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PARTICIPANT FUNDING

A Discussion Paper

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Participant Funding : A Discussion Paper
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by

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INTRODUCTION

Public participation is a vital component to any environmental assessment and waste management process. Public consultation is the involvement of interested parties in the planning process of a project (an undertaking) that can influence the decisions made regarding the undertaking.

The benefits of public involvement include (1) the resolution of issues before the process reaches the formal hearings stage; (2) the identification of other sources of information and alternatives and; (3) the recognition of all of the interests involved. When all concerned parties are represented during the planning stages, then the proposed undertaking can reflect the interests of those concerned. This can avoid the need for a lengthy hearing once the environmental assessment (EA) has been reviewed by the Ministry of the Environment.

Participant funding is the provision of funding to community groups to provide them with the means of participating in the development of an undertaking. In Ontario, participant funding can be administered during the pre-submission consultation phase of the EA process. By providing groups with funds to seek independent professional and technical advice and to become well-informed, public participation can be an effective tool for the planning process.

The Interim Waste Authority Ltd. has commissioned the Canadian Institute for Environmental Law and Policy to prepare this background discussion paper on participant funding and explore some of the complex issues that are inherent in the concept.

THE CURRENT ENVIRONMENTAL ASSESSMENT PROCESS

Federal environmental assessment comes under the Environmental Assessment and Review Process (EARP), as shown in Figure 1. The public has the opportunity to provide input during the public review of the Environmental Impact Statement, and sometimes during the Initial Environmental Evaluation. Under EARP, participant funding can be provided in two phases. The first phase is for scoping meetings and workshops. The second phase is for the review of the environmental impact statement and for preparation for the hearings. An assessment panel of the Federal Environmental Assessment Review Office (FEARO) determines the method and amount of funding to be administered (phase 2 funding only, or phases 1 and 2 funding). This decision is based on internal criteria such as the complexity of the proposal and the level of public concern¹.

The EARP Guidelines Order does not, however, address funding for interested parties, and it has not often been part of the federal process². A recent example of participant funding is the EARP review of Air Traffic Management in the Toronto Area. Of a total budget of \$500,000 for participant involvement, up to \$100,000 is allotted for preparation and participation in scoping meetings and for comment on draft guidelines for the development of the environmental impact statement³.

Ontario's environmental assessment process is outlined in Figure 2. The public has the opportunity to provide input into the process at the pre-submission consultation phase, during the 30 day period allowed for public comment after the EA document has been submitted to the MOE, and at the formal hearings stage. While the pre-submission

guidelines of the MOE encourage proponents to fund the participation of interested parties during pre-submission consultation, this is not a legal requirement. Funding is currently provided for public input at the hearings stage. It should be noted that some funding may be provided for Public Advisory Committees during the development of waste management master plans. This funding is often limited to compensating the group members for gasoline expenses and telephone calls.

Formalized funding for interested parties in Ontario came about with the proclamation of the Intervenor Funding Project Act in 1989. The Act is a three year pilot project designed to provide for the administration of funds to parties who meet the Act's eligibility criteria. The funds are to aid the parties in preparing to participate in hearings before the Environmental Assessment Board, the Ontario Energy Board, and Joint Boards. A party that has been granted intervenor status may apply for funding once the government has reviewed the proponent's proposal, and after a preliminary hearing has been held. Each Board has its own set of rules of practice and procedure under the Act to guide funding applications. The proponent is required to provide the intervenor funding which would be deducted from any costs awarded to the participants at the hearings.

The requirements that the government review be available and that a preliminary hearing be held before funding is available prevent intervenor funding from aiding participants in pre-submission consultation. Intervenor funding helps intervenors only in their preparation for the formal adversarial hearings process. Participant funding can ensure that interested parties access to involvement at all stages.

THE ACTUAL PROCESS: A CASE STUDY

In order to better understand the position of interested parties who lack the resources to participate in the environmental assessment process, it is helpful to examine a case study of a group involved in a waste management issue. In 1983 a group of citizens incorporated themselves to respond to the proposed expansion of a landfill site in their Ontario town. The site had been established in the early 1970's, and had never undergone an environmental impact assessment. The proponent was proposing an expansion of the site from 20 to 120 acres, and the group opposed the expansion on three accounts. They felt that the site, not only the expansion, was environmentally unsafe. The expansion would destroy hundreds of acres of prime farm land. It was also felt that the expansion would affect the quality of life for the people living in and around the town. The group made presentations to their regional municipality and town, and to (at different times) the MOE, the Ministry of Agriculture and Food, the Ministry of Municipal Affairs, and the National Energy Board. The expansion was successfully opposed in 1983 because the regional municipality and town in whose jurisdiction the landfill site fell rejected the proposal.

