primary support groups are the Legal Service Branch, the Enforcement Branch, the Intergovernmental Relations and Strategic Projects Branch, and the Environmental Approvals and Project Engineering Branch. The Operations Division distributes responsibility for environmental programs among six regional offices. The six regions are further divided into six district offices. Like the United States Environmental Protection Agency ("EPA"), the headquarters of the MOE houses an arsenal of legal, technical, and policy personnel while leaving program implementation duties to in-the-field regional and district officers. The six regional offices are the principal regulatory force behind the agency. They retain decision-making authority and may exercise fairly broad discretion in controlling environmental matters in their region. Regional officers may issue Control and other orders, coordinate responses to environmental problems, and independently issue certain environmental approvals. They also issue regulatory interpretations on non-controversial matters. However, the Minister still has final authority over any regulatory or enforcement action taken by the regions. Orders may be issued directly by the Minister. The regions also maintain a technical staff which performs specialized research and technical assistance in the region.

District officers are usually the first to respond to any environmental problem. As field personnel, they monitor environmental problems and can, independent of any other Branch, call in enforcement personnel. District officers are typically non-technical and have no significant independent authority to issue orders. Because they are removed from the decision-making process, they are able to maintain relatively good relations with the regulated community. However, the district officials do issue recommendations to the regional staff indicating which environmental incidents they consider to warrant further investigation or response. The Environmental Programs Support Services Division is located in Toronto and provides specialized technical support and research to the regions and also assists the Toronto headquarters in development of programs and standards. This Division

also adopted its most significant environmental statute, the Environmental Protection Act ("OEPA").⁴⁹ This statute regulates discharges to the air, ground, and water of almost every conceivable substance, contains special requirements for responding to spills of pollutants, and provides substantial authority to require responsible parties to clean up contaminated sites. Accordingly, the statute combines several different programs — air pollution control, water quality regulation, solid and hazardous waste management, spill response, and site remediation — which in the United States are regulated separately, under a variety of statutes, by different state and federal agencies.⁵⁰

The OEPA will be discussed in detail in the next section of this Article. For present purposes, it is worth noting that the MOE in 1989 adopted cleanup guidelines under the OEPA which impose requirements on current and past landowners as persons who cause or permit "discharges" of "contaminants" in violation of the Act. The MOE has also applied these guidelines in advising municipalities and private persons in connection with land transactions and changes in land use.⁵¹ With these guidelines, and significant amendments to the OEPA adopted during the

is staffed by technical experts in the areas of air quality, water resources, waste management, environmental assessment and laboratory services.

The Legal Services Branch is part of the office of the Attorney General and also serves the MOE directly. It is heavily relied upon by the MOE on matters of legal interpretation. This Branch also provides counsel for hearings and prosecutions. The Enforcement Branch is the MOE's environmental police force. This Branch is administratively part of the Operations Division but serves all MOE officials. Enforcement staff may be called in by District inspectors, regional staff, or the Minister to conduct inspections and pursue violations. They can also act on their own initiative or in response to public complaints. The Enforcement Branch has police powers and can initiate charges against suspected violators. Within the Intergovernmental Relations and Strategic Projects Branch, the Associate Deputy for Intergovernmental Relations is involved in overseeing relations on environmental issues with the governments of Canada and other provinces and various special projects such as the Acid Precipitation project and the Niagara River Improvement Project. To assist regional and district staff, the Ministry also has established the Environmental Approvals and Project Engineering Branch. This Branch is located in Toronto but principally serves the regions. This body will process most applications for environmental approvals. See CRUTCHER, ANTHONY J., P. ENG., *THE FUNCTIONAL STRUCTURE OF THE ONTARIO MINISTRY OF THE ENVIRONMENT, CONESTAGA-ROVERS & ASSOCIATES LTD., EXECUTIVE ENTERPRISES INC.* (1985).

⁴⁹ See generally Environmental Protection Act Amendment, 1971, ch. 106, 1971-72 Ont. Stat. 823. Environmental Protection Act, 1971, ch. 86, 1971 Ont. Stat. 705, amended by ch. 1, 1971-1972 Ont. Stat. 25, ch. 106, 1971-1972 Ont. Stat. 823. Ont. Rev. Stat. ch. 141 (1980), amended by ch. 49, 1981 Ont. Stat. 223, ch. 52, 1983 Ont. Stat. 437.

⁵⁰ See United States Clean Air Act, 42 U.S.C.A. §§ 7401-7642 (1983; Supp. 1990); United States Clean Water Act, 33 U.S.C.A. §§ 1251 to 1387 (1986; Supp. 1989); United States Resource Conservation and Recovery Act ("RCRA"), 42 U.S.C.A. §§ 6901-6992 (1983; Supp. 1989), United States Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA"), and 42 U.S.C.A. §§ 9601-9675 (1983; Supp. 1990).

⁵¹ Ontario Ministry of the Environment, Guidelines for Decommissioning and Cleanup of Sites in Ontario (1989).

summer of 1990, the evolving scheme of liability and cleanup is beginning to resemble the scheme established by CERCLA, SARA, the National Contingency Plan, and state analogues.

In 1975, Ontario adopted environmental impact review legislation similar to the National Environmental Policy Act ("NEPA") in the United States.⁵² The Ontario Environmental Assessment Act ("EAA")⁵³ sets forth broad impact review requirements for certain development projects which may have substantial impact on the environment.⁵⁴ A significant difference between the EAA and NEPA is the EAA's provision for public hearings by an independent non-governmental board,⁵⁵ and the requirement for a formal approval from this body before any project may proceed.⁵⁶

Other environmental statutes that have been adopted in Ontario include the Pesticides Act,⁵⁷ the Dangerous Goods Transportation Act,⁵⁸ the Gasoline Handling Act,⁵⁹ the Health Protection and Promotion Act⁶⁰ and the Occupational Health and Safety Act.⁶¹ Manufacturers and other industrial operations must be familiar with these laws and the regulations adopted thereunder. The following sections will help those familiar with United States environmental laws find their way through Ontario's principal environmental statutes.

B. Ontario Environmental Protection Act ("OEPA")

As noted above, the OEPA is the omnibus statute empowering the MOE to control virtually every discharge and other condition causing or continuing to cause pollution of the environment.⁶² Unlike the United States system of environmental law, the OEPA adopts a cross-media approach, protecting air, water, and land resources under one statutory

⁵² National Environmental Policy Act ("NEPA"), 42 U.S.C.A. §§ 4321-4370a (1977; Supp. 1989).

⁵³ Environmental Assessment Act, Ont. Rev. Stat. ch. 140 (1980).

⁵⁴ *Id.* at §§ 5-17.

⁵⁵ *Id.* at §§ 12-13; Jackson, *supra* note 6.

⁵⁶ EAA, Ont. Rev. Stat. at §§ 12-14, 18.

⁵⁷ Ontario Pesticides Act, Ont. Rev. Stat. ch. 376 (1980), *amended by*, 1980 Ont. Rev. Regs. 751, reg. 756, 1981 Ont. Regs. 1605.

⁵⁸ Ontario Dangerous Goods Transportation Act, 1981, ch. 69, 1981 Ont. Stat. 351, *amended by* reg. 363, 1985 Ont. Regs. 929.

⁵⁹ Ontario Gasoline Handling Act, Ont. Rev. Stat. ch. 185 (1980), *amended by* ch. 49, 1988 Ont. Stat. 613.

⁶⁰ Ontario Health Protection and Promotion Act, ch. 10, 1983 Ont. Stat.

⁶¹ Ontario Occupational Health and Safety Act, ch. 29, 1987 Ont. Stat.

⁶² Ontario Environmental Protection Act, Ont. Rev. Stat. ch. 141, §§ 1-149 (1980) [*hereinafter* OEPA].

mandate.⁶³ These resources are all protected by general uniform provisions which establish broad prohibitions against polluting activities, liability for damaging the environment, and a system of one-stop permitting under which all facilities and certain activities, regardless of type and size, must apply to the MOE for approvals to operate, or make any alterations to existing operations, if they discharge pollutants in any manner to any environmental medium. Discharges are also dealt with individually under distinct programs set forth in the Act. For example, the General Provisions prohibit any discharge of contaminants which adversely impact the environment. In addition, Part IV of the Act establishes a specific program for protecting water resources;⁶⁴ Part V sets forth requirements for managing all types of waste;⁶⁵ and Part IX addresses procedures for responding to spills.⁶⁶

Under the OEPA, any construction of new facilities, or alteration of existing facilities or processes which may emit or discharge a contaminant into the natural environment, including certain discharges to waters addressed elsewhere in the Act, must obtain a "certificate of approval" from the MOE.⁶⁷ Certificates of Approval are the MOE's main tool for enforcing requirements of the Act against individual sources of pollution. They are, by design, capable of casting a broad regulatory net over facility operations which result directly or indirectly in a violation of the OEPA's general prohibitions, discussed below, against discharges or release of "contaminants" to the environment which may cause an "adverse effect".⁶⁸

Decisions regarding certificates of approval are made by the MOE on a site specific basis and certificates are now often issued subject to conditions which have the force of law.⁶⁹ Certificates of approval thus may vary in nature and scope depending on the type of facility or activity

⁶³ On November 27, 1989, United States Environmental Protection Agency Administrator William K. Reilly proposed integrating, under a single environmental statute, the nine existing major laws currently addressing different environmental problems in the United States. Reilly indicated that the purpose of such a law would not be "mere organizational alignment" but rather the establishment of a more effective mechanism for pollution prevention which focuses on the environment as an integrated, interdependent system. *Toxics Law Reporter* at 822 (December 13, 1989).

⁶⁴ *Id.* at § 23.

⁶⁵ *Id.* at §§ 24-47.

⁶⁶ *Id.* at §§ 79-112.

⁶⁷ *Id.* at § 8. Wastewater or sewage facility approvals are issued also in conformance with section 24 of OWRA and Section 65 of OEPA; solid and hazardous waste management and disposal approvals are issued in conformance with OEPA sections 26-40; air approvals are issued also in conformance with OEPA section 8.

⁶⁸ *See* OEPA § 5.

