



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

Memo To: Mark Winfield, Pembina Institute
David Martin, Greenpeace Canada
Jose Etcheverry, David Suzuki Foundation
From: Jennifer Agnolin, Theresa McClenaghan, Richard Lindgren
Date: January 12, 2006
Re: Application of the Ontario Environmental Assessment Act to Plans and Programs

**GENERAL STATEMENT OF THE APPLICATION OF EA TO PLANS
AND PROGRAMS IN ONTARIO**

Introduction:

The Canadian Environmental Law Association has been requested to provide a legal opinion as to the application of the Ontario Environmental Assessment Act to the forthcoming Integrated Power System Plan expected to be released in 2006 pursuant to the Ontario *Electricity Act*. The issue is whether and how Ontario's environmental assessment legislation applies to the Integrated Power System Plan (IPSP). In response to this request, CELA has prepared this General Statement of the Application of Environmental Assessment to Plans and Programs in Ontario, with specific consideration of the application to the forthcoming IPSP.

1) Summary of Findings

In recognition of the need for environmental considerations to be made early in planning processes, strategic level environmental assessment (EA) procedures have been developed by various jurisdictions internationally. Strategic EA, or the EA of plans, policies and programs, is mandatory in some jurisdictions and discretionary in others. In the province of Ontario, strategic EA is mandatory as the legislative scheme requires EA of "enterprises, activities, programs, proposals, and plans."

2) Environmental Assessment of Plans and Programs

The widespread acceptance that EA improves the quality of decisions about proposed projects 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 growing belief that project level environmental assessment may occur too late in the planning process to ensure

that all the alternatives and impacts relevant to sustainability goals are adequately considered.¹ Some of the potential 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 programme formulation;
- encourages consideration of alternatives often ignored or not feasible in project 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 World Conservation Strategy was the first to highlight the need to integrate environmental considerations early in the development stage in 1980. This ideal 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 US Council on Environmental Quality has interpreted “major Federal actions” to include policies, plans, programmes, rules and regulations.⁵

3) Strategic Level Environmental Assessment is Required by Legislation in Ontario

The Ontario *Environmental Assessment Act* (R.S.O. 1990, c. E.18) (hereinafter the *Act*) applies not only to projects, which would limit its reach to physical structures, but also to enterprises, activities, programs, proposals, and plans.⁶ Section 3 of the *Act* addresses applicability and states that:

This Act applies to,

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.

⁶ David Estrin and John Swaigen, *Environment on Trial: A Guide to Ontario Environmental Law and Policy*, 3rd ed. (Toronto: Emond Montgomery, 1993) at 194.

(a) enterprises or activities or proposals, plans or programs in respect of enterprises or activities by or on behalf of Her Majesty in right of Ontario or by a public body or public bodies or by a municipality or municipalities;

(b) major commercial or business enterprises or activities or proposals, plans or programs in respect of major commercial or business enterprises or activities of a person or persons, other than a person referred to in clause (a), designated by the regulations;

(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.

In addition, the definition for “undertakings” provided in section 1(1) of the *Act* is identical to the wording of section 3, clearly demonstrating that it was the intent of the legislature to include plans and programs within the ambit of the *Act*.

4) THE APPLICATION OF THE ACT TO PROPOSALS, PLANS AND PROGRAMS IS NOT DISCRETIONARY

The wording of section 3 is mandatory in nature, requiring the *Act* to be applied to all of the listed undertakings. This is in contrast to some other environmental assessment processes in Canada, which instead make strategic level EA discretionary. For example, the British Columbia *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 require strategic EA.”⁷ Ontario’s decision to integrate the EA of plans, programs and proposals into their overall process and not make it discretionary emphasizes the province’s commitment to the early consideration of environmental impacts.

5) POLICIES, PLANS AND PROGRAMS ARE NOT EXEMPT FROM THE ACT

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 *Act* per 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)). Specific exemption is required for an undertaking listed in section 3 to avoid an environmental assessment. There is no general ‘class of undertakings’ exemption in place for any type of policy, plan or program within the province.

6) The Integrated Power System Plan is a Plan Under the Act

⁷ SBC 2002, c. 43, s. 49.

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,

[g]enerally, 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 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.⁸

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:⁹

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

The Integrated Power System Plan of the Ontario Ministry of Energy Science and Technology falls into the category of a plan as defined above. After consultation with the Ontario public, the province will set policy and the Integrated Power System Plan will be prepared. The approved Integrated Power System Plan will in turn lead to the development of specific programs and projects related to energy conservation targets for the province, the development of renewable energy, and the achievement of an appropriate energy supply.¹⁰

The Ontario government's description of the Integrated Power System Plan contained on the Ontario 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 include goals relating to:

a) the production of electricity from particular combinations of energy sources and generation technologies;

⁸ Wood, *supra* note 1 at 266.

