SUBMISSIONS BY THE CANADIAN ENVIRONMENTAL LAW ASSOCIATION TO THE MINISTRY OF ENVIRONMENT AND ENERGY REGARDING THE PROPOSED AMENDMENT TO REGULATION 828 (DEVELOPMENT CONTROL IN THE NIAGARA ESCARPMENT PLAN AREA)

Publication #296
ISBN# 978-1-77189-430-2

Prepared by: Richard D. Lindgren
Counsel

September 15, 1996

TABLE OF CONTENTS

SUBMISSIONS BY THE CANADIAN ENVIRONMENTAL LAW ASSOCIATION TO THE MINISTRY OF ENVIRONMENT AND ENERGY REGARDING THE PROPOSED AMENDMENT TO REGULATION 828 (DEVELOPMENT CONTROL IN THE NIAGARA ESCARPMENT PLAN AREA)

By
Richard D. Lindgren[1]

PART I - INTRODUCTION

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

CELA has long advocated special statutory protection of the unique and internationally significant Niagara Escarpment environment. For example, CELA was a founding member of the Coalition on the Niagara Escarpment (CONE), and was extensively involved in the original public hearings on the proposed Niagara Escarpment Plan (NEP) prior to its adoption in 1985. More recently, CELA has: monitored the implementation of the NEP; undertaken public education and community organization regarding the Escarpment; served as counsel during the public hearings on the Five Year Review of the NEP; and participated in legislative committee proceedings in support of Bill 62, which prohibits certain waste disposal facilities within the Plan Area.

In light of CELA's extensive Escarpment experience, and given the broad-based public support for the current Niagara Escarpment protection regime, we were astounded to learn of the Ministry's proposal to amend Regulation 828 in order to exempt pit and quarry operations from development control requirements in the Plan Area. In our view, this rollback is contrary to the public interest and is inconsistent with various statutory and policy commitments to the long-term protection of the Niagara Escarpment, as described below. The timing and content of this rollback is also highly ironic, given that it was widespread public outrage over the impact of aggregate operations upon the Niagara Escarpment that ultimately resulted in the passage of the Niagara Escarpment Planning and Development Act (NEPDA), the creation of the Niagara Escarpment Commission (NEC), and the adoption of the NEP.

---

[1] Counsel, Canadian Environmental Law Association.

In particular, the proposed amendment purports to exempt aggregate producers within the Niagara Escarpment Plan Area from the current requirement of applying for and obtaining a development control permit under the NEPDA. The "development" covered by the proposed exemption includes aggregate production as well as accessory activities such as excavation, de-watering and transportation, subject to certain exceptions. On its face, the proposed amendment attempts to limit the exemption to pit and quarry operations that were licenced prior to June 10, 1975, and that have been continuously licenced since that date.

CELA strongly objects to the proposed amendment and requests that this ill-conceived proposal be immediately withdrawn and abandoned by the Ministry. CELA's concerns about the amendment may be summarized as follows:

1. The Ministry has failed to demonstrate the justification or need for the amendment;

2. The amendment conflicts with the stated purpose and objectives of the NEPDA and the NEP;

3. The amendment inexplicably negates the 1996 Ontario Court of Appeal decision regarding United Aggregates Limited (UAL);

4. The amendment is inconsistent with comments and conclusions expressed in the Hearing Officers' Report on the Five-Year Review of the NEP;

5. The amendment will inevitably result in significant interpretation and implementation problems;

6. Other legislative regimes that may apply to aggregate operations lack the substantive and procedural safeguards contained within the current development control process under the NEPDA; and

7. The public comment opportunities on the amendment have been woefully inadequate.

Each of these concerns is outlined in Part II below.

PART II - CRITIQUE OF THE PROPOSED AMENDMENT

1. Lack of Justification or Need for the Amendment

Well after the public comment period on the amendment commenced under the Environmental Bill of Rights (EBR), the Ministry belatedly prepared and released the text of the proposed amendment as well as an "information sheet" regarding the amendment. In its haste, however,

the Ministry has failed to provide any justification whatsoever for the proposed amendment. The Ministry also declined to produce a Regulatory Impact Statement under section 27(4) of the EBR to describe the objective of, and the rationale for, this significant environmental rollback. Accordingly, there is a dearth of any evidence demonstrating the public need for the proposed amendment.

