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SUBMISSIONS BY THE CANADIAN ENVIRONMENTAL LAW ASSOCIATION TO THE STANDING COMMITTEE ON GENERAL GOVERNMENT REGARDING BILL 52 (AGGREGATE AND PETROLEUM RESOURCES STATUTE LAW AMENDMENT ACT, 1996)

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By Richard D. Lindgren
Counsel
Canadian Environmental Law Association

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Richard D. Lindgren[1]

PART I - INTRODUCTION

The Canadian Environmental Law Association (CELA) is a non-profit public interest law group which was founded in 1970 for the purpose of using and improving laws to protect the environment and conserve natural resources. Funded as a community legal clinic specializing in environmental law, CELA lawyers represent citizens and citizens groups in the courts and before tribunals on a wide variety of environmental issues. In addition to environmental litigation, CELA undertakes public education, community organization, and law reform activities.

Since 1970, CELA has been extensively involved in casework and law reform regarding pits and quarries in Ontario. For example, CELA lawyers have represented or otherwise assisted local residents and groups who have been concerned about, or adversely impacted by, aggregate operations (i.e. blasting, excavating, or de-watering) and ancillary activities (i.e. processing or trucking) licenced under the Pits and Quarries Control Act (PQCA) and, more recently, the Aggregate Resources Act (ARA). Similarly, in the late 1970's, CELA staff prepared and published several critiques of the proposed Aggregates Act (Bill 127).[2] In the 1980's, CELA submitted comments on the proposed Mineral Aggregate Resource Planning Policy,[3] and submitted a detailed brief on the proposed ARA.[4] In the 1990's, CELA has continued to

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[1] Counsel, Canadian Environmental Law Association. The research assistance by Kathleen Cooper and Donna Bigelow is acknowledged and appreciated by the author.

[2] See, for example, J. Swaigen and J.F. Castrilli, The Proposed Ontario Aggregates Act: Discussion, Evaluation and Recommendations (Queen's University Centre for Resources Studies, 1979); J. Swaigen, "Ontario's Proposed Aggregates Act", Municipal World (September, 1979), pp.227-29; J.F. Castrilli, Submissions of the Canadian Environmental Law Association to the Standing Committee on Resources Development on Bill 127 (The Aggregates Act, 1979); and CELA and the Foundation for Aggregate Studies, Suggested Amendments to Bill 127 (February, 1980).

[3] F. Giorno, Mineral Aggregate Resource Planning Policy: Response of the Canadian Environmental Law Association (February, 1984).

[4] T. Vigod, Submissions of the Canadian Environmental Law Association to the Standing Committee on General Government on Bill 170 (Aggregate Resources Act, 1988) (March, 1989).

focus on aggregate issues in its casework and law reform efforts involving the Niagara Escarpment, the Oak Ridges Moraine, and provincial land use planning reforms.

The purpose of this brief is to outline CELA's principal concerns about the provisions of Bill 52 that amend the ARA. While several of these concerns apply, with necessary modification, to the Bill 52 amendments to the Petroleum Resources Act (PRA), this brief does not focus on the PRA amendments in light of CELA's limited involvement with the petroleum resource development sector.

Part II of this brief reviews the environmental rationale for effective and enforceable regulation of the aggregate industry. Part III of this brief analyzes the key components of Bill 52 and offers CELA's recommendations for reform, which are summarized in Part IV of this brief. It is CELA's overall conclusion that Bill 52 should not be passed in its present form, and CELA submits that several amendments to Bill 52 are necessary to protect the environment and the public interest.

PART II - RATIONALE FOR EFFECTIVE AND ENFORCEABLE REGULATION OF THE AGGREGATE INDUSTRY

It is beyond dispute that aggregate operations are inherently destructive and intrusive activities that can result in a wide variety of direct, indirect, and cumulative impacts upon local residents and the natural environment. These impacts include:

- removal of topsoil, forest and vegetation cover;
- loss of wildlife habitat, agricultural lands, or Areas of Natural or Scientific Interest (ANSI);
- increased off-site truck traffic and resultant nuisance and safety concerns;
- permanent alteration of the natural environment, including damage to unique geological formations;
- loss of landscape diversity and scenic value;
- noise, dust and other nuisance impacts arising from blasting, drilling, crushing and related activities;
- degradation of surface water quality or wetlands;
- permanent stream diversions and alteration of watershed boundaries;

- erosion and sedimentation of watercourses; and

- groundwater interference or depletion.

