

Resource, energy and infrastructure development continues across Canada, resulting in renewed focus on environmental assessment, wildlife, water and air quality, as well as concerns raised by local and aboriginal communities. Issues arise not only with the activity itself but where the products are going and how they are going to get there. The focus of the federal government is on how best to respond to environmental pressures internationally and domestically without adversely affecting the country's economy.

Against this background, here is an update on Canada in 2011 and what's expected in 2012.

CLIMATE CHANGE – CANADA'S FOCUS IS DOMESTIC

Subsequent to the Conference of the Parties to the Kyoto Accord, which was held in Durban, South Africa, in December 2011, Canada announced that it would formally withdraw from the Kyoto Accord. However, this does not mean that domestically the federal and provincial governments are ceasing further action on reducing carbon emissions as both continue to develop law and policy in this area. Canada has adopted the U.S. Environmental Protection Agency (EPA) limits on greenhouse gases (GHGs) for tailpipe emissions and will continue to follow closely EPA GHG rule-making activity under the U.S. *Clean Air Act*. Federal regulations issued in 2011 will require some coal-fired power plants to shut down in the coming years or achieve significant reductions in carbon dioxide emissions, notably by implementing carbon capture and storage technology. However, the extent of future government actions remains uncertain and is expected to stay in line with U.S. policy.

ENVIRONMENTAL ASSESSMENT

A Joint Panel Review for the environmental assessment of the proposed Northern Gateway pipeline, which would transport oil from Alberta to the west coast in Kitimat, British Columbia, began in December 2011 with a public hearing that is expected to continue for approximately 18 months. The Panel will hear from the project proponent, the governments of Canada, British Columbia and Alberta, affected First Nations, environmental non-governmental organizations and a large number of public interveners before it issues its report. In the meantime, the House of Commons Standing Committee on the Environment and

Sustainable Development is conducting a review of the *Canadian Environmental Assessment Act*. Hearings were held in the fall of 2011, and while the report has not yet been issued, it is expected that there will be recommendations for amendments. Key "asks" the Committee may respond to were requests to narrow the application of the federal legislation to large projects and to streamline the process for the assessment, in particular for those which are also subject to provincial environmental assessment regimes. The National Energy Board completed its review of issues related to oil and gas exploration and development in the Western Arctic. The Board agreed to consider alternatives to the current requirement that proponents be able to complete a relief well in the same season as a blowout occurs. Proponents will be required to prove the feasibility of proposed alternatives.

AIR POLLUTION – MOVING TOWARDS A NATIONAL AIRSHED MANAGEMENT APPROACH

The concept of a federal *Clean Air Act* was suggested by the government over five years ago but never pursued. In 2010, federal and provincial environment ministers announced a new approach, agreeing to work on a national system for monitoring and managing air pollutants, beginning with fine particulate matter and ground-level ozone. Work continues on developing the standards for this system. In the meantime, work also continues on the development of base-level industrial emissions requirements or "BLIERS." According to the Canadian Council of Ministers of the Environment, "these requirements will be based on what leading jurisdictions inside or outside Canada are requiring of industry in 'attainment areas,' adjusted for Canadian circumstances." Initially, development of BLIERS is focused on nitrogen oxides, sulphur dioxide, volatile organic compounds and particulate matter. The BLIERS will apply to specified sectors and types of equipment. The sectors that will be subject to the new standards include aluminum and alumina, base metal smelting, cement, chemicals, electricity, iron ore pellets, iron and steel, oil sands, petroleum refineries, pipelines, potash, pulp and paper, and upstream oil and gas. The equipment groups are boilers and heaters, non-utility combustion turbines and reciprocating engines.

Continued on reverse

EFFLUENT

Federal water-quality standards for effluent from municipalities and commercial/industrial facilities that discharge to surface waters are expected to take effect in early 2012. Work continues on improving knowledge of watersheds and aquifers across the country. Several environmental groups have challenged Canada's *Metal Mining Effluent Regulations* in court, which, if successful, could put at risk a number of existing and proposed tailings ponds.

SPECIES AT RISK AND MIGRATORY BIRDS

A parliamentary review of the federal *Species at Risk Act* continued in 2011, but as of yet, no report has been released. In the meantime, the federal Minister of the Environment has indicated that amendments to the legislation are being considered, in particular with respect to incidental take permitting. In Ontario, new listings and habitat protections under that province's *Endangered Species Act* are causing problems for developers, infrastructure development and agriculture. In 2011, Environment Canada released a policy guidance regarding "incidental take" of migratory bird nests and eggs that occurs during resource development projects and "encouraged" industry is urged to adopt best practices to avoid accidental nest and egg destruction. At the same time, however, the policy stated that applying it would not relieve an entity from the legal requirements to avoid incidental take altogether.

ENFORCEMENT – ADMINISTRATIVE PENALTIES NOW PART OF THE FEDERAL TOOLBOX

Administrative penalties have recently been added to the enforcement "toolbox" under nine federal environmental laws, along with other new provisions intended to strengthen enforcement, including lengthening limitation periods, raising maximum fines and imposing minimums. It remains to be seen whether the federal government will continue its traditional reliance on the criminal law to hold those who violate the law accountable or take a more administrative approach in the future.

ENVIRONMENTAL CLASS ACTIONS

A few years ago, the Supreme Court of Canada ruled that a cement plant on the outskirts of the city of Québec was liable to pay damages to area residents for having caused them intolerable inconvenience (noise, smoke, dust), despite the fact that at all times the plant had complied with its operating permits and despite no finding of fault. This decision was under the *Québec Civil Code* and questions were raised as to how applicable it would be to the rest of the country, which are common law jurisdictions.

In 2011, the Ontario Court of Appeal took a different approach when it reversed a decision by a trial judge who had awarded damages to residents of Port Colborne, Ontario, for contamination of their properties caused decades ago by air emissions from a local metal refinery operated by the nickel giant Inco (now Vale). The appellate court held that nuisance claims must relate to an ongoing use of land and that such use of land must be "unnatural". The court found that operating a nickel refinery in compliance with applicable laws and permits is not an "unnatural" use of land nor is it "extra-hazardous." The court also found that damages had not been proven. The residents have sought leave to appeal to the Supreme Court of Canada.

ALBERTA LAND STEWARDSHIP ACT

The *Alberta Land Stewardship Act*, which came into force in 2009, is beginning to have an impact on land-use planning in the province. Under this legislation, the Alberta government establishes master plans for a number of regions in the province. While regions can consult on the plans, the ultimate decision is with the province. The legislation also allows for regional level cumulative effects management and inclusion of Aboriginal Peoples in land-use planning. In 2011, Alberta released a draft land-use plan for the Lower Athabasca Region, which includes the Fort McMurray area of northern Alberta where the oil sands are located. The plan calls for 16 per cent of the land in the region to be set aside for conservation purposes and improved integration of industrial activities in planning. This will likely lead to increased compliance and monitoring costs for industry.