⁶⁹ *Id.* at § 8(4).

involved. Certain exemptions apply to particular facilities or activities.⁷⁰ In order to ensure that sources of pollution comply with both the general prohibitions of the Act and the specific requirements established for each separate medium under the Act, the MOE may refuse to issue a certificate or may alter the terms of any existing certificate.⁷¹

The OEPA's prohibition against operating facilities without certificates of approval is triggered not only by physical aspects of construction, alteration, or replacement of plant or equipment which will cause discharges, but also by the rates of production, and types of process changes which "may" affect increases or even decreases in discharges. For example, Section 8 of the OEPA addresses approvals for emissions other than those to water and provides, in pertinent part that:

No person shall, except under an accordance with a Certificate of Approval issued by the Director,

- (a) construct, alter, extend or replace any plant, structure, equipment, apparatus, mechanism or thing that *may discharge* or from which may be discharged a contaminant into any part of the natural environment other than water; or
- (b) alter a process or rate of production with the result that a contaminant may be discharged into any part of the natural environment other than water or the rate or manner of a contaminant into any part of the natural environment other than water may be altered".⁷²

Accordingly, the terms and conditions of certificates of approval may cover not only the physical aspects of construction or alteration, but also the methods by which facility processes may be conducted or expanded, and the ultimate rates of production.⁷³

The MOE may also control discharges by issuing "program approvals."⁷⁴ These are plans presented by individual facilities outlining specific procedures for preventing or controlling contamination. The MOE may approve these individual proposals if they will prevent or reduce emissions in compliance with the OEPA. Once issued, program approvals provide immunity from prosecution under other sections of the Act as long as the particular conditions⁷⁵ in the approval are met. However, the MOE may nevertheless issue control or stop orders, discussed below, where the facility poses a substantial danger to human health or the envi-

⁷⁰ *Id.* at §§ 8(3)(a)-(f).

⁷¹ *Id.* at §§ 8(4), (5).

⁷² *Id.* at § 8(1).

⁷³ *Id.*

⁷⁴ *Id.* at § 9.

⁷⁵ *Id.* at § 146(2).

ronment, to a facility with program approval.⁷⁶ By contrast, the OEPA does not provide immunity from prosecution, in connection with certificates of approval, even if all of the terms and conditions of the certificate have been met.⁷⁷

Without a certificate of approval, or a program approval, general prohibitions on operating, altering or expanding uses are automatically applicable. The two basic prohibitions applicable to all sources state in pertinent part:

No person shall discharge into the natural environment any contaminant and no person responsible for a source of contaminant shall permit the discharge to the natural environment of any contaminant from the source of contaminant, in an amount, concentration or level in excess of that prescribed by the regulations.⁷⁸

Notwithstanding any other provision of this Act or the regulations, no person shall discharge a contaminant or cause or permit the discharge of a contaminant into the natural environment that causes or is likely to cause an adverse effect.⁷⁹

The key terms of these two prohibitions — “persons”, “contaminant”, “adverse effect”, “discharge”, and “natural environment” — are given such broad definitions that virtually any release of any solid, liquid, gas, odor, heat or sound that causes harm, discomfort, loss of enjoyment, or impairs safety or interferes with conduct of business, could constitute a violation of the Act.⁸⁰

While regulations exist specifying air emission limitations, there are no reportable quantities or initial thresholds specifying which discharges are regulated under the Act. Additionally, “person responsible” under the Act generally includes any person who discharges or has ownership or control of a discharge.⁸¹ As discussed below, this definition can include both owners and operators, and off-site generators and transporters.

The MOE is empowered to conduct inspections “at any reasonable time”, and inspections may lead to prosecutions of the responsible person or persons.⁸² Also, the general provisions of the Act require notification of the MOE by any persons who cause or have control of a prohibited discharge.⁸³

⁷⁶ *Id.* at § 11.

⁷⁷ *Id.* at § 8, 146(3).

⁷⁸ *Id.* at § 5(1).

⁷⁹ *Id.* at § 13(1).

⁸⁰ *Id.* at § 1(1).

⁸¹ *Id.* at § 1(1)(m).

⁸² *Id.* at § 126(1).

⁸³ *Id.* at § 14.

Once it is discovered that a release has occurred, the MOE has broad powers to issue administrative orders to abate and correct the problem. Under the OEPA, the MOE can issue four basic types of orders: "control" orders, "stop" orders, "repair" orders, and "preventive" orders.⁸⁴ These orders may require permanent or temporary measures to stop a discharge or limit or control the rate of a discharge. They may impose conditions or directions relating to allowable discharges, require installation or replacement of equipment to control or eliminate discharges, or establish monitoring and reporting requirements for specific discharges.⁸⁵

For example, when a source of contamination is found to be in violation of both the general discharge prohibition under section 5 and the allowable conditions for discharges under section 13, the MOE can issue, under section 6, a control order directed to any person responsible under the Act. Additionally, under section 7, when the MOE has reasonable and probable grounds to believe that a contaminant being discharged into the environment constitutes an immediate danger to human life, the health of any persons, or to property, a stop order can be issued to any person responsible for the source. Stop orders, which must be in writing and state reasons for issuance, require immediate compliance. Additionally, the MOE has the authority to require necessary cleanup of the land affected by a discharge by issuing a repair order under section 16. Section 17 authorizes the MOE to issue orders requiring a responsible person to implement preventive programs. All such orders are binding on the responsible person, and his successors or assigns.⁸⁶

Failure to comply with an administrative order issued by the MOE can, in the case of spills, result in the MOE undertaking the required action itself, and recovering its costs from the responsible party.⁸⁷ Failure to obey orders can also result in conviction for an offense, punishable by fine or imprisonment.⁸⁸

Procedures for appealing administrative orders are set forth in Part XI of the Act.⁸⁹ Orders establishing any of the above conditions or controls may be appealed to the Environmental Appeal Board. Appeals to the Board may be had, *de novo*, upon filing a notice of appeal within fifteen days after service of the order. The commencement of a proceed-

⁸⁴ *Id.* at §§ 6, 7, 11, 16, 17, 113-119, 149.

⁸⁵ *Id.*

⁸⁶ *Id.* at § 18(1).

⁸⁷ *Id.* at § 82. Spills are defined broadly to include any discharge of a pollutant from a structure, vehicle or container which is abnormal in quality or quantity.

⁸⁸ *Id.* at § 146(1)(1a).

⁸⁹ *Id.* at §§ 120-124.

ing before the Board does not stay the operation of an order. Any party to a hearing before the Board may appeal from its decision on a question of law to the Divisional Court, in accordance with the rules of that court. Matters other than questions of law may be appealed from the Board directly to the Minister, and the Minister has the power to alter or revoke the decision of the Board, consistent with the Act and the public interest.⁹⁰

These general provisions are the tools that the MOE uses most frequently to enforce the OEPA. They are available to remedy and response to events involving air pollution, water pollution, and spills of toxic substances. They can also be employed to ensure proper management of all types of wastes and regulated substances which may impair the environment, and to implement cleanup procedures at contaminated sites.

Any person who violates an order, any term or condition of a certificate of approval or other provision of the OEPA is guilty of an offense punishable by a fine of not more than 5,000 for the first offense, and 10,000 for each subsequent offense. Each day of violation constitutes a separate offense.⁹¹ The limitations period under the OEPA is two years from the date the MOE becomes aware of the offense.^{92 93}

C. Air Pollution Control Under OEPA

Ontario has been engaged in the development of air pollution control strategies for approximately 37 years. Formerly addressed under distinct statutes, air pollution is now regulated under the OEPA. While no separate part of the Act is devoted exclusively to air pollution control, discharges to the air are governed by the general limitations set forth in section 5 and 13, which prohibit discharges of pollutants above designated "adverse effect" levels.⁹⁴ Specific regulatory requirements establishing air pollution thresholds are found in Regulation 308.⁹⁵

No facility may discharge pollutants to the air without first obtaining a certificate of approval.⁹⁶ Regulation 308 sets forth maximum permissible discharge limits which are used to determine whether a source should be approved.⁹⁷ Accordingly, approvals for individual

⁹⁰ *Id.* at §§ 122-123.

⁹¹ *Id.* at § 146.

⁹² *Id.* at § 148.

⁹³ Jackson, *supra* note 6 (January 1, 1990).

⁹⁴ OEPA §§ 5, 13; Ont. Rev. Stat. ch. 141 5, 13 (1980).

⁹⁵ Ont. Regs. 308 [Air Pollution], *amended by* Ont. Regs. 107/85.

⁹⁶ OEPA § 8.

⁹⁷ Ont. Rev. Reg. 308 §§ 1-5, Schedule I.

sources are based on achievement of air quality standards by determining for each source the "point of impingement" concentrations. For each 100 different listed contaminants, point of impingement concentrations are determined using a formula set forth in Regulation 308 which takes into account a multitude of factors, including: the configuration of the surrounding physical environment (building heights); wind direction; the rate of emissions; and type of contaminant. These values must not exceed Ambient Air Quality Criteria established for each contaminant, as set forth under Ontario Regulation 296. Any exceedance of established air pollution thresholds would constitute an offense under the Act. Also, as mentioned above, approvals are issued only for emissions which are not otherwise causing any "adverse effect" not addressed by point of impingement standards.⁹⁸

Certain large facilities emitting air pollutants may be regulated separately, as in the case of the Copper Cliff Smelter Complex which is located in the regional municipality of Sudbury.⁹⁹ Regulation 301 under the Environmental Protection Act establishes unique sulfur dioxide limits for this facility, restricting the total allowable tonnage of contaminants which may be released during a given year. Also, Ontario enforces unique requirements for ferrous foundries, asphalt paving plants, and motor vehicles. Limits on the sulfur content in fuels used for industrial processes are also established under the regulations.¹⁰⁰

In comparison with the United States Clean Air Act, air pollution control requirements under Regulation 308 appear disjointed. Like the Clean Air Act, Regulation 308 establishes a system for maintenance of ambient air quality. However, unlike the Clean Air Act, Ontario's Regulation 308 does not require control technology at the source unless ambient standards will be exceeded. Accordingly, it is possible in some circumstances for a source to achieve compliance by utilizing dispersion into the atmosphere without the additional imposition of individual ("at the stack") technology. This omission in the existing Regulation 308 can allow air quality to degrade by permitting plants to emit pollutants up to the level of ambient air thresholds prior to requiring installation of additional technological controls at the source, notwithstanding the availability of such technology. Currently, as a matter of practice, such source controls are only required where standards would not otherwise be met through control orders. Also, controls are not technology forcing, because there is no expiration date assigned to certificates of approval, and

⁹⁸ *Supra* note 90.