Accordingly, aggregate operations cannot be viewed as innocuous, benign, or temporary land uses. In CELA's view, the various impacts and risks associated with aggregate operations, particularly those located near residents or environmentally sensitive areas, means that aggregate legislation must contain effective and enforceable provisions that prevent, minimize or mitigate adverse environmental effects. Indeed, one of the stated purposes of the ARA is:

> To minimize adverse impact on the environment in respect of aggregate operations.[5]

CELA's principal concern with Bill 52 is that it is fundamentally at odds with the ARA's environmental protection objective, as described below. Accordingly, CELA objects to the self-serving formal title of Bill 52, which claims, among other things, that the Bill is intended to "promote" conservation and environmental protection and "enhance" compliance measures. CELA submits that the converse is true – Bill 52 **undermines** conservation and environmental protection and **dismantles** monitoring and enforcement requirements. For this reason, Bill 52 must be viewed as another objectionable example of the current government's de-regulation agenda.

PART III - CRITIQUE OF BILL 52 AMENDMENTS TO THE ARA

(a) General

In 1975, the provincial government established the Ontario Mineral Aggregate Working Party to provide advice on aggregate issues and policy. In 1976, the Working Group reported that the government lacked credibility on aggregate matters due to:

- failure to adequately enforce the existing legislation;

- various loopholes and deficiencies in the legislation; and

- little evidence of effective rehabilitation of pits and quarries.[6]

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[5] ARA, section 2(d).

[6] Ontario Mineral Aggregate Working Party, Report to the Minister of Natural Resources on a Policy for Mineral Aggregate Resource Management in Ontario (December 1976), p.3. More recently, the Ministry of Natural Resources acknowledged that "some members of the industry ran their operations in complete disregard

In addition, the Working Group concluded that aggregate legislation must, among other things, reflect:

> ... 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 through regulations that are enforceable.[7]

Twenty years later, it appears that little has changed. The enforcement of aggregate legislation by the Ministry of Natural Resources (MNR) has remained somewhat underwhelming, and the ARA still contains a number of weaknesses regarding rehabilitation, public consultation, site plan requirements, licence classes, and other matters.[8] However, rather than rectify these problems, Bill 52 compounds them by: making enforcement even less likely under the ARA; failing to close existing loopholes under the ARA; and creating or maintaining excessive Ministerial discretion under the ARA. Thus, Bill 52 represents another squandered opportunity for the government to live up to the environmental protection principles espoused in the 1976 Working Group Report.

(b) Aggregate Resources Trust

Section 6.1 of Bill 52 amends Part I of the ARA by establishing the "Aggregates Resources Trust", which is to be used to provide funding for: (1) rehabilitation of lands where a licence or permit has been revoked;[9] (2) rehabilitation of abandoned pits and quarries; (3) research on aggregate resource management; and (4) "payments" to the Crown or municipalities "in accordance with the regulations". The Trust is to financed through licence and permit fees, rehabilitation security payments, other special payments, and the transfer of existing funds currently held in special purpose accounts of the Consolidated Revenue Fund. The Trust will be obliged to report annually on the financial affairs of the Trust, and the Minister is obliged to table this report with the Lieutenant Governor in Council and the Legislative Assembly.

In principle, CELA supports the creation of a stand-alone Trust that does not form part of the Consolidated Revenue Fund. However, CELA remains concerned about the Minister's ability

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for the environment, the rights of neighbouring landowners, or their obligations as good corporate citizens": see MNR, Managing Ontario's Aggregate Resources in the 1990's - Provincial Policy and Legislation (October 1989).

[7] Ibid.

[8] J. Swaigen and D. Estrin, Environment on Trial (Emond Montgomery, 1993), pp.759-60.