In 1987 the site was sold, and the new owners applied for the same expansion. Once again, the expansion was blocked by the regional municipality and the town, with the input of the interested party.

In 1989, the owners proposed two separate expansions. The smaller of the two was for an infill, the assessment of which falls under the Environmental Protection Act. The larger expansion was the same as had been proposed before, and the assessment for it fell under the Environmental Assessment Act. The proponent has submitted technical data, and studies have been conducted by the town, the regional municipality, and by the group themselves. The proponent has requested that the expansions be taken to a consolidated hearing so that all concerns can be heard at once.

The interested party, with a membership of over 200 and a steering committee of 12, has notified the Environmental Assessment Board that they are interested in obtaining intervenor status. They cannot, however, obtain funding until a pre-hearing meeting has been held. The group requires funding immediately to commission their own hydrogeological and other studies. They feel that there is a need for independent studies as the MOE is relying for the most part on studies conducted by experts employed by the proponent. In the 8 years that the group has been involved, total costs are in the thousands of dollars. This figure does not include the volunteer time donated by the group's members. Most of the costs have been for legal fees. The group's funds have all been generated through fundraising activities by the members.

Figure 3 demonstrates Ontario's EA process as experienced by this group. Participant funding would be of benefit to this group for the commissioning of studies that could present another viewpoint in the process. If they had had the opportunity to provide informed input into the proponent's proposal for these expansions, some of the issues

could have been addressed before the hearings phase. For example, the hydrogeologic suitability of the site could have been discussed before the process moved to the hearings stage. It could have been less costly and adversarial for the proponent to have addressed the concerns of all parties in its proposal, rather than relying on the government review process to uncover the issues of concern.

BENEFITS OF PRE-SUBMISSION CONSULTATION

Pre-submission consultation, aided by participant funding, is emerging in Ontario as a vital component to any environmental, and thus waste management, process. Public consultation is defined as "a systematic public involvement in the planning process of the proponent that can influence decisions taken for the undertaking"⁴. The Ontario Ministry of the Environment (MOE) has endorsed pre-submission consultation in their Guidelines and Policy on Pre-Submission Consultation in the EA Process as essential to ensuring the good planning required by the Environmental Assessment Act.

The goal of pre-submission consultation is to involve interested parties in the development of the proposal for an undertaking in order that the final proposal submitted to the Environmental Assessment Branch of the MOE is more acceptable to all of the concerned parties. Issues are addressed in the non-adversarial and informal forums of scoping meetings and workshops. Ideally, any issues resolved before the environmental assessment for the undertaking reaches a hearings stage will decrease the duration and expense of the hearings process. This is done by involving the public in the early stages of the planning process in order to identify any issues of concern that a proposed

undertaking may raise, and that could be better dealt with in the early stages of the process. Participant funding aids these interested parties in this process by providing the resources needed so that they can develop independent and informed comments relating to the identified issues of concern.

The benefits of pre-submission consultation extend to all of the parties involved⁵. For the proponent, pre-submission consultation aids in: (1) identifying and addressing issues before an environmental assessment (EA) is submitted; (2) identifying other sources of information and alternatives for the proponent; and (3) helping the proponent to fulfil EA requirements. For interested parties, consultation provides the opportunity for concerns to be taken into account which leads to the development of an undertaking that is more acceptable to all of the parties involved. It is also a means of addressing and resolving issues before they arise in the hearings process. For the provincial interests, consultation increases the amount of information available on which decisions are based, and helps in the identification of all areas of concern.

There are several rationales for funding the participants in the process. The ability of interested parties to be meaningfully involved in administrative tribunals has been hampered in the past by lack of resources. Funding would provide the means for participation as the public would be able to inform itself with objective information, and generate data in response. This would provide for the incorporation of other viewpoints, data, and expertise into the planning process. This would also lead to better decision-making, and would enhance the accountability of the agencies and proponents involved⁶.

Participant funding would also increase organized public involvement, and thus public acceptance of any decisions made.