Indeed, the available evidence demonstrates the public need to **maintain** , not undermine, development control requirements for pit and quarry operations within the Plan Area. As described below, there are numerous adverse environmental effects associated with aggregate operations. In addition, there are numerous aggregate operators in the Plan Area who may potentially benefit from the rollback. Indeed, it is CELA's understanding that of the 43 or so aggregate producers within the Plan Area, there are approximately three dozen producers who obtained aggregate licences prior to June 10, 1975.

In fact, the evidence at Five Year Review hearings revealed that most of these licences were issued in the early 1970's without detailed environmental impact studies. Moreover, several large operations are located on or near the Escarpment brow, and some operations have resulted in the permanent removal of the Escarpment brow. Other aggregate operations have large licenced areas which remain unexploited to date, including lands that have been identified as provincially significant Areas of Natural and Scientific Interest (ANSI). Significantly, few operations within the Plan Area have undertaken purposeful or extensive rehabilitation of lands impacted or degraded by quarrying.

Accordingly, the effect of exempting these numerous producers from development control requirements must, in CELA's opinion, be regarded as profound and undesirable. More importantly, the Ministry has failed to provide any persuasive or compelling reasons in support of this flawed amendment.

2. Inconsistency with the NEPDA and NEP

The purpose of the NEPDA is as follows:

> The purpose of this Act is to provide for the maintenance of the Niagara Escarpment and land in its vicinity substantially as a continuous natural environment, and to ensure only such development occurs as is compatible with that natural environment (section 2, NEPDA).

Similarly, the objectives of the NEP have been expressed in the following manner:

(a) to protect unique ecologic and historic areas;

(b) to maintain and enhance the quality and character of natural streams and water

supplies;

...

(d) to maintain and enhance the open landscape character of the Niagara Escarpment insofar as possible, by such means as compatible farming or forestry and by preserving the natural scenery; and

(e) to ensure that all new development is compatible with the purpose of this Act as expressed in section 2 (section 8, NEPDA).

In CELA's view, the Ministry's proposed amendment is clearly inconsistent with the above-noted statements of purpose and objectives. By eliminating the strongest environmental safeguard in the Plan Area -- development control -- the amendment effectively allows further aggregate development on licenced lands to bypass NEC and public scrutiny under the NEPDA. Given the intensive and destructive nature of quarrying activities, CELA must question why the Ministry has proposed to make it easier, not harder, to continue these activities within a landscape that is unique and significant enough to be designated as a World Biosphere Reserve.

It must be recalled that aggregate operations are **not** innocuous, benign, or temporary uses of land within the Plan Area. To the contrary, there is a wide range of direct, indirect and cumulative environmental impacts arising from aggregate operations, including:

- physical removal of topsoil and vegetation cover;
- loss or degradation of wildlife habitat;
- increased off-site truck traffic;
- permanent alteration of the natural environment;
- loss of landscape diversity and scenic value;
- noise, dust and other nuisance impacts from blasting, drilling, crushing and related activities;
- degradation of surface water quality;
- permanent stream diversions and alteration of watershed boundaries;
- erosion and sedimentation of watercourses; and
- groundwater interference and depletion.

Accordingly, it remains CELA's position that the Ministry should be working with all

stakeholders to achieve the equitable but expeditious phase-out of all quarrying activities within the Plan Area. In CELA's view, the Plan Area must no longer serve as a long-term source of aggregate. However, by proposing such a broad exemption for these activities, the Ministry is effectively making it easier for such activities to continue in perpetuity, at least until the last viable aggregate deposit has been extracted.

The environmental significance of aggregate operations was clearly recognized by both the Ontario Court (General Division) and the Ontario Court of Appeal in the UAL litigation. In particular, Mr. Justice Belleghem identified serious environmental concerns about the proposed expansion by UAL, including surface water and groundwater problems. These findings were unanimously upheld in the Ontario Court of Appeal by Justices Houlden, Carthy and Charron, who found that:

> The proposed water-taking and discharge [by UAL] would involve the use of pumps, sumps, valves, meters, pipes or hoses, and the construction of filtration ponds, settling ponds, weirs, berms or similar facilities. The process could potentially have a significant impact on the natural environment. The water-taking would have an impact on groundwater levels, groundwater contours and natural springs. The proposed water discharge could have a serious effect on Black Creek and Sixteen Mile Creek which adjoin the property (emphasis added).

