

Torys on Environmental, Health and Safety

Vol. 18, No. 6
May/June 2011

Ontario

Divisional Court rules on employer's duty to report injuries at a workplace

In *Blue Mountain Resorts v. Ontario*, the Ontario Divisional Court ruled that an employer's duty under the *Occupational Health and Safety Act* (OHSA) to report all fatal and critical injuries at a workplace extends beyond incidents involving workers to include incidents involving members of the public, because such incidents have the potential to cause similar harm to workers. This case arose from a December 2007 fatality at Blue Mountain Resorts (BMR), when a guest drowned in an unsupervised swimming pool located on the resort property. BMR did not initially report the incident to the Ministry of Labour (MOL), but was ordered to do so by an MOL inspector. BMR appealed the order, because the person who drowned was not a worker and BMR's view was that the reporting requirements were triggered when a worker was harmed (not when any person was harmed in a way that could also harm a worker). The Ontario Labour Relations Board (OLRB) upheld the inspector's order. On judicial review, the Court held that the OLRB's decision with respect to the obligation to report the swimming pool death was not unreasonable and, accordingly, dismissed the appeal. In arriving at its decision, the Court indicated that a "workplace" is a place where one or more workers works, and does not require the physical presence of a worker at the time of the incident. As a result, the Court concluded that the resort swimming pool was part of the workplace.

For further information, please see the [Divisional Court decision](#).

Government implements expert safety panel recommendations

The Ontario government recently amended the OHSA and the *Workplace Safety and Insurance Act* in order to implement the recommendations of Ontario's Expert Advisory Panel on Occupational Health and Safety. In response to the panel's recommendations, which were reported in Torys' [December 2010 EH&S Bulletin](#), the amendments establish the MOL as the lead for accident prevention (transferring it from the Workplace Safety and Insurance Board), appoint a new Chief Prevention Officer (CPO) and create a new prevention council to advise the CPO and the Minister of Labour. The amendments also give the Minister of Labour oversight of Ontario's education, training and promotion of workplace health and safety.

For further information, please see the [MOL's Press Release](#).

Ministry of the Environment prescribes activities eligible for registration on Environmental Registry

Following the enactment of the *Open for Business Act, 2010*, the Ontario Ministry of the Environment (MOE) has begun identifying certain low-risk activities that will no

To discuss these issues, please contact

[Dennis Mahony](#)
416.865.8214
[David Chernos](#)
416.865.8246
[Crawford Smith](#)
416.865.8209
[Michael Fortier](#)
416.865.8147
[Tyson Dyck](#)
416.865.8136

or
Jeff Gracer
(Partner at Sive, Paget & Riesel, New York)

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longer require certificates of approval, provided that the activities meet specific requirements and are registered on the Environmental Activity and Sector Registry (EASR). On June 14, 2011, the MOE prescribed automotive refinishing (including autobody shop spray booths), heating systems and standby power systems as activities that are eligible to be registered on the EASR.

For further information, please see the [Environmental Registry](#). For a description of the relevant *Open for Business Act, 2010* amendments, see Torys' [April 2011 EH&S Bulletin](#).

General regulation under the *Toxics Reduction Act, 2009* amended

On June 3, 2011, the Ontario Ministry of the Environment (MOE) amended Ontario Regulation 455/09 (General), made under the *Toxics Reduction Act, 2009*. The amendments include the following:

- December 31, 2012 is now the date on which covered facilities must submit their phase 1 toxic substance reduction plans and plan summaries (the due date was previously December 31, 2011).
- The amendments prescribe the qualifications, role and requirements of a toxic substance reduction planner, who is one of two individuals who must certify a toxic substance reduction plan (the other being the highest-ranking employee at the facility with management responsibilities relating to the facility).

The amendments to O. Reg. 455/09 will come into effect on July 1, 2011 and can be accessed [here](#).

For further information, please see the [Environmental Registry](#).