⁹⁹ Copper Cliff Smelter Complex, Ont. Regs. 301.

¹⁰⁰ OEPA §§ —. O. Reg. —.

there is no system for imposing ongoing operational requirements.¹⁰¹

Proposed amendments to the air regulation under the OEPA have been under consideration by the provincial government since 1986. As proposed, these would restructure the current approach to air pollution regulation in Ontario. Current proposals suggest that the principal reforms are likely to involve the imposition of direct emission limits on all air pollution sources regardless of size, monitoring to establish compliance, development of a revised air pollution index, controls on visible emissions, and provisions for controlling organics from incinerators, upsets and shutdowns, and fugitive emissions.¹⁰²

This new system would involve "at the source" technology requirements based on available technology and optimum achievable performance levels.¹⁰³ For hazardous air pollutants, the "lowest available control technology" ("LAER") would be required. For medium hazard pollutants, the "best available control technology" ("BACT") would be required, and for low hazard pollutants, controls demonstrated as acceptable or "New Source Performance Standards" ("RACT") would be sufficient. These "bottom of the stack" controls would be minimum requirements. When particular sources exceeded threshold levels and cause adverse environmental effects, additional emission reduction would be required. Like the United States Clean Air Act and many state programs, these emission controls would be implemented by way of a source-specific permit system. Certificates of approval would be issued based on construction and operation approvals. The operation approvals would be based on installation of air pollution control technology and periodic review of air quality attainment. Certificates of approval would expire in 10 years, allowing technology forcing adjustments in subsequent approvals. New facilities would be required to achieve air quality control requirements in order to receive an initial certificate of approval.¹⁰⁴

For the most part, these changes reflect an acceptance of the approach taken in the United States, and for this reason the proposed regulations do at least provide some comfort for those companies seeking consistency. However, these proposed changes also would impose a comprehensive restructuring of the way air quality compliance is con-

¹⁰¹ Ontario Ministry of the Environment, *Stopping Pollution At its Source: Clean Air Program ("CAP") Explanatory Notes (1987)* [*hereinafter* Explanatory Notes]; Jackson, *supra* note 6 (January 31, 1990).

¹⁰² Discussion Notes, *supra* note 30, at 1-5.

¹⁰³ *Id.*; see also Explanatory Notes, *supra* note 101.

¹⁰⁴ *Id.*

ducted in Ontario. Moreover, they would apply to both new and existing sources, and could substantially increase operation and equipment costs.

D. Ontario Water Resources Act

The Ontario Water Resources Act ("OWRA"), due to historical reasons alone, is a distinct statute which overlaps substantially with the OEPA.¹⁰⁵ Authority to administer this law was transferred to the MOE from the Ontario Water Resources Commission in 1972.¹⁰⁶ Much like the OEPA, the OWRA prohibits persons from causing or permitting the discharge of "any material of any kind" that may "impair the quality" of surface or ground water.¹⁰⁷ Until the enactment of OEPA, this statute established the primary program for permitting wastewater discharges. Under the OWRA, water quality is deemed impaired if the material discharged, or its derivatives, does or may cause "injury to any living thing as a result of use or consumption of any plant, fish or other living matter or thing in the water or in the soil in contact with the water. Facilities which fail to meet such standards are in violation of the Act and may be subject to enforcement upon application by the MOE for a court order.¹⁰⁸ As in prosecutions under the OEPA, hearings may be held, but generally are not required. Penalties under the OWRA are the same as those under the OEPA, and failure to report a discharge constitutes an offense under the Act.¹⁰⁹ The statutory limitations period is two years from the date the MOE is aware of the offense.¹¹⁰

The OWRA establishes permit requirements for the extraction of greater than 50,000 liters of water per day and for the construction of wells. Approval by the appropriate Director is necessary for operation of water works, sewage works, and related projects.¹¹¹

E. Regulation of Wastewater Discharge Under OEPA

Direct discharges of certain industrial wastewater, previously controlled solely by means of compliance orders issued under the OWRA, are now further regulated by a new program established under the OEPA. The Municipal Industrial Strategy for Abatement, known as "MISA", is a significant new addition to the OEPA scheme which clari-

¹⁰⁵ Ontario Water Resources Act, Ont. Rev. Stat. ch. 361 (1970, amended) [*hereinafter* OWRA].

¹⁰⁶ *Id.* at § 2(1), Rev. Stat. Ont. ch. 332 § 3 (1970).

¹⁰⁷ *Id.* at § 16. *See also* Ontario Objectives for Water Quality Control, June 1967; Ontario Guidelines and Criteria for Water Quality Management, February 1973.

¹⁰⁸ *Id.* at § 15(3).

¹⁰⁹ *Id.* at §§ 67, 68.

¹¹⁰ *Id.* at § 54.

¹¹¹ *Id.* at §§ 23, 24, 34.

fies and improves the permitting process for industrial discharges.¹¹² Like the United States Clean Water Act,¹¹³ MISA establishes regulations under which discharges must monitor types and concentrations of toxic substances in their waste water and report total amounts. Each source applies for a "program approval," which, if approved, establishes an abatement regulation with discharge limits tailored to that source. Also like the Clean Water Act permit system, the controls adopted under MISA are technology forcing; program approvals are subject to periodic review and renewal, and the standards may become more stringent as available available abatement technology improves. The ultimate goal of the program is to eliminate toxic discharges to Ontario waterways.¹¹⁴

A facility that complies with its program approval generally is immune from prosecution under the OEPA.¹¹⁵ Prosecution may be commenced, however, for a discharge that causes a violation of other water pollution control statutes, such as the Federal Fisheries Act.¹¹⁶

The MISA program currently targets all major direct discharges to Ontario waters. Regulations will be developed for nine industry sectors, including: the petroleum refining industry; organic chemical manufacturers; inorganic chemical manufacturers; mining industries iron and steel manufacturers; the pulp and paper industry; industrial mineral producers; the metal casting industry; and electric power plants. Each abatement regulation will place limits on dischargers in each industrial sector. These technology forcing limits will be based on the best available pollution control technology economically achievable (BATEA). Discharges may be required to abate pollution with additional controls designed to reach effluent limits lower than those achievable with BATEA if the receiving water body continues to be seriously degraded.¹¹⁷

During 1989-90 the MOE promulgated general effluent monitoring regulations and the first five sets of industry sector regulations under MISA.¹¹⁸ These regulations require plants in the petroleum refining, iron and steel manufacturing, organic and inorganic chemical manufac-

¹¹² Ont. Rev. Stat. 141 § 136, "MISA."

¹¹³ 33 U.S.C.A. §§ 1251-1387 (West 1990).

¹¹⁴ *Id. supra* note 112; *see also* MISA White Paper, *supra* note 112. Current Regulations call for review of approvals every five years.

¹¹⁵ Ont. Rev. Stat. ch. 141 § 146(2) (1980).

¹¹⁶ *See supra* note 41.

¹¹⁷ MISA White Paper, *supra* note 112.

¹¹⁸ MISA Monitoring Regulations: O. Reg. 695 (1988), *amended by* O. Reg. 533/89 (General Effluent monitoring); O. Reg. 359 (1989) (Petroleum Sector refining); O. Reg. 209 (1989) (Organic Chemicals Sector); O. Reg. 321 (1989) (Iron and Steel Sector); O. Reg. 359 (1989) (Inorganic Chemicals Sector); O. Reg. 91 (1990) (Industrial Minerals Sector).

turing and industrial minerals, sectors to monitor effluents, for one year beginning December 1, 1989. Subsequent regulations will be promulgated to specifically limit the amount of toxics each plant may discharge. The MOE maintains specific plant lists by industry sector.¹¹⁹

Under regulations yet to be adopted, discharges will be subject to MOE audits, and those who fall out of compliance may be required to take abatement actions. Violators will be subject to penalties under the OEPA range up to \$1,000,000 per day for each offense. Directors and officers of corporations are individually liable for actions of the corporation, and may be fined up to \$25,000, and imprisoned for one year.¹²⁰

F. Hazardous Waste Management Under OEPA

Ontario has established a comprehensive waste management system consisting of statutory standards for licensing waste management facilities and regulatory requirements governing waste generators. Together, Part V of the OEPA and Ontario Regulation 309 establish a waste management scheme similar to that found under the United State Resource Conservation and Recovery Act ("RCRA").¹²¹ However, significant distinctions exist, most notably with respect to liability for off-site disposal.

Part V of the OEPA sets forth statutory requirements and prohibitions restricting the use of sites or facilities for disposal of wastes. All owners or operators of waste management facilities are required to have certificates of approval from the MOE.¹²² Before granting certificates of approval to certain waste disposal sites or facilities, the MOE is required to hold public hearings. In other instances the MOE may hold hearings but is not required to do so.¹²³ No certificate of approval can be issued until the proponent of a waste facility satisfies minimum financial responsibility requirements.¹²⁴

Part V of the OEPA also establishes liability for owners and operators of waste facilities or sites. Under the Act, all wastes disposed of at facilities or sites become the property of the owners and operators.¹²⁵ Those parties may be held jointly liable for any damage caused by such

¹¹⁹ Jackson, *supra* note 6, (Jan. 31, 1990).

¹²⁰ OEPA §§ 146(a)(1)-(2), 147(1)-(4); 13, *as amended*, 6/28/90. Where a corporation discharges hauled liquid industrial wastes or hazardous waste, it may be fined up to \$1,000,000 for each day upon first conviction and up to \$2,000,000 on each subsequent conviction.

¹²¹ 42 U.S.C. §§ 6901 to 6992k (1990).

¹²² Ont. Rev. Stat. ch. 141 § 27 (1980).

¹²³ *Id.* at §§ 30, 32.

¹²⁴ *Id.* at § 34.