Accordingly, development control must be regarded as an essential mechanism to ensure the long-term protection and maintenance of the Niagara Escarpment environment. Development control is not just mere "red tape" or "green tape" that aggregate producers must endure; instead, development control is an important and effective tool for screening, approving (with or without conditions), or rejecting proposed development within the Plan Area. In CELA's view, applying development control to proposed land uses within the Plan Area helps achieve the purpose and goals of the NEPDA and NEP. On the other hand, arbitrarily removing development control requirements from, arguably, the most significant land use within the Plan Area -- aggregate production -- will clearly **not** achieve the purpose and objectives of the NEPDA and NEP.

In short, aggregate operations do not maintain or enhance the natural integrity or continuity of the Niagara Escarpment and land in its vicinity. Similarly, aggregate operations do not maintain or enhance the open landscape character of the Plan Area, nor do aggregate operations protect unique ecologic areas, preserve the natural scenery, or maintain the quality or character of natural streams and water resources within the Plan Area. In CELA's opinion, it cannot be seriously contended by the Ministry that allowing aggregate operators to evade development control is somehow compatible with the purpose and objectives of the NEPDA and NEP.

3. Circumvention of the Ontario Court of Appeal Decision

In its March 13, 1996 decision regarding UAL, the Ontario Court of Appeal ruled that quarry

expansions constitute "development" within the meaning of the NEPDA and therefore require a development control permit from the NEC. The Court also noted that the NEPDA does not exempt pre-existing uses from its requirements, and further found that it was not unfair to impose such requirements upon fresh stages of pre-existing uses. Accordingly, there is no legal justification for the proposed amendment to Regulation 828 since the Court clearly upheld the legality of applying development control to pre-existing pits and quarries.

The Court of Appeal decision provided considerable clarity on this important issue, and the Ministry should be commended for its success in this litigation. However, the Ministry's proposed amendment -- which effectively circumvents the result achieved by the Ministry in the courts -- gives rise to a number of unanswered questions about the Ministry's motives and timing. Why has the Ministry decided, in essence, to waste the public resources utilized successfully in the UAL litigation? Why, and at what point, did the Ministry decide to move at lightning speed to undo the Court of Appeal decision in a matter of months? Why has the Ministry decided to single out the aggregate industry for this preferential treatment? How will the Ministry be able to resist or refuse similar requests for development control exemptions from other proponents within the Plan Area? Unless and until answers are forthcoming from the Ministry on these key questions, the proposed amendment will continue to lack public credibility or acceptance.

4. Inconsistency with the Five-Year Review Report

In the early 1990's, the NEP was subject to a comprehensive Five-Year Review which involved, among other things, a public hearing that culminated in the release of a detailed Hearing Officers' Report in 1993. While the Hearing Officers did not recommend the termination of existing aggregate operations within the Plan Area, the Hearing Officers expressed serious concern about the adverse environmental impacts associated with older aggregate operations:

> It appears to us that as these older quarries have expanded to cover larger areas, the potential for adverse effects has become more evident. The evidence is that quarries operating under approved site plans that allow the removal of significant natural features and interference with drainage basins... [We] are concerned that we received very little documentation to provide reassurance that the effects on watercourses are localized and temporary (NEPR.91, p.229).
>
> We believe that the evidence... indicates a need to study the effect of the pre-1985 aggregate operations on water resources and to recognize and protect important environmental features. In particular, we believe there should be a review of the effects of the concentration of quarries in the central part of the Niagara Escarpment Plan Area, not only on water resources but on important natural features inside and outside the Mineral Resource Extraction Areas (NEPR.91, p.241).
>
> We have also considered the fact that the Ministries, representing the MOE as well as the

> MNR, did not provide any evidence or opinion from experts in the fields of water resource management, biology or other natural sciences, to indicate that the effects of the quarries approved in the early 1970's or earlier have been examined and found to be acceptable (NEPR.91, p.242).

