



CANADIAN ENVIRONMENTAL LAW ASSOCIATION
L'ASSOCIATION CANADIENNE DU DROIT DE L'ENVIRONNEMENT

MEMORANDUM

To: Mark Winfield, Pembina Institute
David Martin, Greenpeace Canada
Jose Etcheverry, David Suzuki Foundation
From: Paul Muldoon, Theresa McClenaghan, Richard Lindgren
Date: February 27, 2006
Re: Applicability of Ontario's *Environmental Assessment Act* to Ontario's Integrated Power System Plan

EXECUTIVE SUMMARY

The forthcoming Integrated Power System Plan (IPSP) is a public sector "plan" to which Ontario's *Environmental Assessment Act* (EA Act) applies. The application of the EA Act is mandatory since there are no declaration orders or regulations which exempt the IPSP from EA Act coverage. While special EA approval and exemption provisions are currently in place for certain individual electricity projects (see Ontario Regulation 116/01 and Ontario Regulation 334), these provisions do not alter, affect or preclude the EA Act's applicability to the provincial IPSP. In short, there is no constitutional or statutory reason for the IPSP to be developed outside of the EA Act.

PART I - INTRODUCTION

The Canadian Environmental Law Association (CELA) has been requested to provide a legal opinion on the applicability of Ontario's EA Act to the forthcoming IPSP, which is expected to be released in 2006 pursuant to Ontario's *Electricity Act, 1998*. The specific legal issue is whether and to what extent the EA Act applies to the IPSP to be developed by the Ontario Power Authority (OPA) on the behest of the Government of Ontario.

Accordingly, CELA has prepared the following summary of why and how the EA Act applies to public sector "plans" and "programs" in Ontario, with specific consideration of the EA Act's applicability to the IPSP.

PART II - RATIONALE FOR EA ACT COVERAGE OF "PLANS" AND "PROGRAMS"

In recognition of the need for ecological and socio-economic considerations to be incorporated early in environmental planning processes, strategic level EA procedures have been developed by various jurisdictions across Canada and other countries. "Strategic EA," or the EA of plans, policies and programs, is mandatory in some jurisdictions and discretionary in others. In Ontario, strategic EA is mandatory since the legislative framework requires EA of "enterprises, activities, programs, proposals, and plans," as described below.

The widespread acceptance that EA improves the quality of decisions about proposed undertakings has led to the development and practice of strategic environmental assessment (SEA), or the environmental assessment of policies, plans and programs. This is a result of the broadly held view that project-level EA may be too limited, and may occur too late in the planning process, to ensure that all alternatives and impacts relevant to sustainability goals are adequately considered.¹ Some of the societal and environmental benefits of strategic level EA are that it:

- facilitates consultation between authorities on, and enhances public involvement in, evaluation of environmental aspects of policy, plan and program formulation;
- encourages consideration of alternatives often ignored or not feasible in project-level EA;
- allows more effective analysis of cumulative effects of both large and small projects;
- encourages and facilitates the consideration of synergistic effects;
- allows more effective consideration of ancillary or secondary effects and activities; and
- facilitates consideration of long range and delayed impacts.²

The 1980 World Conservation Strategy was the first to highlight the need to integrate environmental considerations early in development planning stages. This concept then became an accepted part of World Bank policy in 1987, which stated that environmental issues must be addressed as part of overall economic policy rather than project by project.³ Since that time, many jurisdictions around the world have integrated strategic level EA into their existing processes. For example, the United States requires EA for “legislation and other major Federal actions significantly affecting the quality of the human environment.”⁴ Further, the U.S. Council on Environmental Quality has interpreted “major Federal actions” to include policies, plans, programs, rules and regulations.⁵

In his text, Wood explains the EA process using a tiered structure to show the evolution of a development from the early planning phases to project implementation. He states that:

Generally, there exists a tiered forward planning process which starts with the formulation of a policy at the upper level, is followed by a plan at the second

¹ Christopher Wood, *Environmental Impact Assessment: A Comparative Review* (Essex, England: Addison Wesley Longman, 1995) at 268.

² Wood, *supra* note 1 at 268.

³ Wood, *supra* note 1 at 267.

⁴ *National Environment Protection Act of 1969*, 42 U.S.C. § 4332.