¹²⁵ *Id.* at § 40(a).

waste.¹²⁶ An additional statutory provision requires MOE approval for any use of land previously operated as a disposal site within a period of twenty-five years.¹²⁷

While Part V of the OEPA focuses principally on owners and operators of waste facilities, Regulation 309 further regulates waste management activities of both owner/operators of waste facilities and generators of waste under a scheme similar to the RCRA waste tracking system. Like RCRA, Regulation 309 identifies regulated wastes, and other non-hazardous wastes; requires generators of wastes to register with the MOE; imposes manifesting requirements for waste shipments; mandates compliance with packaging requirements of the federal Transportation of Dangerous Goods Act and regulations; and establishes standards for certain waste management sites.¹²⁸

The waste identification scheme established under Ontario Regulation 309 is similar, in many respects, to regulations under RCRA. For instance, like RCRA regulations, Regulation 309 distinguishes hazardous waste from non-hazardous waste;¹²⁹ establishes a comparable list of four waste characteristics for identifying hazardous wastes,¹³⁰ and lists certain wastes which are hazardous either because they are generated in particular processes, or because their properties warrant their being listed regardless of their toxic concentrations or hazardous characteristics.¹³¹ The exceptions to the definition of "hazardous" and "liquid industrial" waste are also similar to those under RCRA. Exempted from the definitions of hazardous and liquid industrial waste are: sewage; wastes from the operation of a wastewater treatment plant permitted under the Ontario Water Resources Act; domestic waste; certain incinerator ashes; hazardous/industrial waste produced by small generators, (5 kg/month); residues and empty containers.¹³²

The definitions of "hazardous waste" and "liquid industrial waste" in Regulation 309, however, are more inclusive than the definition of "hazardous waste" under RCRA. Regulation 309 includes certain radioactive wastes and pathological wastes under the same regulatory scheme.¹³³ United States companies should be aware that these and

¹²⁶ *Id.* at § 87.

¹²⁷ *Id.* at § 45.

¹²⁸ Waste Management (General), Ont. Regs. 309 (1980), compare 42 U.S.C.A. §§ 6901 to 6992k (West 1980).

¹²⁹ Compare Ont. Regs. 309 § 1(27) with 40 C.F.R. § 261.3.

¹³⁰ Compare Ont. Regs. 309 §§ 1(10), (29), (37), (51) with 40 C.F.R. § 261 Subpart C.

¹³¹ Compare Ont. Regs. 309, Schedule 1, 2 with 40 C.F.R. § 261 Subpart D.

¹³² Ont. Regs. 309 §§ 1(27) (xii-xxi), amended (1980).

¹³³ Ont. Regs. 309 §§ 1(27) (xiii-ix).

other wastes will fall under RCRA-type requirements in Canada, even though they would not be so regulated if generated or shipped in the United States.

Like RCRA, Regulation 309 mandates tracking of waste from "cradle to grave", or from its source to its place of ultimate disposal. Since 1986, every facility which produces, collects, handles or stores liquid industrial waste or hazardous waste has been required to obtain a generator registration number and register each waste with the MOE. Each generator must maintain manifest records describing its disposition. Generators are required to properly package and label waste, and use transporters operating under valid certificates of approval. Generators and transporters may only ship waste to facilities having certificates of approval to treat, store or dispose of the particular waste.¹³⁴

In general, American companies doing business in Ontario will find the mechanics of waste tracking requirements to be similar in concept to the requirements under RCRA. However, in Ontario different requirements will apply to the transportation of waste within the province, through Ontario for disposal outside of the province, and into or out of the province for disposal. This accounts for differing requirements for compliance with manifest and generator/disposer certifications in other jurisdictions, and to ensue that waste sent out of the province will be accepted by an authorized facility.¹³⁵

Liabilities that may be imposed on generators under Regulation 309 are significantly less strict than those established under RCRA and CERCLA. Waste generators in Ontario are relieved of responsibility for the fate of wastes after they have been disposed of by an approved facility. As noted previously, Part V of the OEPA only requires that waste be shipped to an approved waste disposal site having a valid certificate of approval. Ownership of the waste is transferred to the owners and operator at the approved waste disposal site upon acceptance of the waste shipment.¹³⁶ Whenever waste is not formally accepted at a waste disposal site, ownership of the waste is deemed to be transferred to the owners and operators of the site immediately before it is deposited.¹³⁷

¹³⁴ *Id.* at § 40(a)(1).

¹³⁵ *Id.* at §§ 20-23.

¹³⁶ *Id.* at § 40(a)(1). Alison Hall of the MOE indicated that some larger waste disposal companies attempt to use service contract provisions to opt out of this ownership rule. Personal Communication with Alison Hall, Legal Services Branch, Ontario Ministry of the Environment (February 24, 1990).

¹³⁷ OEPA § 40a(2). Generators remain liable for complying with their statutory responsibilities, and, if they improperly classify wastes resulting in disposal at an unlicensed site, they may be liable for "permitting contamination" and be subject to a remedial order under OEPA § 16, or be liable for creating an illegal waste disposal site in violation of OEPA § 39.

Despite these provisions, in a recent informal interview officials at the MOE Legal Services Branch stated that, when faced with an abandoned facility requiring cleanup, MOE may invoke the more general liability provisions of the OEPA to impose responsibility on off-site generators for "causing or contributing to a discharge." The MOE has not yet tested this authority, and it has conceded that generators would have a strong defense in an action relating to contamination resulting at an approved waste facility.¹³⁸

The lack of any express statutory provision under which generators and transporters may be held responsible for hazardous wastes after disposal may create a significant legal incentive for United States companies to export hazardous wastes to Canada. Some United States companies have found it more attractive to ship wastes to Canada rather than face strict liability under RCRA and CERCLA for the uncertain future of waste handled by independent waste disposal contractors.¹³⁹ In response to the trend toward increased imports from the United States, the MOE has been increasing its efforts to monitor and analyze such shipments. Additionally, United States companies should remain aware that the scope of generator liability for such waste shipments remains subject to change. Indeed, as mentioned above, MOE officials already are contending that existing law is broad enough to permit actions against generators and transporters.

Regulation 309 also establishes standards for land-based waste disposal sites and other waste management systems, including incinerators.¹⁴⁰ Separate waste management standards are set forth for asbestos wastes.¹⁴¹ ¹⁴² Special restrictions on transfers of liquid industrial wastes previously imposed by Regulation 313 are now found under Regulation 309. These restrictions prohibit any generator from permitting liquid industrial or hazardous waste to pass from his control except by transfer to an operator of a waste transport system which has received a certificate of approval, or a provisional certificate of approval.¹⁴³ Procedures for confirming shipments are outlined in the regulations.¹⁴⁴

¹³⁸ Alison Hall, *supra* note 136.

¹³⁹ Mary Hall, "Legal Waste Management: Issues in Site Decommissioning", Baker & McKenzie. The Canadian Institute: Conference on the Cleanup of Toxic Real Estate, Industrial Plants and Natural Resources.

¹⁴⁰ Jackson, *supra* note 6, (January 31, 1990).

¹⁴¹ Ont. Regs. 309 § 25, 26.

¹⁴² Ont. Regs. 11 (1982).

¹⁴³ Ont. Regs. 309 § 16(1)(a).

¹⁴⁴ *Id.* at §§ 21-24.

G. PCB Waste Management Regulations

The waste management regulations under OEPA define PCBs as a hazardous waste, and generators of such wastes are subject to manifest tracking and other waste management requirements.¹⁴⁵ In addition, a separate regulation imposes specific requirements for handling PCB materials before and after they become wastes.¹⁴⁶ This regulation also issued under the OEPA, creates special reporting and recordkeeping requirements for all operators of PCB waste disposal sites. Operators of disposal sites must comply with restrictions relating both to the removal of PCBs from certain equipment and to the manner of storage at the disposal facility. Disposal facilities for PCB wastes are required to obtain certificates of approval from the Ministry pursuant to general provisions of the OEPA.¹⁴⁷

H. Sewage System Regulations

Under Part VII of the OEPA, persons are prohibited from constructing new sewage systems or altering existing systems unless a certificate of approval is first issued by the MOE.¹⁴⁸ Sewage systems are defined under the Act as septic tanks, leaching bed systems, and other on-site disposal facilities that do not discharge directly or indirectly to surface waters; it does not apply to discharges to publicly owned treatment works.¹⁴⁹ Compliance with the Act and the regulations for sewage systems is a prerequisite for maintaining a certificate of approval.¹⁵⁰ Applicants must demonstrate that the system complies with standards required for construction, installation, and performance of sewage systems, and does not cause a nuisance, detriment to the public health, or impairment of the quality of the environment.¹⁵¹ The MOE has been given broad powers to issue, suspend or revoke any certificate of approval for such systems¹⁵² and require licenses for installers.¹⁵³ The MOE may issue and, if necessary, carry out remedial orders.¹⁵⁴ The cost of work performed by the government under such an order may be recovered from

¹⁴⁵ *Id.* at §§ 1(27)(xi), 15-24.

¹⁴⁶ Ontario PCB Waste Management Regulations, Ont. Regs. 11/82, amended by Ont. Regs. 575/84 (1982).

¹⁴⁷ *Id.* Currently there are no approved PCB disposal facilities within Ontario.

¹⁴⁸ Ont. Rev. Stat. ch. 141 § 65 (1980).

¹⁴⁹ *Id.* at § 62.

¹⁵⁰ Ontario Regulation on Sewage Systems, Ont. Regs. 374 (1981).

¹⁵¹ Ont. Regs. 374 (1981).

¹⁵² Ont. Rev. Stat. ch. 141 § 65.

¹⁵³ *Id.* at § 62.

¹⁵⁴ *Id.* at § 69.

the recipient of the order.¹⁵⁵ Fines of up to \$1,000 also may be issued for non-compliance with any provision of the Act, regulations, certificate of approval, or any license.¹⁵⁶

Municipal sewage works and other sewage works that discharge to surface waters are regulated under the Ontario Water Resources Act.¹⁵⁷ The Act sets forth the requirements applicable to municipalities or other entities seeking to establish sewer works.¹⁵⁸ Under this section the Director of the MOE retains the authority to veto any construction plans and bylaws establishing local financing mechanisms for sewer systems, with the exception of private individual on-site sewage facilities or facilities to drain agricultural land.¹⁵⁹

I. Spill Response and Clean-Up Under OEPA

Part IX of the OEPA, known as the "Spills Bill", establishes a comprehensive scheme for the prevention, control, containment and correction of "spills." It imposes obligations that are separate and distinct from the general and media-specific reporting and control requirements under the Act and regulations. In essence, the Spills Bill establishes a separate reporting and response program especially formulated for spills of all types of materials that may adversely affect the environment. It sets forth spill reporting requirements; prescribes special procedures for response to and remediation of spills; establishes joint and several liability among responsible parties; confers response authority on the Ministry in the event responsible persons are unavailable or recalcitrant in responding to spills; creates rights of response action for municipalities, regional municipalities and certain designated classes of persons; imposes liability for personal injuries, pecuniary losses and rights of compensation; and establishes an "Environmental Compensation Corporation" responsible for allocating compensation rights and payments.¹⁶⁰

The Spills Bill creates special duties and joint liability for persons having control of a pollutant and persons who cause a spill or permit a spill to continue. "Person having control of a pollutant" is defined to include the person and his employees and agents who "have charge, management or control" of a pollutant immediately before the first discharge, whether or not this discharge occurs into the natural environ-

¹⁵⁵ *Id.* at § 68.