Ontario Hydro has recognized the benefits of funding during the pre-submission consultation phase. In 1990 they established a Pilot Participant Funding Project for the Little Jackfish River Hydroelectric Project. They awarded \$75,000 to six groups who represented 16 parties. The participants were chosen by an appointed review panel from within Ontario Hydro. The effectiveness of the program is scheduled to be assessed in 1991.

THE ISSUES SURROUNDING PARTICIPANT FUNDING

The application of participant funding to the development of undertakings is largely unexplored. There are several issues relating to the nature and amount of the funding, as well as who should administer it and its relationship to intervenor funding that need to be addressed.

WHO WILL BE ELIGIBLE?

Appendix A contains the criteria used under the Intervenor Funding Project Act when applications for funding are considered. It also contains FEARO's funding eligibility criteria, and those used by the Berger Inquiry, one of the first tribunals to award funding for intervenors. Common elements of criteria between all three funding sources are that:

the intervenor must represent a clearly ascertainable interest that should be represented at the hearing;

- . separate and adequate representation of the interest should assist the board and contribute substantially to the hearing;
- . the intervenor does not have sufficient financial resources to enable it to adequately represent the interest;
- . the intervenor has an established record of concern for and commitment to the interest;
- . the interested party has a proposal and budget documenting their intended use of the funds provided.

Any funding criteria should include these elements.

WHAT WILL FUNDING BE PROVIDED FOR?

Participant funding would ideally aim at providing assistance to interested parties in identifying their interests and participating in public consultation. There are two essential needs of the participants: to understand the technical reports which requires the aid of experts to help interpret and analyze the documents and; to conduct their own reviews to identify gaps in information. Intervenor funding under Ontario's Intervenor Funding Project Act provides for legal counsel and eligible disbursements at hearings. Legal fees are calculated at the current Legal Aid rate. Eligible disbursements include expert witnesses, consultants, typing, printing, copying, and transcripts.

FEARO discourages the use of funds for legal advice, but provides for professional fees, salaries of persons employed for research and preparation, travel and accommodation, office and equipment rentals, accounting, advertising, and general administration. An

intervenor funding application for the Environmental Assessment and Joint Boards is contained in Appendix B. A list of FEARO'S eligible expenditures is also contained in Appendix B.

While these established funding regimes give some indication as to the types of funding, the varying nature of each planning process would make it necessary to meet with potential intervenors before the funding criteria have been developed. This would be in order to decide on a planning process, and also for what the intervenors felt they needed funding at each stage. The MOE Guidelines on Pre-Submission Consultation in the EA Process outline the following areas for which proponents should seek input⁷:

- (1) proposed sequence of decision stages;
- (2) adequacy of the data base;
- (3) alternatives to evaluate;
- (4) methods for assessing the alternatives;
- (5) predicted environmental effects;
- (6) proposed mitigation measures;
- (7) the evaluation of alternatives and proposed decisions;
- (8) the undertaking and its purpose; and
- (9) reports which document the above.

Most of these areas of input require expert advice and documentation for the review of highly technical material, as well as the development of a clear position from the intervenors. Funding should be administered at each stage in order to assist the

intervenor in fulfilling their role at that time.

Options

- (1) Funding can be provided for those items outlined in the Intervenor Funding Project Act.
- (2) Funding can be provided for those items outlined by EARP.
- (3) Funding can be provided for the essential needs of the participants: their ability to understand technical reports and the ability to conduct their own reviews to identify gaps in information.
- (4) Funding can be provided for a compilation of other options.

WHO WILL ADMINISTER THE PARTICIPANT FUNDING?

The Intervenor Funding Project Act does not provide for the administration of participant funding during the pre-submission phase⁸. The important issues that need to be addressed when determining who should administer participant funding are the neutrality of the body and their ability to take on this task. There are several bodies that could administer funding but who do not necessarily possess the mandate at this time to do so.

A person or a panel of people from the Environmental Assessment Branch could administer the participant funding. The EA Branch is responsible for steering the EA process for undertakings. They are an integral part of the process of development for a project, and because of this involvement may be the most qualified body to allocate funding. The EA officers who are overseeing the project may know where funding would be the most valuable and beneficial. There is a concern, however, of potential bias if

administration of funding is left up to the officers who are responsible for seeing the process through from beginning to end. The administrators could inadvertently influence the type of intervenor, and amount of funding allocated, towards what they perceive to be of value. This does not necessarily ensure equitable representation of the public. The other difficulty with the EA Branch is that it may not possess the resources to take on the additional mandate of administering participant funding.