[9] However, it appears that no licences or permits were ever revoked by the MNR under the PQCA: see J. Swaigen and D. Estrin, Environmental on Trial (Emond Montgomery, 1993), p.760.

to appoint a non-government person to act as the Trustee of the funds.[10] This broad discretion would presumably allow the Minister to appoint the industry association (i.e. Association of Aggregate Producers of Ontario), specific aggregate producers, or even private individuals, to oversee, administer, and allocate these funds. For the purposes of greater certainty and accountability, CELA submits that the Minister should only be permitted to designate a Crown employee (preferably a MNR employee) as the Trustee. In the alternative, it may be advisable for the Minister to establish a multi-stakeholder advisory committee to provide ongoing advice on the administration of the Trust, and to identify and prioritize the types of work to be funded under the Trust.

CELA is also concerned about the overbroad range of activities that could be funded through the Trust. CELA submits that Trust fund expenditures should be expressly limited to environmental protection, resource conservation, or rehabilitation purposes. In CELA's view, the section 6.1(2) reference to "research" (paragraph 3) is too vague and could conceivably include market research and development, as opposed to research into rehabilitation techniques or technology. Similarly, the section 6.1(2) reference to "payments" to Crown agencies or municipalities (paragraph 4) does not appear to be specifically linked to environmental restoration or protection activities, and could conceivably be used to authorize payments to agencies or municipalities for non-environmental purposes. The absence of any regulations governing such payments compounds CELA's concerns about this matter.

CELA RECOMMENDATION #1: **Bill 52 should be amended to:**

(a) **permit the Minister to only designate a Crown employee as the Trustee of the Aggregate Resources Trust, or alternatively, permit the Minister to establish a multi-stakeholder advisory committee regarding the Trust; and**

(b) **ensure that Trust expenditures are expressly limited to environmental protection, resource conservation, or rehabilitation purposes.**

(c) Site Plan Requirements

Bill 52 maintains the ARA's current distinction between Class A (greater than 20,000 tonnes) and Class B (less than 20,000 tonnes) licences, and then goes on to generally require site plans

[10] Bill 52, section 6.1(3).

for such licences. However, Bill 52 merely requires licence applicants to submit "a site plan in accordance with the regulations".[11] Similarly, Class A licence applicants are merely required to submit "a report in accordance with the regulations".[12]

With respect to the distinction between Class A and B licences, CELA submits that there is no environmental rationale for distinguishing between the two categories, or for reducing the documentation requirements for Class B licences. This point was made succinctly by the Conservation Council of Ontario in its submissions on the ARA:

> [T]he current subdivision between Class A and B licences is arbitrary and unnecessary. The requirements for each licence should be the same... [A] small operation in an environmentally sensitive area may cause much greater impact than a large well-sited operation. Likewise, aggregate permits and wayside permits should be treated the same as licences.[13]

CELA made similar recommendations in its original submission on the ARA:

> 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. The 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.[14]

Accordingly, CELA submits that Bill 52 should be amended so as to eliminate this highly arbitrary distinction between Class A and B licences and associated documentation requirements.

CELA strongly objects to Bill 52's repeal of existing statutory site plan requirements. In particular, Bill 52 repeals existing sections 8(1), (2) and (3) of the current ARA, which prescribe mandatory content requirements for site plans for Class A licences, including:

- a map showing the location of the site;

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[11] Bill 52, section 8(1).

[12] Bill 52, section 9(1).

[13] Conservation Council of Ontario, A Critical Review of Bill 170 - The Aggregate Resources Act (December 1988).

[14] T. Vigod, supra, f.n. 4, pp.6-7.

- a general description of the site;
- a description of adjoining land uses;
- location, dimension and use of buildings or structures to be erected or maintained on the site;
- the location of the excavation setback limits;
- the location and type of fencing;
- screening and berms;
- access roads;
- significant natural or artificial features;
- the watertable and surface water resources;
- proposed water diversion, storage and drainage facilities;
- points of discharge into surface waters; and
- progressive and final rehabilitation plans.