¹⁵⁶ *Id.* at § 68(2).

¹⁵⁷ Ontario Water Resources Act, Ont. Rev. Stat. ch. 332 §§ 42-61 (1970, amended).

¹⁵⁸ Ont. Rev. Stat. ch. 361 §§ 24-33 (1980).

¹⁵⁹ *Id.*

¹⁶⁰ OEPA at §§ 79-112.

ment.¹⁶¹ A “discharge” includes any addition, deposit, emission or leak. A “spill” is defined, in pertinent part as (1) a discharge of a “pollutant” to the “natural environment”,¹⁶² (2) from a “structure . . . or other container,” (3) that is “abnormal in quality or quantity in light of all the circumstances of the discharge”.¹⁶³ “Spills” have been construed to include gradual leaks from underground storage tanks, for example, but whether leaking landfills would constitute a “spill” is still a matter of some debate. The MOE may decide on an ad hoc basis the quantities of spilled substances that would be “abnormal” or “cause an adverse effect.”¹⁶⁴

Persons responsible under the Spills Bill are required to notify the MOE and the municipality or regional municipality where the spill occurred as soon as the person knows or ought to know that the spill has caused or may cause an adverse effect, as defined in the statute, and “forthwith do everything practicable to prevent, eliminate and ameliorate the adverse effect and to restore the natural environment.” Failure to report a spill or release of a pollutant in any quantity is a chargeable offense under the Spills Bill and the general provisions of the OEPA. Persons potentially responsible for a spill should be warned that the Ministry is empowered to determine, after the fact, whether a particular discharge constitutes a spill of “abnormal quantity” or “adverse effect” subject to these reporting requirements.¹⁶⁵

Under the Spills Bill, a spill notification must include: identification of the owner of the pollutant, if known or ascertainable; identification of the person having control of the pollutant; and a description of actions taken or intended to be taken in response to the spill. These notification requirements are distinct from the notification requirements under the more general provisions of the OEPA.¹⁶⁶ The MOE may require the reporting person to supply additional information.¹⁶⁷

Responsibility for spilled substances is not limited to persons in control of the substances at the time of the spill. The duty to respond appropriately applies to owners as well as persons responsible for substances at the time of a spill and during transit, notwithstanding the fact that the

¹⁶¹ *Id.* at § 79(1)(e).

¹⁶² *Id.* at § 1(1)(ca). At least one Ontario court has determined that a discharge continues to be a discharge so long as it remains in the natural environment and poses a risk of adverse effects. *See R. v. J. Brett Hill*, unreported decision of District Court Judge Matheson, May 24, 1988, aff'd by Ontario Court of Appeal, Dubin, C.J. Finlayson, and Carthy J.J.A., June 26, 1990.

¹⁶³ *Id.* at § 79(1)(j).

¹⁶⁴ Allison Hall, *supra* note 136, (February 24, 1990).

¹⁶⁵ OEPA §§ 80, 81.

¹⁶⁶ *Id.* at § 80(1).

¹⁶⁷ *Id.* at § 80(3).

owner or responsible person may not be the owner or person in control at the time that the substance is spilled, and all persons connected with property during and after the occurrence of a spill, having control of the spill or actively or passively contributing to its occurrence, may be jointly and severally liable for response costs.¹⁶⁸

The MOE has broad discretionary powers to order specific cleanup actions and to restore the environment after a spill. It can order responsible persons to do anything practicable to prevent, eliminate or ameliorate the adverse effects or to restore the environment.¹⁶⁹ Where the MOE cannot identify a responsible person or believes that the person will not respond, the MOE can instruct its employees and agents to undertake cleanup and restoration of the environment. Such actions can be taken by the Ministry without affording persons the right to a pre-enforcement hearing.¹⁷⁰ The Spills Bill authorizes municipalities, regional authorities, and certain designated classes of persons to "do everything practicable to prevent, eliminate and ameliorate the adverse effects and to restore the environment."¹⁷¹ Responses by these government and private bodies must be coordinated in ways specified in the statute.¹⁷² These entities have a right to compensation for all reasonable costs incurred.¹⁷³

The Spills Bill establishes two different standards of liability for cleanup costs and other damages, such as personal injury or pecuniary loss. As under the general provisions of the OEPA, the owner or person having control of a pollutant has an absolute duty to clean up and restore the natural environment to its pre-spill condition¹⁷⁴ and will be held absolutely liable for costs arising out of failure to carry out that duty.¹⁷⁵ For other kinds of loss or damage, such as personal injury and pecuniary losses of an individual or the government, a defendant is strictly liable, subject to an affirmative defense that the person took all reasonable steps to prevent the spill of the pollutant.¹⁷⁶

As with prosecutions under the OEPA generally, all public and private actions for compensation under the Spills Bill are subject to a two-year statute of limitations, which begins to run on the date that the person commencing the action knew or ought to have known of the loss or

¹⁶⁸ *Id.* at §§ 81(2), 87(8); Jackson, *supra* note 6, (January 31, 1990).

¹⁶⁹ OEPA, pt. IV § 85.

¹⁷⁰ *Id.* at § 82.

¹⁷¹ *Id.* at § 88. To date there have been no classes of private persons designated to carry out this authority. Jackson, *supra* note 6, (January 31, 1990).

¹⁷² *Id.* at § 88(3).

¹⁷³ *Id.* at §§ 88(4)-(6).

¹⁷⁴ *Id.* at § 81(1).

¹⁷⁵ *Id.* at § 1431.

¹⁷⁶ *Id.* at § 87(3), (6).

damage.¹⁷⁷ The statute of limitations does not apply, however, to the duty to undertake response actions and will not bar the MOE from issuing orders to enforce that ongoing obligation.¹⁷⁸

Under the "Spills Bill", the Environmental Compensation Corporation and Fund has been established to allocate financial liability and pay compensation, including cleanup costs and other pecuniary damages to victims of spills. To relieve parties of the need to resolve compensation and liability disputes in court, the Corporation has established a system for compensating victims out of the Ontario general revenues. The Corporation may then seek restitution in court from responsible parties jointly and severally liable under the Spills Bill.¹⁷⁹

J. Underground Storage Tanks

Leaking underground storage tanks are one of the most pervasive causes of ground water contamination in Ontario.¹⁸⁰ Underground storage tanks ("USTs") containing "gasoline and associated products" (petroleum liquids) are currently addressed both by statute and regulation under Ontario law, and by a federal code of practice established by the Canadian Council of Resource and Environmental Ministers ("CCREM").¹⁸¹ Tanks containing substances or wastes other than petroleum liquids are governed by the general provisions of the OEPA described above relating to the control of environmental contaminants.¹⁸² As in many of the United States, underground petroleum storage tank legislation in Ontario was originally intended to prevent fires and explosions through construction, design and installation requirements. Recent amendments have focused on leak prevention technology and testing for the purposes of protecting groundwater and the environment.

The principal law governing USTs (as well as above-ground tanks) in Ontario is the Gasoline Handling Act ("GHA").¹⁸³ This statute is

¹⁷⁷ *Id.* at § 87(13).

¹⁷⁸ *Id.* at § 87(4)(5).

¹⁷⁹ *Id.* at §§ 90-109, 87(8). In response to the Exxon-Valdez Alaska Oil Spill, a similar spill response funding mechanism was introduced in the United States' 101st Congress for oil spill response. Senate bill 686 set forth the proposed "Oil Pollution Prevention, Response, Liability and Compensation Act of 1989" for the purpose of consolidating and improving Federal laws for compensation and liability.

¹⁸⁰ Mary Hall, *supra* note 139.

¹⁸¹ OEPA, pt. III § 8. Tanks storing liquid petroleum fuels for consumptive use on the premises are regulated separately by the Ontario "Fuel Oil Code" promulgated under the Ontario Energy Act. Ont. Regs. 288, Ont. Rev. Stat. ch. 139 (1980). This Regulation is implemented by the MOCCR, Fuels Safety Branch.

¹⁸² Gasoline Handling Act, Ont. Rev. Stat. ch. 185 (1980), *amended* by ch. 49 (1988) [*hereinafter* Gasoline Handling Act].

¹⁸³ *Id.*

administered by the Director of the Fuels Safety Branch of the Ontario Ministry of Consumer and Commercial Relations ("MOCCR"), with the assistance of the office of the provincial Fire Marshal.¹⁸⁴ Under the GHA, operators of non-exempt underground (and above-ground) petroleum storage tanks are required to be licensed by the MOCCR.¹⁸⁵ Recent amendments to the GHA require owners of USTs to provide a statement to the MOE indicating that the tank and its piping are protected from external corrosion.¹⁸⁶ All equipment used for tank systems must be approved by the MOCCR.¹⁸⁷

Regulation 439, known as the Ontario Gasoline Handling Code ("GHC"), specifies additional standards for licensing, installation, testing, daily inventory control, operation and maintenance, and reporting of leaks.¹⁸⁸ When a leak is suspected, the MOCCR must be notified, and owners can be required to empty and pressure test the UST and its associated piping. These requirements are in addition to the spills notification provisions under the OEPA. When a UST is leaking, the MOE may issue orders requiring response action.¹⁸⁹

The GHC requires owners of old USTs which are unprotected against corrosion and were installed prior to May 1, 1974, to establish a program for removing or upgrading such tanks by January 1, 1991. These tanks may either be removed and replaced by new corrosion protected tanks or upgraded by approved methods, which include impressed current corrosion protection or internal lining.¹⁹⁰ Requirements also exist for removing USTs when it is known that they will no longer be used, or when they have been out of use for more than five years.¹⁹¹

Requirements under the GHA and the Code are extensive and detailed, and should be carefully reviewed by all current and prospective operators of both USTs and above-ground tanks. Also, persons engaged

¹⁸⁴ *Id.* at § 6; Licensing requirements apply to owners or operators of service stations or marinas, bulk storage plants, or transporters of gasoline and "associated products." Associated products include fuel oils, other oils and glycol-based antifreezes which are classified according to flash point. *See id.* at 3(3) and Ont. Reg. 486 § 3 (1979). Owners or operators of underground tanks storing petroleum fuels for consumptive use on premises are exempt from most requirements under the GHA and GHC. However, leaks from these tanks are subject to OEPA reporting and cleanup requirements.