The Environmental Assessment Board is already responsible for the administration of intervenor funding. This makes them a logical option when exploring participant funding as: (1) they have experience in what is useful to fund; (2) they know the issues surrounding funding; (3) they are familiar with the costs associated with being an intervenor. There would be no duplication of government bodies\functions as they are already involved in funding participants. There is the possibility of bias if the EA Board is used as any decision on what gets funded for how much gives predetermined value to what the Board will be dealing with if hearings are called. This may not assure equitable representation for the public. This could be addressed through the condition that any person(s) involved with the allocation of funding would not be involved with the hearings for that undertaking.

The Attorney General is responsible for the administration of justice in the province. Its purpose is to protect people's rights, and it administers a number of tribunals such as the Ontario Municipal Board. It is seen as a more neutral body, and was responsible for the Intervenor Funding Project Act. Its involvement with other tribunals and independent

nature make it attractive as an option. It may however be a duplication of services to involve a special office of the Attorney General to administer participant funding.

The Ontario Legal Aid Plan is administered by the Attorney General and is another body that is designed to administer funding proposals. Their involvement in participant funding could be an extension of their existing mandate. They have few resources, however, to expand their services, and some concern has been expressed about their knowledge with the true costs associated with intervening in an undertaking. Legal Aid has a structure in which administrators decide whether funding should occur or not, and the appeal mechanism is to committees.

The final option is to administer participant funding through an independent body such as the Environmental Assessment Advisory Committee. An independent body would be the most neutral party to administer funding. It would, however, be a duplication of services, and would require much education and training of the persons involved.

Options

- (1) An administrator or panel from the Environmental Assessment Branch
- (2) An administrator or panel from the Environmental Assessment Board
- (3) Administration through a special office of the Attorney General
- (4) Administration through the Legal Aid Plan
- (5) Administration by an independent body or organization

FUNDING OPTIONS

Funding can be allocated in a lump sum, or can be distributed on a stage-by-stage basis. It has been suggested that a staged planning process would be most effective for awarding participant funding⁹. The proponent would prepare a document that would present the planning process leading to the identification of the undertaking as a number of stages. Each stage would separately outline the involvement of the public, and would build on each other to finally produce the document to be submitted for an environmental assessment. The public would be advised of the planning process once the document was completed, and applications for participant funding would be accepted for the first stage of the process.

Potential intervenors would submit applications to a funding panel at the beginning of each stage. Criteria for funding would include those outlined in the Intervenor Funding Project Act, the extent of the intervenor's proposed contribution to the stage, and previous contributions to the process. This facilitates the development of coalitions among the groups involved, and also establishes participation as an option at each stage. This process will make the formal review process more efficient as intervenors will already have a detailed understanding of the undertaking. It will also give more guidance to the proponent, and will necessitate more responsible and effective participation.

For any process it is necessary to achieve a balance between intervenor accountability and certainty for the intervenors. A staged process allows the funding administrators to evaluate an intervenor's contribution to the process before awarding funds

for the next phase. Accountability with lump sum funding would have to come through the intervenors responsibility to the funding body that administers the funding. Certainty for the interested parties would come through lump sum funding. They would be able to budget for expert advise, and retain legal counsel without the worry that they may not receive funding for the next stage. There is also the question of whether interested parties can understand at the early stages of the process what is needed for the whole planning exercise. A staged process would allow the evolution of the groups and the issues involved.

Amounts of funding given out by FEARO on a project by project basis are determined by internal criteria such as the complexity of the proposal and the level of public concern. The amounts allocated under the Intervenor Funding Project Act are determined by the funding panel when they review the intervenor's funding proposals. Legal fees are assessed, and a ceiling is placed on the amount of eligible disbursements. The proponent is given a funding order from the panel to pay the intervenor.

The staged nature of participant funding makes it difficult to assess how much funding will be needed for the whole planning process. There are several indicators that can aid in determining the amount of funding needed. During an initial scoping session the proponent could assess the range of interests that need funding. This would facilitate the establishment of coalition groups in order to avoid duplication, and would uncover the issues that need to be addressed. From there, funding needs could be determined in the categories of legal fees, expert advice, independent reviews, and general evaluation of documents. Intervenors may be interested in conducting independent studies in their area

of concern. These could be identified at the beginning of the process and modified at each stage. Likewise, a sense of other funding needs could be assessed early on.