Bill 52 also repeals current requirements under sections 8(2) and (3) relating to detailed mapping of the above-noted information. Similarly, Bill 52 repeals sections 8(5) and (6) of the current ARA, which prescribe mandatory content requirements for Class B licence applications, which generally must contain the above-noted information. Bill 52 also repeals the mandatory site plan requirements that are currently prescribed for wayside permits: see section 25(1) and (2) under Bill 52. A similar rollback is proposed for site plans for aggregate permits: see section 36(1) under Bill 52.

Bill 52 eliminates these specific requirements in favour of prescribing site plan requirements by regulation. It is CELA's understanding that this regulation has not been drafted nor circulated for public comment, nor is there any indication when this regulation will be available for comment. It may well be that the regulation, once drafted, will prescribe the same site plan requirements that are currently found in the ARA, although there is no guarantee that this will be the case. In any event, for the purposes of greater certainty and predictability, CELA strongly submits that site plan requirements should be retained in the ARA itself rather than in regulations. Regulations are generally much easier to amend (or gut) than statutes, and regulations are often the product of closed door negotiations with the regulated industry rather than full public consultation.

CELA recognizes that new regulations under the ARA should, in theory, trigger public notice-and-comment opportunities under the Environmental Bill of Rights (EBR). However, it should be recalled that section 16 of the EBR gives the Minister discretion not to provide public notice-and-comment opportunities on proposed regulations. Therefore, there is no guarantee that there will, in fact, be meaningful public consultation on new ARA regulations that prescribe new site plan requirements for licence and permit applications. Indeed, it is noteworthy that there has been no notice of Bill 52 itself on the EBR Registry, although section 15 of the EBR clearly requires such notice in this case.

The above-noted concerns also apply to Bill 52's repeal of the specific content requirements for the "reports" that are currently required for Class A licence applications under the ARA. More specifically, under section 9(1) of the existing ARA, the report must be signed by the author and provide the information necessary for the Minister's evaluation of the licence application. The information that is required includes:

- suitability of the progressive and final rehabilitation plans;
- the environment that may be affected and any proposed remedial measures;
- social and economic effects that may result from the proposed aggregate operations;
- relevant planning and land use considerations; and
- various operational details.

Under Bill 52, these existing statutory requirements are to be replaced by as-yet unknown regulatory requirements for such reports. For the reasons described above, the public can draw very little comfort under this regulatory approach, particularly given the malleable nature of regulations.

CELA RECOMMENDATION #2: **Bill 52 should be amended to:**

(a) eliminate the distinction between Class A and B licences; and

(b) retain the prescribed content requirements for site plans and reports in the ARA rather than in regulations.

(d) Public Consultation and Hearings

Bill 52 repeals section 11 of the existing ARA and replaces it with a provision that merely requires applicants to "comply with the prescribed notice and comment procedures".

However, because these "prescribed procedures" have not yet been promulgated, it is too early to determine whether these procedures will improve or (more likely) reduce public consultation requirements under the ARA.

For example, section 11 of the existing ARA requires the applicant to serve copies of the licence application upon municipal clerks, publish notice in newspapers having general circulation in the area of the proposed site, and post signs around the proposed site. In CELA's view, these minimal notice requirements should be supplemented by more effective means of providing public notice (i.e. mailouts, door-to-door flyers, personal service, or actual notice to potentially interested persons). However, Bill 52 makes no attempt to enhance existing notice requirements, and there is no guarantee that the existing requirements will even be included in the "prescribed procedures". CELA submits that Bill 52 should be amended to retain and enhance public notice requirements in the ARA rather than in regulation.

Similarly, under sections 11(4) and (6) of the existing ARA, any person can file a notice of objection and require a public hearing on the application, provided that such notice is filed within 45 days from the date of the second newspaper notice. Upon receipt of such notice, the Minister has a mandatory duty under the existing ARA to refer the application and objections to the Ontario Municipal Board (OMB).[15] In CELA's view, this right to object and require a public hearing before an independent tribunal is an important safeguard under the ARA. Under the existing ARA, however, the Board does not make a final decision respecting the application. Instead, the Board merely submits a report containing its findings and recommendations to the Minister, who is free to reject the Board's recommendations when deciding to issue or refuse a licence.