¹⁸⁵ Gasoline Handling Act, *amended by* ch. 49 § 6(a)(1988).

¹⁸⁶ *Id.*; *amended by* ch. 185 § 2. Tanks regulated under the Energy Act are not a subject to this time table, however, heating fuel tanks installed for on-premises consumption must be removed if they will be taken out of use, or have been out of service for 2 years.

¹⁸⁷ Gasoline Handling Code, Ont. Regs. 439(1980) [*hereinafter* Gasoline Handling Code].

¹⁸⁸ *Id.* at §§ 8(34), (35), 9(3), (7).

¹⁸⁹ Gasoline Handling Code, *amended by* Ont. Regs. 436/82 § 9(49), (50).

¹⁹⁰ Gasoline Handling Code, §§ 9(18), 9(17-21).

¹⁹¹ *Id.* at § 9(24).

in property transactions in Ontario should note the provision requiring owners of property where tanks are located to give notice to prospective purchasers of the existence of the tanks.¹⁹² Unlike the law in many of the United States, the GHA preempts all municipal bylaws.¹⁹³

As mentioned above, in 1989 the CCREM published its Environmental Code for Underground Storage Tank Systems Containing Petroleum Products. This Code of Practice sets forth uniform technical requirements for USTs, parts of which have already been incorporated into provincial regulations throughout Canada. It is expected that this Code will be adopted in its entirety as law in the provinces and establish federal uniformity of UST requirements.¹⁹⁴ Under this Code, all owners of USTs would be required to register tanks, and suppliers would be forbidden from delivering petroleum products to unregistered tanks. As under current Ontario regulations, old USTs would be required to be removed or upgraded. However, for tanks 25 years of age or older, and for tanks of unknown age, upgrading would not be permitted. Also, under this Code, USTs with known or suspected leaks would be required to be removed immediately.

VI. LIABILITIES FOR CONTAMINATED LAND IN ONTARIO

While most of the regulatory programs under the OEPA create compliance requirements addressing current activities, sites contaminated by past activities continue to pose environmental threats throughout Ontario. Until recently, the province relied solely on the common law to remedy problems created by past polluting activities. Persons responsible for contaminated lands have been subject to common law remedies for negligence, nuisance, trespass and strict liability (under the English rule as established in *Rylands v. Fletcher*).¹⁹⁵ Under these theories, neighboring landowners could recover damages if their property were contaminated due to activities on the site of another.

Under any of these theories, except negligence, a prospective plaintiff would not need to produce evidence of fault or absence of due care to establish liability. Moreover, as in most of the United States, in Ontario a violation of any of the statutory provisions set forth above could constitute evidence of negligence. To some extent, the statutory remedies discussed above have supplanted the older common law remedies for environmental harms. However, the common law is still the primary

¹⁹² Gasoline Handling Act, *amended by* ch. 185 § 16.

¹⁹³ Jackson, *supra* note 6, (January 31, 1990).

¹⁹⁴ (1868), L.R. 3H.L. 330. *Mary Hall*, *supra* note 130.

¹⁹⁵ *Hall*, *supra* note 130.

avenue for recovery of damages for environmental contamination.¹⁹⁶

Although neither Ontario nor Canada has adopted any comprehensive statute imposing strict liability for the remediation of contaminated sites, environmental statutes do provide significant authority relating to contaminated land in Ontario. In general, the MOE may enforce cleanup requirements by issuing orders or by refusing to issue new certificates of approval for activities. The MOE may also advise other Ontario agencies against issuing approvals until sites are cleaned up.¹⁹⁷

The evolving system for cleanup of contaminated land and allocation of liability under the OEPA is beginning to resemble the framework established in the United States by CERCLA, the Superfund Amendments and Reauthorization Act of 1986 (SARA), the National Contingency Plan (NCP), and similar efforts of the MOE to enforce cleanup orders against parties having past or present associations with contaminated sites. Perhaps the most prominent example of the MOE's new direction in this area is the case involving Northern Wood Preserves site in Thunder Bay, Ontario, where contamination occurred over a fifty year period. In 1987 the MOE ordered all past and present owners and operators, including a successor corporation, to conduct studies and remedial actions at the site. The orders also hold the recipients jointly liable for costs. A challenge to these orders is pending before the Environmental Appeal board in Ontario.¹⁹⁸

Recent regulatory and legislative developments codify the authority of the MOE to impose cleanup requirements and liability under provisions comparable to existing United States law. In 1989, the MOE adopted cleanup guidelines under the OEPA that impose requirements on current and past land owners as individuals who cause or allow "discharges" of "contaminants" in violation of the Act.¹⁹⁹ The MOE has applied these guidelines in advising municipalities and private parties in connection with land transaction and changes in land use.

On June 28, 1990, Ontario adopted the Environmental Protection Statute Law Amendment Act ²⁰⁰ which amends the OEPA and the Water Resources Act in several respects. With respect to contaminated lands, the Act authorizes the MOE to issue control orders to:

-an owner or previous owner of the source of contaminant;

¹⁹⁶ OEPA §§ 6.7; 8(1), (4), (7), (16), (17); 13; 85; 113.

¹⁹⁷ See MOE Amended Order: Canadian National Railway Col, et. al., July 6, 1988 G.L. Van Fleet, Director.

¹⁹⁸ Ontario Ministry of the Environment, Waste Management Branch, *Guidelines for Decommissioning and Cleanup of Sites in Ontario*, February 1989.

¹⁹⁹ Ont. Stat. ch. 18 (1990).

²⁰⁰ *Id.* at § 124.

- a person who is or was in occupation of the source of contaminant; or
- a person who has or had the charge, management or control of the source of the contaminant.

The Act authorizes the government carry out cleanup work where an order is in default, and to secure its response costs by imposing a lien on land subject to a MOE order. Such liens are to be satisfied in the same manner, and receive the same priority, as tax liens.²⁰¹ Also, the Act now eliminates application of a separate statute²⁰² providing for automatic stay on enforcement orders subject to appeal.²⁰³

Thus, companies doing business in Ontario now face serious exposure to liability as past or present owners, purchasers, or vendors of land. There is some debate over whether persons with a security interest in property, including a mortgagee or insurer, will be held similarly liable. Also, the amendments do not address the issues of allocation of response costs among responsible parties. The application of concepts of contribution and indemnity have apparently been left to the courts to determine. There is, however, some indication from MOE officials that a statutory scheme will be put in place to address these issues.²⁰⁴

Procedurally, OEPA's broad provisions for liability may be triggered in different ways. First, under the OEPA, the MOE has wide-reaching authority to investigate environmental conditions on any site suspected of containing contamination and to issue orders to any "persons responsible," as defined above.²⁰⁵ Second, under the Environmental Assessment Act ("EAA"), certain development proposals must undergo an environmental review process²⁰⁶ not unlike the process under the United States National Environmental Policy Act ("NEPA").²⁰⁷ Under the EAA, potential contamination may be pinpointed in the course of MOE's routine analysis of former land uses, or by any environmental assessment and remediation work conducted prior to development plans approval. Fourth, under the Planning Act,²⁰⁸ development requiring zoning and other approvals may cause investigation of past land uses which reveal likelihood of contamination. Likewise, under the Condominium Act,²⁰⁹ the MOE serves in an advisory capacity in the approval

²⁰¹ Ontario Statutory Powers Procedure Act.

²⁰² Ontario Stat. ch. 18 § 64 (1990).

²⁰³ Personal communication from Stanley Berger, Ontario Ministry of the Environment, Legal Services Branch. July 1990.

²⁰⁴ See also OEPA §§ 6, 7, 16, 17, 85, 113.

²⁰⁵ 42 U.S.C.A. §§ 4321 to 4370a.

²⁰⁶ *Id.* at § 1(m) [emphasis added].

²⁰⁷ The Planning Act, Ont. Stat. ch. 1(1983).

²⁰⁸ The Condominium Act, Ont. Stat. Rev. ch. 84 (1980).

²⁰⁹ OEPA at § 150.

of these developments, and has a similar opportunity to search for contaminated lands. Finally, to avoid liability, prospective purchasers are now likely to initiate their own investigations by prospective purchasers and along with those conducted by the MOE comprise the most common triggers for the discovery and imposition of liability for contamination.

The 1990 amendments to the OEPA and Water Resources Act now offer some protection for purchasers of contaminated property against unknowing assumption of liability. Under section 150 of the OEPA the MOE Director may issue an order prohibiting transactions involving contaminated lands where the seller does not first provide, to all persons acquiring an interest in the land, a copy of any MOE order regarding contamination or other environmental violations on-site. The Director may require the order to be registered on the title of the land to which the order relates. This section provides the purchaser the right to rescind the transaction if the purchaser has not been notified in advance by the vendor.^{210 211}

Regulations under the Gasoline Handling Act also establish a duty to inform a purchaser of the presence of underground tanks storing petroleum liquids:

Where a property having gasoline or associated product storage tanks is sold or leased, the owner of the property shall inform the purchaser or lessees of the existence of the tank or tanks and shall provide proof to the purchaser or lessees that the tank or tanks comply with . . . [the provisions for withdrawing a tank from use]. Each owner is subject to penalties for failure to disclose and properly respond to this obligation.²¹²

Accordingly, under Ontario law the unwary purchaser is protected against problems associated with the existence of underground storage tanks.

A. Ontario Guidelines for Decommissioning and Cleanup of Sites

Neither Ontario nor Canada has adopted regulations comparable to the United States National Contingency Plan establishing procedures for the remediation of contaminated sites. In February 1989, however, the Ontario Ministry published "Guidelines for the Decommissioning and Cleanup of Sites in Ontario."²¹³ These guidelines set forth important new procedures for ensuring that decommissioning of facilities and cleanup of contaminated sites is completed in an environmentally acceptable manner. While the Ontario guidelines do not yet have the force of

²¹⁰ Gasoline Handling Code, § 9(24).