Funding allocations would be known at the beginning of each stage as intervenor applications were reviewed, and funds awarded. For each group or stage a ceiling could be placed on the amounts to be awarded. For example, it may be stipulated that legal fees may not be more than 50% of a group's total operating costs, or may not exceed \$5000 in stage 1. The staged process is beneficial when funding is the issue because it allows for the entry and exit of groups in the process. Some groups will find that they are most effective at certain points in the process, and therefore will not need funding for all the stages.

Costs can also be assessed by establishing a time line for each stage. A deadline will require all of the parties involved to work efficiently and consistently to meet their requirement for that stage. This time limit, however, should be flexible to accommodate the evolving nature of the process.

Options

- (1) Lump sum funding
- (2) Staged funding

MONITORING AND EVALUATION

The Intervenor Funding Project Act S.9(2) states;

If an intervenor fails without reasonable cause to comply with the conditions of an award, the intervenor and its directors and officers, upon the order of the board, shall be jointly and severally liable to repay to the proponent the amount of the award, or such part thereof, as the board may order.

This section of the Act makes any group or individual responsible and accountable to the board with whom they are dealing. A similar binding stipulation could apply to the recipients of participant funding. This could be administered, in the absence of legislation, in the form of a contract. Staged funding allows the administrators to evaluate the effectiveness of interested parties before allotting funds for the next phase. Lump sum funding may be carried out through the deposit of the funds in a lawyers trust account which would make the disbursement of the funds accountable.

Participant funding has not yet been widespread in application. Therefore, it is difficult to evaluate in concrete monetary terms its value. Once it has been formally adopted into a process, the predicted hearings cost and the cost of participant funding can be compared, as well as its relative value for those involved (for example, which process do they find more understandable and easily used).

By providing participant funding to deal with issues before the hearings process, it is expected that many concerns will be resolved before hearings begin. Also, the intervenors will be familiar with the issues as they will arise at the hearings, and their participation will be more effective. Both of these points indicate that the hearings can be shortened and may be less costly when the investment is made in participant funding.

Two specific issues surrounding the value of participant funding need to be addressed; the commitment of the proponent towards the intervenors, and the consistency of the intervenors. Participant funding will be of value only if the proponent is committed to addressing the intervenor's views and concerns. If the process continues without the changes to the development of the proposal that the intervenors desire, then the hearings process will be just as lengthy and costly. The second issue is that of consistency within the intervenors. In order to promote an efficient and fair process, the intervenors must be required to remain consistent in their comments during pre-submission consultation and the hearings. They must also have continuity in their membership who are directly involved in the process.

Options

- (1) **Intervenors could be accountable to the process through a stage-by-stage evaluation of their input.**
- (2) **Intervenors could be responsible to the body that administers the funding.**
- (3) **The funding could be placed in a lawyers trust account.**

SUMMARY

Participant funding may be a necessary vehicle to ensure involvement by the public in planning undertakings. At the federal level, participant funding can be administered during the Initial Environmental Assessment. Provincially, the pre-submission consultation phase of the EA process can be used to administer participant funding. Several issues need to be considered with regards to the funding. These centre around the eligibility of the public, who administers the funding, and participant funding's relationship to intervenor funding.

This background document has been sponsored by the Interim Waste Authority Ltd., and prepared by the Canadian Institute for Environmental Law and Policy for discussion purposes. The views expressed are those of the Institute and do not necessarily represent the views of the Interim Waste Authority Ltd.

ENDNOTES

1. G. Kerry, Personal Communication, FEARO.
2. J. Castrilli, "Intervenor Funding: Intervenor Funding Project Act, 1988" Insight (1990) 23.
3. Castrilli, op. cit.
4. B.L. Fenoulhet, Draft Working Paper 6: Public Consultation (unpublished, a paper prepared for the Environmental Assessment Program Improvement Project, 1989) 4.
5. Ministry of the Environment, Guidelines and Policy on Pre-Submission Consultation in the EA Process. (Toronto: Environmental Assessment Branch, 1987) 2-3.
6. K. Cooper et. al. Response of the Canadian Environmental Law Association (CELA) to the Discussion Paper "Toward Improving the Environmental Assessment Program in Ontario" (Toronto: CELA, 1991) 58-59.
7. MOE, op. cit., 8.
8. Cooper et. al., op. cit., 57.
9. Cooper et. al., op. cit. 38-40. See this paper for a more detailed description of this process.