With respect to the potential expansion of existing operations, it appears that the Hearing Officers relied, in part, upon the fact that development control process remained in effect and could weed out undesirable proposals:

> ... [T]he Commission and the government apparently concluded in 1985 that parts of the Rural Area can be considered for new mineral resource extraction activities, subject to the provisions of the NEPDA, the Plan amendment process, and development criteria being satisfied....
>
> ... [T]he NEC did not take the position that the development criteria were inadequate for the purpose of screening out environmentally unacceptable proposals.
>
> ... [T]he potential for adverse effects that might be anticipated in relationship to any proposal for expansion can be evaluated and mitigated, we believe, by the development criteria and policies of the Plan (emphasis added, NEPR.91, pp.230-31).

In CELA's view, removing development control for pre-1975 aggregate operations undermines a key component of the Hearing Officer's report. It is clear from the above-noted excerpts that the Hearing Officers had grave concerns about the environmental impacts of these older pits and quarries. Nevertheless, the Hearing Officers were confident that the development control provisions under the NEPDA and NEP would serve as an effective screen if aggregate producers proposed to further expand or develop these operations. However, the Ministry's proposed amendment to Regulation 828 allows aggregate producers to bypass the very protections that were so heavily relied upon by the Hearing Officers in deciding not to recommend the termination of existing pits and quarries within the Plan Area.

5. Interpretation and Implementation Problems

In addition to CELA's objections in principle to the proposed amendment, there are a number of interpretation and implementation problems that will result from the current wording of the amendment. As drafted, the amendment is very broadly worded and potentially covers a wide variety of activities and operations. The only explicit exceptions to the proposed exemption (i.e. asphalt plants, industrial plants, or transfer stations) provide little comfort or certainty, and they do not justify the otherwise overbroad exemption.

Indeed, CELA notes that these intensive industrial uses are already prohibited under the current NEP policies for Mineral Resource Extraction Areas. More specifically, "asphalt plants, concrete

plants, brick manufacturing plants and other similar manufacturing uses" are already excluded from the list of permitted uses under Section 1.9 of the NEP. Therefore, the explicit exceptions under the proposed amendment are somewhat redundant since they add little to the current regulatory provisions that require NEP amendments and development control permits for proponents wishing to establish such uses on property licenced only for aggregate extraction.

CELA also notes that the proposed amendment makes no real attempt to define or limit what is meant by "production of aggregate", or "activities accessory to production of aggregate". CELA recognizes that the amendment lists some types of accessory activities (i.e. excavation or de-watering), but these examples are merely illustrative and do not exhaust the list of activities that may be considered to be "accessory" to aggregate production. In the absence of a precise definition of "production of aggregate", CELA is left with no clear indication as to what types of pit and quarry operations will fall into this category -- sand and gravel operations? Dolostone/limestone operations? Shale quarries? Sandstone quarries? All of the above?

Similarly, the proposed exemption establishes no parameters or tonnage limits on the aggregate operations that will benefit from the exemption. It therefore appears that the exemption will apply to all aggregate producers in the Plan Area, regardless of the size, scale or impact of their operations, provided that they otherwise meet the simple requirement of having a pre-1975 licence. The amendment's failure to distinguish different levels of operational significance means that even the most intrusive or destructive operations within the Plan Area will escape further development control scrutiny under the NEPDA. In CELA's view, this "one-size-fits-all" exemption is irrational and cannot be justified.

6. Inadequacy of other Legislative Regimes

In its "information sheet" on the proposed amendment, the Ministry has correctly noted that other applicable regulatory requirements -- such as the Ontario Water Resources Act (OWRA) and the Environmental Protection Act (EPA) -- will continue to remain in effect within the Plan Area. Presumably, this list of "other" legislative regimes also includes the Aggregate Resources Act (ARA).

The problem is that none of these statutes -- the OWRA, EPA, or ARA -- are specifically geared towards the protection and conservation of the Niagara Escarpment. These statutes are laws of general application and are not, strictly speaking, environmental planning statutes that are specially tailored to meet the special circumstances of the Niagara Escarpment. Indeed, by eliminating development control for aggregate producers, the Ministry has done an endrun around the substantive protections (i.e. the development criteria) and the procedural protections (i.e. notice, comment, hearings, appeals, etc.) that are currently entrenched in the current Niagara Escarpment regime.

Moreover, in light of the MNR's rather lacklustre enforcement record under its aggregates

legislation (and given the recent Bill 52 "reforms" proposed for the ARA), CELA has no confidence that the current ARA regime confers sufficient protection of the Escarpment environment. CELA's concern about inadequate monitoring and enforcement is also applicable to the MOEE statutory regime, particularly in light of recent Ministry budget cuts, staffing reductions, and approvals "reform" under both the EPA and OWRA.