²¹¹ Ont. Rev. Stat. ch. 185 § 8.

²¹² MOE Guidelines, *supra* note 198.

²¹³ MOE Guidelines at 2.

regulations, they purport to apply whenever the MOE invokes its powers to issue environmental protection orders under the various MOE authorities.

Unlike CERCLA and comparable laws adopted at the state level, the Ontario guidelines may be applied to any site, not just "priority sites" or sites for which private parties seek to recover response costs.²¹⁴ Furthermore, formal MOE approval to proceed with decommissioning or site cleanup is not needed, and prospective purchasers of a site may use the guidelines to determine whether significant environmental liabilities exist, and to require actions or agreements relating to cleanup prior to sale.²¹⁵ While compliance with the guidelines is not mandatory in cases of privately initiated cleanups, they represent the MOE's cleanup standards by which sites will be judged should an MOE enforcement order follow.

As described previously, the statutory powers of the MOE to issue environmental compliance orders are broad. As a matter of policy, the MOE is directing its staff to implement the decommissioning guidelines under the full range of these various authorities.²¹⁶ For example, section 3 of the OEPA provides that the MOE may investigate problems of pollution, conduct studies, plan, and gather information in order to protect the environment. Implicit in this provision is the authority to investigate past occurrences of pollution and to take steps to resolve such problems.

Under OEPA section 17, written orders may be issued by MOE officials and may require a person responsible for an undertaking or property to "implement procedures specified in the order" and to "take all steps necessary in order that procedures specified in the order will be implemented in the event that a contaminant is discharged into the natural environment from the undertaking or property." Also, under the EAA, in the course of assessing appropriateness of certain development proposals the MOE may determine that a site is contaminated. It may then refuse to issue the requisite approvals or may condition them on completion of appropriate investigations and remedial actions carried out in accordance with the guidelines.²¹⁷ In all of these cases the MOE may require that decommissioning and site cleanup guidelines be followed and that all private remediation be subject to MOE oversight and approval.

As in the case under the Spills Bill, liability for costs incurred by the

²¹⁴ Jackson, *supra* note 6, (January 31, 1990); OEPA § 17.

²¹⁵ *Id.*

²¹⁶ *Id.*

²¹⁷ *Id.*

government upon a party's failure to comply with a section 17 order is absolute, and does not depend on a finding of fault. Failure to obey such an order also could result in additional penalties or issuance of an abatement order by a provincial court. The decommissioning guidelines now encourage Ministry officials to issue orders whenever cleanup does not proceed voluntarily. It is anticipated that this program will provide important assistance to Ministry officials seeking expeditious cleanup of sites.²¹⁸

Once responsible persons become engaged (voluntarily or otherwise) in the decommissioning or site cleanup process, the MOE District offices will take the lead role in reviewing the work of the proponents of the project. The MOE Waste Management Branch will provide technical and policy assistance in the process. The guidelines require proponents and participants in a decommissioning or site cleanup to establish a schedule outlining dates for completion of the various phases of site work.²¹⁹ Progress reports may be required by the MOE when projects involve public review, and public consultation is required to take place throughout the decommissioning or site cleanup process.

The guidelines provide considerable latitude for government officials to require specific actions at various stages of the site cleanup process. Like the procedures under the United States Contingency Plan ("NCP"), the Ontario guidelines utilize a phased approach to cleaning up sites. Sites or facilities may undergo as many as a four phases of study, decommissioning and cleanup activities. These phases may include: Planning of the Decommissioning or Site Cleanup (Phase 1); Designing and Implementing the Decommissioning or Site Cleanup (Phase 2); Verifying Completion of a Satisfactory Decommissioning or Site Cleanup (Phase 3); and Final Government Approval and Release of Liability (Phase 4). Under the guidelines, MOE officials can select among appropriate remedies determined by available cleanup standards and other cleanup standards deemed to be necessary and appropriate.²²⁰

Phase I, decommissioning or site cleanup activities require project proponents to complete an initial analysis of site contamination, secure agreements necessary to carry out the cleanup, develop preliminary sampling and remedial work plans, select cleanup criteria, and prepare a public communications strategy.²²¹ Phase II activities involve design and implementation of the remedial work program, selection of remedial ac-

²¹⁸ MOE Guidelines at 4.

²¹⁹ MOE Guidelines at 4-100.

²²⁰ *Id.* at 11-16.

²²¹ *Id.* at 16-17.

tion technology, establishing financial assurance, and implementation of the remedial work plan.²²² Phase III activities involve verification of the completion of the decommissioning or cleanup activities, ongoing monitoring, additional financial assurance, if applicable, and "communication" of the completed decommissioning, which may involve press releases and an on-site "open house" for members of the MOE and the public.²²³

Phase IV activities are designed to provide proper notice of the history of the decommissioned or formerly contaminated site to future owners or users. These activities include registration of the decommissioning or site cleanup on the title to the property, submittal of a report detailing the work completed at the facility or site, a written statement provided by MOE outlining the activities and level of cleanup undertaken at the site, a list of suggested future land uses for the site, and a requirement that future land uses be in accordance with plans for the site pursuant to the decommissioning or site cleanup program.²²⁴

As is the case under CERCLA and various state laws in the United States, the completion of the procedures under the decommissioning guidelines can leave important questions and potential liabilities for site owners and other responsible parties. Under Section 10.2 of the guidelines, the MOE is required upon request to issue a written statement "outlining the activities and level of cleanup achieved at the site." However, this section states that such a notice "in no way amounts to MOE accepting liability for any future environmental problems that may arise at the site; this rests with the property occupant and owner."²²⁵ From the OPEA and the Guidelines, it may be inferred that all persons connected with contaminated property may be held accountable for insufficient site remediation where a site once thought to be clean is later determined to require further remediation, or where future cleanup standards are imposed which are more strict. Accordingly, proponents of a site cleanup and (absent an allocation agreement) past owners and operators will in most cases carry contingent liability for possible future cleanup costs. The uncertainties involved in determining "how clean is clean" will remain important for liable parties.

As in the United States, potentially responsible parties are now beginning to negotiate agreements allocating liability for cleanup costs,

²²² *Id.* at 17-19.

²²³ *Id.* at 18; "Cleanup" is defined under the Guidelines to mean: "the restoration of a contaminated site to ensure the protection of health and the environment.

²²⁴ *Id.* at § 10.2.

²²⁵ Jackson, *supra* note 6.

both in connection with business transactions and in response to known incidents of past contamination. The continuing obligations and the enormity of new obligations assumed by purchasers is a serious issue for companies doing business in Ontario, and one which will become more pervasive as the MOE expands its site cleanup role.

The federal government and the CCREM have recently agreed to an initiative which would establish a national contaminated sites cleanup program. Cost sharing plans have been proposed to deal with "orphan" sites where responsible parties are unavailable.²²⁶ Also, various municipal governments in Ontario have been implementing procedures for cleaning up lands as part of their municipal land use regulation responsibilities.²²⁷

VII. THE NEW ONTARIO ENFORCEMENT EFFORT

To the extent they ever existed, the days of forgiveness for environmental violations in Ontario have ended. Recent statistics released by the MOE and certain legislative proposals for changing the penalty structure indicate that Ontario is now focusing on prosecution and conviction of polluters.²²⁸

It is crucial for companies doing business in Ontario to understand both the nature of the various forms of environmental penalties, and the trends in enforcement. Violators of any requirements of the environmental laws discussed in this Article are subject to enforcement measures which may include the issuance of tickets and small fines for minor offenses, issuance of non-prosecutorial control or stop orders administered directly by the MOE's Enforcement Branch. Certain offenses such as improper use of waste generator manifest reports, and failure to label waste systems with certificate of approval identification numbers are, under the Provincial Offenses Act ("POA"), merely "ticketable" offenses, and subject to a maximum fine of \$153.00.²²⁹ Violation of administrative orders and other offenses under environmental statutes can result in civil penalties or prosecution in the Divisional Court. Once initiated, prosecutions can result in a prison sentence and imposition of sig-

²²⁶ *Id.*

²²⁷ Ministry of the Environment, Enforcement Activity Report, Fiscal Year 1985-1989 (4th Quarter, Jan. 1-Mar. 31, 1989).

²²⁸ Provincial Offenses Act, Ont. Rev. Stat. ch. 400(1980).

²²⁹ On June 22, 1990 the first jail term was imposed for a provincial environmental offense in Ontario. The offender violated Section 16 of the Ontario Water Resources Act, and Section 13 of the OEPA by illegally accepting and disposing of drums of hazardous waste which leaked their contents and contaminated local ground water supplies.

nificant fines.²³⁰ For example, under Ontario environmental laws, prosecutions can be based on a wide range of acts or omissions such as: failure to obtain environmental permits; causing a release of a contaminant; failing to take all reasonable care to prevent releases of contaminants; failing to give immediate notice of a release of a contaminant to the environment; failure to comply with, or participating in an operation with another who fails to comply with waste management regulations; failure to comply with requirements for the transportation of dangerous goods; or failure to disclose information to Ministry investigators. Because offenses under the statutes discussed above are quasi-criminal, repeat offenders may be subject to increased civil penalty assessments and prison terms.

With the adoption of the Spills Bill, persons responsible for ownership or control of sources of pollution or site contamination not only may be held liable for government cleanup costs, but are also vulnerable to private damages or cost recovery.²³¹ Enforcement officers under the Ministry's Investigations and Enforcement Branch, Ontario's "environmental police", are authorized with police powers to conduct enforcement actions for violations of the OEPA.²³² Further, although there is no "citizens suit" provisions per-se, citizens can register complaints with the MOE seeking enforcement of the OEPA.²³³ A conviction under the OEPA or under analogous provisions of the new Canadian Environmental Protection Act is prima facie evidence against polluters in private actions to recover damages based on negligence, nuisance, strict liability (under the English rule established in *Rylands v. Fletcher*), interference with riparian rights or deceit.

