169

Canadian Environmental Law Association
L'Association canadienne du droit de l'environnement

243 Queen Street W., 4th Floor, Toronto, Ontario M5V 1Z4
Telephone (416) 977-2410 / Fax (416) 599-0707

Publication #169
ISBN# 978-1-77189-560-6

SUBMISSIONS

of the

CANADIAN ENVIRONMENTAL LAW ASSOCIATION

to the

STANDING COMMITTEE ON GENERAL GOVERNMENT

on

BILL 170, AGGREGATE RESOURCES ACT, 1988

prepared by:

Toby Vigod
Counsel

March, 1989

TABLE OF CONTENTS

I. BACKGROUND

The Canadian Environmental Law Association (CELA), since its inception in 1970, has been involved in pits and quarries issues through its case work, summary advice and commentary on new law and policy initiatives in this area. In 1979, the Centre for Resource Studies at Queen's University published a paper written by CELA staff entitled "The Proposed Ontario Aggregates Act: Discussion, Evaluation and Recommendations."[1] CELA also submitted a detailed brief and Model Bill on the then proposed Aggregates Act, Bill 127, to the Standing Committee on Resources Development.[2] In 1984, CELA also commented on the Mineral Aggregate Resource Planning Policy.[3]

It has long been recognized that the 1971 Pits and Quarries Control Act is in need of an overhaul. Deficiencies were identified as early as 1976 by a provincial working party established to advise the Ontario government on mineral aggregate policy. While Bill 170 is an improvement over existing legislation, there are a number of serious deficiencies that should be remedied before the legislation is passed. As Ontario's experience over the last 20 years demonstrates, it is very difficult to significantly amend legislation once it is put in place. Every effort should be made to ensure that new aggregates legislation adequately addresses the deficiencies identified in the present law and is forward-looking to deal with the widespread sentiment on the need for environmental protection.

While it is recognized that a reliable source of aggregates is

necessary to the provincial economy, any new legislation must ensure that resource extraction is carried out in ways that minimize or prevent adverse social and environmental impacts. CELA has reviewed the proposed Aggregates Resources Act and believes that while it is an improvement over the existing legislation, Bill 170 should not be passed in its present form.

It is also important to examine this Bill in the context of the committment of Ontario to the principles enunciated in the Report of the World Commission on Environment and Development (the Brundtland Report) and the goal of "sustainable development." The Brundtland Report defined sustainable development as the use of environmental resources in a manner which meets the needs of the present generation without compromising the ability of future generations to meet their own needs. Two important principles underlie the sustainable development concept: firstly, that governments act as stewards who hold the world's resources in trust for future generations; and secondly, that governments must recognize the interdependence of the environment and the economy and must integrate environmental and economic decision-making at the highest levels.[4]

It is submitted that the committment of the government to the integration of economic and environmental considerations can be measured by examining new legislation and policy as it is brought forward. The Aggregate Resources Act should be one of the first pieces of legislation to be measured by this benchmark.

Our submissions will address briefly the nature of the environmental problems posed by aggregate operations, and then detail some of the key areas of the proposed Bill that CELA believes are in need of amendment. We have also read the review of Bill 170 prepared by the Foundation for Aggregate Studies and wish to endorse its recommendations.[5]

II. NATURE OF THE ENVIRONMENTAL PROBLEMS POSED BY AGGREGATE EXTRACTION

As we detailed in our 1980 brief to the Standing Committee on Resources Development, there are a number of environmental problems that can arise from aggregate extraction activities. These include:

- noise, dust and wind erosion from operations and related truck traffic;
- damage to water tables and wells from excavations and blasting;
- stream pollution and damage from erosion and sedimentation arising from site operations in too close proximity to water courses;
- damage to areas believed to be habitat for endangered species and flora and fauna;
- damage to unique archeological and geological formations.[6]

Thus it is clear that resource extraction can have a major impact on the environment. The Aggregate Resources Act must ensure that these impacts are minimized.