Bill 52 proposes a number of sweeping changes to current hearing requirements under the ARA. First, the 45 day appeal period has been replaced by a vague reference to filing objections "during the prescribed consultation procedures". In the absence of the draft regulation that prescribes these procedures, it is impossible to know whether the 45 day appeal period will be maintained or (more likely) reduced under Bill 52. CELA submits that the 45 day period is workable and well-established, and it should retained in the ARA itself rather than in the regulations.

More alarmingly, Bill 52 confers new and virtually unfettered discretion upon the Minister to not refer an application and objections to the Board,[16] even where the hearing request is reasonable and made in good faith. It is noteworthy that Bill 52 fails to prescribe criteria or identify the circumstances in which it would be appropriate for the Minister to refuse to refer a matter to the OMB. Similarly, Bill 52 does not require the Minister to provide written

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[15] Unless the Minister opines that the hearing request is frivolous or vexatious, or fails to disclose a substantial interest warranting a hearing: see ARA, section 11(7).

[16] Bill 52, section 11(5).

reasons to the objector where a hearing request has been refused.[17] In CELA's view, this provision unjustifiably constrains the fundamental right to a hearing under the ARA, and CELA strongly recommends that this provision be deleted from Bill 52.

Even where a hearing request has been granted, Bill 52 permits the Minister to dictate the scope of the hearing by directing the Board to determine "only the issues specified in the referral".[18] This provision does not appear in the existing ARA. In CELA's view, not only does this provision enable the Minister to sweep contentious but important issues off the table, but it also threatens the integrity and independence of the hearing process itself. This is particularly true since the Minister is, in fact, an automatic party to the hearing[19] and should therefore not be empowered to constrain or skew the hearing parameters. CELA submits that the OMB, after considering the submissions of all parties during the pre-hearing and hearing stages, is in the best position to determine which issues are relevant and require adjudication. Accordingly, CELA strongly recommends that this provision be deleted from Bill 52.

CELA notes that under Bill 52, the OMB has been given the power to "direct" the Minister to not issue the licence, or to issue a licence subject to prescribed conditions or recommended conditions.[20] It appears that "prescribed conditions" are those which may be prescribed by regulation.[21] If so, it seems that the Board can only "recommend" additional conditions which go beyond the standard licence conditions which may be prescribed by regulation. In CELA's view, Bill 52 should empower the Board to impose conditions of approval as part of its decision-making authority. After all, the decision to grant a licence is often inextricably bound with the terms and conditions that accompany the licence. Indeed, after hearing the site-specific evidence and argument, the Board is in the best position to determine if "additional" conditions are warranted in the circumstances. In CELA's view, it makes little sense to give the OMB the de facto approval decision, but to reserve to the Minister the power to decide whether "additional" conditions should imposed upon the licence.

Bill 52 goes to permit the Board to decline to hold a hearing where the Board finds that the objection is frivolous, vexatious, or made solely for the purpose of delay.[22] In CELA's view, this provision is both unworkable and unnecessary. First, if the referral request truly was frivolous, vexatious, or made solely for the purpose of delay, it is highly unlikely that the

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[17] In contrast, the Minister is obliged under Bill 52 to provide reasons to the applicant where the Minister decides to refuse to issue the licence: see Bill 52, section 11(10).

[18] Ibid.

[19] Bill 52, section 11(6).

[20] Bill 52, section 11(8).

[21] See Bill 52, section 67(f.2).

[22] Bill 52, section 11(8), para.3.

Minister would have referred the matter to the OMB in the first place. Instead, the Minister would have exercised the new section 11(5) power and would have refused to refer the matter to the Board. CELA submits that the Minister's referral power serves as an effective screen for weeding out unmeritorious objections.

However, once a matter has been referred to the Board by the Minister, the Board should hold the hearing, and should not be empowered, in essence, to second-guess the Minister by refusing to proceed with the hearing. CELA therefore recommends that if an application is referred to the OMB by the Minister, the Board "shall" (not "may") hold the hearing and shall make a decision on whether the licence should be approved, and if so, whether terms and conditions should be imposed. Otherwise, if the Board is left with residual discretion to refuse to hold a hearing, virtually every case will be commenced with a proliferation of preliminary motions by the applicant and/or other parties requesting that the hearing not proceed despite the Ministerial referral. Such a litigious approach does not promote certainty, predictability, or cost-effective dispute resolution.