Statistics released in June 1989 by the MOE reflect a dramatic increase in environmental prosecutions, convictions and penalty assessments.²³⁴ This report covers enforcement actions and prosecutorial activity for fiscal years 1983-1988. Enforcement trends are summarized graphically as follows:

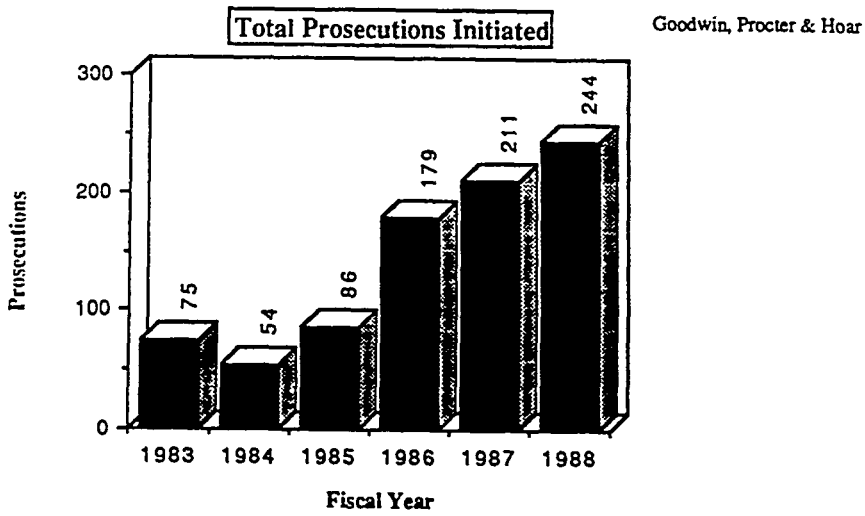
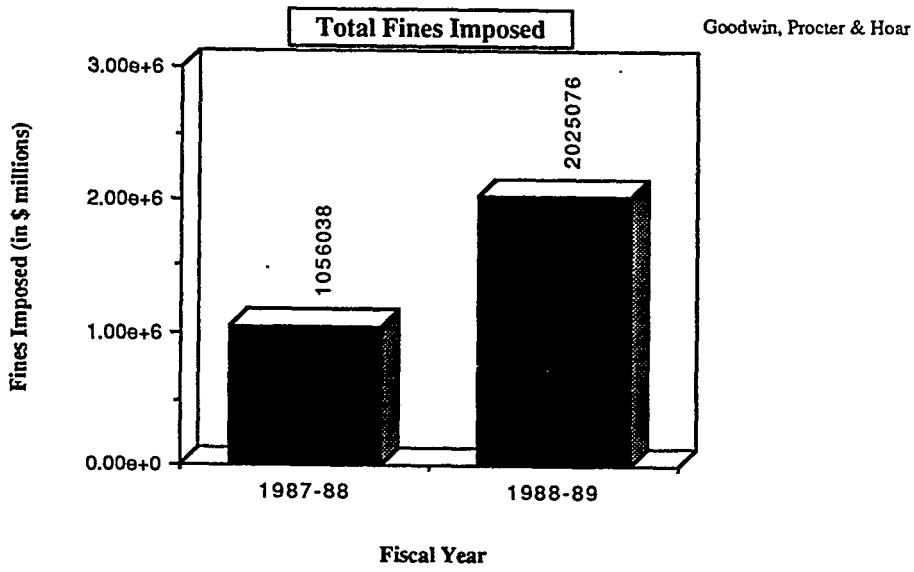
²³⁰ OEPA § 91.

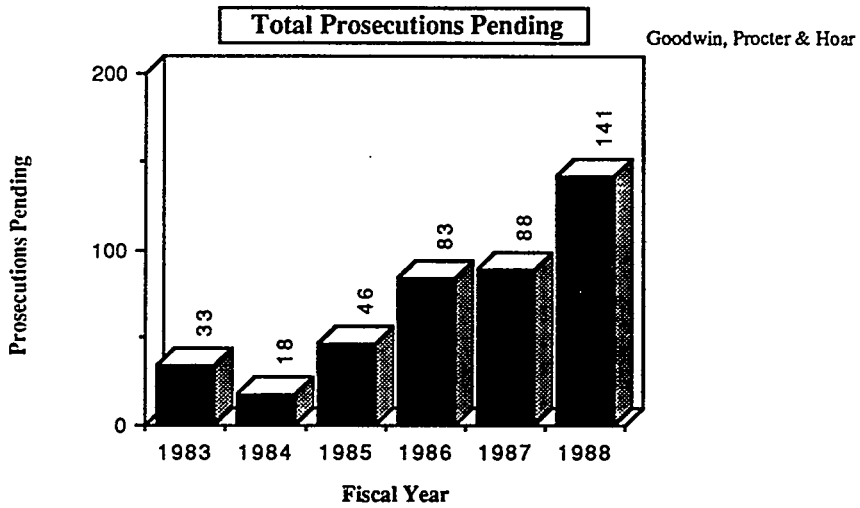
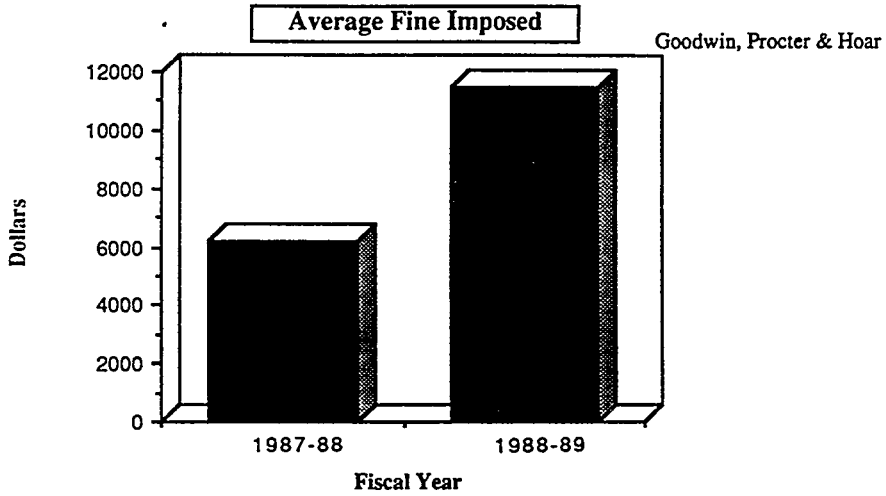
²³¹ *Id.* at § 128.

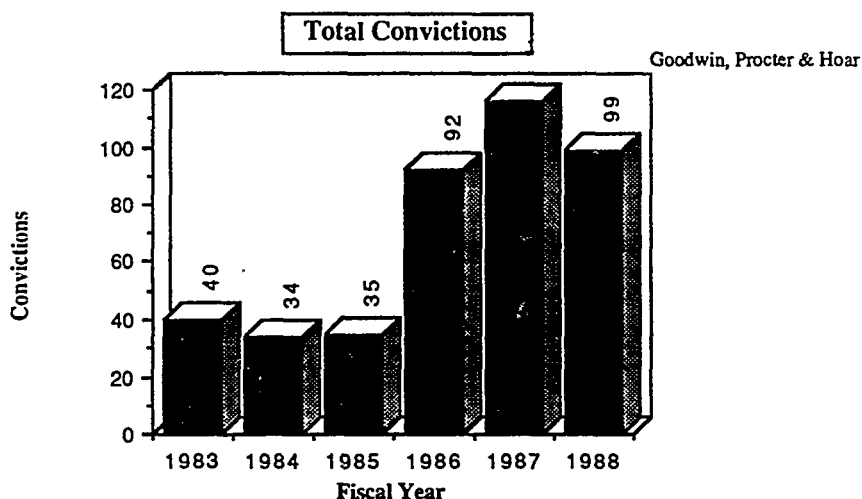
²³² Jackson, *supra* note 6.

²³³ MOE Enforcement statistics Report, at p. 3.

²³⁴ Ont. Stat, *supra* note 199.







As these charts reflect, civil penalties assessed for environmental offenses more than doubled between fiscal years 1987 and 1988. The average penalty assessment in fiscal year 1988 was \$11,506, which is nearly twice the average in fiscal year 1987. Prosecutions initiated for all environmental offenses have risen from seventy five in fiscal year 1983, to two hundred forth four in 1988. Additional statistics released by the MOE indicate that in fiscal year 1988 three hundred forty three companies or persons were charged with an aggregate of 1,568 offenses.

Increases in statutory penalties for environmental offenses are likely to accelerate these enforcement trends. The 1990 Environmental Protection Law Amendment Act raised the maximum penalties by up to five times the previous limits. For example, individuals convicted of contaminating the natural *environmental may be fined up to \$50,000 for a first conviction and up to \$100,000 for each subsequent conviction. Corporation may be fined up to \$1 million for the first conviction and \$2 million for each subsequent conviction.

The MOE has observed that these increases may not be as large as those imposed by other provinces. In Quebec and British Columbia, environmental fines have, in some cases, been increased by twenty times the original ceilings, with special maximum fines of up to \$3,000,000 and three years in prison for intentional environmental violations.²³⁵

²³⁵ BNA International Environmental Law Reporter. There was substantial support within the MOE for quadrupling, rather than doubling the maximum fines.

VIII. CONCLUSION

From a practical standpoint, this overview of Environmental laws of Canada and Ontario suggests two overarching conclusions. First, in Ontario, environmental laws and regulations provide for considerable administrative discretion to enforce statutory prohibitions and to craft appropriate remedies to environmental problems. There are fewer established thresholds or rigid requirements for addressing particular environmental problems, and the statutory authority of the MOE is substantial enough to address most problems that can arise. The general provisions of the OEPA, together with the other statutory and regulatory mechanisms discussed above, can be used to impose stringent and expensive requirements on an ad hoc basis at the discretion of the MOE.

Second, while Canadian environmental regulatory programs appear to be developing in ways resembling United States environmental laws, it should not be assumed that experience with that system will provide a reliable foundation for interpreting environmental statutes and regulations in Canada or the provinces. Understanding the differences between certain institutional and administrative systems in Canada and the comparable systems in the United States is of key importance in construing any environmental requirement. Indeed, absent diligent and comprehensive study, important nuances of Canada's federal and provincial environmental laws and regulations may be lost on United States practitioners.

In the past, Ontario environmental laws have to some degree been underenforced or have lacked regulatory teeth. This trend now appears to be changing. Reorganization of environmental statutes and adoption of new enforcement programs signal a new effort to address a full range of environmental problems. In the past three years prosecutions and penalties for environmental violations clearly have increased. Due to several new legislative initiatives this trend should accelerate. In the circumstances, no business engaged in operations or transactions in Ontario can afford to be ignorant of environmental requirements.