III. ANALYSIS OF BILL 170 AND RECOMMENDATIONS FOR AMENDMENTS

A. Purpose of the Act and Definition of Environment

Section 2 of the proposed Aggregate Resources Act sets out the purposes of the Act. This is an improvement over the existing legislation which does not contain an explicit purpose section. Section 2(d) provides that one of the purposes of the Act is to minimize adverse impacts on the environment in respect of aggregate operations. We would submit that this clause is rather weak and should be rewritten with a more clearly articulated positive statement ensuring environmental protection. **CELA therefore recommends that clause 2(d) be amended "to provide for the protection of the environment and ensure that the adverse impacts of aggregate operations are minimized."**

The term "environment" is found in the purpose section and referred to many times thereafter in the remainder of the legislation. The definition is therefore very important and should not be unduly restrictive. The proposed definition found in section 1(1) provides that "environment" means the use, condition and natural features of the site and adjacent lands. The government amendment would change the definition slightly to mean "the land, air and water and includes the use, condition and natural features of the site and adjacent

lands." It is our submission that both these definitions are too restrictive and do not reflect present day thinking on the comprehensive and interactive aspects of the environment. The reference to adjacent lands does not take into account that adverse environmental effects from quarrying activities may well extend beyond the boundaries of adjacent lands. **CELA recommends that the more comprehensive definition of "environment" as found in the Environmental Assessment Act be used.**[7] This would also lead to consistency of definitions in Ontario's legislation, using the most comprehensive definition as a model.

B. Application of the Act

Presently the proposed Bill only applies to designated areas of Ontario. While the government has announced that application of the Act will be expanded through a three-year program to evaluate and phase-in designation of new areas of the Province by regulation, it is our recommendation that section 5(1)(c) should be amended now to apply to all of Ontario. Our reasons for making this recommendation are as follows:

- aggregate operations have environmental impacts wherever they are located and there should not be pollution havens created where requirements for site plans, rehabilitation and security are less onerous;
- even the aggregates industry at the 1980 Standing Committee hearings into Bill 127 argued that the failure to apply the existing legislation to the whole province has been unfair

to those in designated areas in comparison to those in undesignated areas who are not required to meet the provisions of the Act.

In 1976, the Ontario Mineral Aggregate Working Party in recommending that any new Act be more widely applied, stated that in its opinion the licensing of pits and quarries is the most effective means of controlling the operation and rehabilitation of any aggregate extractive site.[8] We agree. There is no reason for the protections given under the legislation not to apply to the entire province.

C. Site Plan Requirements and Considerations for the Issuance of Licences and Permits

Presently, Bill 170 sets out a regime involving the issuance of either Class A or Class B licenses to people operating pits and quarries on non-Crown land (Part II); wayside permits (Part III); and aggregate permits to people operating pits and quarries on Crown land and land under water (Part V). In each of these categories there are different requirements for site plans. **CELA recommends that the site plan requirements should be the same for all categories of licences and permits.** The proposed system is confusing and the requirements are arbitrary. There is no rationale for differing requirements for permits on Crown land and licences on non-Crown land and wayside pits. The potential for adverse environmental impacts are the same for all these categories and the site plan requirements should be the same. It should also be noted that Bill 170 does allow

the Minister to ask for additional information in respect of each type of licence or permit. This will provide for any flexibility needed.

In addition, the proposed bill sets out matters to be considered by the Minister in deciding whether a licence or permit should be granted. Sections 12, 26 and 38 deal with licences, wayside pits and aggregate permits, respectively. Again, **it is submitted that a consistent, uniform approach is to be preferred** and that a combination of those items found in sections 12 and 26 would be a starting point for matters that the Minister should consider before the issuance of any licence or permit. **CELA would also urge the inclusion of several items presently found in section 6 of the** Pits and Quarries Control Act. **These include: (a) the preservation of the character of the environment; (b) the availability of natural environment for the enjoyment of the public; and (c) the need, if any, for restricting excessively large total pit or quarry output in the locality.** These requirements continue to be valid considerations and should be retained in the new legislation.