⁵ Barry Sadler et al., “Environmental assessment in a changing world: evaluating practice to improve performance (final report).” *International Study of the Effectiveness of Environmental Assessment* (1996). Hull, Quebec, Canadian Environmental Assessment Agency and International Association for Impact Assessment.

stage, and by a programme at the end. A policy thus may be considered as the inspiration and guidance for action, a plan as a set of coordinated and timed objectives for implementing the policy, and a programme as a set of projects in a particular area.⁶

Wood then adopts an example in the general category of transportation to illustrate the process and the level of EA applicable at each stage. The example is reproduced below:⁷

Area	Policies (SEA)	Plans (SEA)	Programs (SEA)	Projects (EA)
Transportation	Transport Policy	Long-term national roads plan	Five-Year road building program	Construction of motorway section

In summary, applying EA principles to largescale or overarching governmental plans (i.e. before individual, site-specific projects are undertaken to implement the overall plan) makes considerable sense from environmental, social, cultural and economic perspectives.

PART III – LEGAL BASIS FOR EA ACT COVERAGE OF “PLANS” AND “PROGRAMS”

(a) Overview of the EA Act

In essence, Ontario’s EA Act establishes an information-gathering and decision-making process that is intended to be open, participatory, and comprehensive (i.e. addressing broad matters such as resource conservation, pollution control, land use planning, public health and safety, economic considerations, etc.).

The purpose of the EA Act is defined in section 2 as “the betterment of the people of Ontario” by providing for the “protection, conservation and wise management” of the environment.

“Environment” is broadly defined in section 1 of the EA Act as:

- (a) air, land or water;
- (b) plant and animal life, including human life;
- (c) the social, economic and cultural conditions that influence the life of humans or a community;
- (d) any building, structure, machine or other device or thing made by humans;
- (e) any solid, liquid, gas, odour, heat, sound, vibration or radiation resulting directly or indirectly from human activities; or

⁶ Wood, *supra* note 1 at 266.

⁷ Wood, *supra* note 1 at 267.

- (f) any part or combination of the foregoing and the interrelationships between any two or more of them.

In general terms, Ontario's EA Act applies to "undertakings" (see below) proposed by public sector proponents, unless such undertakings have been exempted from the Act by way of "declaration orders" or regulations. The EA Act does not apply to private sector undertakings, unless such undertakings have been designated by regulation as undertakings to which the Act applies. It is also possible for proponents to voluntarily agree to the application of the EA Act.

Where an undertaking is subject to the EA Act and requires the preparation of an individual EA, the proponent is responsible for preparing the necessary EA documentation in consultation with interested persons. At the present time, Ontario's individual EA process consists of four main steps:

- preparation and approval of "Terms of Reference" to direct the content and conduct of the EA process for the proposed undertaking;
- preparation and submission of the EA, consisting of the studies, reports and research prescribed by the Terms of Reference;
- government and public review of the EA submitted by the proponent; and
- Ministerial decision on the proposed undertaking (i.e. approve, reject, refer to mediation, or refer to the Environmental Review Tribunal for a public hearing and decision).

(b) Which Proponents and Undertakings are Subject to the EA Act?

"Proponent" is defined under section 1 of the EA Act as:

the person who,

- (a) carries out or proposes to carry out an undertaking; or
- (b) is the owner or person having charge, management or control of an undertaking.

"Person" is defined under section 1 of the EA Act as including "a municipality, Her Majesty in right of Ontario, a Crown agency within the meaning of the *Crown Agency Act*, [or] a public body". "Public body" is further defined as "a body other than a municipality that is defined as a public body by the regulations".

"Undertaking" is defined under section 1 of the EA Act as:

- (a) an enterprise or activity or a proposal, plan or program in respect of an enterprise or activity by or on behalf of Her Majesty in right of Ontario, by a public body or public bodies, or by a municipality or municipalities;

- (b) a major commercial or business enterprise or activity or a proposal, plan or program in respect of a major commercial or or business enterprise of a person or persons, other than a person or persons referred to in clause (a), that is designated by the regulations; or
- (c) an enterprise or activity or a proposal, plan or program in respect of an enterprise or activity of a person or persons, other than a person or persons referred to in clause (a), if an agreement is entered into under section 3.0.1 in respect of the enterprise, activity, proposal, plan or program.

The foregoing definitions of “undertaking” are essentially repeated in section 3 of the EA Act, which, in effect, specifies that the Act applies to:

- public sector undertakings proposed by or on behalf of the provincial Crown, by public bodies, or by municipalities;
- private sector undertakings that are designated by regulation; and
- undertakings by proponents who consent in writing to the application of the EA Act.

Despite the potentially broad scope of the foregoing provisions, it should be noted that countless public sector proponents and undertakings have been exempted by “declaration orders” (section 3.2) or by regulation (section 39(f)).