7. Inadequacy of Public Comment Opportunities

Given the environmental and regulatory significance of the proposed amendment, CELA submits that the public comment opportunities provided by the Ministry have been woefully inadequate. Again, CELA is unclear as to why the Ministry is moving so hastily and providing only minimalist notice and comment opportunities on the proposed amendment.

It should be recalled that on July 31, 1996, the Ministry widely released its Responsive Environmental Protection document, which professed the Ministry's commitment "to ensuring the efficient administration of the Niagara Escarpment Plan". The document went on to invite public comment on how this objective is to be achieved, but otherwise made no specific recommendations regarding the current Niagara Escarpment regime. In particular, the document was completely silent on the issue of exempting pit and quarry operators from development control.

Less than two weeks after the release of Responsive Environmental Protection, the Ministry quietly posted an electronic notice on the EBR Registry respecting the proposed amendment to section 5 of Regulation 828. The Registry Notice curtly acknowledged that the proposal was "a change" from what was described in Responsive Environmental Protection. It strikes CELA as highly unlikely that this proposal was first conceived or initiated only after the release of Responsive Environmental Protection. Indeed, well before Responsive Environmental Protection was released, CELA was advised that an amendment to Regulation 828 for aggregate operations was actively being considered by the Ministry. In CELA's opinion, the Ministry's subsequent failure to even mention the proposal in Responsive Environmental Protection is both misleading and offensive.

More alarmingly, when the EBR Notice was first posted to invite public comment on the proposed amendment, the Ministry initially refused to provide the proposed text of the amendment to CELA and other interested parties. An entire week elapsed before the Ministry reversed itself and agreed to provide members of the public with a copy of the proposed amendment. Given that the Ministry has only provided a five-week comment period on the amendment, the passage of this week without the actual regulatory text is significant and inexcusable. A more realistic timeframe for public comment would have been at least 60 to 90 days, and the Ministry should have produced a Regulatory Impact Statement under the EBR to facilitate public comment on the proposal.

In CELA's opinion, the public comment opportunities in this matter are clearly inadequate and contrary to the letter and spirit of Part II of the EBR. Similarly, the inadequate consultation in this matter makes a mockery of the Ministry's EBR Statement of Environmental Values (SEV), which professes commitment to meaningful public participation in environmental decision-making. Moreover, it is difficult if not impossible to reconcile the substance of the proposed amendment with the Ministry's SEV commitments to using an ecosystem approach, considering cumulative effects, and exercising the precautionary principle.

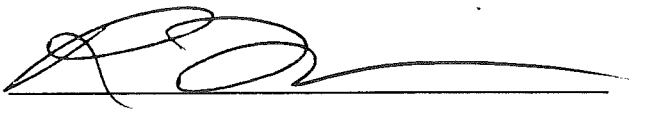
PART III - CONCLUSIONS AND RECOMMENDATION

CELA submits that the proposed amendment to Regulation 828 is completely unjustified, fundamentally flawed, and poorly drafted. Aggregate operations are arguably the most disruptive and destructive activity within the Plan Area, and further expansions or phases of such operations **must** be subject to development control requirements. Other regulatory regimes -- such as the EPA, OWRA or ARA -- are an inadequate substitute for the Escarpment-specific protections now entrenched under the NEPDA and the NEP.

For the foregoing reasons, CELA recommends that the proposed amendment be immediately withdrawn and abandoned by the Ministry.

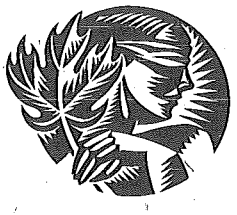
All of which is respectfully submitted.

September 15, 1996



Richard D. Lindgren
Counsel

Canadian Environmental Law Association
517 College Street • Suite 401 •Toronto • Ontario • M6G 4A2
Telephone 416/960-2284 • Fax 416/960-9392 • E-Mail cela@web.net



Canadian Environmental Law Association
517 College Street • Suite 401 •Toronto • Ontario • M6G 4A2
Telephone 416/960-2284 • Fax 416/960-9392 • E-Mail cela@web.net