D. Public Notification

Presently, section 11 of proposed Bill 170 requires full public notification when an application is made for new licence. In the case of amendments to licences, municipal governments may be informed and there is no requirement for public notice. There is no public notification requirements for applications for wayside and

aggregate permits. Notification to municipal governments is only required after the permit has been issued. There is no public notification requirement. We would submit that there is no rationale for these different notification requirements. **CELA recommends that the public notification requirements for licences apply equally to amendments to licences; the granting of permits; and proposed amendments to permits.**

E. Appeals and Hearings

Under proposed Bill 170, section 11 provides that any person may file a notice of objection to the issuance of a licence applied for and the Minister is required to refer the application to the Ontario Municipal Board for a hearing unless the objection is not substantive or is frivolous or vexatious. Under section 11(8) the Minister may refer an application on his or her own motion to the Board and under section 20 an applicant or licensee can also require a hearing in a variety of circumstances.

There are no hearing provisions in the case of wayside permits and under section 44 only the applicant or aggregate permittee may request a hearing from the Mining and Lands Commissioner. **CELA recommends that the opportunity to file a notice of objection with reasons and to request a referral by the Minister to the Board be provided to municipal governments and members of the public for all new licences and permits and all significant changes and renewals of these instruments.** It is submitted that the same test as outlined in

section 11(7) should apply to guide the Minister as to whether requests for referrals should be allowed.

CELA also recommends that the Act be amended to provide that all hearings be held before the Joint Board which would include a member of the Environmental Assessment Board whose main focus is environmental concerns. CELA would therefore recommend that "Board" in the definition section be amended to read "Board" means the Joint Board as defined under the Consolidated Hearings Act.

Finally, CELA recommends that the hearing decision be a final and binding decision with a right of the parties to the hearing to appeal the decision to the Minister or cabinet. Presently Bill 170 provides that the Board is only recommendatory and that after considering the Board's report the Minister "may take such action as the Minister considers appropriate."(s.21(4)). It is our submission that this leaves too much discretion to the Minister and that it would be fairer if the Board was vested with decision-making authority in first instance with subsequent appeal to the Minister or cabinet. Recently, the Environmental Protection Act was amended to give the Environmental Assessment Board decision-making authority where previously it only had the power to make recommendations.

F. Reports and Need for Additional Environmental Assessment Requirements

Presently only section 9 provides for the filing of a report by any

person applying for a Class A licence. We would recommend, first of all, that the reporting requirement should apply equally to Class B applicants as well as those persons applying for aggregate permits under Part V. CELA also recommends that the reporting requirements be expanded to include the following items:

(a) a clear demonstration of the need for the proposed site, the persons it is likely to benefit, the persons it is likely to harm, and the period of time over which the impact is likely to occur;

(b) a clear description of the environment to be affected or that might be expected to be affected, directly or indirectly;

(c) a description of the ultimate use of the site and the suitability of the proposed use;

(d) a consideration of measures to mitigate the above impacts.

There has been a lot of discussion in the past decade as to whether the Environmental Assessment Act should apply to aggregate extraction. The Ontario Mineral Aggregate Working Party in 1976 dealt with this issue. It suggested that under a new Aggregate Resource Management Act, an application for a new licence would be accompanied by a statement of the environmental impact of the proposed pits or quarry. It stated that " this environmental impact statement would result from consideration of all the alternatives concerning the environment." The Working Party noted that the

Ministry of Environment would be asked to work closely with the Ministry of Natural Resources in drawing up the necessary guidelines. The Working Party therefore recommended that pits and quarries be exempted from the provisions of the Environmental Assessment Act since the new act will contain equal environmental requirements to be applied to pits and quarries (emphasis added).[9] The Ontario Liberal Party, in the past, has advocated that all pits and quarries be subject to an environmental impact assessment and that the provisions of the EAA should apply. CELA, in its 1980 brief on Bill 127 took into account the comments of the Working Party and recommended amendments to the bill to incorporate requirements for environmental assessment. It is submitted that Bill 170 as written does not reflect the aim of the Working Party recommendations. CELA would recommend that, at a minimum, the suggested amendments listed above should be added to section 9 and to a new section in Part V dealing with requirements for applicants for aggregate permits.