Nevertheless, if a public sector undertaking is not exempted by order or regulation, then the proponent must apply under the EA Act to the Minister of the Environment for approval to proceed. This application consists of the Terms of Reference and the EA documentation prepared in accordance with the Terms of Reference (section 5). Proponents are under a mandatory legal duty to consult with “interested persons” when preparing the Terms of Reference and EA documentation (section 5.1).

The wording of section 3 of the EA Act is mandatory in nature, and requires compliance by proponents of non-exempted undertakings, regardless of whether the undertaking is a “plan” or a site-specific project. This mandatory language is in contrast to some other EA processes in Canada, which instead make strategic level EA discretionary. For example, British Columbia’s *Environmental Assessment Act* states that the Minister *may* order an assessment of any “policy, enactment, plan, practice or procedure of the government”, but does not automatically require strategic EA.⁸ Ontario’s decision to make EA mandatory (not discretionary) for plans, programs and proposals emphasizes the province’s strong commitment to the proper consideration of all environmental impacts at the earliest planning stages.

⁸ SBC 2002, c. 43, s. 49.

(b) Declaration Orders to Exempt Undertakings from the EA Act

As noted above, the Minister of the Environment may declare that a “proponent, a class of proponents, an undertaking, or a class of undertakings” is exempt from the requirements of the EA Act, pursuant to section 3.2(1)(a) of the Act.

In order to declare an exemption, the Minister requires the approval of the Lieutenant Governor in Council (section 3.2(1)), and it must be “in the public interest to do so, having regard to the purpose of this Act and weighing it against the injury, damage or interference that might be caused to any person or property by the application of this Act to the undertaking” (section 3.2(1)).

If a declaration order is not made to exempt a public sector undertaking caught by the EA Act, then the proponent is prohibited from carrying out the undertaking unless and until approval to proceed is received by the proponent from the Minister and/or Environmental Review Tribunal: see section 5(3) of the EA Act. Moreover, no other person, agency or entity can issue legal authorizations needed to carry out the undertaking unless and until the proponent receives approval to proceed under the EA Act: see section 12.2(2) of the Act.

To date, no declaration orders (or regulations) have been issued under the EA Act to exempt the IPSP from EA Act coverage.

(c) The IPSP is a Public Sector “Plan” under the EA Act

Having regard for the above-noted definition of “undertaking”, the IPSP can clearly be characterized as a public sector “plan” for the purposes of the EA Act. After consultation with Ontarians, the provincial government (as represented by the Minister of Energy) will set overall energy policy direction (i.e. statutory directives to the OPA), and the IPSP will be prepared for (and ultimately adopted by) the provincial government. Once approved, the IPSP will, in turn, result in the development and implementation of specific provincial programs and projects related to energy conservation targets, siting and operation of renewable energy sources, and achievement of an appropriate energy supply mix.⁹

The Ontario government’s description of the forthcoming IPSP in the *Environmental Bill of Rights* Registry states:

It has been many years since a comprehensive, long-term plan for electricity has been prepared for the Province of Ontario. The Minister of Energy has requested that the Ontario Power Authority (OPA) begin the process of developing a proposed Integrated Power System Plan. Section 25.30 (2) of the *Electricity Act, 1998* allows the Minister of Energy to issue directives setting out the goals to be achieved during the period covered by the plan. The directives may included goals related to:

⁹ These are some of the areas in which the Plan is to develop recommendations, as stated in the Ontario government’s *Environmental Bill of Rights* Registry posting of the OPA Supply Mix Advice Report, available online at <http://www.ene.gov.on.ca/envregistry/026852ep.htm>.

- a) the production of electricity from particular combinations of energy sources and generation technologies;
- b) increases in generation capacity from alternative energy sources, renewable energy sources or other energy sources;
- c) the phasing out of coal-fired generation facilities; and
- d) the development and implementation of conservation measures, programs and targets on a system-wide basis or in particular service areas.

The OPA must follow any directives issued by the Minister in preparing its integrated power system plan.¹⁰

An important legal precedent for applying the EA Act to provincial energy planning initiatives occurred in 1989, when Ontario Hydro developed a long-term, comprehensive electricity plan known as the Demand/Supply Plan (DSP). The DSP was subject to the EA Act, and the Ontario government of the day referred the matter for a public hearing before the Environmental Assessment Board [now the Environmental Review Tribunal]. This EA hearing ended in 1993 when the proponent decided to withdraw the DSP.