Where an application is not referred to the Board, Bill 52 empowers the Minister to decide whether or not to issue the licence. If the Minister refuses to issue the licence, Bill 52 permits the applicant to appeal the Minister's decision to the OMB. In contrast to an objector's appeal rights described above, Bill 52 does not give the Minister or the Board any power to refuse an applicant's hearing request, even if the request is frivolous, vexatious, or completely unmeritorious. In CELA's view, this discrepancy provides further evidence of the uneven treatment of applicants and objectors under Bill 52. More importantly, CELA submits that Bill 52 should be amended to ensure that there is adequate public notice in advance of an applicant's appeal hearing to ensure that interested or affected persons have an opportunity to attend the hearing and seek party or participant status, as may be appropriate.

These comments apply, with necessary modification, to the applicant's right to seek a hearing on the imposition or variance of licence conditions (section 13), site plan amendments (section 16), licence transfers (section 18), and licence revocations (section 20). In CELA's view, merely requiring notice to be filed with municipal clerks under these sections is inadequate and does not ensure that persons interested in, or affected by, these proposals actually receive timely or proper notice. At a minimum, newspaper advertisements, signage, mailouts, and other forms of notice must be required under these sections. In addition, when the MNR finally enacts its "classification regulation" under the EBR, all of these proposals must be prescribed as "instruments" for the purposes of Part II of the EBR (public notice and comment).

Although Bill 52 gives the Board decision-making authority under the ARA, Bill 52 goes on to exclude the application of section 43 of the OMB Act (re-hearings) and section 21.1 of the Statutory Powers Procedure Act (re-hearings) to Board decisions and orders under the ARA. In CELA's view, there is no justification for immunizing Board decisions under the ARA from these important safeguards. It must recalled that under the ARA, the Board will be making long-term licencing decisions of considerable public interest and environmental significance. If, after the Board's decision, there is a material change in circumstances, or if there is new evidence that casts doubt on the soundness of the Board's original decision, then it is highly

desirable to permit parties to request that the Board reconsider the matter. In CELA's view, the Board's current practice direction regarding re-hearing requests contains sufficient safeguards against overuse or abuse of these statutory re-hearing provisions. Accordingly, CELA recommends that sections 11(15), 13(10), 16(12), 18(9) and 20(9) of Bill 52 be deleted in order to permit re-hearing requests where appropriate. CELA has no objection to the Bill 52 provisions that preclude the application of section 95 of the OMB Act (petitions to Cabinet) to Board decisions and orders under the ARA.

CELA RECOMMENDATION #3: **Bill 52 should be amended to:**

(a) retain and enhance public notice requirements in the ARA rather than in regulations;

(b) retain the current 45 day appeal period for the filing of objections and hearing requests in the ARA rather than in regulations;

(c) maintain the current ARA provisions which require the Minister to refer an application and objections to the OMB upon request by any person, unless the hearing request is frivolous or vexatious;

(d) delete the power of the Minister to direct the OMB to consider only the issues specified in the referral;

(e) empower the OMB to impose, rather than recommend, conditions of approval;

(f) delete the power of the OMB to refuse to hold a hearing after the objection has been referred to the Board by the Minister;

(g) require adequate public notice (and EBR Registry Notice) where the Minister makes a proposal regarding the issuance or refusal of a licence, licence conditions, site plan amendments, licence transfer, and licence revocation; and

(h) ensure the application of section 43 of the OMB Act and section 21.1 of the Statutory Powers Procedure Act to decisions and orders of the Board under the ARA.

(e) Monitoring, Investigation, and Enforcement

Arguably, the most significant aspect of Bill 52 is its attempt to establish a new self-monitoring regime for aggregate producers. For example, section 15.1 of Bill 52 will require licencees to file "annual compliance reports" in accordance with as-yet unknown regulatory requirements. These reports will be available for public inspection in MNR offices, although fees may be charged if a member of the public requests a copy of the report. A similar reporting requirement will be established for aggregate permits: see section 40.1 of Bill 52.