Ontario Regulation 153/04 provisions regarding brownfields amended

The MOE recently issued amendments to O. Reg. 153/04 made under the *Environmental Protection Act*. In general, the amendments clarify the intent and scope of certain provisions, correct minor errors and incorporate new data. The amendments, among other things, make revisions to the MOE's 2009 Soil, Ground Water and Sediment Standards to reflect current science and to correct errors, including revisions to certain petroleum hydrocarbon and sodium standards, and clarify that the use of potable ground water standards is necessary near wells that are used for human consumption or agriculture, but not necessary near wells that do not require potable water (e.g., dewatering wells).

For further information, please see the [Regulation Decision Notice](#).

Ministry of Labour publishes inspection blitz schedule

The MOL has published a schedule of its upcoming 2011–2012 inspection blitzes designed to focus on sector-specific hazards. These blitzes are announced in advance and results are reported after the blitzes are completed. The proposed schedule for 2011-2012 includes the following:

Focus	Program	Date
New and Young Worker	Industrial and Health Care Sectors	May 1–August 31 2011
Pits and Quarries, Sand and Gravel Pits (hazards associated with crushing, screening and conveying processes)	Mining Sector	July 1–31 2011

Access Equipment <ul style="list-style-type: none"> • Ladders • Suspended Stages • Elevated Work Platforms 	Construction Sector	August 1–30, 2011
Personal Protective Equipment	Industrial and Health Care Sectors	October 1–31, 2011
Underground Mining (ventilation hazards)	Mining Sector	October 1–31, 2011
Infection Control	Health Care Sector	November 1–30, 2011
Musculoskeletal Disorders (MSD)	Industrial, Construction, Mining and Health Care Sectors	February 1–29, 2012
Construction Trade Specific	Construction Sector	February 1–29, 2012
Racking and Storage	Industrial Sector	February 1–29, 2012

For further information, please see the [MOL Press Release](#).

United States

Supreme Court rejects greenhouse gas nuisance lawsuit

On June 20, 2011, the U.S. Supreme Court issued its decision in the case of [American Electric Power Co., Inc., v. Connecticut](#), reversing the Second Circuit Court of Appeal’s ruling that would have allowed a group of states, cities and land trusts, including New York State and New York City, to pursue federal public nuisance lawsuits against certain large U.S. electric power plants with regard to their carbon dioxide emissions. In its decision, the Supreme Court unanimously held that the U.S. *Clean Air Act* and the U.S. Environmental Protection Agency’s implementation of that Act displace any federal common law right to seek abatement of CO₂ emissions from fossil fuel–fired power plants. However, in another key part of its decision, the Court affirmed the Second Circuit Court’s decision that at least some of the plaintiffs had standing to bring their claim.

Draft guidance proposed to clarify definition of “waters of the United States”

On April 27, 2011, the Environmental Protection Agency (EPA) and the U.S. Army Corps of Engineers (ACOE) issued joint draft guidance seeking to clarify which wetlands are considered “waters of the United States” protected by the *Clean Water Act* (CWA). Although the U.S. federal government (typically through the EPA) has authority to regulate environmental matters in “waters of the United States,” the phrase has been the subject of significant debate and has been extensively litigated. This is particularly so in regard to small, isolated wetlands that do not appear to be navigable or connected to any other water body. The new draft guidance interprets the federal jurisdiction under the CWA more expansively than the existing guidance, which was published in 2008. For example, the new guidance explicitly describes interstate waters as categorically within federal jurisdiction and modifies the position of the EPA and the ACOE (together, the Agencies) concerning swales, erosional features and upland-draining ditches characterized by infrequent or low-volume flow. The proposed guidance also provides a more explicit and extensive list of waters over which the Agencies would generally not assert jurisdiction, thus providing greater certainty that activities affecting these waters would not trigger federal jurisdiction. For further information, please see the [Draft Guidance](#). **1**