In the years since the DSP was withdrawn, there have been significant changes in how individual electricity projects are subject to EA requirements in Ontario. In essence, individual public and private projects within the electricity sector are now generally subject to (or exempted from) requirements prescribed under Ontario Regulation 116/01 (see also section 15 of Ontario Regulation 334). However, none of these project-level changes serve as an exemption of broad provincial electricity supply plans from EA Act coverage. Moreover, nothing has changed Ontario's basic constitutional authority over its own institutions, natural resources or interests, including its exclusive jurisdiction over the "development, conservation and management of sites and facilities in the province for the generation and production of electrical energy" (section 92A of the Constitution).

Therefore, there is no constitutional or statutory constraint on the province's ability to ensure that the IPSP is subject to the EA Act.

(d) Public Hearings under the EA Act

Where caught by section 3 of the EA Act, the proponent must prepare an EA in accordance with the approved Terms of Reference and submit it to the Ministry of the Environment. Subject to the requirements of the Terms of Reference, an EA will typically describe: the purpose of the undertaking; a description of and the rationale for the undertaking; "alternatives to" the undertaking; and "alternative methods" of carrying out the undertaking. In addition, the EA will describe the environment that will be affected, or might reasonably be expected to be affected, by the undertaking and the alternatives, and will identify and evaluate the potential environmental impacts. The EA will also describe the actions that are necessary, or that may be

¹⁰ EBR posting, *ibid*.

necessary, to prevent, change, mitigate or remedy the effects, and must evaluate the advantages and disadvantages to the environment of the undertaking, the alternative methods of carrying out the undertaking, and the alternatives to the undertaking (see section 6.1(2) of the EA Act).

The proponent must involve the public in the preparation of the EA, and must give public notice once the EA has been submitted to the Ministry of the Environment. During this Government Review stage, any person may comment in writing on the undertaking or the EA. After the Ministry of the Environment completes its Review, the public must again be notified, and any person may comment in writing on the EA, Government Review or undertaking. During this final stage, any person may request the Minister of the Environment to refer the matter (i.e. the IPSP EA) to the Environmental Review Tribunal for hearing and decision.

Where a person has requested that the Minister refer the matter to the Tribunal for public hearing and decision, the Minister is obliged to do so under the EA Act, unless, in her absolute discretion, she considers that the hearing request is frivolous or vexatious, that a hearing is unnecessary, or that a hearing may cause undue delay (see section 9.3(2)).

In addition, the Minister may, on her own initiative, refer an application to the Environmental Review Tribunal, and may give directions or impose such conditions on the referral as the Minister of Environment considers appropriate. The Minister may also refer part of a decision to the Tribunal (see sections 9.1 and 9.2).

Regardless of whether the final decision is made by the Minister or the Tribunal, the decision to approve or reject the proponent's application must consider the purpose of the Act, the approved Terms of Reference, the EA, the Government Review, public comments, and if applicable, any mediation report (see sections 9(2), 9.1(3), and 9.2(5)).

The Minister is also empowered to refer the application to a tribunal other than the Environmental Review Tribunal if she considers it appropriate in the circumstances (section 11). Similarly, the Tribunal itself may refer to another tribunal or entity a matter that relates to an application (section 11(7)).

If the matter has been referred to a Tribunal, the Minister of the Environment may review the Tribunal's decision, and may (with the approval of the Lieutenant Governor in Council) order a variation of the decision, or may order a substitution of the Minister's decision for the Tribunal's decision (section 11.2).

PART IV -- CONCLUSIONS

The forthcoming IPSP is a public sector "plan" to which Ontario's EA Act applies. The application of the EA Act is mandatory since there are no declaration orders or regulations which exempt the IPSP from EA Act coverage. While special EA approval and exemption provisions are currently in place for certain individual electricity projects (see Ontario Regulation 116/01 and Ontario Regulation 334), these provisions do not alter, affect or preclude the EA Act's applicability to the provincial IPSP. In short, there is no constitutional or statutory reason for the IPSP to be developed outside of the EA Act.

Among other things, this means that the IPSP proponent will be required to consult the public in drafting the Terms of Reference for the IPSP EA, and in preparing the EA documentation prescribed by the approved Terms of Reference. Once the IPSP EA has been completed and submitted to the Minister of the Environment, the public will have the right to review the EA and to comment in writing. Once the Government Review of the IPSP EA is complete, the public will have the right to review and comment upon the published Review, and to request that the matter be referred, in whole or in part, to the Environmental Review Tribunal for a public hearing and decision. If a request for a hearing has been made, the Minister of the Environment must refer the application to the Environmental Review Tribunal, unless she determines that the hearing request is frivolous or vexatious, that a hearing is unnecessary, or that a hearing may cause undue delay.

We would be pleased to provide further information or assistance with respect to any of the matters outlined herein.

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