Bill 52 goes on to repeal section 17 of the existing ARA, which imposed an express duty on the MNR to inspect licenced sites and to assess and report upon compliance under the ARA. In CELA's view, there is a complete lack of persuasive evidence demonstrating that self-monitoring by the industry will result in better compliance rates, more prosecutions, or increased usage of other enforcement tools such as licence revocation. Indeed, given the substantial (and well-known) staffing reductions and budget cutbacks experienced by the MNR, it is likely that the MNR's inspection activities under the ARA will be reduced to mere tokenism.

It is CELA's understanding that after further staff cuts (and corresponding reduction in resources) are implemented by the MNR, there will only be some 17 aggregate officers to oversee almost 3,000 pits and quarries across the province. In light of these figures, it is unclear how rigorously these officers will be able to check or review the reports submitted by licencees. In fact, it does not appear that MNR staff will be required under Bill 52 to actually attend the sites to verify the information contained in the annual reports by licencees. In CELA's view, perfunctory reviews of "annual compliance reports" are an inadequate substitute for a systematic program of regular monitoring, investigation, and enforcement by public officials.

In addition, merely waiting for aggregate producers to self-report non-compliance means that serious environmental problems or ARA contraventions may go unidentified for a considerable period of time. This is particularly true for problems that may not be readily visible to members of the public living near a licenced site. For example, an operator could be excavating below the watertable or beyond setback requirements, using improper backfill materials, undertaking poor or inadequate progressive rehabilitation, or underreporting the aggregate tonnages being extracted (and underpaying into the rehabilitation fund, which could leave inadequate funds for final rehabilitation). Without regular inspections by MNR staff, these situations could continue undetected and uncorrected for a lengthy period of time under Bill 52.

It is CELA's understanding that both the MNR and the aggregate industry have expressed liability concerns arising from the fact that the inspections required under section 17 were not always being completed on an annual basis. Indeed, there is evidence that up to 40% of all

licences were not being inspected on an annual basis.[23] In CELA's view, this problem is largely attributable to the MNR's failure to dedicate adequate resources for such inspections. Accordingly, the solution to this problem is to better allocate existing resources, rather than completely terminate the inspection requirement.

CELA RECOMMENDATION #4: **Bill 52 should be amended to:**

(a) retain section 17 of the ARA in order to ensure the continuation of regular monitoring, investigation and enforcement activities by MNR staff.

(f) Delegation of Powers

Bill 52 contains provisions which permit certain ARA powers to be exercised by non-MNR employees. For example, section 4(1) under Bill 52 allows the Minister to designate "any person" as an inspector under the ARA. Presumably, this provision could be used to appoint industry representatives as "inspectors" under the ARA to facilitate the "self-monitoring" regime described above. For the purposes of enhanced accountability and credibility, CELA submits that only Crown employees should be eligible to be appointed as inspectors.

Similarly, sections 32.1 and 46.1 under Bill 52 permit the Minister to delegate any of his or her powers under Part III (wayside permits) and Part V (aggregate permits) of the ARA to employees of the Ministry of Transportation of Ontario (MTO). Given the MTO's lengthy involvement with such permits (particularly the MTO's interest in ensuring cheap, plentiful aggregate for road construction and maintenance), CELA submits that Part III and Part V powers should not be delegated to the MTO.

CELA RECOMMENDATION #5: **Bill 52 should be amended to:**

(a) ensure that only Crown employees may be designated as inspectors under the ARA; and

(b) delete the proposed delegation of Ministerial powers under Part III and Part V of the ARA to the Ministry of Transportation.

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[23] MNR, Self-Monitoring Program: Update Report (March 1996), p.1.

(g) Abandoned Pits and Quarries

Bill 52 repeals Part IV (abandoned pits and quarries) of the ARA in its entirety, but fails to replace it with a new Part. In CELA's view, this repeal is a significant oversight, given that abandonment of pits and quarries remains a serious problem in many parts of Ontario. For example, it has been estimated that there are approximately 300 abandoned (and unrehabilitated) quarries just in the MNR's Grey-Bruce District alone. Accordingly, CELA recommends that Part IV of the ARA be left intact under Bill 52.