G. Wayside Permits

There have been many documented instances where wayside pits have managed to remain open for long periods of time becoming in effect de facto permanent pits. There is a need for greater control over the granting of wayside permits than is presently provided for in Bill 170. **CELA recommends that (1) the use of wayside permits be limited to "special projects" only; (2) that wayside permits not be renewable for four years following the expiration of the last permit; and (3)**

no wayside permits should be granted to a person who has applied for a licence or permit at the same location.

Section 27 provides that the Minister may issue a wayside permit whether or not the location of the site complies with all relevant zoning by-laws. This section appears to violate the Mineral Aggregate Resources Policy statement which allows municipalities to protect sensitive areas. Further, section 66 of Bill 170 states that the Aggregate Resources Act will prevail over any municipal by-law, Official Plan or development agreement that treats the same subject-matter in different ways. This section would remove the power that municipalities currently have to put in place stricter controls. **CELA recommends that section 66 be amended to allow municipal regulation of aggregate extraction, except where there is a conflict with the new Aggregate Resources Act.**

H. Rehabilitation of Lands Under Water

Section 47 of Bill 170 provides that the rehabilitation requirements of the Act do not apply to pits or quarries covered by water that is not the result of excavation of aggregate below the water table. The rationale for this exemption is not self- evident and it is submitted that this loophole should be deleted. There can be environmental impacts of aggregate extraction in these circumstances and **CELA therefore recommends that section 47 be deleted.**

I. Intervenor Funding

It is submitted that the rationale for intervenor funding has been well documented in this province for a number of years. The many statutory opportunities for public input into environmental decision-making are rendered meaningless unless adequate funds are provided for intervenors. **CELA recommends that the Aggregate Resources Act provide for intervenor funding to those people who meet criteria which could be set out in the Act or regulations. In the alternative, the Board hearing matters under the Aggregate Resources Act should be designated as a Board under the recently passed Intervenor Funding Project Act.** The granting of intervenor funding will ensure that the Board has the benefit of all the evidence relevant to the granting of a licence.

IV. CONCLUSIONS AND SUMMARY OF RECOMMENDATIONS

In 1976, it was the unanimous conclusion of the Ontario Mineral Aggregate Working Party that any legislation to control the extraction of mineral aggregate must ensure two things:

> "Firstly, a commitment on the part of the municipalities, the aggregate industry, the Provincial Government and all segments of the community at large to ensure that the transgressions and unreasonable trespassing against our environment and our quality of life by the extraction industry in the past will cease, and that these operations will in the future be conducted under legislation that is broadly acceptable and enforced under regulations that are enforceable; and then secondly, that within the guidelines of this commitment the provincial policy will be structured to ensure that adequate supplies of aggregate resources are made available in a competitive situation in the appropriate locations."

In coming to these conclusions, the Working Party noted that there was one basic reason for the 1971 Pits and Quarries Control Act not accomplishing its intended purpose and that was because it had its essential priorities reversed.[10] It has been 13 years since the Report of the Working Party was released and acceptance by the government of the basic principles espoused in the Report is overdue. While Bill 170 is an improvement over existing legislation there are a number of serious deficiencies that should be remedied before the Bill is passed.

CELA, therefore,makes the following recommendations for amendments to Bill 170:

(1) Clause 2(d) should be amended "to provide for the protection of the environment and ensure that the adverse impacts of aggregate operations are minimized."