⁹ Wood, *supra* note 1 at 267.

¹⁰ 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 Power Authority Supply Mix Advice, available online at <http://www.ene.gov.on.ca/envregistry/026852ep.htm>.

- 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.”¹¹

Furthermore, on the last occasion when Ontario entertained a long-term, comprehensive electricity plan, the Demand Supply Plan, (the DSP), released in 1989, then Ontario Premier Petersen’s government applied the *Environmental Assessment Act* to the DSP and subjected it to a Joint Ontario Environmental Assessment Board / Ontario Energy Board hearing under the *Consolidated Hearings Act*.

7) Whether the Environmental Assessment of the IPSP under Ontario’s legislation would include a hearing.

The proponent must apply to the Minister of the Environment for approval to proceed with an undertaking, that is, in this case, for approval to proceed with the IPSP. The application must consist of the proposed terms of reference for the environmental assessment and the environmental assessment subsequently submitted. The Environmental Assessment must be prepared by the proponent of the Plan. The proponent is not allowed to proceed with the undertaking unless the Minister of the Environment or the Environmental Review Tribunal gives approval.

TERMS OF REFERENCE

The proponent will have an obligation to consult with interested persons in preparing the terms of reference and in preparing the environmental assessment, and public notice is required. The Minister of the Environment must approve the terms of reference, with any amendments that she considers necessary, if she is satisfied that an environmental assessment prepared in accordance with the approved terms of reference will be consistent with the purpose of the Environmental Assessment Act and the public interest.

The purpose of the Act is, “the betterment of the people of the whole or any part of Ontario by providing for the protection, conservation and wise management in Ontario of the environment.” Environment is broadly defined as “air, land or water; plant and animal life, including human life, the social, economic and cultural conditions that influence the life of humans or a community, any building, structure, machine or other device or thing made by humans, any solid, liquid, gas, odour, heat, sound, vibration or radiation resulting directly or indirectly from human activities, or

¹¹ EBR posting, *ibid*.

any part or combination of the foregoing and the interrelationships between any two or more of them.”

Accordingly, the Minister of the Environment will have to be satisfied that the environmental assessment prepared in accordance with the terms of reference will be consistent with the purpose as described and in the public interest, in order to approve the terms of reference.

PREPARATION OF ENVIRONMENTAL ASSESSMENT

The proponent must prepare the environmental assessment in accordance with the approved terms of reference and submit it to the Ministry of the Environment. The environmental assessment must describe the purpose of the undertaking, a description of and the rationale for the undertaking, and for alternative methods of carrying out the undertaking and alternatives to the undertaking. It must also describe the environment that will be affected, or might reasonably be expected to be affected, effects that will or might be caused, and actions necessary or may be 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.

The proponent must give public notice of the submission of the environmental assessment and any person may comment in writing on the undertaking or on the environmental assessment. After the Ministry of the Environment completes its statutory review of the environmental assessment, the public must be notified, and any person may comment in writing. At that point, any person may request that the Minister of the Environment refer the proponent’s application, in this case, for approval of the IPSP to the Environmental Review Tribunal for hearing and decision.

The Minister may 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.

Whether the decision is made by the Minister, or the application is referred in full or in part to the Environmental Review Tribunal, the decision maker must consider the purpose of the Act, the approved terms of reference, the environmental assessment, the Ministry review, public comments, and if applicable, any mediators’ report.

Where a person has requested that the Minister of the Environment refer the application to the Tribunal for hearing and decision, the Minister is obliged to do so, unless, in her absolute discretion, she considers the request to be frivolous or vexatious; or unnecessary; or that a hearing may cause undue delay in determining the application.

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. Similarly, the ERT itself may refer to another tribunal or entity a matter that relates to an application.

If the matter has been referred to a Tribunal, the Minister of the Environment may review the tribunal’s decision and may order a variation of the decision, or may order a substitution of the Minister’s decision for the Tribunal’s decision.

CONCLUSION

The forthcoming Integrated Power Supply Plan is a plan to which the province of Ontario's *Environmental Assessment Act* applies. The application of the EA Act is mandatory. The proponent of the IPSP will be required to consult the public and to apply for approval of the terms of reference of the environmental assessment of the plan, and then to consult the public in preparation of the environmental assessment. Once application for approval of the IPSP is submitted to the Minister of the Environment, the public will have the right to review the environmental assessment and comment in writing. Once the Ministry of the Environment completes its Review of the environmental assessment, the public will have the right to review the Ministry Review, to comment in writing, and to request a hearing before the Environmental Review Tribunal. 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 request is frivolous or vexatious, or she considers a hearing unnecessary, or she considers 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.

CANADIAN ENVIRONMENTAL LAW ASSOCIATION per

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