CELA RECOMMENDATION #6: **Bill 52 should be amended to:**

(a) retain Part IV of the ARA with respect to abandoned pits and quarries.

(h) Exemptions and Waiver of Rehabilitation Requirements

Bill 52 gives the Minister broad discretion to vary or dispense with various requirements under the ARA. For example, new section 34(7) under Bill 52 permits the Minister to grant exemptions from the requirement to obtain aggregate permits. Where this occurs, the operator is to comply with applicable regulations, which have not yet been prepared or released for public comment. Similarly, Bill 52 leaves intact the existing section 49 of the ARA, which permits the Minister to waive or reduce rehabilitation requirements. For the purposes of greater accountability and certainty, CELA recommends that both powers should be eliminated from Bill 52.

CELA RECOMMENDATION #7: **Bill 52 should be amended to:**

(a) delete the Minister's power to grant exemptions from aggregate permit requirements; and

(b) delete the Minister's power to waive or reduce rehabilitation requirements under the ARA.

PART IV - CONCLUSIONS AND RECOMMENDATIONS

For the foregoing reasons, CELA does not support Bill 52 as drafted. In CELA's view, Bill 52 is replete with provisions that undermine environmental protection principles, dismantle key monitoring and enforcement requirements, and create new loopholes and uncertainties under the ARA. These problems are compounded by the fact that no draft regulations have been promulgated under Bill 52, which leaves the public with no guarantees that existing ARA requirements will be retained under the new regime.

CELA's specific recommendations regarding Bill 52 may be summarized as follows:

CELA RECOMMENDATION #1: **Bill 52 should be amended to:**

(a) permit the Minister to only designate a Crown employee as the Trustee of the Aggregate Resources Trust, or alternatively, permit the Minister to establish a multi-stakeholder advisory committee regarding the Trust; and

(b) ensure that Trust expenditures are expressly limited to environmental protection, resource conservation, or rehabilitation purposes.

CELA RECOMMENDATION #2: **Bill 52 should be amended to:**

(a) eliminate the distinction between Class A and B licences; and

(b) retain the prescribed content requirements for site plans and reports in the ARA rather than in regulations.

CELA RECOMMENDATION #3: **Bill 52 should be amended to:**

(a) retain and enhance public notice requirements in the ARA rather than in regulations;

(b) retain the current 45 day appeal period for the filing of objections and hearing requests in the ARA rather than in regulations;

(c) maintain the current ARA provisions which require the Minister to refer an application and objections to the OMB upon request by any person, unless the hearing request is frivolous or vexatious;

(d) delete the power of the Minister to direct the OMB to consider only the issues specified in the referral;

(e) empower the OMB to impose, rather than recommend, conditions of approval;

(f) delete the power of the OMB to refuse to hold a hearing after the objection has been referred to the Board by the Minister;

(g) require adequate public notice (and EBR Registry Notice) where the Minister makes a proposal regarding the issuance or refusal of a licence, licence conditions, site plan amendments, licence transfer, or licence revocation; and

(h) ensure the application of section 43 of the OMB Act and section 21.1 of the Statutory Powers Procedure Act to decisions and orders of the Board under the ARA.

CELA RECOMMENDATION #4: Bill 52 should be amended to:

(a) retain section 17 of the ARA in order to ensure the continuation of regular monitoring, investigation and enforcement activities by MNR staff.

CELA RECOMMENDATION #5: Bill 52 should be amended to:

(a) ensure that only Crown employees may be designated as inspectors under the ARA; and

(b) delete the proposed delegation of Ministerial powers under Part III and Part V of the ARA to the Ministry of Transportation.

CELA RECOMMENDATION #6: Bill 52 should be amended to:

(a) retain Part IV of the ARA with respect to abandoned pits and quarries.

CELA RECOMMENDATION #7: Bill 52 should be amended to:

(a) delete the Minister's power to grant exemptions from aggregate permit requirements; and

(b) delete the Minister's power to waive or reduce rehabilitation requirements under the ARA.

All of which is respectfully submitted.

September 23, 1996

Richard D. Lindgren
Counsel