(2) The more comprehensive definition of "environment" as found in the Environmental Assessment Act should be used.

(3) The Act should apply to all of Ontario.

(4) The site plan requirements should be the same for all categories of licences and permits.

(5) A consistent, uniform approach should be taken in setting out the matters to be considered by the Minister in deciding whether a licence or permit should be granted.

(6) The following clauses should be added to sections 12, 26 and 38 dealing with considerations that should be taken into account by the Minister in deciding whether a licence should be granted:

    (a) the preservation of the character of the environment;
    (b) the availability of natural environment for the enjoyment of the public; and
    (c) the need, if any, for restricting excessively large total pit or quarry output in the locality.

(7) The public notification requirements for licences should apply equally to amendments to licences; the granting of permits; and proposed amendments to permits.

(8) The opportunity to file a notice of objection with reasons and to request a referral by the Minister to the Board should be provided to municipal governments and members of the public for all new licences and permits and all significant changes and renewals of these instruments.

(9) All hearings should be held before the Joint Board.

(10) The reporting requirement should apply equally to Class B applicants as well as those persons applying for aggregate permits under Part V. As well, the reporting requirements should be expanded to include the following items:

(a) a clear demonstration of the need for the proposed site, the persons it is likely to benefit, the persons it is likely to harm, and the period of time over which the impact is likely to occur;
(b) a clear description of the environment to be affected or that might be expected to be affected, directly or indirectly;
(c) a description of the ultimate use of the site and the suitability of the proposed use;
(d) a consideration of measures to mitigate the above impacts.

(11) The use of wayside permits should be limited to "special projects" only; wayside permits should not be renewable for four years following the expiration of the last permit; and no wayside permit should be granted to a person that has applied for a licence or permit at the same location.

(12) Section 66 should be amended to allow municipal regulation of aggregate extraction, except where there is a conflict with the new Aggregate Resources Act.

(13) Section 47 should be deleted.

(14) The new Act should provide for intervenor funding to those people who meet criteria set out in the Act or regulations. In the alternative, the Board hearing matters under the Aggregate Resources Act should be designated as a Board under the recently passed Intervenor Funding Project Act.

V. ENDNOTES

1. Swaigen, John and Castrilli, J.F. The Proposed Ontario Aggregates Act: Discussion, Evaluation and Recommendations (Kingston, Ont.: Centre for Resource Studies, September, 1979).

2. Castrilli, J.F. Submissions of the Canadian Environmental Law Association to the Standing Committee on Resources Development on Bill 127, The Aggregates Act, 1979, (Toronto: CELA, February 5, 1980) at p.1-2. CELA and the Foundation for Aggregate Studies, Suggested Amendments to Bill 127, February, 1980.

3. Giorno, Frank, Mineral Aggregate Resource Planning Policy: Response of the Canadian Environmental Law Association, (Toronto: CELA, February 21, 1984).

4. The World Commission on Environment and Development, Our Common Future, (Oxford University Press, 1987).

5. Foundation for Aggregate Studies, The New Aggregate Resources Act: Is There Much New? (Toronto: FAS, January 11, 1989).

6. Supra, note 2 at 1-2.

7. Section 1(c) of the Ontario Environmental Assessment Act provides that:

> "environment" means,
>
> (i) air, land or water,
> (ii) plant and animal life, including man,
> (iii) the social, economic and cultural conditions that influence the life of man or a community,
> (vi) any building, structure, machine or other device or thing made by man,
> (v) any solid, liquid, gas, odour, heat, sound, vibration or radiation resulting directly or indirectly from the activities of man, or
> (vi) any part or combination of the foregoing and the inter-relationships between any two or more of them, in or of Ontario.

8. Ontario Mineral Aggregate Working Party. Report to the Minister of Natural Resources on a Policy for Mineral Aggregate Resource Management in Ontario. December 1976, at p.61.

9. Ibid. at 55-56.

10. Ibid. at 5.